The role of the Scottish devolution ‘settlement’ in the recognition of constitutional statutes and Britain’s unwritten constitution

Kenneth Campbell

Thesis presented for the degree of Doctor of Philosophy
The University of Edinburgh
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ABSTRACT

Because the British constitutional order is notoriously uncodified, though not truly ‘unwritten’, we must excavate a little deeper to expose the roots of the constitution. That the British constitutional order includes statutes with constitutional character is clear even on a surface examination. That such statutes will be approached in an especially careful manner by the courts appears increasingly clear. It is these features, and the light which devolution in the evolving territorial constitution helps to shed on them that form the subject of this research.

The historical past of Britain’s constitution is long, which is a matter of interest both with respect to the resources on which it can draw, and, perhaps more strongly, because of the narrative of continuity which at times appears to have a normative as well as descriptive and rhetorical dimensions. The thesis begins with a survey along a longer arc which seeks to make sense of the notion of ‘constitutional’ as it has come to be understood over time by constitutional actors, and particularly by the courts, in the British context. In this way, it may be possible to gain insight into the forces which have led to articulation of the idea of constitutional statutes as instruments having a particular status. That historical perspective is followed by a survey of the principal contending intellectual perspectives on the British constitutional order, in order to situate the work which follows.

It is against the background of the incompletely resolved, and perhaps irresoluble, contending analyses of constitutional fundamentals, that the emergence of judicial recognition of constitutional statutes as a common law component of the constitution must be considered. This the thesis does first by a doctrinal analysis of the notion of constitutional statutes as that has come to be explicated by the higher courts in the past quarter century. The argument then moves to an examination of the structure of devolution within the UK, and the case law of the higher courts arising from the devolution settlement, as a means of exploring the nature and effect of constitutional statutes, something which has not previously been the subject of systematic analysis.
That analysis is extended in light of the re-ordering of components of the British constitution, including the devolution settlement, following on the UK’s departure from the European Union. In doing so, the thesis concludes with reflection on the nuanced constitutional understanding disclosed in the case-law, and how this challenges executive-centred models of the constitutional order.
**LAY SUMMARY**

Most states have a constitution which is written in a single document. It is often said that the British constitution is unwritten. That is not accurate; rather, the British constitution is better described as uncodified, meaning that it is not found in a single document. That is because it comprises a mix of statutes (Acts of Parliament), conventions (practices accepted by all participants in government) and rules of the common law (law made by judges in accordance with long-standing legal principles).

In last thirty years, there has been a significant amount of change in the British constitution, and much of it has been effected by statute. The courts have come to recognise certain statutes as being constitutional statutes. Such statutes will be interpreted in an especially careful manner by the courts, and they may only be amended or repealed by express words in later statutes.

This thesis aims first to explore the forces which have led to articulation of the idea of constitutional statutes as instruments having a particular status. These are placed in their broader historical context. Then the thesis explores the legal analysis which the courts have employed in recognising this special class of statutes. The argument then moves to an examination of the structure of devolution within the UK, and the case law of the higher courts arising from the devolution settlement, as a means of exploring the nature and effect of constitutional statutes, something which has not previously been the subject of systematic analysis.

That analysis is extended in light of the re-ordering of components of the British constitution, including the devolution settlement, following on the UK’s departure from the European Union. In doing so, the thesis concludes with reflection on the nuanced constitutional understanding disclosed in the case-law, and how this challenges executive-centred models of the constitutional order.
Declaration

I confirm that this thesis presented for the degree of Doctor of Philosophy in the University of Edinburgh is solely my own work. It has not been submitted for any other degree or professional qualification.

The thesis makes limited use of material from the following blog-post in Chapter 5:

K Campbell ‘Constitutional dogs that barked and dogs that did not: The Scottish Continuity Bill in the Supreme Court’ from UK Const L Blog (14th Jan 2019) (available at http://ukconstitutionallaw.org)

Copyright in this thesis rests with the author.

Kenneth Campbell, November 2020
# Table of Abbreviations

The following abbreviations are used in the text:

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<td>Continuity Bill</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECA</td>
<td>European Communities Act 1972</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EUWA</td>
<td>European Union (Withdrawal) Act 2018</td>
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<td>HRA</td>
<td>Human Rights Act 1998</td>
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<td>ECT</td>
<td>European Community Treaty</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UKSC</td>
<td>UK Supreme Court</td>
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The following abbreviations are used in footnotes for publishing houses:

<table>
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<td>CUP</td>
<td>Cambridge University Press</td>
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<td>EUP</td>
<td>Edinburgh University Press</td>
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<tr>
<td>LUP</td>
<td>London University Press</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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Preface

Beginnings

Thinking about the relationship between devolution and the wider British constitution as a workshop for exploring the notion of constitutional statutes was the starting point for this research. I began working on the questions discussed at length here in the autumn of 2013, when the referendum on Scottish independence was on the horizon, and scholarly debate about various fundamental questions concerning the shape of the constitution at a variety of levels was accelerating in the wider community, at least as much as in the academy. Indeed the breadth and depth of public discourse about those issues is one of the positive features acknowledged on all sides of the question.1 Had the result of the 2014 referendum been different from what it turned out to be, this work might then have taken one of two directions: the first, as in effect an historical study, informed by the experience of devolution to the point of the referendum, and perhaps some speculation about how the notion, created in a political constitutional model, of constitutional statutes might inform the transition to an independent state, presumably one organised on legal constitutionalist lines. Alternatively, it might have changed focus to a more comparative examination of the model of constitutional statutes in the Westminster model on the one hand, and legal constitutionalism, which would most likely have been the model of the constitution of an independent Scotland, on the other. So were my provisional research plans at the time.

Such analysis and discussion would have been challenging enough. Of course, in the events which have since happened, even the constitutionally chunky post-2014 referendum developments in the devolution arrangements which actually took place, particularly those represented by the Smith Commission, the Scotland Act 2016, and the Wales Act 2017 (which I take to be inspired in part by the trend of devolution in Scotland), now seem to

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pale into politico-legal history in the wake of the events of 23rd June 2016. While the political and economic fall-out of the 2016 referendum on Britain’s membership of the European Union will likely be with us for at least a generation, the period since June 2016 has certainly provided unforeseen opportunities for exploration of a surprising number of components of the British constitution in real time. Some aspects of that unfolding and multi-layered story bear directly on this research. Thus the Miller cases, the European Union (Withdrawal) Act 2018, and the Continuity Bill reference all throw important light on the central questions in this research. In Miller, the Supreme Court was called upon to explicate the juridical relationship between EU law and the constitution through the conduit of the European Communities Act 1972 at a deeper level than ever before. Amongst other things, the Continuity Bill reference and the European Union (Withdrawal) Act 2018 pose, without completely answering, questions about political and legal intersections in the structures of devolution.

The common law and constitutional change
At one stage of this project, I considered whether this research might become a contribution to defending a version of common law constitutionalism, perhaps adapting the insights of Trevor Allan and Sir John Laws to this particular context. While the common law is certainly an important part of the matrix of the British constitution, and the twin poles of the constitution (the rule of law, and the legislative supremacy (almost universally miscalled ‘sovereignty’) of Parliament) are, ultimately, fundamental doctrines of the common law, as my thinking developed I came to the view that approaching the issues in that way would be such a shift of focus as to come to be a completely new project. Nevertheless, the

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3 The contested character of the notion of constitutionalism in the British context is examined in Chapter 2.

4 It will be evident that I take the position that in terms of fundamental structuring norms, the British constitution is bi-polar (in the sense most clearly articulated by Sir Stephen Sedley), with the rule of law and the supremacy of Parliament being co-equal. Further, the common law, and the common law judicial method, is a critical, institutional, fact, just as is the legislative supremacy of Parliament. These ideas are explored in Chapters 1 & 2.
significance of the common law as a self-standing source of legal-constitutional principles, and the common law judicial method is, I think, often given insufficient weight in analysis of the judicial role in the British constitution, and in the judicial response to constitutional challenges. At a normative level too, the insights of this type of analysis seem to me better equipped to account for the embedding of fundamental rights in an uncodified constitutional order. That is not to discount Parliament, nor its plenary legislative competence. Rather, it is an attempt to recognise that while Parliament may introduce fundamental rights, such as are found in the Human Rights Act, for example, or may alter the fundamental structures of constitutional architecture, as in devolution legislation or the European Communities Act 1972, it is through the tools and modalities of the common law that these are delineated, explicated and enforced. Reflexive recourse to the notion of Parliamentary sovereignty tends to obscure the historical role of the judicial response to executive action in tandem with, rather than in opposition to Parliament, as it is sometimes projected. It will be suggested the position is a more complex ebb and flow, albeit on a long arc. That is something to which I return in Chapter 1.

Acknowledgements
Judged even by the standard of part-time postgraduate research, this thesis has had a lengthy gestation. There may have been times when some of those mentioned in the acknowledgements might reasonably have entertained doubt about its reaching this final form. On the other hand, this research has been carried out during one of the most eventful, and turbulent, some might say stimulating, periods in recent British constitutional history; thus there turns out to have been even more material with which to engage than could have been imagined at the outset of this project. That has provided challenges as well as opportunities, and it has sometimes seemed the direction of travel of the research has changed at least as often as UK government policy about the basis of the country’s departure from the European Union.

This research has been carried out in parallel with my practice at the Bar in Edinburgh and London. While that certainly added to the pressures of time,
the perspective of the legal practitioner is necessarily different from that of the legal academic, and that may sometimes be evident in the authorial voice. Nonetheless, in an essentially doctrinal study such as the present research, it seems to me there is value in the meeting of both perspectives, and that is one of the things I have sought to achieve in this thesis.

Scholarly work of this kind entails concentric circles of obligations of gratitude. First, my supervisors Professors Stephen Tierney and Neil Walker, whose guidance has been patient, and commentary lively; our supervision meetings strayed well beyond the immediate focus of this research, and I, at least, have benefitted from that. Secondly, I must thank the University of Edinburgh for awarding me a Shaw Macfie Lang Fellowship, and I must hope that I have reciprocated in my contribution to the life and work of the Law School. That same Law School has been a source of much stimulation both from staff and other friends in the postgraduate community; not least Professor Chris Himsworth, Dr Asanga Welikala, Dr Elisenda Casanas Adams, Dr Paolo Cavaliere, Dr Harashan Kumarasingham, Dr Tom Daly, Dr Alex Latham, Dr Jenna Sapiano, Dr Silvia Siteu, Dr Amanda Wyper, Dr Pablo Grez, Chris Jones, and Martin Kelly.

Tom Daly and Silvia Siteu were instrumental in establishing the Constitutional Law Discussion Group as a student-led forum for presentation and debate on constitutional law broadly defined, showcasing both postgraduate research and established academics. I was fortunate to take on the role of co-convenor along with Pablo Grez, in succession to Tom and Silvia for two eventful academic years. Amongst the catholic range of scholars who contributed to the CLDG, Professor Tony Bradley, Professor Peter Cane, Professor Mike Gordon, Professor Rick Rawlings, Dr Jack Simson Caird, Professor Jeff King and Professor Roger Masterman have stimulated my thinking about some of the questions considered in this thesis. In addition to the discussion groups such as the CLDG, the Law School also has a lively programme of visiting scholars from around the globe working and debating in its midst, and I have benefitted from coffee
and conversation with Professors Erin Delaney and Tommy Crocker in particular.

Most of the research and debate which has helped shape my thinking has taken place around legal Edinburgh, mainly in Old College and in Parliament House, as well as in a number of convenient Old Town coffee houses. Thus, as I like to think, maintaining a connection with the Enlightenment tradition of the city and this university, very much in the footsteps of David Hume, who shares that dual affiliation. However I was also fortunate to have had Professor Christine Bell’s encouragement and the Law School’s financial support to travel to the International Institute for the Sociology of Law in Oñati in the Basque Country in July 2016 for a workshop on “Local, Regional and International Perspectives on Political Settlement and Transition”. That two-day workshop was hastily, but fruitfully, reconfigured in response to the outcome of the referendum on 23rd June 2016, whose consequences were rightly recognised to have resonance beyond the parochial concerns of British politics. From those conversations I began a long period of reflection on the effect of the result of that referendum on the devolution settlement and the wider British constitution. I was also pleased to have the opportunity to participate in the Edinburgh-Oxford Public Law Colloquium in 2017 and 2018, attending stimulating meetings discussing a diverse series of papers in both of those many-spired cities, and in doing so I benefitted from debating with Ewan Smith in particular.

As I have indicated, this research project, like its author, has lived a double life, conducted in two libraries half a mile apart. Just as I have benefitted from the insight and conversation of colleagues in the Law School, so I have also gained much from fellowship and discussion with friends and colleagues at the Bar, particularly James Wolffe QC, Laura Dunlop QC, James Mure QC, Peter Sellar, Paul Reid, and Paul Harvey. Another colleague at the Bar, Denis Edwards, deserves a special mention; he and I have been debating law, politics and the constitution since we were undergraduates. Many of the ideas and developments considered here would have been thought eccentric in the extreme had they featured in a public law
essay when our conversation began in the 1980s; that that they may now be controversial but are not, I think, outlandish, is a mark of the depth of British constitutional development in the interim. Finally, but far from least in my thanks, my wife Kirstin Anderson, who has been along this road herself and who has encouraged me to keep to my task, even as other things pressed in.

I do not suppose that all of those whom I have mentioned will agree with all I have written here, but I hope that the fruit of the effort has justified their encouragement of me.

Edinburgh
25 November 2020
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Introduction

Salus populi suprema lex esto.⁵

Mr Podsnap explained, with a sense of meritorious proprietorship,
"...We Englishmen are Very Proud of our Constitution, Sir.
It Was Bestowed Upon Us By Providence.
No Other Country is so Favoured as This Country."⁶

Beginnings
Whether providentially ordained or not, the history of the British constitution has been one of evolution over an extended period, and that evolution has often been cloaked in assertion of continuity of both institutions and many of its fundamental precepts. While the longevity of the Crown in all its senses,⁷ the higher courts, Parliament and the Great Offices of State speak for themselves, it is with certain of those fundamental precepts that this research is concerned. In the absence of a codified constitutional order, we must excavate a little deeper to expose the roots of the constitution. That the British constitutional order includes statutes with ‘constitutional’ character is clear even on a surface examination, though as we shall see, questions of description or classification have proved controversial. That such statutes will be construed by the courts as being outwith the normal constructional doctrine of implied repeal appears increasingly clear, with the consequence that questions arise about possible constraints on the seemingly limitless law-making competence of Parliament. It is these ideas, and, in particular, the light which devolution in the evolving territorial constitution helps to shed on them, that form the subject of this research.

Where, then, is this research situated in the broader sweep of current debates around the British constitution? On any view, the period since 1998, has been one of significant constitutional change in all parts of the United Kingdom, albeit without any clear, overarching logic nor indeed an

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⁵ Cicero De Legibus iii, 6
overarching narrative.\textsuperscript{8} While the first Blair government did establish the Jenkins Commission, it is striking that this followed a number of foundational changes: devolution and the Human Rights Act in particular. Those structural changes implemented policies that had been developed during Labour’s long period in Opposition, but without an overarching narrative or structure for reform.

For the most part, that constitutional change has been effected by statute. Some of those statutes and elements of others have been extremely influential in changing judicial thought and modus operandi. Here I particularly have in mind the Human Rights Act 1998, and the Convention rights provisions of the devolution legislation. With those developments, a focus on fundamental rights vis a vis public authorities from a new source became possible, and with it, a new judicial language of proportionality. Perhaps some more vanguard judicial thinkers were part way down that road already, though the route was certainly contested,\textsuperscript{9} but those enactments made them the concern of all. However, for reasons connected with the Eurosceptic tendency in the Conservative Party,\textsuperscript{10} there has come to be something of a backlash against Convention jurisprudence, and arguments about so-called judicial overreach have become prominent.\textsuperscript{11} Amongst other effects of this tendency, and indicative of the party-political tensions involved, was the establishment by the 2010 Coalition government of the abortive Commission on a British Bill of Rights.\textsuperscript{12} Of perhaps greater moment, certainly in the context of the evolution of public law generally and the areas of it forming the focus of this research, has been a reassessment of common law constitutional principles and fundamental rights by the higher courts judiciary. There have been a number of

\textsuperscript{8} V Bogdanor \textit{The New British Constitution} (Hart 2009), pp40-9.
\textsuperscript{9} This development is traced in M Hunt \textit{Using Human Rights Law in English Courts} (Hart 1998).
\textsuperscript{10} It is worth reminding ourselves that up until the debate about ratification of the Maastricht Treaty in 1992, the Conservative Party was the largest pro-EU voice in British politics.
\textsuperscript{11} On the latter point, the work of the Judicial Power Project is interesting, if partisan. For an elegant and systematic critique, see P Craig ‘Judicial Power, the Judicial Power Project and the UK’ (2017) Qld LJ 355.
\textsuperscript{12} The final report of the Commission may be viewed online at: https://webarchive.nationalarchives.gov.uk/20130206065653/https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf
reminders that there are fundamental rights and fundamental constitutional principles embedded in the common law and which predate the statutory constitutional restructuring of the past 20 years.\(^{13}\)

Perhaps surprisingly in light of the experience of more explicitly federal polities, including those with what might broadly be called ‘Westminster model’ institutions, until recently, there has not been a great deal of judicial consideration of inter-institutional relations in the post-1998 British constitutional order. That may in part reflect the relative effectiveness of political mechanisms; it may also be indicative of the relative lack of legislative substance with which to engage. As we shall see in Chapter 4, inter-governmental relations appertaining to both legislative and executive elements are the least developed parts of the devolution structures in the United Kingdom, at least in their formal embodiment in the devolution statutes. However the aftermath of the referendum on UK membership of the EU has generated acute inter-institutional tensions, some of which have been on a political level, whilst others have been the subject of what is clearly constitutional adjudication by the superior courts. This has called for deeper engagement with a number of constitutional statutes as well as certain common law principles. These themes are considered further in Chapter 5.

*Legal and political constitutionalism*

Although constitutionalism is a central concept in contemporary constitutional discourse and has been for some time, in Britain at least, it is a notion which appears more often characterised than defined.\(^{14}\) At its most basic, the notion of constitutionalism imports some idea of government limited by law, the delegated authority of the constituent power of a given state, however that is established in a particular polity.

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A good deal of recent theorising about British constitutionalism has taken as part of its theoretical architecture the conceptual divide between political constitutionalism and legal constitutionalism, where political constitutionalism describes constitutional structures in which the higher courts have no power to invalidate legislative acts on the grounds that they are unconstitutional because, in the absence of a codified constitution, parliament is the ultimate source of legal authority. Legal constitutionalism depends on a codified constitution containing at least the necessary implication of judicial supremacy in the power to give the ultimate authoritative interpretation of the constitution and the constitutionality of legislative acts. Sometimes this is cast in terms of interpretation by reference to a charter of fundamental rights. It is in this sense that the British constitution has acquired features of limited legal constitutionalism by reason of the enactment of the Human Rights Act 1998 as much as the devolution statutes. This is the sense in which the terms legal and political constitutionalism are used in this research. These aspects of constitutionalism and their conceptual boundaries are discussed further in Chapter 2.

It is in this area of constitutional discourse that this research can be situated. It is becoming evident that the UK Supreme Court and intermediate appellate courts are fashioning and refashioning constitutional components in their assessment and application of statutes and other legal principles. In an uncodified constitutional order, constitutional statutes are important constitutional components, and the judges are incrementally bringing their constitutionality into focus. That is the subject of this research.

As we shall see, it is arguable that there is something of a disjunction between constitutional legal theory and empirical political science. In addition, the literature is more diverse than the positions of contending scholars and theorists, and additionally embraces a growing number of thoughtful contributions from the senior judiciary. Overlaid on this debate about constitutionalism are the structures of devolution, which have

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15 A King, *Does the United Kingdom still have a Constitution?* (Sweet & Maxwell 2001); V Bogdanor *The New British Constitution* (Hart 2009), xiii.
received much less attention in this context. For that reason, the UK’s devolution structures are central to this research.

What this thesis aims to achieve
I conceive of this project as deepening understanding of the nature and standing of constitutional statutes as a relatively recently developed component of the British constitutional order, taking the structures of devolution as a lens through which to examine this development. At the outset, this requires historical context-setting, in part because the past of that constitutional order is long, and its narrative of continuity requires to be considered; and in part because the notion of constitutional statutes requires to be set along side other constitutional developments. Thereafter, the project involves doctrinal analysis, first of the notion of constitutional statutes as a component of the legal-constitutional order, followed by consideration of the explication of their character by the higher courts in selected devolution case law. Because the devolution scheme involves both legal and political restraint on legislative and executive action, and complex interaction with the political constitution of the UK, the devolution jurisprudence provides a useful vehicle for considering the boundaries of the notion of constitutional statutes. In this context, the political constitution signifies the parts of the constitutional order in which political rather than legal mechanisms regulate the conduct of actors, and where constitutional conventions are of particular importance. Further, because the juridical consequences of the UK’s membership of the European Union was directly engaged in the structure of devolution, it is necessary to explore this structure further in light of the major constitutional rearrangement consequent on the UK’s exit from the Union.

Methodology
The methodology of this thesis blends doctrinal and philosophical analysis with an historical awareness or context-setting framework. In keeping with the common law context in which the judicial exploration of constitutional statutes takes place, the methodology might be characterised as ‘practical
reasoning’. This approach aims to draw general conclusions from particular instances, rather than proceeding from a general argument or theory and thence applying it to specific instances. However it is not simply a matter of inductive contra deductive reasoning, rather it is a contextually- and historically-informed model. That historical foundation is necessary to situate institutional understanding of the constitution and the constitutional in the British model. On this foundation is laid a substructure of the competing perspectives on constitutionalism: legal, political and mixed, before doctrinal analysis is undertaken.

Further, such practical reasoning imports argument for a concrete purpose, rather than theorising at the level of abstraction or of the ideal. Of course, in the context of constitutional construction and interpretation, the normative conclusions of at least some aspects of such reasoning are likely to be contested. This research takes the judicial perspective because part of the central argument is that it is only possible to make sense of the juridical character of the British constitutional order, and in particular the place of constitutional statutes, if one has an appreciation of the deep role of the common law and in particular the common law judicial method in explicating the boundaries of the constitution.

In order to develop the argument about the central research questions concerning devolution jurisprudence and the light they cast on the notion of constitutional statutes, it is necessary first to lay out a conceptual map. Therefore the opening chapters of the thesis seek to do two things: first, to address the particular importance of an historical perspective when considering the deep structures of the British constitutional order, both because of the explanatory context which this provides, and also because of the centrality of a continuity narrative to many readings of the constitution, judicial and otherwise. Secondly, to describe and engage with academic commentary on the essential character of the broader constitutional order and the place of constitutional statutes in it. From those surveys, the mutability of the British constitutional order will become rather clearer.

16 A helpful consideration of practical reasoning as a legal methodology may be found in S Brewer (ed) Evolution and Revolution in Theories of Legal Reasoning: Nineteenth Century Through the Present vol 4 (Taylor & Francis 1998) p850ff.
While political theorists might debate the ideal constitutional structure both in the abstract and in the context of a particular polity, I conceive of constitutional-legal thought as a more concrete activity. Public law is like any other branch of law in that respect: practical in its concerns, albeit the units of account may often bear greater political valence than in many areas of private law. My approach to this research is closely informed by my experience of more than twenty years’ practice at the Bar, half of which time has been spent engaged in public law litigation of various kinds. From that lived experience of the common law method one develops some understanding of the tools and the practical operational limitations of that method of legal reasoning and practice; that is, after all, one of the professional skills one brings to bear on a given case. Further, while an Advocate is not a judge, he or she must necessarily engage with the reality of judicial method. That is not intended to be a resort to or defence of legal realism; rather it is to recognise that there are internal precepts about the task of adjudication. Aside from systemic or procedural requirements, perhaps the most significant practical constraint, certainly on the first instance judge, is the focus on determination of the central issue in the instant case. At the level of the Supreme Court, the perspective is often broader, and that is why the threshold for leave to appeal to that court is more exacting: that an appeal should raise an arguable point of law on matter of general public importance, which ought to be considered by the Court at that particular time.

It seems to me that such written scholarly professional engagement has long been a part of the literature of both private and public law in England. In Scotland it has long been part of the literature of private law, but for reasons which are not yet clear, sustained scholarly professional engagement with public law has taken rather longer. Separately, in the past quarter century or so, there has been a marked theoretical turn in academic writing about

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18 i.e. that the issue or issues resonate beyond the circumstances of the given case.
19 Which is to say that the court may refuse to grant leave on the footing that it might prefer to deal with a particular issue in a case where it was perhaps more central or better focussed. In other words, the court has control of its own docket in a way which courts of first instance, and most courts of second instance, do not.
public law and constitutional law. Indeed the very notion of public law and its nature seems to have become contested.\textsuperscript{20} Whether that conduces to a wider understanding of the objects of study is an open question. In conjunction with other pressures on the legal academy in the same period, there has been an explosion in publishing in this as in other areas of legal scholarship. As the stage of formulating a review of the literature underpinning chapters 1 and 2, I took a conscious decision to focus on what might be called the journals of record, by which I mean the long-established UK-centred journals covering general legal or public law matters. Other sources have been consulted where they are referred to in relevant commentary in those publications, or in the monographs and collections listed in the accompanying bibliography. In addition to providing manageable limits, that is, parenthetically, consistent with the common law methodology in classification of authority. A similar approach underlies the online sources referred to: blogposts are mainly from the UK Constitutional Law Association blog and \textit{Public Law for Everyone}, both of whose breadth and depth is of consistent quality.\textsuperscript{21}

\textit{Structure and research questions}

Components of the constitution have been embodied in statute for much of English, Scottish and British recorded constitutional history. However, recognition by the courts that certain consequences flow from that characterisation is much more recent, as is positive affirmation at the highest judicial level. Although perhaps somewhat unwieldy, the title of this research hints at a search for organising principles for, or components of, the constitution in the uncodified British constitutional order, and does so primarily through the work of the higher courts in the UK.

The central research questions are about the extent to which devolution case-law assists in understanding the idea that in the uncodified British constitutional order there are statutes recognised as having ‘constitutional’


\textsuperscript{21} Available respectively at https://ukconstitutionallaw.org/ and https://publiclawforeveryone.com/ Blogposts and other online resources were last accessed on 19 November 2020.
character and which consequently fall to be treated differently from ordinary statutes in terms of their protection from encroachment by Parliament. While there is a good deal written about British constitutionalism, and about the mechanics of devolution, little work has been done to explore the light which devolution may throw on these questions about ‘constitutional’ statutes. Further, the relatively limited literature on constitutional statutes is largely focussed on questions of characterisation, so that examining them through the lens of devolution enriches the picture, and helps illuminate a recent and important structural component of the constitution.

It follows that this work will require a blend of theoretical and doctrinal analysis, including a survey of the debates about British constitutionalism, to provide a context for analysis of the devolution structures and case-law. Each of the ‘constitutional’ statutes throws light on various aspects of this. On one view, the devolution statutes and also the European Communities Act 1972, contain self-imposed limitations on Parliament’s legislative supremacy, and that in turn is a reworking of the procedural democracy of Parliament. Similarly, the HRA contains rights for the most part already recognised in the common law, but which are elaborated by reference to the ECHR in such a way as to impose some constraint on Parliament.

Of course, there is a significant danger of reading the cases through the prism of a legal or political constitutionalist starting position. Like a prism, such a starting position may tend to distort the direction of travel. To change metaphors, there is a danger of squeezing decisions into the box formed by a legal or a political constitutionalist perspective. This research seeks to avoid that danger by emphasising a more practical, contextualised approach to the case-law. By focussing on judicial method and the internal perspective of the common law, this research seeks to produce a more purposive reading of the judicial treatment of constitutional statutes. From an examination of the approach actually adopted by the senior judges and its context, a normative account will be developed. That focus on the Scottish devolution case law will be supplemented by comparative consideration of a representative selection of cases from other UK jurisdictions. Devolution legislation is useful for this purpose because contains a discrete scheme of institutions
and modes of enforcing rights. It provides a setting for examining the judicial response to inter-institutional relationships and the new interface between the legal and political modes of British constitutionalism.

Outline of chapters

1. ‘Constitutional’ in the British context

This is the first of two scene-setting chapters, and it seeks to give content to the notion of ‘constitutional’ in the British context, particularly from the judicial perspective. The chapter contends that an historically-informed approach is particularly apt given the historically-rooted character of many of the fundamental precepts of the British constitution, and the importance of a narrative of institutional continuity. Nonetheless, given its uncodified character, there are challenges in identifying the boundaries of core elements of the constitution. Political, legislative, and judicial characterisations are explored.

There are a small number of statutes which bear the term ‘constitutional’ in their short title, and a rather larger number which are constitutional by character. Features of these are outlined, before a more detailed consideration of judicial reasoning across the second half of the twentieth century, focusing on the so-called Quartet of House of Lords cases in the 1960s, and the greater judicial engagement with public law matters from the 1980s onwards. That case-law and analysis provides background for the second chapter, concerning theories about the British constitution.

2. Scholarly debates about British constitutional essentials

This chapter is also about scene-setting, and surveys threads in academic writing about the British constitution and constitutionalism, exploring a number of key concepts beginning with an examination of what is ‘constitutionalism’ is used to signify in this context – something which turns out itself to have no fixed/agreed characterisation. From there, the chapter explores the sweep of constitutional ideas, with particular focus on Parliamentary sovereignty, the place of the common law and common law method, and the notion of the rule of law. It is evident that the direction of the debate is moving towards the necessary recognition that in reality, a
model containing features of both political and legal constitutional authority is appropriate.

3. The notion of ‘constitutional’ statutes
This chapter sets out to explore the notion of constitutional statutes in greater detail, following on from the broader context-setting in chapters 1 and 2. Much of the existing literature on this topic focuses on questions of classification and identification; that literature is addressed here, drawing out the contrast between the work of David Feldman and Paul Craig in particular. There are also questions about the symbolic role of certain enactments or provisions within enactments which are addressed, together with the separate question of whether there is a normative hierarchy amongst such provisions. From that scholarly debate, the chapter moves on to address the case-law in which there is explicit judicial consideration of the notion of constitutional statutes, before drawing a number of preliminary conclusions.

4. The structure and jurisprudence of devolution
This chapter provides a descriptive and operational foundation for the two chapters which follow. It contains a comparative outline of the structures of devolution in Scotland, Wales and Northern Ireland, which have important differences as well as obvious similarities. Initially, the models chosen were quite distinct as between each of the devolved nations, with both the degree and at least some aspects of the forms reflecting local institutional and political history. In the interim, the form of devolution in Wales has come to resemble more closely that in Scotland, albeit on a narrower range of executive and legislative competence. The position in Northern Ireland is rather different both in its internal structures and in features of inter-governmental relations, which are explicitly addressed for reasons directly related to the troubled recent history of Ulster. The juridical implications of this are drawn out in an examination of the key cases in the devolution jurisprudence, in particular: Whaley, AXA, BH, Martin, Imperial Tobacco, Att Gen v National Assembly Commission, Robinson and Buick.
5. Devolution, EU law and constitutional statutes
This chapter explores constitutional dimensions of the UK’s relationship with the EU as it intersects with devolution. After positing two dimensions of EU law interaction with the structure of devolution, namely an internal and an interfacing dimension, the chapter examines in detail the juridical nature of the European Communities Act 1972. That is necessary in order to understand the decision of the UK Supreme Court in *Miller v Secretary of State for Exiting the EU*, the European Union (Withdrawal) Act 2018, and the Continuity Bill litigation. These are all juridically-significant consequences of the referendum on EU membership, and throw the research questions in this thesis into sharp relief.

6. Developing an explanatory account
In this chapter a normative analysis is developed. This seeks to explain the conceptual bases for the emergence of the judicial characterisation of provisions as having distinct status as ‘constitutional’ statutes. The place of the devolution case-law, including its interplay with Brexit-related case-law, in explicating this is addressed. From that, this chapter seeks to develop a narrative articulating how this perspective illuminates the question of how constitutional statutes fall to be approached and understood, and the role they play in the contemporary British constitutional order.

Some aspects of the subject-matter of this research continue to be in a state of flux. I have sought to take account of developments down to 1st October 2020.
Chapter 1

Historical perspectives on British ideas of ‘constitutional’

Every one of these statutes, and every other statute, is mediated to the people by the common law.

If Parliament did the unthinkable... then I would say that the courts would also be required to act in a manner which would be without precedent... There are advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.

A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.

Introductory - An historically informed approach

With apologies to L P Hartley, history is a foreign country, where they do things differently. At Glasgow University in the 1980s, the foundation undergraduate course in the law of the British constitution and its administrative law was entitled Constitutional Law and History. While not seeking to provide a comprehensive historical exploration of the British constitution, that course had the great merit of putting institutions such as the Cabinet, the Civil Service, and the then re-nascent procedure of judicial review in their historical setting, explaining something of their evolution, as well as their current operation. Lawyers, particularly constitutional lawyers, have a rather complex relationship with history, and it may be this is particularly acute in the British constitutional tradition. That complexity of relationship reflects the way in which constitutional narrative is approached in the long view (if indeed it is so approached), and also the way in which historically-rooted notions are deployed at any given time.

In contrast to the nineteenth century, after the first quarter of the twentieth century, there has been a turn away from writing of overarching British constitutional history. Possible reasons include the critique of the so-called

24 Scotland Bill 2015-16, clause 1(1). Note that as enacted, the wording of section 1 of the Scotland Act 2016 differs subtly, a matter considered in Chapter 4.
Whig view of history, and the more recent academic fashion for study of shorter periods of history, at the expense, so it might seem, of an overarching narrative. The currently fashionable anti-elite turn in academic history is surely also a contributory factor, though constitution-making and constitution-developing is inevitably an activity undertaken by the political class, and thus, one supposes, an elite. It is trite to observe that the historical past of Britain’s constitution is long, which is a matter of interest both with respect to the historical resources on which it can draw, and, perhaps more strongly, because of the narrative of continuity which at times appears to have a normative as well as descriptive and rhetorical dimensions.

Amongst the functions of history might be said to be elucidating how ideas about the functions of institutions have changed over time, which in the constitutional setting may aid understanding of taxonomy, and mode(s) of use. This chapter seeks to make sense of the notion of ‘constitutional’ as it has come to be understood by constitutional actors, and particularly by the courts, in the British context. In this way, it may be possible to gain insight into the forces which have led to articulation of the idea of constitutional statutes as instruments having a particular status. Self-evidently, constitutional is not a neologism in the British political tradition; the word and the idea are, after all, found in the titles of foundational nineteenth century texts by Bagehot and Dicey. Further, the notion of the ‘ancient constitution’ as a prelapsarian source of ideas about rights and about relations between the individual and state exerted considerable influence in English and American legal-political thought from the seventeenth to nineteenth centuries, though it is no more than vestigial in both legal traditions now, having been entirely supplanted by the Diceyan model in the British tradition. However it is also true that significance of the notion of the ‘constitutional’ as an element of legal discourse has varied across the twentieth century and into the twenty-first. It will be argued that ‘constitutional’ as an idea of legal significance had reduced valence in the

middle years of the twentieth century, and only re-emerged in the final quarter-century as part of the wider public law revival evident in response to the expansion of the post-war administrative state. In approaching that set of questions, and also to gain a fuller appreciation of the significance of devolution structures in that connection, it is appropriate to place these in a broader legal-historical context.

Utility of history
History matters in explaining the British constitution and the place of judicial interpretation of constitutional statutes for three broad reasons, some of which are particular to the British constitutional context, and others which perhaps apply to constitutional exegesis more generally. These are: first, providing explanatory context; secondly, explaining institutions; and finally, providing an understanding of the British constitutional continuity narrative.

First, history gives explanatory context to juridical structures. While many core legal concepts are routinely analysed in abstract forms, constitutional structures are best explained in their context. Of course, exemplars from different systems might properly be compared (for example, one can meaningfully ask if Article 10 of the European Convention on Human Rights is more effective in securing freedom of expression than the First Amendment to the US Constitution, or vice versa); but it is contended their individual shape can only be understood properly in the context of their historical development. Note that this point is emphatically not conceived of as an argument for an ‘originalist’ understanding of constitutions, of the kind associated with the late US Supreme Court Justice Antonin Scalia. To say that context matters is not, however, to say that history determines meaning or scope. Nonetheless, there are interesting reasons why protection of essentially the same juridical notion as freedom of expression takes such different forms. These can be accounted for by reference to the legal-political history of their adoption. So it is with other constitutional

27 WI Jennings and JDB Mitchell were among the first constitutional law scholars to adapt existing notions to the changing shape of the state; cf. WI Jennings The Law and the Constitution 1st edition (ULP 1933) to 5th edition (ULP 1967); JDB Mitchell Constitutional Law (W Green 1st edition 1964, 2nd edition 1967).
components. To take an example, to engage with the enduring power of the notion of Parliamentary sovereignty, it is necessary to have regard both to its origin in the political turmoil of the seventeenth century, as well as to high tide of Parliamentary government in the nineteenth century.\(^{28}\)

Secondly, at a more detailed descriptive level, an historically-informed view helps explain institutional forms, and may explain practices and relationships between constitutional actors.\(^{29}\) Perhaps the paradigmatic example of a necessarily historical explanation of form in the British constitution is the notion of Cabinet government, and its relationship with both Houses of Parliament. It is simply not possible to explain the conventions around the operation of Cabinet government without giving an account of how that form of executive came into being, and indeed how it has since developed along with other aspects of British party politics and government. It is perhaps no coincidence that Bagehot begins his classic account of the constitution with the Cabinet, since Cabinet government reached its apogee in the middle years of the nineteenth century, while it is a testament to the changed place of the Cabinet that in his survey of the ‘new’ (i.e. post 1998) constitution, Bogdanor affords no discrete place to it.\(^{30}\) Likewise, taking an example with a shorter history, consider the changing form and status of the Sewel Convention. This started life as a declaration by a Minister,\(^{31}\) quickly became established as a constitutional convention,\(^{32}\) and has subsequently been recognised by statute as part of the third tranche of devolution following the 2014 independence referendum and the Smith Commission.\(^{33}\) In the form it has been enacted, the language employed to describe a key aspect of scope differs from that in the 1998 Act. As

\(^{28}\) Parliamentary government here meaning in contrast to domination of Parliament by the executive as has been the position through the twentieth century and into the twenty-first.

\(^{29}\) This is perhaps the legal historical equivalent of the contextual approach to the history of political thought; cf. Q Skinner *The Foundations of Modern Political Thought* (CUP 1978); Q Skinner *Visions of Politics: Vol I, Regarding Method* (CUP 2002).


\(^{31}\) Hansard HL col 791 (21 July 1998).

\(^{32}\) Memorandum of Understanding and supplementary agreements between the UK Government, Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee (Stationery Office 2000) Cm4806.

\(^{33}\) See Scotland Act 2016, s 2. For a discussion (predating the 2016 Act) of the possible effect of the translation of the convention into statute, see K Campbell ‘The ‘Scotland Clauses’ and Parliamentary supremacy’ [2015] JR259, at p262ff.
embodied in the Scotland Act 2016, the provision is that the UK Parliament “will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament", whereas the 1998 Act speaks of ‘legislative competence’ and ‘devolved competence’. Further, it can be argued that the 2016 enactment does not address the full width of the convention, which had been understood to include a requirement that legislative consent also be obtained where the UK Parliament intends to alter the competence of the Scottish Parliament or the executive competence of the Scottish Ministers. A further layer of doubt is added by the treatment of the convention in its statutory form in the Supreme Court’s decision in Miller v Secretary of State, considered more fully in Chapter 5.

Thirdly, perhaps more so than in many other constitutions, in Britain an historically-informed approach best aids exposition of the continuity narrative which is central to most readings of the structure and operation of the constitution, whether reformist or conservative. That is, the narrative emphasising absence of revolutionary breaks, at least since the seventeenth century, and the undoubted institutional continuity of the core elements of the British state since the eighteenth. Of course, the normative value of that continuity narrative is contested, but it is suggested that all such readings are best explored from a starting point informed by history. However, it must also be emphasised that the legal-historical narrative needs to be understood as an ‘is’ rather than an ‘ought’, particularly in the constitutional context. In other words, this is an account which accords a place to what has been called ‘traditionality’, in the sense of situating rules and decisions in an extended institutional continuum, rather than

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34 In earlier Bill versions of SA 1998 there were references to devolved matters.
37 Bogdanor, op cit. fn 30, pp11-12.
38 H Butterfield The Whig Interpretation of History [1931] (Norton Library 1965) marks the starting point of a more consciously contested view of the continuity narrative of British history; many less elegant analyses have followed. For an avowedly historical introduction to the British constitution (despite its title), see J Allison The English Historical Constitution (CUP 2007). Allison’s normative standpoint is not one which is wholly consistent with the present research, but his historically informed approach certainly is.
traditionalism, characterised as veneration of the old and established merely
because of its age and survival. 39

As this research is concerned with a distinctively judicial tool for analysing
certain constitutional components, namely constitutional statutes, it is
necessary to give some consideration to judicial understanding of the
‘constitutional’. In so doing, it is necessary to define the scope and method
of inquiry. It is suggested this includes, but is not confined to, the use of the
word as a term of art, not least because that appears to have ebbed and
flowed. Rather, it is necessary to consider a broader range of examples.
Thus discussion of relationships between the component parts of the state,
or the nature of fundamental rights protections obviously engage the
‘constitutional’, even if discourse is not explicitly framed in those terms.

Challenges in identifying the constitutional in the British context
In the uncodified British constitutional order, characterising the
‘constitutional’ is significantly more challenging than in equivalent polities
with codified constitutional arrangements because, self-evidently, there are
no bright line boundaries. Boundaries, that is, between the constitutional
body and the ordinary law, and between the constitutional realm and the life
of daily politics. There is also a related normative dimension. There is an
ongoing debate between theorists advancing broadly political and broadly
‘legal’ or judicial constitutional models which is explored in more detail in
the next chapter. On the whole, there is an emerging sense that rather than a
conception of pure parliamentary sovereignty, these are now tending to
converge in some form of rather more mixed model which seeks to
accommodate the premise of parliamentary supremacy within a more
nuanced view of the rule of law; one which recognises the broader range
and deeper degree of judicial scrutiny, both of executive acts and,
increasingly, of legislative activity, both as a consequence of the Human

39 N Walker ‘Out of Place and Out of Time: Law’s Fading Coordinates’ (2010) 14 ELR 13,
pp20-21; and see too M Krygier, ‘Law as tradition’ (1986) 5 Law and Philosophy 237. S
Thomson The Constitutional Basis of Judicial Review in Scotland University of Edinburgh
PhD thesis (2013), pp8-15 applies the notion in a specific public law setting, namely the
evolution of judicial review in Scotland.
Rights Act and the devolution legislation. Such an approach is increasingly common in British constitutional law writing, with some partisans of a purely political constitution and so an unqualified conception of parliamentary sovereignty moving to an explicit recognition of a mixed model. This debate is manifest in the range of scholarly exposition of the nature of parliamentary sovereignty in the modern constitution. Nonetheless, we should not mistake a degree of convergence for consensus. For the continuing potency of the debate is evident in the persistence of arguments around the political and legal nature of parliamentary sovereignty thrown up in debates arising from the UK’s exit from the European Union. As we shall see, some of these ideas about a more mixed constitutional model are characterised in a variety of ways in judgments of the higher courts, which suggests that judges are themselves striving for a common language, and that the understanding of the boundaries of the constitutional is not fixed.

It is also evident that political actors are currently much more willing to use legal tools to address what only thirty to forty years ago might have been considered matters to be resolved by directly political means. Strategic litigation undertaken or underwritten by interest groups has a pedigree matching the post-war expansion of public law, but litigation with a more or less political dimension has a much longer pedigree. While potential examples of the overtly political use of legal process can be found as far back as Baron Coke, reliance on those earlier cases for contemporary illustration risks anachronism. For example, the Case of Proclamations is

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40 AXA General Insurance v L Advocate 2012 SC(UKSC) 122. That deeper judicial scrutiny is a consequence both of the interpretative approach required particularly by the Human Rights Act 1998, s 3, and Scotland Act 1998, s 100, as well as broader developments in public law litigation and conceptual debated considered later in this chapter.
43 C Harlow & R Rawlings Pressure Through Law (Routledge, 1992), and compare the series of high-profile and constitutionally important series of litigations in the wake of the referendum on the UK’s membership of the European Union, discussed further in Chapter 5.
undoubtedly of constitutional significance, but a fuller account of its original context is perhaps more necessary than would be the position with historical sources in, for example, a private law case. Thus, available remedies, and the then-current relationship between the courts and the Crown require to be taken into account; and it may be a statement of the obvious, that the nature of the executive in early-modern England, (or, for that matter, early-modern Scotland) is significantly different from the contemporary administrative state. All of which is to say that, despite lengthy historical antecedents, attention is better directed to more recent case-law in order to examine this phenomenon. Equally, as will become evident, while the phenomenon of constitutional case law has never disappeared, its prevalence has matched the ebb and flow of public law litigation over the past century.

_Constitutional statues recognised_

Where then to start with the exploration of the notion of the constitutional in the British setting? For contemporary readers, it may be tempting, even obvious, to begin with Laws LJ’s well-known commentary on the very notion of statutes constitutional in nature having special status in *Thoburn.*

Sitting in the Divisional Court and in the context of a case which was avowedly political so far as the citizens involved were concerned, Laws LJ sketched the outlines, though not the hard-edged boundaries, of the idea of constitutional statutes and also set about characterising its scope:

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental... And from this a further insight

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44 *Case of Proclamations* (1610) 12 Co. Rep. 74, whose constitutional significance and continued relevance is illustrated by the discussion in *Miller v Secretary of State for Exiting the EU* ([2017] UKSC 5) [2018] AC 61, see L Neuberger (para 44); and L Reed (paras 165, 169, 174, 177, 203, 215, 217).

45 As Paul Craig has shown, administrative law has a longer pedigree than is perhaps commonly thought, albeit under a variety of other names: *UK, EU and Global Administrative Law* (CUP 2015). Stephen Thomson has done similar work in relation to Scotland: *The Constitutional Basis of Judicial Review in Scotland* University of Edinburgh PhD thesis (2013).


47 The so-called ‘metric martyrs’: a number of traders consciously refusing to use metric measure in the course of trade, as required by UK secondary legislation implementing the EU Metrication Directive 80/181/EEC (as amended by Directive 89/617/EEC), as a protest against the role of the European Union as a source of law in the United Kingdom.
follows. We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes.

As to the nature or scope of constitutional statutes, his Lordship continued: The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. Examples are Magna Carta, the Bill of Rights 1689, the Union with Scotland Act 1706, the Reform Acts... the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The European Communities Act clearly belongs in this family.48

It is plain from the opening sentence that while Laws LJ may have been coining a new label, the characteristics defining constitutional statutes were not new. It follows that one must delve deeper to outline their character. Elsewhere in his judgment, Law LJ goes on to assert (i) that constitutional statutes had particular features; and (ii) were, because of their constitutional character, of such systemic importance as to require express amendment or repeal by later legislation, and thus to constitute an exception to the general principle of statutory construction in the form of the doctrine of implied repeal.49

It can be argued that the notion of statutes of constitutional character has been recognised at least since the Glorious Revolution. While there was no doubt a military underpinning to the forces of change (and indeed of reaction), the reality was of political and legal transfer of constitutional domination from monarch to Parliament. Establishment of a constitutional monarchy by an act of Parliamentary or legislative will can be seen as cementing Parliamentary sovereignty as against the monarch. With it came the establishment of what we might now choose to call the rule of recognition, in a form which places Parliament on at least equal footing with the monarch. The intervening three centuries are the story of a shift to primacy of the elected House. While the possibility that enactments might have constitutional character is not new, systematic judicial exegesis is much more recent. On one view, an implicit feature of the common law, or,

48 Cf. Thoburn, at p 186D-G, per Laws LJ para 62 (statute chapter numbers omitted).
49 Thoburn, per Laws LJ paras 60 & 63.
perhaps more accurately, the common law method of judicial reasoning and process, as it emerged first in England and later in Scotland, and other members of the common law and mixed-jurisdiction juridical families, was being documented and given a name.\textsuperscript{50} On the other hand, it might be said that a corollary of what Stephen Sedley called ‘the long sleep’ of public law in the middle years of the twentieth century, was an equally somnolent approach to the constitutional.\textsuperscript{51} In part, this can be seen to be a reflection of the archly positivist conception of the legal order which dominated the era of the growth of the British administrative state.

Arguably, that is also the \textit{de quo} of J A G Griffith’s well-known observation that the British constitution is no more and no less than what happens.\textsuperscript{52} While Griffith was certainly the apotheosis of a particularly British and Fabian type of legal modernism which was rooted in the antithesis of what would now be called legal constitutionalism, it can be seen in retrospect that his observation was made at a point where the ebb tide was already running. Loughlin makes this point explicitly in setting Griffith’s lecture at the terminal moment of what he (Loughlin) calls legal Modernism.\textsuperscript{53}

\begin{flushright}
\textit{The Common Law and the constitution}
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Just as the British constitution is uncodified, famously so is the core of the legal system in each of its three constituent jurisdictions. That core is what has been known since time immemorial as the common law, with or without capitalisation. While the origins and conceptions of sources are quite distinct as between Scotland and England,\textsuperscript{54} there is no doubt that the common law is a foundational source of law and has been part of the constitutional order in both jurisdictions from mediaeval times.\textsuperscript{55} Sir John

\textsuperscript{50} J Laws \textit{The Common Law Constitution} (CUP 2014), Ch1.
\textsuperscript{52} JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, at p19. The claims of legal modernism are discussed further in Chapter 2.
\textsuperscript{54} For this purpose, Northern Ireland’s common law is closely bound to that of England & Wales.
\textsuperscript{55} SFC Milsom \textit{Historical Foundations of the Common Law} (Butterworths 1969); J Cairns ‘Historical Introduction’ in K Reid & R Zimmermann (eds) \textit{A History of Private Law in Scotland} (OUP 2000) (in reality, Cairns’s contribution is much more than an historical
Laws described the common law as the “unifying principle” of the British constitution,\(^{56}\) that is because legislation has effect only through the interpretative principles of the common law. In particular, he invokes reason, fairness and the presumption of liberty as guiding principles.\(^{57}\) In addition, the common law method of reasoning gives the constitutional order a particular character. Laws points to evolution (meaning case-by-case development via the doctrine of precedent); experiment (the flexibility to develop or discard working hypotheses); history (“the power of continuity”); and distillation (“the modification and adjustment of the law to meet new conditions”).\(^{58}\) Trevor Allan draws a connection between the rule of law and the substance of the common law, which he characterises as “a framework of principles and values amounting to an enduring constitution.”\(^{59}\) While Allan is surely correct to point to a connection between the rule of law in the British constitutional order and the common law, it is perhaps not necessary for the purposes of this research to resolve the question of whether the common law amounts to a constitution. It is sufficient for the purposes of the argument to recognise that the common law foundations of the judicial branch of the state and, especially, the common law method (including the elements identified by Laws) have a strong and direct connection with the constitutional order.\(^{60}\) This is the sense in which ‘the common law constitution’ will be used in this research.

**Constitutional as a term in statute**

While the exact scope of the constitutional change effected by the expansion and development of governmental structures across the UK in the middle years of the twentieth century may be open to debate, there can be no doubt about the overt constitutional reform wrought during the years of the Blair government spanning the turn of the present century. A significant part of that process was carried out by statute. Indeed a good number of Laws LJ’s


\(^{57}\) Ibid.

\(^{58}\) Laws, op cit., pp7-9.

\(^{59}\) TRS Allan *The Sovereignty of Law* (OUP 2013), p32.

list of constitutional statutes date from the early years of this period, including the Human Rights Act, as well as the devolution statutes discussed in detail later in this research.

Khaitan has estimated that there are at least 15 statutes of the UK Parliament which use the term ‘constitution’ or its cognates. 61 There are, however, only two statutes passed by the UK Parliament actually bearing the name ‘constitutional’ and which are directed to the British constitution (in distinction to legislation passed to facilitate the shift from Empire to Commonwealth): namely the Constitutional Reform Act 2005, and the Constitutional Reform and Governance Act 2010. Others identified by Khaitan have incidental references to the constitution or particular aspects of it in specific provisions. For example, the Legislative and Regulatory Reform Act 2006, section 3(2)(f) precluding the use of Henry VIII powers in that Act to enact provisions of “constitutional significance” - something of a question-begging provision. 62

Taking the Constitutional Reform and Governance Act 2010 first, a number of features can be noted. This enactment is directed to putting the management of the Civil Service and the Diplomatic Service on a statutory basis, dealing with financial interests of members of both Houses of Parliament, and requiring treaties to be laid before Parliament prior to ratification. While the provisions about the Civil Service and treaty practice make important changes to the manner in which prerogative powers are exercised by the executive, and thus undoubtedly partake of the character of ‘constitutional’, these are in the nature of plumbing rather than core structural features.

By comparison, the Constitutional Reform Act 2005 is of a different order. While the 2005 Act is primarily concerned with the establishment of the UK Supreme Court and a restructuring the process of appointment of members of the judiciary - including what might be described as the dis-establishment

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61 T Khaitan “‘Constitution” as a Statutory Term’ (2013) 129 LQR 589, at 590.
of the office of Lord Chancellor - section 1 stands out even from those significant elements. Under the heading ‘the rule of law’, it provides:

1. This Act does not adversely affect—
   (a) the existing constitutional principle of the rule of law, or
   (b) the Lord Chancellor’s existing constitutional role in relation to that principle.

This section is undoubtedly significant, simply by dint of what it enacts; but its formulation also begs a number of questions, without offering any answers. It contains an affirmation that the rule of law is an existing constitutional principle. By its indication that an existing principle is unaffected, the intent is plainly to leave matters unaltered, or at least unaltered in an adverse manner. Of course, the rule of law has been spoken and written of as part of the British Constitution since at least the time of Dicey; however it has not previously been affirmed by Parliament, nor is there a single nor uniform definition or characterisation of the notion in the case law or other literature, nor does the 2005 Act give any further specification. That legislative formulation is in keeping with the British constitutional narrative of continuity, and arguably it is also characteristic of the British constitution to assert existing principles without exhaustive definition. Perhaps it is also of a piece with common law method to allow development of existing principles or institutions by limiting hard-edged boundaries, and by treating some core doctrines as immanent, hence avoiding the necessity to elaborate their detail in any given case. As will be seen later, this is certainly a feature of case-law about the constitution.

Constitutional principles

Equally challenging is the notion of a ‘constitutional principle’. While, structurally, the notion of constitutional principles is clearly capable of holding meaning, the normative questions begged by the phrase are around identification/characterisation and extent: in other words, how many such


principles are there, and what do they look like?\textsuperscript{65} And what is their relationship to constitutional statutes? Since the rule of law has generally been considered to be in the protection of the courts, the 2005 Act does nothing to diminish the scope of judicial review, and it is at least arguable that the Act may even enhance the scope of review by virtue of that explicit affirmation of the place of the rule of law. From time to time, the higher courts have spoken explicitly of constitutional principles, often about guarantees of access to the courts, and about procedural rights; thus Lord Hope in \textit{Jackson}:

The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.\textsuperscript{66}

Other cases have engaged directly with the notion of constitutional principles and constitutional rights; for example, the existence of a constitutional right to vote has received extended judicial consideration in the context of the long-running series of litigations about the prohibition on prisoners voting. Thus in \textit{Moohan, petitioner}, the Lord Ordinary pointed to the importance of locating the source of such principles:

If the right to vote is a constitutional principle of the common law, existing without reference to the parliamentary legislation giving effect to it, how can this be justified?\textsuperscript{67}

Having identified that conundrum inherent in the free-standing right argument, he went on to observe:

It seems to me that the common law has developed to recognise the right to vote as a fundamental or constitutional common law right. But it has done so alongside and in step with the statutory extension of the franchise and with the incorporation into domestic law of the ECHR, particularly A3P1. It has now reached the point where it can be described as constitutional, so much so that in the unlikely event of parliament now seeking to legislate to restrict it severely or to abolish it entirely, the question would again be raised as to whether there were any limits to the doctrine of parliamentary sovereignty. \textit{But that is quite different from saying that there is (and presumably has been for

\textsuperscript{65} There is, of course, no list, nor, more challengingly, is there a readily identifiable repository.

\textsuperscript{66} \textit{Jackson v Attorney General} [2006] 1AC 262, at 304 per L Hope para 107.

\textsuperscript{67} \textit{Moohan, petitioner} 2014 SLT 213, at 232 per L Glennie para 72
a constitutional right of universal suffrage for all purposes... (emphasis added)\textsuperscript{68}

On appeal, the UK Supreme Court engaged even more firmly with constitutional principle and its statutory bounds, noting that on the one hand voting was fundamental to the democratic dimension of the constitution, and also that the right to vote has always been exercised on such terms as are regulated by Parliament.

I have no difficulty in recognising the right to vote as a basic or constitutional right... Like the courts below I do not think that the common law has been developed so as to recognise a right of universal and equal suffrage from which any derogation must be provided for by law and must be proportionate. It is important to bear in mind, as the Lord Ordinary did... the historical development of the right to vote. Parliaments were initially summoned and the franchise created by the King’s writ. In the fifteenth century parliamentary legislation in both Scotland and England and Wales sought to regulate the franchise... Since [1832] the franchise has been extended by statute. It has thus been our constitutional history that for centuries the right to vote has been derived from statute.

While the common law cannot extend the franchise beyond that provided by parliamentary legislation, I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful.\textsuperscript{69}

In addition to the recognition of a basic or constitutional right to vote, it is also noteworthy that the court was prepared to leave open the question of its position in the event of significant statutory impingement on the franchise.

Self-evidently, statutes are important as constitutional components, but it is equally clear that they do not contain all of the boundary definitions. Nor

\textsuperscript{68} Moohan, petitioner, at 232 per L Glennie para 71

\textsuperscript{69} Moohan v Lord Advocate ([2014] UKSC 67) 2015 SC(UKSC) 1, per L Hodge paras 33, 34 & 35.
indeed has the use of language in naming core concepts been consistent beyond the wording of any legislation. Thus, for instance, we find constitutional principles invoked in some cases, as well as discourse about fundamental rights. As we have seen above, in the judicial consideration of prisoner voting rights, courts have identified a constitutional principle that the right to vote is a correlative of a democratic polity. However, that has been held not to be a free-standing right, because the mode of exercise has been regulated by statute since the Reform Act of 1832. It can be seen that the courts have recognised the necessity of constitutional principles, and grappled with those boundaries. These are given content on a case by case basis. That the boundaries of constitutional principles, and thus of the ‘constitutional’, are filled out incrementally ought not to be surprising. It is entirely consistent with the pragmatic character of the British constitution in general and the common law judicial method in particular.

To anticipate a later part of the argument, while constitutional principles and constitutional statutes may engage the same subject-matter, there is no necessary overlap. Neither is a necessary condition for the existence of the other. Constitutional statutes, it will be argued, are significant because of their structural role. Constitutional principles, on the other hand, are normative statements about or commitments within the constitutional order; these may worked out in detail in statutes which may or may not be constitutional, as the voting litigation demonstrates.

Statutes constitutional by character, not by name
Not every constitutional statute bears the name, of course; indeed most do not. What, then, of some of the other statutes identified by Laws LJ as being of constitutional character, and what of the apparent parliamentary intent? Mention will be made of the Human Rights Act 1998, the devolution statutes, and the legislation delineating the core rules about the UK’s membership of the European Union. Those are particularly relevant to this research because they contain the most significant components of the restructuring of the British constitution in the last half century.
Implicit in the notion of civil and political rights is acceptance of their centrality for participation by individuals in a mature democratic polity. While there may be room for argument about the full extent of such rights, it is suggested their centrality is axiomatic. In that way, such rights may be described as fundamental. By its function of elaborating justiciable fundamental civil and political rights, the Human Rights Act is self-evidently constitutional in character, since such rights are on any view (except perhaps the muscular positivism of JAG Griffith), the stuff of constitutions. In that sense, the Human Rights Act can be said to be constitutional. Nevertheless, despite setting out for the first time in statute a catalogue of justiciable fundamental rights, the rights enumerated are neither unqualified nor entrenched. It might be asked rhetorically, what of the Bill of Rights and Claim of Right? Or, for the truly antiquarian, what of Magna Carta? What is striking about the 1688/1689 Acts is their foundational character in terms of the architecture of the constitutional monarchy and parliamentary government, but also that their provisions have not routinely been relied on in rights adjudication. That is perhaps a consequence of the rise of Parliamentary domination of government particularly in the nineteenth century.

By its structure, the Human Rights Act seeks to preserve the supremacy of the UK Parliament. On the face of it, that presents a conundrum, since the notion of justiciable fundamental rights may be thought to carry with it an implicit hierarchy placing those rights ahead of legislative and executive authority. That is certainly the position in other constitutional orders. The mechanism of declarations of incompatibility in the Act, reserving to Parliament, or more accurately to the executive, to remedy, or not, an incompatibility between legislation and Convention rights aims to preserve the balance. Whether it succeeds in doing so, or does so in an unqualified manner is more controversial. Nevertheless, the Human Rights Act has

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70 There have, of course, been rights sceptics since the idea of fundamental rights emerged in the late seventeenth/early eighteenth century. The argument here is that if civil and political rights are conceptualised, certain structural and normative consequences follow.
71 Cf. W Bagehot *The English Constitution* [1867] (Collins 1963), Ch 4.
72 See especially A Kavanagh *Constitutional Review under the UK Human Rights Act* (CUP 2009), and cf. J Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010), 299-304. Kavanagh and Goldsworthy perhaps best articulate the legal and political
raised awareness of fundamental rights, and has helped frame judicial discourse. Initially that was around the Human Rights Act-executive acts, then HRA-statute interface and more recently in informing judicial discourse consciously shaping fundamental rights in the common law constitution.\textsuperscript{73}

As can be seen from the Kilbrandon Commission, debates about devolution of power from the central institutions of the state has been one of the central political concerns about the constitution for the past 50 years, and the series of devolution Acts will be examined in more detail in subsequent chapters.\textsuperscript{74} Self-evidently, though, structural change in the relationships between the central and sub-state components is constitutional in character and no particular additional characteristic is required to qualify these Acts as constitutional. Nonetheless, the Scotland Act 1998 makes express reference to the constitution as a matter reserved to the legislative competence of the UK Parliament.\textsuperscript{75} However that is no longer a complete account, for the Scotland Act 2016 introduces several significant nuances. On the one hand, the permanent existence of the Scottish Parliament and the Scottish Government as part of “the United Kingdom’s constitutional arrangements” is articulated there, and, further, is made subject to manner and form limitations on amendment, discussed further below.\textsuperscript{76} On the other hand, there is the conundrum of the Sewel convention. Well-known, and by 2016 well established, as a tool for managing boundary questions around legislative competence, the Sewel convention, as already noted, was given statutory form in the 2016 Act, in implementation of one of the recommendations of the Smith Commission.\textsuperscript{77} In the absence of an explicit statutory framework for inter-institutional action between central and devolved actors in the UK’s territorial constitution, the Sewel convention has an important role to play in providing a pragmatic political and constitutional tool. At the time of enactment, the full constitutional character

\textsuperscript{73} R (HS2 Action Alliance) v Sec of State for Transport [2014] 1WLR 234.


\textsuperscript{75} Scotland Act 1998, Schd 5 Part I.

\textsuperscript{76} Scotland Act 2016, s 1 inserting new s 63A into the Scotland Act 1998.

\textsuperscript{77} Scotland Act 2016, s 2. For discussion of the antecedents, see K Campbell ‘The “Scotland Clauses” and Parliamentary supremacy’ [2015] JR 259.
of the convention remained undefined, in the sense that there was an open question about how far it might be brought to bear in the legal as well as the political realm. An important element of the constitutional aspect of Sewel is whether the consent of the Scottish Parliament is a prerequisite of constitutional amendment, certainly where such change bears on the devolved institutions, since one understanding of the convention is that it includes a requirement that the Scottish Parliament (and other devolved legislatures) be asked to consent to changes in the constitutional order affecting their respective structures and competence. In *Miller*, the Supreme Court gave a resounding negative answer to the question of applicability to all questions of structural change, while the ongoing debate about the EU (Withdrawal) Act 2018 suggests that questions about consent in relation to alteration in devolved competence remain live and controversial. 78

The European Communities Act 1972, on the other hand, is tantalisingly oblique in its treatment of constitutional questions. Section 2 is so fundamental to the operation of the Act, and so quite unlike any prior constitutional statute, that its text is worth considering in full:

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ["enforceable EU right"] and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to
give directions or to legislate by means of orders, rules, regulations or other
subordinate instrument, the person entrusted with the power or duty may
have regard to the [objects of the EU] and to any such obligation or rights as
aforesaid.

...

(4) The provision that may be made under subsection (2) above includes,
subject to Schedule 2 to this Act, any such provision (of any such extent) as
might be made by Act of Parliament, and any enactment passed or to be
passed, other than one contained in this part of this Act, shall be construed
and have effect subject to the foregoing provisions of this section; but,
except as may be provided by any Act passed after this Act, Schedule 2 shall
have effect in connection with the powers conferred by this and the
following sections of this Act to make Orders in Council or orders, rules,
regulations or schemes.

It will readily be apparent this structure envisages a process of norm
creation which is both dynamic and far-reaching. Dynamic, because without
further primary legislation, legal norms created in the EU legal order
become norms of the British constitutional order and its component legal
systems. Far-reaching first, because Ministers may make subordinate
legislation which may do what would otherwise require an Act of
Parliament; and secondly, and much more significantly, EU law is accorded
priority over all other domestic sources of law in the UK legal order. Thus
the Act operates to alter the hierarchy of norm-creation and norms
themselves. Beyond that, as the UK Supreme Court observed in *Miller*, the
European Communities Act 1972 provided an entirely new constitutional
process for making law in the United Kingdom, albeit one which will
disappear with the UK’s exit from the European Union in 2020. However,
the Act will enjoy an extended half-life while the *acquis* developed during
the UK’s membership is gradually domesticated via the mechanism in the

*Constitutional as an idea in judicial reasoning*
Since this is not a comprehensive history of constitutional adjudication in
the British courts, it is perhaps arbitrary to select a particular point in the
course of the law as a point of departure. On the other hand, it might be said

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79 *Miller*, per L Neuberger para 62. The Supreme Court was divided 8:3 on the main issue,
with Lord Neuberger giving the leading judgment. Fuller consideration of the court’s
analysis of the ECA may be found in Ch. 5.

80 Detailed consideration of the juridical effects of the EU withdrawal legislation may be
found in Ch. 5.
that the reorganisation of the British state with the emergence of the administrative state on a substantial scale in the decades prior to and, especially, immediately after the Second World War marked a significant watershed in terms of constitutional development as in so many other aspects of life and governance in Britain.\footnote{S Sedley op. cit. fn63, Ch 1.} A deliberately broadly-encompassing relationship between the individual and the state was ushered in first by wartime exigency, and thereafter by the post-war welfare state. It might also be said that the high water mark of the state which developed in that period was reached at some point during the 1960s and 1970s.\footnote{For a provocative counter-conventional and administration focussed history of the period, see D Edgerton The Rise and Fall of the British Nation (Penguin 2018).} Even as the administrative state was advancing, the constitutional significance of this expansion, and thus reshaping, of the institutions of the state and relations flowing from them did not pass unnoticed, both in extra-judicial polemic,\footnote{Lord Hewart The New Despotism (Ernest Benn 1929).} and more considered committee of inquiry.\footnote{Report of Committee on Administrative Tribunals, (HMSO 1957) Cmd 218.} For that reason, and because of the continuing resonance of its focus on the constitutional significance of continued availability of judicial review of executive action, it is suggested that what has been described as ‘the Quartet’ of decisions of the House of Lords in the 1960s comprising \textit{Ridge v Baldwin}, \textit{Conway v Rimmer}, \textit{Padfield v Minister of Agriculture} and \textit{Anisminic v Foreign Compensation Commission} provide a useful starting point for discussion.\footnote{\textit{Ridge v Baldwin} [1964] AC 40, \textit{Conway v Rimmer} [1968] AC 910, \textit{R v Minister of Agriculture & Fisheries, ex parte Padfield} [1968] AC 997, and \textit{Anisminic Ltd v Foreign Compensation Commission} [1969] 2AC 147. The notion of a Quartet is discussed in A. Latham and P.F. Scott, ‘Debating Lord Reid’s Legacy: The Quartet at 50’, U.K. Const. L. Blog (24th May 2018) (available at https://ukconstitutionallaw.org/).} In all four cases, the leading speech or the most influential speech was that of Lord Reid, and several core strands of modern public law emerge from them. \textit{Conway} and \textit{Ridge} (re)established the importance of due process rights characteristic of decision-making in the courts in relation to administrative adjudication, while \textit{Padfield} put beyond doubt the judicial supervision of the exercise of ministerial discretion ary powers. With their focus on procedural fairness and exercise of executive power, these case form important building blocks for the judicial review era beginning in the late 1970s, which redefined the boundaries of executive and administrative power, and the tools of judicial oversight of their exercise. At a deeper,
Anisminic concerned the effect of a purported statutory ouster of the jurisdiction of the courts. The Foreign Compensation Commission was originally established under the Foreign Compensation Act 1950 to deal with compensation payments made by the Yugoslav and Czech governments for property expropriated after the Second World War, and had its jurisdiction extended to deal with claims relating to British property in Egypt following the aftermath of the Suez Crisis in 1956. Section 4(4) of the 1950 Act provided that:

The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.\(^{86}\)

Anisminic had been expropriated from significant property in Egypt and sought to challenge a compensation determination made by the Commission, which, unsurprisingly, sought to rely on section 4(4). That determination was, it argued, valid on its face, and in order to establish it was a nullity, court proceedings would be required and that was expressly prohibited by statute.\(^{87}\) Because of the then-current law which classified questions about jurisdiction of inferior tribunals as being about errors in vires, in order to meet that apparently simple position, the company was compelled to argue that as the determination was invalid, there was in fact no determination, and resolution of that question was the substance of the proceedings.\(^{88}\) Giving the leading speech, Lord Reid noted that statutory provisions seeking to limit the jurisdiction of the courts “have a long history”, but none protected a decision which was a nullity. There were, and are, a number of reasons why the law may hold a decision to be a nullity, and as there was no provision about any of them in the Act, Lord Reid came “without hesitation to the conclusion in that in this case we are not

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86 While the 1950 Act remains in force, section 4(4) was repealed by the Statute Law (Repeals) Act 1989, s 1(1) & Schd I Pt II.

87 Anisminic, per L Reid at 169H

88 Anisminic, per L Reid at 170A-B.
prevented from inquiring whether the order of the commission was a nullity.”

While it is true that neither Lord Reid nor the other judges of the majority made express reference to constitutional rights, though Lord Pearce did undertake a detailed survey of the history of the supervisory jurisdiction of the English courts over inferior bodies, the decision ought to be examined both in its context and its effect. Doing so illuminates the decision as marking an early point in the revival of the notion of the constitutional as a topic of current interest in legal discourse because the House of Lords effectively restructured the basis for challenging decisions of administrative tribunals (on the point of error and jurisdiction) as well as making a broader point about the constitutional centrality of access to courts for determination of rights. Of course, the common law method has its own continuity narrative which sometimes de-emphasises the significance of changes of direction. Nonetheless, the import of the decision did not escape contemporary commentators, and HWR Wade in particular had little doubt that the decision capped a series of decisions ‘invigorating’ judicial review, and that:

in effect they [the court] have established a kind of entrenched provision which the legislature, whatever it says, is compelled to respect. The essence of this provision is that no executive body or tribunal should be allowed to be the final judge of its own powers.

While subsequent history amply demonstrates Wade was certainly correct in that assessment, there is greater significance in the fact of the judicial reassertion of scrutiny over the administrative apparatus of the state, and thus a subtle shift in the balancing of powers amongst the branches of the state. For the context of the decision is against a background of seemingly unlimited expansion in the executive across the twentieth century accompanied by a growing number of administrative tribunals exercising

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89 Anisminic, per L Reid at 170D. The enduring centrality of nullity in judicial review is is explored in C Himsworth ‘Escape form nullity? Readdressing the consequences of unlawfulness in administrative law’ [2018] JR 151.
80 Anisminic, per L Pearce at 194ff.
adjudicatory functions in areas of executive action, sometimes with sometimes without judicial recourse. Since the early-modern foundation of the Scottish, English and later British state, control of government (that is, the executive part of the state) has been effected by a combination of Parliamentary and judicial activity. That model is implicit in the Revolution settlement, with Article 9 of the Bill of Rights as the boundary of Parliament and the courts. Arguably, in the course of the nineteenth century, Parliamentary control of government strengthened at the expense of the earlier judicial component. In the twentieth century, the dynamic of government was different again, with executive strengthened and Parliamentary control diminished by a combination of the scale and reach of the modern administrative state, and party political discipline in the House of Commons.

Concern about that phenomenon had led a decade earlier to the Franks Committee, and to the Tribunals and Inquiries Act 1958 giving effect to its recommendations. A more diffuse political unease about the effects of such expansion on the executive branch of the state explicitly informed the appointment of the Royal Commission on the Constitution in 1969. Whilst that unease is not articulated by the House in Anisminic, it did underlie part of the argument advanced by the company. Nor, it should be noted, was the House unanimous in its decision. In his dissent, Lord Morris of Borth-y-Gest articulated an approach affording primacy to the unvarnished words of section 4(4), fairly preferring to give Parliament the benefit of the doubt. Nonetheless, with the reaffirmation of judicial supervision of administrative bodies by the court in Anisminic, the ground was laid for the development of judicial review as a constitutional tool in the decades which followed. The

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96 Cf. “It is a wrong approach to say that if there has been a mistake, the executive can correct it, for that would be an abrogation of the court’s function.” Anisminic, record of argument at p 153G. See also the argument for the company noted at 167B-C.
continuing valence of the decision may be seen in much more recent UK Supreme Court decision in *Privacy International* where a very similar issue arose in relation to a tribunal with a much more sensitive jurisdiction, namely the Investigatory Powers Tribunal. 98 It is noteworthy that all these cases concern the relationship between individual and state, and the scope of judicial protection of individual. On one view, they are about ‘principles’ rather than about large structural questions, which indicates that judges, particularly in the common law tradition, are more comfortably adjudicating ‘constitutionally’ in rights cases concerning individuals, rather in large structural questions. 99

**Constitutional as an Idea in Political Programmes**

Brief mention has already been made of the Royal Commission on the Constitution, and it is instructive to place its scope and its concerns in the wider legal-political discourse of the last half century. Given its title, perhaps the first thing to strike the reader at the remove of over forty years is how narrow, and, arguably, unambitious, its terms of reference were. Of these, the first and second should be noted: 100

To examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom;

to consider, having regard to developments in local government organisation and in the administrative and other relationships between the various parts of the United Kingdom, and to the interests in the prosperity and good government of Our people under the Crown, whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships... 101

From these terms of reference, seemingly perennial concerns about centralisation of government emerge, as do the beginnings of official interest in legislative and administrative devolution. Conspicuously absent from the majority report are any systematic reappraisal of the internal arrangements of the centre, and any notion of formal and structural


99 This is vouched by the nature of the challenges in the case-law considered in Chapter 4.

100 The third point in the terms of reference related to the Channel Islands and Isle of Man, and resulted in little by way of concrete proposals.

101 Royal Commission report, p ii.
protection for fundamental rights.\textsuperscript{102} In the Memorandum of Dissent by Lord Crowther-Hunt and Professor Peacock, a somewhat more systematic approach is evident, particularly to the arrangement of the centre, and also to the significance of the UK’s then-recent accession to the EEC.\textsuperscript{103} Even there, however, a somewhat limited view of the constitution is adopted. Perhaps these limitations reflect the nature of the concerns which led to establishment of the Commission; perhaps they reflect the quietude of discourse about the constitution in the middle years of the twentieth century.

In the intervening period, at least until the decade beginning in 2010, the absence of sustained mainstream public discourse about the constitution as such has the subject of remark by commentators.\textsuperscript{104} That is not say that the constitution has been missing from political programmes, and in particular those of governing parties; rather, it is to point to the apparent lack of valence of an overarching constitutional narrative as part of the broader political debate. As will evident from the list of enactments falling within the characterisation of constitutional statutes with which this research is concerned, the first Blair government secured legislation for a number of significant constitutional changes. Devolution and fundamental rights are the most significant subjects, but other important changes were made to the composition of the House of Lords,\textsuperscript{105} the franchise for European Parliament elections,\textsuperscript{106} and the establishment of the Electoral Commission.\textsuperscript{107} While these developments were advanced under the ‘modernisation’ umbrella of that government, there was no sense in the party programme of a constitutional moment, nor of a unifying theme.\textsuperscript{108} Instead, there were

\begin{footnotes}
\footnote{102}{The latter point is discussed in a thoughtful commentary on the work of the Commission in T Daintith ‘Kilbrandon: The Ship that Launched a Thousand Faces?’ [1974] \textit{MLR} 37, esp. at 551-3.}
\footnote{103}{The Royal Commission on the Constitution 1969-73 (HMSO 1973), vol II, Memorandum of Dissent by Lord Crowther-Hunt and Professor A Peacock, Cmnd. 5460-I.}
\footnote{104}{See e.g. F Mount \textit{The British Constitution Now} (Heinemann 1992) Ch1; P Riddell ‘The Constitution and the Public - How Voters Forgot the Constitution’ in M Qvortrup (ed) \textit{The British Constitution: Continuity and Change} (Hart 2015).}
\footnote{105}{House of Lords Act 1999.}
\footnote{106}{European Parliamentary Elections Act 1999.}
\footnote{107}{Political Parties, Elections and Referendums Act 2000.}
\footnote{108}{The notion of a constitutional moment was first articulated by Bruce Ackerman in \textit{We The People: Foundations} (Harvard 1991), pp266-68. Ackerman’s thesis is is of a series of ‘constitutional moments’ occurring within a narrative of continuing ‘normal politics’, with such constitutional moment being rare juncture, and involving an interaction of the political}
\end{footnotes}
distinct political reasons for each of the key reforms: devolution, human rights and Lords reform. Perhaps that is an affirmation of the pragmatism suffusing the British constitutional tradition, but it also indicates the relative ease of constitutional change by a government with a substantial Parliamentary majority. It might be that is a subsidiary reason for the judicial development of the notion of constitutional statutes as a distinct class. Nonetheless some distinguished commentators have subsequently discerned in the totality a ‘New British Constitution’, while others discern an unsettled constitution or even a constitutional ‘unsettlement’, in which the limitations of the constitutional order admit of change but not of an overall recasting resulting in a new ‘settlement’.

**British Judicial Constitutionalism**

While later chapters will explore devolution and specifically devolution case law in more detail in order to illuminate the notion of constitutional statutes, to put that discussion in context it may be helpful first to consider the broader sweep of judicial constitutionalism in Britain in the last sixty years or so. We have already seen the changing and enhanced sense of the constitutional in judicial discourse; however, by judicial constitutionalism is meant something more profound, namely the moulding by the senior courts of constitutional components and determination of boundary lines between elements of the constitution. Given the axiom of parliamentary legislative supremacy, this is not judicial constitutionalism of the American or German models. Rather it is the enforcement of the other pole of the British constitutional order, namely the rule of law. In this, the significance of the procedure known as judicial review cannot be overstated. Nonetheless, this is not, and does not pretend to be, a comprehensive survey of the development of judicial review, valuable though such a history might be to a broader understanding of the development of public law. Rather the focus

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109 V Bogdanor *The New British Constitution* (Hart 2009). See too the discussion in a number of papers in Qvortrup op cit., fn 104. Cf. A King *Does the United Kingdom still have a constitution?* (Sweet & Maxwell 2001).


will be on an increasingly explicit constitutional discourse on the part of the higher judiciary, and a number of judicial decisions are discussed which are either avowedly constitutional in character, or which engage closely with constitutional themes.

In the political sphere, the 1980s saw the ending of the post-1945 consensus about the shape of the state, accompanied by significant development of judicial review as a tool to challenge issues more avowedly about policy than simply administrative decision-making, first in England and then in Scotland. A survey of the distance already travelled by the law relating to judicial review in the mid-1980s is elaborated in the speeches of Lords Diplock and Roskill in *CCSU*. Shortly before that decision, in *Brown v Hamilton District Council*, the House of Lords gave a clear invitation to the Scottish legal system to revitalise the judicial role in the constitutional oversight by the courts of executive action. At root, the impelling forces were the same: the need to adapt existing judicial tools; in England procedural reform occurred in 1977, while application to the supervisory jurisdiction of the Court of Session was rationalised in 1985 as a direct result of the observations of the court in *Brown*. Issues of the substantive thresholds or categories of judicial review marched in step until the creation of the devolution jurisdiction in 1998, which necessitated development of additional tools by the legal systems of the devolved nations.

At broadly the same point in time, legal commentators, judicial and otherwise, expressed increased interest in the notion of fundamental (or constitutional) rights. Starting with Lord Scarman’s Hamlyn Lectures in 1974, the status of the fundamental rights in the ECHR and, in particular, how they might be applied in the UK, became a subject of steadily growing interest - and controversy. Similarly, while UK accession to the (then) EEC took place on 1st January 1973, appreciation of the significance of

112 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, at 407-413 per L Diplock; at 413-423 per L Roskill.
113 *Brown v Hamilton DC* 1983 SC(HL) 1, at 49 per Lord Fraser. Following those observations, the procedure for judicial review in the Court of Session was restructured and made at once more flexible and coherent; see J St Clair & N Davidson *Judicial Review in Scotland* (W Green 1986) for an immediate account, now superseded by J Clyde & D Edwards *Judicial Review* (W Green 2000).
Community law as a source of fundamental rights perhaps became more fully apparent some time thereafter in the decisions in *Marleasing*,\(^{115}\) and *Factortame*.\(^{116}\)

While the claimants in *CCSU* were ultimately unsuccessful, the House of Lords took the opportunity to reassess the relationship between the executive and judicial arms of the constitution, and in so doing reshaped the grounds of judicial review.\(^{117}\) At the same time, in making clear that executive action in exercise of common law powers “whether or not the common law is for this purpose given the label of ‘the prerogative’” was equally susceptible to judicial review,\(^{118}\) the House made explicit the constitutional limits of such executive powers. On the other hand, in another case the House was equally alive to the limits of review by the court: “judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system of this beneficent power.”\(^{119}\) As will become clear in the development of this research, delineation of the boundary or boundaries here is an evolutionary process.

It is trite to observe that the conceptual and juridical origins, and thus the scope, of the judicial review jurisdiction of the superior courts in Scotland and England are very different.\(^{120}\) That breadth of jurisdiction was well-established in Scotland by the later nineteenth century, when the First Division in *Forbes v Underwood*, a case rightly described by Clyde and Edwards as a ‘milestone’, took the opportunity to make clear that only it had the power of review and that:

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117 *CCSU*, at p 186D-G per L Diplock at 410-411.

118 *CCSU*, at 411C per L Diplock.

119 *Notts CC v Sec of State for Environment* [1986] AC 240, at 250H-251A per L Scarman.

the same rule applies to a variety of other public offices such as statutory tribunals and commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit those functions are entrusted to them.\textsuperscript{121}

While the amenability of administrative acts of the executive to judicial review is long-established by means of the prerogative writs in England and Wales (dating at least to the sixteenth century) and the supervisory jurisdiction of the Court of Session in Scotland (dating at least to the late seventeenth century), the multi-faceted character of the Crown left open the enforceability of orders of the court against the executive.\textsuperscript{122} Although the Crown Proceedings Act 1947 made for certain enforceable liabilities in delict and tort, existing prerogative powers were expressly preserved and limits maintained on public law remedies.\textsuperscript{123} However, in 1994, the House of Lords affirmed that the Crown in the sense of the executive was subject to judicial remedies and further that ministers acting in their official capacities were subject to the law of contempt of court.\textsuperscript{124}

While this is not the place to explore the full course of the evolution of the supervisory jurisdiction of the Court of Session, it is worth noting that Clyde and Edwards open for consideration, without giving a definitive view, the question of whether the long sleep of public law in England during the middle years of the twentieth century identified by Sir Stephen Sedley was quite so deep or profound in Scotland.\textsuperscript{125} In light of the relative paucity of cases until the late 1980s, and in the absence of an Anisminic or CCSU, it is perhaps safer to say that the bed may have been marginally better furnished, but the sleep equally fitful.

\textsuperscript{121} Forbes v Underwood (1886) 13R 465, at 467 per LP Inglis.

\textsuperscript{122} The first edition of De Smith’s Judicial Review explicitly recognised the need for an historical perspective in understanding the ‘peculiarities’ of judicial review in England: Woolf et al De Smith’s Judicial Review (7th ed) (Thomson Reuters 2013), vi.


\textsuperscript{125} Clyde & Edwards p 36 para 2.36, referring inter alia to Barrs v British Wool Marketing Board 1957 SC 72, particularly at 82 per LP Clyde. S Sedley Lions under the Throne (CUP 2015) Ch 1.
The Quartet cases have already been alluded to, and can be considered as part of a judicial response to the form and scale of the post Second World War administrative state. That response was not the product of isolated judicial thought. Thus, the Franks Committee was established in response to particular political concerns but resulted in the Tribunals and Inquiries Act 1958,¹²⁶ which contained, inter alia, removal of ouster clauses in earlier legislation regarding administrative tribunal decisions,¹²⁷ and a duty on ministers and administrative tribunals to give reasons for their decisions if requested to do so, thus opening up the possibility of appeal or judicial review.¹²⁸ In that connection, it is noteworthy that, with one exception, the tribunals listed in Schedule 1 to the 1958 Act were established or re-established by legislation from the 1940s and 1950s, this the Act clearly established the separation of such decision making from the ambit of the administrative or executive components of government.¹²⁹ The practical reality of limited capacity for traditional notions of ministerial responsibility in the context of greatly increased numbers of administrative decisions perhaps gave added impetus to the normative principle of independent oversight.

It is reasonable to postulate that both the trend to more reasoned decision-making by administrative bodies, and the Quartet decisions laid the ground for creative though by a generation of lawyers and in due course judges less instinctively deferential to the executive. Speaking at something of a midpoint in the arc of development, Lord Diplock observed that “progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime.”¹³⁰

¹²⁷ Tribunals and Inquiries Act 1958, s 11.
¹²⁸ Tribunals and Inquiries Act 1958, s 12.
¹²⁹ That is not to say that there were no statutory tribunals prior to 1945; of course there were, for example under the Taxes Acts and the Workmen’s Compensation Acts, the point is about expansion in number and the scope of administrative decision making. See further JDB Mitchell Constitutional Law (2nd ed)(W Green 1967) Ch 16.
¹³⁰ R v IRC, ex parte National Federation of Self-Employed & Small Businesses [1982] AC 617, at 641D.
It is convenient to sketch the themes which have emerged in this elaboration of the constitutional. The judgment of Laws LJ in *Thoburn* has already been mentioned, and is plainly a cornerstone of a new approach to the treatment of statutes. However as exploration of *Anisminic* and the other Quartet cases indicates, that is far from the only, or indeed the first, strand of the constitutional. Thus over an extended period, the courts have had occasion to consider the position of both the executive and the legislative branches in relation to the rule of law. In doing so, they have determined that the rule of law entails that the executive is subject to the jurisdiction of the courts to make positive orders (in contradistinction to awards of damages for breach of private law obligations), and that a Minister of the Crown is open to proceedings for contempt. Secondly, the unqualified extent of the legislative supremacy of the UK Parliament - one of the underlying issues in *Thoburn*, of course - has been called into question by a number of senior judges, though that remains a far from universal position amongst the senior judiciary. The balance of power between courts and Parliament is also an issue which has gained party political saliency in the backwash of the UK’s departure from the European Union. On the other hand, the enactments of devolved legislatures are plainly subject to review, and the courts have taken some care to describe the limits, and, at the same time, to hint at questions for the UK Parliament.\(^\text{131}\) Finally, the UK Supreme Court has recently indicated that the common law remains a vital part of the British Constitution, and further that, in areas where there is an EU dimension, *kompetenz-kompetenz* questions are matters of domestic - i.e. common - law.\(^\text{132}\)

Despite judicial affirmations of the constitutional premise of Parliamentary supremacy, there are also a growing number of strong judicial statements that the common law - before as well as after EU accession - recognises limits on that supremacy consequent on the doctrine of the rule of law. That, it is suggested, is both an affirmation and a consequence of the place of the

\(^\text{131}\) AXA at 143, per L Hope para 50.

\(^\text{132}\) *Pham v Secretary of State for Home Dept* ([2015] UKSC 19) [2015] 1 WLR 1591, at 1620 per L Mance para 90.
common law method in the British constitution. Perhaps the clearest exposition of that is found in *R (Jackson) v Attorney General*, which was part of the series of litigations about the legality of legislation prohibiting foxhunting with hounds, and a case which focussed on the constitutionality of the use of the Parliament Acts in the enactment of that legislation.133 Amongst the remedies sought was a declaration that the Parliament Act 1949 was not an Act of Parliament, and thus neither was the Hunting Act 2004: in short, an invitation to the court to declare two Acts of Parliament to be invalid, and to do so on domestic constitutional grounds. The House of Lords declined to do so for a number of reasons; but for present purposes, the point of interest is the discussion of the place of Parliamentary sovereignty in the British constitution, and the range of views articulated on the topic by very senior judges.

For Lord Bingham, then the Senior Law Lord, the bedrock of the British constitution both at the time of enactment of the Parliament Acts and equally in the current era, was the supremacy of Parliament. Giving a strictly Diceyan view, his Lordship went on,

> It is... unnecessary for present purposes to touch on the difference, if any, made by our membership of the European Union. Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.134

Nonetheless, Lord Bingham was satisfied of the constitutional propriety of the issue being considered by the court in this case, because in the nature of the Parliament Act procedure, the appellants had raised a question of law which could not, as such, be resolved by Parliament. However “it would not be satisfactory, or consistent with the rule of law, if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.”135

A different view emerges from the speeches of Lords Steyn and Hope, who each opined, separately and in clear terms, that the sovereignty of

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133 *R (Jackson & ors) v Attorney General* [2006] 1AC 262.
134 *Jackson*, at 271C per L Bingham para 2.
135 *Jackson*, at 281F-G per L Bingham, para 27.
Parliament was no longer unconstrained, and did so by reference to a number of statutes of constitutional character albeit without expressly invoking Laws LJ. In Lord Steyn’s view the ‘classic’ account given by Dicey was out of place in the modern UK. Nevertheless, in his Lordship’s view,

“the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

Lord Hope went further, suggesting that it was at least an open question whether Parliamentary sovereignty had ever been absolute. In any event, like Lord Steyn, Lord Hope was satisfied that constitutional statutes passed by the will of Parliament constrained its legislative sovereignty. For his Lordship, the rule of law enforced by the courts was the ultimate controlling factor on which our constitution is based, a point evidenced by the fact that that the House had been willing to hear this appeal and to give judgment upon it. That was, in his view “another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.”

Thus it is plain that on this core question of the formulation and scope of the ultimate rule of recognition in the British constitution, the judges of what was then the highest court in the UK showed a range of views and disagreed about whether the central premise of Parliamentary sovereignty in its strong Diceyan form continues to be a complete and unqualified constitutional norm. In the period since Jackson was decided, and particularly during the period when Lord Neuberger was President of the Court, the UK Supreme Court has perhaps given more emphasis to common law constitutionalism rather than to external constraints on Parliamentary sovereignty, and the

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136 Jackson, at 302-3 per L Steyn para 102.
137 Jackson, at 303C per L Hope para 104. In the Scottish context, there is rich literature about this question which is conveniently summarised in J Clyde & D Edwards Judicial Review (W Green 2000), paras 4.30-4.35.
138 Jackson, at p 304E, per L Hope para 107. See too Lord Bingham’s extra-judicial riposte to Lords Hope and Steyn: Bingham The Rule of Law (Allen Lane 2010), Ch 12.
139 See, for example, R (HS2 Action Alliance Ltd) v Sec of State for Transport [2014] 1 WLR 324 (discussed in a later chapter), and Kennedy v The Charity Commission [2015] 1AC 455 (neutral citation [2014] UKSC 20).
exposition of common law qualifications on exercise of powers by Parliament have been reaffirmed.140

Preliminary conclusions
This chapter has attempted to sketch key points on the road towards a dynamic sense of the constitutional in British public law in the last half century. It is necessarily an outline only, but it is suggested that a line can nonetheless be discerned. With the unprecedented expansion of the administrative state in the middle years of the twentieth century, accompanied by non-judicial forms of adjudication, raised questions of accountability and control as it became apparent that previous notions of parliamentary accountability were at best an incomplete account.141 More searching judicial scrutiny, first of statutory decision-making bodies, and then of prerogative powers followed. While the court may have couched itself in modest terms, that is the significance of Anisminic because the House of Lords there affirmed the fundamental principle of judicial oversight, with all that implies in terms of process and balancing of powers between components of the state. The continued tension between the power and reach of the administrative state, and the reality of parliamentary accountability mechanisms have ensured that judicial review as a tool has undergone continued refinement.

Over the same period, political choices about deeper institutional structures have altered the constitution, in the sense of the organisation of the state. Many of the most important such changes (for example, membership of the EU, the Human Rights Act, and devolution) have been enacted in statutes which have been framed so as to come with a fine balance of judicial as well as political oversight. In this way, constitutional problems and ideas are of necessity engaged in the judicial process. Equally, as section 1 of the Constitutional Reform Act 2005 indicates, there are instances of statutory reaffirmation of existing constitutional principles.

140 See, for example, AXA General Insurance Co v L Advocate 2012 SC(UKSC) 122, at pp 143-4 per L Hope para 51. AXA is considered in more detail in a later chapter.
141 Lord Hewart The New Despotism (Ernest Benn 1929); Report of Committee on Administrative Tribunals, (HMSO 1957) Cmd 218.
In *Thoburn*, Laws LJ characterised constitutional statutes as bearing on the relationship between the individual and state at a high (“overarching”) level, or engaging fundamental rights. That is itself a high level definition, in the sense that it allows some such legislation to be identified, but is not so particular as to be exhaustive. In fairness, it may be that this was intended as a descriptive characterisation in any event. That characterisation, which is the subject of Chapter 3, has been the object of important critique and refinement by David Feldman and others.

Devolution is particularly significant in this context. Aside from the self-evident structural change in the form of new devolved institutions, the redistribution of competences, executive and legislative, has, it is suggested, deeply affected notions of ‘constitutional’ both at the level of principle and of process. Judicial policing of the boundaries of devolution is an explicit part of the legislative scheme, and is arguably more fully developed than inter-governmental mechanisms for resolution of boundary disputes. Further, the devolution jurisprudence contains ideas about the protection of constitutional rights, and suggestions about parliamentary supremacy which may in time challenge current notions of political constitutionalism. That devolution jurisprudence is the subject of later chapters.
Chapter 2

Scholarly debates about British constitutional essentials

An account of... law on any specific subject is always a theory of how best to read the relevant legal materials, guided by notions of justice and coherence... 142

Between writers in these two contrasting styles there is almost complete lack of consensus over the major issues of public law. Further their disagreements are not explicable in terms of the weight of evidence applied within a neutral framework which is definitive of the subject. These disagreements must be understood essentially in terms of the spirit which informs their style of thought - and ultimately this concerns fundamental questions about the natures of human beings, their societies and their government. In short, it concerns their attitude to politics. 143

Introductory

In the previous chapter we saw an historical and institutional perspective on the notion of the constitutional in the context of the development of the British state. Before turning, in the next chapter, to explore whence the notion of constitutional statutes emerged, in what manner, and to what end, it is necessary to situate this research in a broader plain of scholarly debate and enquiry about constitutionalism generally and the British constitution in particular. In this chapter, the focus therefore shifts to theorising about the British constitutional order. As will become apparent, this is far from uncontested ground, and it is therefore necessary to sketch the main features of the debate. This is provided primarily in order to contextualise the analysis in subsequent chapters, and so it is not necessary to provide a comprehensive survey. Definition, or at least characterisation, is always central to legal discourse, but especially so in public law where there is often less agreement on questions of scope and sometimes also of definition compared with private law scholarship. There are also important distinctions about starting points, and frequently about conceptual landscape, within different Anglophone constitutional traditions. It is therefore also necessary to explicate more generally a number of concepts which are central to the

142 TRS Allan The Sovereignty of Law (OUP 2013), p5.
discussion and whose characterisation is itself the subject of debate in varying degrees:

- constitution
- constitutionalism
- political and legal constitutionalism
- Parliamentary sovereignty, and the notion of sovereignty more generally

Constitution

‘Constitution’ as a legal usage has a long pedigree, and its signification has developed over time.""""144 In the sense of a foundational act, or an exercise of constituent power, the modern usage dates back to the era of the American constitution and the French revolution. As a bare minimum, the constitution of a state requires to contain rules defining the ruler or sovereign,""""145 defining the ruler’s relations with the ruled, and describing the way in which the ruler’s powers and duties are to be exercised and regulated.""""146 In this respect, the British constitution is of interest as a subject of study because its rules on these matters are not codified in one place; rather they are to be found in a number of statutes, in constitutional conventions,""""147 and in principles contained within the common law.""""148 This too falls within an older legal sense of the term ‘constitution’.""""149 There may of course be room for argument about whether particular, peripheral, examples are included, particularly in relation to conventions (since these are in their nature unwritten,""""150 and the most malleable in form), but that those are the sources

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145 Recognising that these terms are used as a shorthand for the apex of political power, rather than necessarily implying a single person, at least in the modern era.
147 Dicey Constitution, Ch 8.
148 The place of the common law is the core of Sir John Laws’ first lecture in Laws op cit. fn146.
149 Dicey Constitution pp22-27; Loughlin op cit. fn144, p120.
is not seriously be in doubt. Important though conventions undoubtedly are, Anthony King provides a timely warning against British constitutional-lexicographical exceptionalism, observing that even in codified constitutional structures, not every rule and practice is recorded in writing.\textsuperscript{151} Nonetheless, the range and significance of conventions in the British constitution is one of its distinguishing features, particularly in relation to restraints on executive power.\textsuperscript{152} Another distinguishing feature of the British constitutional order in particular, and the subject of this research is the emergence of a further category, or sub-category, of constitutional components in the form of constitutional statutes. It will be contended this is a judicial tool to regulate interaction of other elements of the state with fundamental rights contained in or structures of the uncodified constitution. Chapter 3 explores both the reasons for and juridical character of this development which is a central focus of this research.

Constitutionalism - legal and political
In the Introduction to this research, a working characterisation of the conceptual divide between political constitutionalism and legal constitutionalism was offered, where political constitutionalism was held to describe constitutional structures in which the higher courts have no power to invalidate legislative acts on the grounds that they are unconstitutional because, in the absence of a codified constitution, Parliament is the ultimate source of legal authority. By contrast, legal constitutionalism depends on a codified constitution containing at least the necessary implication of judicial supremacy in the power to give the ultimate authoritative interpretation of the constitution and the constitutionality of legislative acts.\textsuperscript{153}

Although constitutionalism is a central concept in contemporary constitutional discourse and has been for some time, in Britain at least, it is

\textsuperscript{151} A King Does the United Kingdom Still Have a Constitution? (Sweet & Maxwell 2001), p3.
\textsuperscript{153} See too the comparative summary in fn 159.
a notion which appears more often characterised than defined.\textsuperscript{154} In its essence, this discussion has a long pedigree in Western legal and political thought - stretching back through the work of Bagehot\textsuperscript{155} and Dicey\textsuperscript{156} in the high Victorian era, the Federalist debates of the 1780s in the infant United States,\textsuperscript{157} to the work of Hobbes and Locke in the wake of the civil wars and emergence of the early modern English and then British state.\textsuperscript{158} The UK is typically said to be the paradigm of a political constitution, while the US is the paradigm of a legal constitution.\textsuperscript{159}

While its antecedents are lengthy,\textsuperscript{160} in its contemporary form, the core of the idea of constitutionalism is about limited government: the notion of the constituent power vested in all members of a polity delegating limited, though no doubt ample, authority to government.\textsuperscript{161} From his survey of the

\textsuperscript{155} W Bagehot The English Constitution [1867] (Collins ed 1963), particularly ch 6.
\textsuperscript{156} Dicey Constitution.
\textsuperscript{157} A Hamilton, J Madison & J Jay The Federalist, [1788] T Ball (ed) (Cambridge 2003). Papers 47-51 address the separation of powers, while No. 78 addresses constitutional judicial review.
\textsuperscript{159} Cf, R Bellamy Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (CUP 2007), 10. Bellamy also, rightly, notes the oversimplification contained in both stereotypes. This is not the place to consider in depth the extent to which these paradigms are completely accurate representations in all respects, for in truth, like all archetypes, the reality is more nuanced. The US model is perhaps closer to the paradigm than the British model, but it is perhaps also important to note that although the US Supreme Court undoubtedly exercises that strong form of judicial review, the US constitution, whether in its original form or as subsequently amended, does not explicitly include a clause of judicial primacy. That doctrine emerged a dozen years after the constitution, in the US Supreme Court’s decision Marbury v Madison (1803) 5 U.S. (1 Cranch) 137. It is interesting to observe that while the court in Marbury asserted the power of constitution review, the question of such review by the Supreme Court did not resurface until the eve of the Civil War, half a century later, in the equally well-known case of Dred Scott v Sandford (1857) 60 US (19 How) 395, and it was not really until the the post-Reconstruction era of the last quarter of the nineteenth century and the rise of the industrial republic in the early twentieth century that the notion became a significant element of American constitutionalism (cf. B Ackerman We the People: 1 Foundations (Belknap/Harvard UP 1991), Ch 3), arguably evidencing the malleability of a constitutional order interpreted by the common law method.
literature, and under reference to argument from a positivist conception of sovereignty as against conceptions focussed on maintaining the ultimate authority of the democratic legislature, Murkens persuasively demonstrates that beyond this, there is no consensus about characterisation in the academic literature.\textsuperscript{162} Approaching the question of constitutionalism from a somewhat different direction, Feldman suggests that the American conceptual model of constitutionalism framed around a classical eighteenth century notion of limited government and distinct separation of powers has been adopted in Anglophone discourse elsewhere without a sufficient critical engagement with its history.\textsuperscript{163} Certainly, applying the contextual historical approach suggested in Chapter 1, the US Constitution contains both conscious continuity and conscious breaks with the then-contemporary understanding of the British constitution,\textsuperscript{164} and perhaps serves as a timely reminder there is no single ideal type, or, at least, that a careful contextual examination of constitutionalism in a given setting is necessary.\textsuperscript{165}

As with other aspects of its uncodified constitutional order, there is no accepted conception of notion of constitutionalism in British public law discourse.\textsuperscript{166} That has not precluded extensive, and increasingly frequent, invocation in academic writing on the topic. Murkens offers a provocative analysis of such usage by scholars in this area, identifying three principal trends:

- To fill the void left by the absence of a constitutional theory.
- To step into the shoes of an absent constitutional document.
- As ‘an umbrella term to cover either the new constitutional settlement between the judiciary, Parliament and government, or distinct constitutional concepts such as democracy, parliamentary sovereignty, the rule of law, separation of powers, accountability and legality

\textsuperscript{162} Murkens, op cit. fn154, p430.
\textsuperscript{163} Feldman, op cit. fn154, p122.
\textsuperscript{165} For a thoughtful comparative account, viewed from an American perspective, see E Delaney ‘Judiciary Rising: Constitutional Change in the United Kingdom’ (2014) 108 NWU LR 543.
\textsuperscript{166} Cf. Murkens, op cit. fn154, p430.
(constitutionality), fundamental rights (especially liberty) and the avoidance of arbitrary power.\textsuperscript{167}

Murkens attributes this matrix of usage to the dominant traditions of historical or political accounts of the British constitutional order, in which a pragmatic and flexible conception of rules means “constitutional law has no special sanctity”.\textsuperscript{168} That is certainly consistent with his third usage, which is one that has a good deal of empirical underpinning, as will be seen later in this chapter. Taking the example of Parliamentary sovereignty, Murkens identifies a problem with the (implicitly) unthinking invocation of flexibility of this concept, in that its historical foundations “and object of reference (the political system) have either radically changed or no longer exist”.\textsuperscript{169} That is, in the absence of a definitive, presumably legal, characterisation, the concept has become unmoored from its historical origins, and has acquired a somewhat procrustean character in political if not in legal discourse. Parliamentary sovereignty presents a particular challenge to the notion of constitutionalism conceived of as rule-binding of the institutions of state, because the primacy built into that doctrine in its purest form makes it extremely difficult to conceive of an indisputable basis, or bases, for the institutional entrenchment of fundamental rights, or of unequivocal rule of law limitations on the exercise of institutional power. That notion of primacy provides an apparent legitimacy for excluding constraints. In the context of a constitutional order with government formed from the legislature, structural controls on executive action by the legislative component are necessarily incomplete. Viewed in this way, the internal morality of the common law both in terms of the principle of legality, and its longstanding focus on vires and related concerns with procedural fairness, rationality, and, more recently, proportionality become an attractive alternative model.\textsuperscript{170}

\textsuperscript{167} Murkens, op cit. fn154, pp431-2.
\textsuperscript{168} Murkens, op cit. fn154, p432, quoting FW Maitland The Constitutional History of England (CUP 1908), p536.
\textsuperscript{169} Murkens, op cit. fn154, p433.
\textsuperscript{170} Cf. CCSU v Minister for Civil Service [1985] AC 374, per L Diplock at pp410-11.
Until the enactment of the Scotland Act 1998, the existence of a distinct modern Scottish constitutionalism was a contested notion. However, the undoubted constitutional character of that legislation, taken together with judicial glosses on the devolution scheme considered in later chapters, opens an interesting question about the extent to which such an idea may have begun to emerge. Elsewhere in the UK’s evolving territorial constitution, those observations are becoming increasingly applicable in Wales too. However the twentieth-century constitutional history of Northern Ireland adds layers to the model of devolution in Ulster which are not part of the Scottish or Welsh constitution. The institutional development of devolution in all three nations is considered in detail in Chapter 4. From that survey, it will be argued that a more nuanced understanding of constitution and constitutionalism is required for the contemporary British constitutional order. One of the paradoxes of this development is that the nature of constitutional understanding plainly varies at different institutional levels, with a more acutely developed sense in the devolved nations. That is not simply a matter of political difference, which is plain enough, but of institutional perception too - a matter which has attracted comment from the House of Lords Constitution and EU Select Committees on a number of occasions, particularly in the context of events subsequent to 23rd June 2016, considered further in Chapter 5.

Sweep of constitutional ideas
In an early paper aimed at recovering the unfairly neglected public law writing of JDB Mitchell, Martin Loughlin characterised the two dominant conceptual/analytical approaches, which he calls “styles”, of British public law scholarship as “normativism” and “functionalism”. Between writers in these two contrasting styles there is almost complete lack of consensus over the major issues of public law. Further their

172 Page, op cit., paras 2-16 - 2-23.
disagreements are not explicable in terms of the weight of evidence applied within a neutral framework which is definitive of the subject. These disagreements must be understood essentially in terms of the spirit which informs their style of thought - and ultimately this concerns fundamental questions about the natures of human beings, their societies and their government. In short, it concerns their attitude to politics.  

In Loughlin’s analysis, normativism is rooted in “a belief in the separation of powers and the need to subordinate government to law.” This, he argues, reflects an ideal of the autonomy of law. Functionalist analysis “tends to view law as part of the apparatus of government.” It is result-orientated and instrumentalist, and also “reflects an ideal of progressive evolutionary change.” This characterisation of the ways in which scholars approach constitutional discourse seeks to avoid ideology being the centrepiece of descriptions of constitutional theory, while recognising that it is nonetheless a significant underlying feature. By shifting the focus in this way it is possible the conceptual apparatus may be more accessible than an analysis framed by a less fruitful focus on ideological classification, and for that reason, Loughlin’s approach has much to commend it when surveying the literature in this area.

As we have seen, casting the debate in terms of constitutionalism is perhaps unhelpful given the absence of consensus about its conceptual boundaries in the British context. It is convenient to take as a working characterisation of the debate that this primarily concerns the relationship between the institutions of state, and particularly the question of which of the legislative or judicial branches has primacy as the ultimate source of authority about the validity of legal acts. In Britain’s uncodified constitutional structure, that debate has both normative and descriptive aspects because the ultimate rule of recognition is not exhaustively delineated in a single universally-

177 idem.
178 idem.
recognised source.\textsuperscript{179} Non-exhaustive boundaries of competence inherent in an uncodified constitutional order carry with them multi-polarity of constitutional authority.\textsuperscript{180} Thus there is scope for debate about the accuracy of descriptive accounts, and equally about the soundness of normative accounts. That fact explains the substantial literature which has accumulated about the normative and empirical limits (if any) on the exercise of law-making power by the legislature. Of course that is a top level constitutional issue, since the allocation and terms of the exercise of power by the various branches of the state is one of the core purposes of the constitution, and constitutionalism in the round embraces a broader question of the relationships between the branches of government and state, and their subjection to the rule of law.

Loughlin appears to suggest the normativist and functionalist styles of public law scholarship are fundamentally irreconcilable.\textsuperscript{181} That is perhaps too stark, and this research will argue that while the differences of position are undoubtedly profound, there is some common ground; though it is nonetheless probable that efforts to reconcile them entirely are likely to prove chimeric. In this context, both the extent and manner of control of the exercise of executive and administrative powers are relevant, as the evolution of judicial review of administrative action in all jurisdictions of the UK demonstrates. Likewise, the relationship between the centre and sub-national structures is a core concern of most constitutions. Devolution to Scotland, Wales and Northern Ireland has marked a fundamental reorganisation of the governance arrangements of the United Kingdom, and while the mechanics of the institutions in Scotland, and to a lesser extent Wales and Northern Ireland, have received the attention of scholars, the effect on the legal constitution as an organic whole has received rather less attention. It is in that space that this research seeks to situate itself.

\textsuperscript{179} In that respect Hart’s approach has the virtue of describing the character of such a rule, rather than prescribing its content: HLA Hart \textit{The Concept of Law} (2d ed)(Oxford 1994), Ch. 6.

\textsuperscript{180} To take a concrete example, the judicial approach to questions of statutory construction arising in the context of devolution engages both statutory rules, for example Scotland Act 1998, s 101(2), and common law norms in the form of presumptions about legislative intent and the modalities of construction where civil rights are engaged.

\textsuperscript{181} Loughlin, op. cit. fn175, pp138-9.
Discourse about the British constitution still takes place under the long shadow of A V Dicey, whose characterisation of the fundamental principle of English constitutional law as being the ‘sovereignty of parliament’ has entered the popular lexicon. In the Diceyan model, the conventional characterisation of sovereignty is that (i) Parliament is able to legislate on any topic without reference to a higher source of authority; (ii) legislation has continuing effect unless and until repealed; and (iii) in consequence of (i) and (ii), Parliament is, in general, unable to bind its successors. His formulation of that essential idea, which has its roots in the constitutional settlement subjecting the Crown to Parliament which followed the Glorious Revolution of 1688-9, has remained tremendously influential amongst British political writers, even if UK membership of the EU introduced a significant qualification, which remains no less complex in the aftermath of the UK’s exit. Further, incorporation of the European Convention on Human Rights into domestic law via the Human Rights Act 1998 has made for equally important changes, as a consequence of which it is open to question whether it is helpful to continue to speak of the ‘sovereignty’ of Parliament. In ordinary language usage, sovereign power may be understood as power answerable to none: it will be contended that is not an account of Parliamentary legislative supremacy which accurately represents the current British constitution, and thus its use may be apt to beguile the user to believe otherwise.

While Dicey’s best-known work The Law of the Constitution may be useful in its effort to present what was perhaps the first systematic legally-centred view of the British constitution, use of the language of ‘sovereignty’ has proved less than helpful to the succeeding discourse. That is because the notion of sovereignty has come to be explicated as having a political

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183 On the route to that settlement, see E Vallance The Glorious Revolution: 1688 Britain’s Fight for Liberty (Little Brown 2006); S Pincus 1688: The First Modern Revolution (Yale UP 2009).
184 Sovereignty and supreme power is helpfully delimited in WI Jennings The Law and the Constitution (5th ed)(LUP 1959) 147-8. Other aspects of the multiple dimensions of ‘sovereignty’ are explored by N MacCormick Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (OUP 1999), Ch8; and N Walker ‘Sovereignty Frames and Sovereignty Claims’ in R Rawlings, P Leyland & A Young op cit, 18-33.
dimension and a legal dimension which are distinct but connected. Political sovereignty is political power unrestrained by higher political power, and can thus be seen to be inextricably bound to the idea of the state and its territorial extent. The legal dimension of sovereignty is the power of making law without constraint from a higher source of law or legal authority.

For Neil MacCormick, sovereignty is “neither necessary to the existence of law and state nor event desirable.” In his analysis, the ‘law as command of a sovereign’ model, traceable through Austin to Hobbes, and debunked by Hart, cannot stand either in the face of distributed powers in consequence of a codified constitution, or in face of a body of recognisable law not tied to a state, such as canon law or EU law. The latter point is perhaps more problematic than the former, because while it is true the examples given are not tied to a single state, they are nonetheless connected to a source which is the ultimate authority in its domain. So that if the point is about law beyond the territorial link, it is well made, but is perhaps less robust in establishing the notion of autonomous legal authority. Stronger explanatory power attaches to MacCormick’s second perspective: a distinction between internal and external sovereignty. Looking first to the internal ordering of a state, MacCormick calls on us to ask if “there is any person who enjoys power without higher power internally to the state.” In the event that all are subject to some legal and/or political controls or checks, he concludes there is no sovereign internal to the state. Empirically, of course, that is a description of many codified constitutional models. Turning to the external dimension, that is, consideration of a given state’s relations with other states and bodies operating on the international plane:

We might conclude that in this perspective a state, whatever its internal distribution of legal or political power, is a ‘sovereign state’ in the sense

186 MacCormick op cit. fn184, p127.
188 MacCormick, op cit. fn184, p129.
190 MacCormick, op cit., fn184 pp129-130.
191 MacCormick, op cit fn 184, p129.
that the totality of legal or political powers exercised within it is in fact subject to no higher power exercised from without.\textsuperscript{192}

While MacCormick was seeking to characterise these internal and external dimensions to make good an analysis of divided sovereignty in support of a wider project to conceptualise a possible future direction for the European Union, they are also useful in the present context to illustrate why discourse employing an undifferentiated notion of sovereignty is not in fact helpful in understanding legal norm creation. That is because with this characterisation, MacCormick is in danger of conflating the identity of the state (the external dimension) with the answer to an empirical question about authority for norm-creation in a given polity.

Neil Walker goes further, identifying two dimensions of sovereignty in legal thought.\textsuperscript{193} As a frame, it is:

- part of the deep and often taken-for-granted conceptual structure through which law is authorized and organized as law and in terms of which we are able to conceive of legal order in general.

Walker also characterises sovereignty as having a:

- discursive form of a claim variously, and sometimes speculatively or contentiously, made in respect of a State, a federal province, a nation, a people, a supra-State, a constitution, a constitutive rule or rule-set, a governmental complex, or a specific institution of government or governance.\textsuperscript{194}

The latter is intended to capture the richer range of tiers and sources of authority which have an impact on the modern state.\textsuperscript{195} Walker is surely right to identify this as particularly acute problem of analysis in the case of the British constitution, precisely because it lacks a clear distinction between internal and external sovereignty, and their respective limits.\textsuperscript{196}

\textsuperscript{192} idem.


\textsuperscript{194} Walker, op cit., pp18-19.

\textsuperscript{195} Walker, op cit., pp24-5.

\textsuperscript{196} Walker, op cit., p31.
Despite the substantial volume of scholarship related to sovereignty, and particularly Parliamentary sovereignty, not all accounts of sovereignty and the British constitutional order sufficiently distinguish these aspects of the idea. Perhaps this is in part a problem of perspective: many political theorists and actors appear to conflate sovereignty with governmental power, while legal theorists focus on the autonomy of law. That bifurcation is problematic because perhaps more than in other constitutional orders, the legal and political are intertwined at a structural level in the British constitution, particularly in relation to its twin poles of the sovereignty of Parliament and the rule of law. While there is considerable explanatory force in the narrative of continuity, that is also apt to obscure elements of the constitution because, self-evidently, the scope and character of the British state has expanded greatly, with the development of additional jurisgenerative sources of authority since the late nineteenth century, let alone 1689, notwithstanding considerable institutional continuity at the apex of the constitution.¹⁹⁷

Dicey’s insight that doctrine of Parliamentary sovereignty is a legal fact because it is a political fact is a compelling one in a polity without a grundnorm in the form of a codified constitution. However, it is no longer a complete account. In an important recent paper,¹⁹⁸ Loughlin and Tierney seek to address deep conceptual problems in the notion of Parliamentary sovereignty occasioned by:

continuing adherence to Dicey’s account, [which, they] argue, is now creating a ‘hopeless confusion of both language and thought’ which flows from a failure to distinguish between the particularity of Dicey’s legal doctrine and the general concept of sovereignty. And the failure to recognise that his legal doctrine is inextricably tied to a particular political belief about authority is causing constitutional lawyers to become ‘perplexed by unreality’.¹⁹⁹

This paper seeks to challenge assumptions about ‘sovereignty’ in the contemporary understanding and usage of the notion of Parliamentary

¹⁹⁷ See too Chapter 1.
¹⁹⁹ Loughlin & Tierney, op cit., p990. The internal quotes are from Dicey Constitution p12.
sovereignty, as first articulated by Dicey and thereafter projecting over subsequent constitutional discourse. Building on earlier work explicating sovereignty and the juridical character of the state, the authors argue due to the well-known historical institutional continuity within the British state, confusion about sovereignty is often evident.

Having lived so long with the authority of the legal doctrine of Parliamentary sovereignty, [lawyers] wrongly assume it is definitive of the concept. They fail to appreciate that a conflation has taken place because Parliament is at once conceived to be a legislature and a constituent assembly... 

In the latter resides the ultimate independent character of the state, and to that, it is argued the attribute of sovereignty properly understood belongs. Loughlin and Tierney argue that sovereignty has power-generating and power-distributing dimensions. The former is political, and the latter legal. The “error British lawyers commonly make is to fail to draw a distinction between sovereignty and government.” Sovereignty should not be confused with particular institutional forms.

Loughlin & Tierney argue that the conventional legal model of Parliamentary sovereignty fails to take sufficient account of the nature and extent of changes in the political structures of the British state. In particular, they propose that:

these changes are most coherently explained through an examination of changing assumptions about the source and location of political authority, and that these changing assumptions are most clearly expressed through a relational understanding of sovereignty. Such a relational understanding imports that “as power-generational conditions change they inevitably alter the power-distributive dimension of authority.” In other words, shifts in the sources of political authority carry with them changes in the legal conceptual realm. As a consequence, a legal

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200 Particularly M Loughlin The Idea of Public Law (OUP 2003), and Foundations of Public Law (OUP 2010).

201 Loughlin & Tierney op cit., p1000.


203 Something which MacCormick’s notion of internal and external dimensions of sovereignty discussed above tends to obscure.

204 Loughlin & Tierney, op cit., p1009.

205 idem.
account of which recognises no limitations on “sovereign authority” (i.e. competence) is now conceptually inadequate. This is an argument firmly rooted in legislated and executive political alterations of the structures of government, and amounts to a justification of a ‘manner and form’ model of constraints on legislative authority. That is, a model according law-creating primacy to Parliament, while modifying the notion that Parliament may not bind its successors by recognising constraints in legislative provisions requiring a particular form of process to change or repeal an existing Act. In this way, it is argued, fundamental structural or rights-conveying statutes may be ‘entrenched’ to the maximum extent consistent with Parliamentary supremacy. In this, Loughlin and Tierney acknowledge the elegant manner and form model proposed by Mike Gordon, though without adopting his normative justification for it.206

Taking stock of the arguments thus far, there are at least two problems with the Diceyan account of sovereignty in its purest form in contemporary circumstances. First, as the work of MacCormick, Walker, Tierney and Loughlin mentioned above illustrates, ‘sovereignty’ is an attribute of the State, which has also been appropriated to other institutional actors. In the context of the UK Parliament, this is apt to confuse because of the multiple significations of the word ‘sovereignty’ already mentioned.207 It is also apt to confuse because of the second problem with Dicey in understanding the contemporary constitution: while Parliament is the supreme legislating body, it is subject to the legal constraints already alluded to in the form of EU law, and, in a less direct and more analytically controversial form, by the European Convention on Human Rights via the Human Rights Act. In consequence, it is no longer apt to describe Parliament as the singular supreme law-making body; legislating is a central aspect of law-making, of course, but does not exhaust its scope, and the location of the final determination of legal validity is also a law-making function.208 That is certainly so in a common law system at least, since the doctrine of *stare

207 This confusion is traced by Loughlin *The Idea of Public Law* (OUP 2003), Ch5.
decisis has the consequence that once an issue is determined at appellate level in one case, that ratio is binding in future cognate cases. There are also more nuanced constraints as a consequence of the devolution arrangements for Scotland, and also those for Northern Ireland and Wales. While those constraints have been come politically controversial in recent times, their legal force is undiminished, and allows Barber to go so far as to assert that Parliamentary sovereignty as a judicial precept was ‘abandoned’ after Factortame, but that the notion has:

enjoyed an afterlife. Though no longer part of the UK’s Constitution, it still continues to attract the attentions of scholars, who, knowingly or unknowingly, apply the label to new constitutional phenomena.  

Sir John Laws puts the point in a less absolute way:

Legislative supremacy is not a doctrine set in stone. It is an evolving legal construct: a principle not a rule.

In light of the Supreme Court’s approach to the place of Parliament in the process of the UK’s withdrawal from the EU, which is explored in Chapter 5, it is suggested that this evolutionary characterisation is to be preferred to talk of complete abandonment.

Dicey’s formulation may or may not be explicitly employed in subsequent commentary, but its sense is the starting point for discussion, and reference to Dicey in the analysis which follows is intended to reflect that rather than any sense that his work remains the last word on the point: which it very definitely is not, as the range of arguments addressed at the highest judicial level in the aftermath of the referendum on the UK’s membership of the EU amply illustrates.

Amongst other things, this research seeks to interrogate the assertion of an unchangeable primacy in the doctrine of Parliamentary supremacy, or Parliamentary sovereignty, in British constitutionalism in light of recognition by the higher courts of statutes with constitutional character. That is to say, it is necessary to consider the extent to which the traditional

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209 N W Barber ‘The afterlife of Parliamentary sovereignty’ (2011) 9(1) I.CON 144, at p144.


211 As to which, see further Chapter 5.
notion of legislative supremacy is either absolute, or immutable. It will be contended that a more nuanced understanding is now appropriate, and the notion of constitutional statutes is part of an effort by the higher courts to accommodate that more sophisticated understanding of the constitution. An analytical note about language in this context: ‘supremacy’ is preferable to ‘sovereignty’ in this discussion for two reasons: first, as we have seen, juridically speaking, sovereignty is more properly understood as an attribute of a state rather than an institution within a state. Secondly, the linguistic associations of the term sovereignty may be apt to mislead in discourse about the narrative force of what ought to be understood by the phrase Parliamentary sovereignty.

Mimicking Dicey, the rule of recognition for the British constitution is not infrequently rendered as ‘whatever the Queen in Parliament enacts is law’, a formula also used by Hart to illustrate the operation of the notion of a rule of recognition, his own deeply influential contribution to constitutional understanding. However, as laws are not self-executing, the corollary is that rules require to be applied and interpreted in a given case by senior officials, and specifically judges. In the practical operation of this process, Sir John Laws, a judge as well as a jurist, offers an important insight: namely that "every one of these [constitutional] statutes, and every other statute, is mediated to the people by the common law." As a description of the common law judicial process, this is surely correct: the judiciary is the institution charged with the authoritative determination of the meaning and scope of the law. Were it not so, the meaning of statute would simply become a matter of opinion. Further, insofar as the notion

213 There is room for the view that a good deal of political discourse, particularly debate concerning, but not confined to, the UK’s relationship with the EU is bedevilled by this misconception. This is also evident in Parliamentary debates during the progress of the Human Rights Act, on which see A Kavanagh Constitutional Review under the UK Human Rights Act (CUP 2009), Ch 11.
217 Miller v Sec of State for Exiting the EU ([2017] UKSC 5) [2018] AC 61, per L Neuberger paras 2-4.
of Parliamentary supremacy in its purer forms admits of no distinction in character amongst statutes, all statutes require to be treated in that way. Dicey gives that account, but the point is also illustrated by the debate about ‘constitutional’ statutes initiated by Sir John Laws in his judicial capacity in Thoburn. That debate about the elaboration of a class of statutes protected from anything other than direct and express amendment or repeal, is both an acknowledgement of a degree of Parliamentary legislative supremacy and of its limitations by the employment of common law method. Whether there is a boundary test of political resonance as a condition of particular statutes being so characterised is another matter. As will become evident in Chapter 3, questions of characterisation take up a good deal of the existing literature about constitutional statutes.

For Tomkins, the British constitution is avowedly political in character because the executive - or at least the government of the day - can continue only so long as it has the support of a majority of the House of Commons. Though his position on the extent to which the British constitution is essentially political has since become more nuanced, as to the need for the executive to command the House of Commons, Tomkins remains firm in arguing that the British constitution differs from other western constitutions because it recognises the practical realities of government and puts them at the centre of the constitution. Other constitutional orders, he claims, have “tended to focus instead on legal controls. Ideals of ‘the rule of law’ or of respect for ‘fundamental’ or ‘human’ rights form the backbone... [and] are generally enforceable in courts of law rather than in political institutions such as Parliament.”

Richard Bellamy’s approach focusses more on the supposed advantages of political constitutionalism. For him, political constitutionalism requires “a large number of accountable representatives to agree on a settled law as a means for preventing arbitrary rule by any one person or group,” and it is to be preferred to legal constitutionalism because: courts are by their very nature too narrow in focus and as forums to deal adequately with the issue of deciding a collective policy on rights that

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219 Dicey, op cit., p35.
221 A Tomkins, Our Republican Constitution (OUP 2005), p1.
222 Tomkins, op cit., p3.
looks at the myriad ways different rights interact. They lack the informational and legitimacy advantages that come from decision making by large numbers of representatives responsive to the views of millions of electors.\textsuperscript{223}

Those perceived advantages are explored by him with reference to a vision in which “the democratic process \textit{is} the constitution”,\textsuperscript{224} and, by contrast, Bellamy argues, legal constitutionalism “creates conditions of domination.”\textsuperscript{225} Normative support for political constitutionalism generally rests on claims about popular participation - usually mass democratic participation at some level - or about a broader sense of democratic accountability. It is not, however, self-evident that political constitutionalism is any less apt to avoid ‘conditions of domination’.\textsuperscript{226} Nor, in a system which operates other than by direct democracy, is it obviously more democratically legitimate; the more so where the Parliamentary and executive branches overlap so closely as they do in the British model.\textsuperscript{227} For all the potential for parliamentary control of the executive in the form of confidence and ministerial accountability, the reality in the general run of events is of executive domination of the Commons. Accounts giving primacy to Parliament, usually on the basis of asserted democratic legitimacy, often give insufficient weight to that reality, and all the more so in the post-war political reality where executive control of the Commons and the legislative agenda is overwhelming.\textsuperscript{228}

Mention has already been made of the distinction drawn by Loughlin between normativism and functionalism in British constitutional thought. Loughlin framed this dichotomy in the context of an earlier expression of the debate about the legal nature of the British constitutional order, focussing on mid-twentieth century ‘legal modernists’, an era which he persuasively characterises as ending with JAG Griffith’s Chorley lecture,

\textsuperscript{223} R Bellamy ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 ICON 86, at 111.
\textsuperscript{225} Bellamy, op cit., p 260; the argument is developed in Chs 2 & 3.
\textsuperscript{226} Indeed the growing scholarly literature on the contemporary phenomenon of ‘authoritarian democracy’ suggests otherwise.
\textsuperscript{227} Cf. Hailsham \textit{The Dilemma of Democracy} (Collins 1978).
\textsuperscript{228} The very febrile atmosphere conjured by the minority government of 2017-19 is clear proof of this.
‘The Political Constitution’ in 1978. Nevertheless, the distinction is worth pursuing for its explanatory power in the context of the continuing irreconcilability of the two positions in later scholarship. Recognising the growth of the administrative state alluded to in chapter 1, and running counter to the Diceyan view that there was no English or British administrative law separate from the ‘ordinary’ law, a central concern for the mid-century functionalist approach was developing a method for rationalising the structures called into existence in a unstructured form during the period from the mid-nineteenth to the mid-twentieth centuries.

For Mitchell, what was required was “mechanism which can duplicate the evolutionary process of the common law in the field of public law.” Mitchell’s rationale, and that of other functionalists, and especially Griffith, being that the established courts were no longer suitable for the task because their processes of adjudication and indeed their conception of the nature of law were far removed from the needs of the modern state. In part, the courts’ conceptual difficulty stemmed from what he considered an outdated view of Parliament and its relationship with the executive. For Mitchell, by the mid-twentieth century, parliamentary control of government was a myth. Party discipline meant the Commons was no longer an effective scrutineer of government, at the same time as the growing executive and administrative state required greater scrutiny. This analysis flowed from a concern that the reality underlying the Diceyan model was one of “dangerous uncertainty” about where real authority lay within the modern state.

In practical terms, the problem was that in the absence of any effective system of administrative law we have been forced to rely on procedural safeguards which confer only limited (and disproportionately small) benefits upon individuals, but which delay and are often out of harmony with the administrative realities.

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231 Mitchell, op. cit., p57.
233 Mitchell, op cit. fn 232, p57
In Mitchell’s view, the Revolution settlement imported control of government by the courts and Parliament, which had operated in the eighteenth century, but “by the middle of the nineteenth century control of law has steadily ceded ground to control by political means alone.”235 In that, he provides a riposte to the likely counter-majoritarian concern that “the reasonable dispersal of power is a safeguard for liberty.”236 Nonetheless, Mitchell’s proposed model of what would effectively amount to a fourth strand of the machinery of the state in the form of judicial apparatus separate from the existing courts specifically to oversee the machinery of the administrative state was essentially a development of the existing model, rather than a truly legal constitutionalist mode of controlling exercise of executive power.

At the apex of the functionalist view is JAG Griffith’s well-known observation that the British constitution is no more and no less than what happens,237 which underpins his claim that the political element was and ought to be the focus of the state and which sought to avoid claims for the legitimacy of a particular constitutional order on the basis that:

I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position; that laws made by those in authority derive validity from no other fact or principle, and so impose no moral obligation of obedience on others; that so-called individual or human rights are no more and no less than political claims made by individuals on those in authority; that a society is endemically in a state of conflict between warring interest groups, having no consensus or unifying principles sufficiently precise to be the basis of a theory of legislation.238

While Griffith was certainly a leading exemplar of a particularly British and Fabian type of constitutional thought which was rooted in the antithesis of what would now be called legal constitutionalism, it can be seen in

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235 Mitchell, op cit., fn230, p59.
236 idem.
238 Griffith, op cit., p19.
retrospect that his observation was made at a point where the ebb tide was already running against such a functionalist view, with growing concerns about control of institutions in the ever-expanding administrative state and growing interest in notions of fundamental rights as bearing on that task.\textsuperscript{239}

Griffith’s modernism is more than a muscular application of the dominant British legal philosophy of positivism in the context of public law. Certainly, as the passage quoted above clearly indicates, Griffith was avowedly highly positivist in outlook, taking the view that law is not a norm but it is a social fact, and that critique ought to be by reference to valid asserted function, rather than a more abstract normative value.\textsuperscript{240}

Yet, there is at least an empirical problem with viewing constitutional law only as a means to an end in quite the stark terms of Griffith’s paper. Griffith himself identified challenges of politics and economics inundating 1970s Britain,\textsuperscript{241} and it is not clear that his conception provides a satisfactory juridical response to the political immobility of that era, or that it has explanatory power in the changed political architecture and relationships of the early twenty-first century. At best, it might be said that Griffith and the like represent a ‘post-metaphysical pragmatism’, where progressive social policy is no longer to be hamstrung by ‘timeless’ values, which would be to give an explicitly normative dimension to an avowedly functionalist conception of the constitution.\textsuperscript{242} Griffith’s claim that the political element was and ought to be the focus of the state sought to avoid claims for the legitimacy of a particular constitutional order took his positivism well beyond legal positivism of the kind exemplified by HLA Hart, and which is concerned with the social sources of law. Griffith, by contrast, articulated a broader sense of positivism, concerned with the founding of all knowledge in empirical experience: in this context, the deep political culture of the constitution. In turn, that carries with it normative claims about the primacy of the political dimension of the constitution. That

\textsuperscript{241} Griffith, op cit., pp1-2.
\textsuperscript{242} Progress is also a metaphysical concept, of course, and moreover an increasingly contested one: L Sklair \textit{The Sociology of Progress} (Routledge 1970).
may be contrasted with mainstream legal positivism, which can be consistent with both political and legal constitutionalism.

**The sweep of ideas: common law and the constitution**

In both the Scots and English legal systems, the common law is both the name given to the collection of judicial decisions containing principles and rules which inform the process of interpretation and application of rules of law, and the body of case law progressively developed over an extended arc of time which, as a self-standing source of law, is the common law’s distinguishing feature. The common law is a notoriously living, that is, evolving, construct; by which is meant that in its case law, essential principles are in a state of continuing development and refinement as the courts engage in the incremental exposition of the law, one case at a time. Such development is underpinned by the doctrine of precedent and the methods - and limits - which form part of it. That same process of evolution can be seen in the deep systemic rules of the common law; hence the operating rules of the common law are subject to development, even at a fundamental level. Thus, for example, the well-known decision of the Judicial Committee of the House of Lords in 1966 to change its practice on departing from its previous decisions in certain circumstances. Their Lordships did so not in the body of the decision of a particular case, but rather by a statement made at a sitting of the court at which all members were present, and of course the consequence of the Practice Statement was to effect a juridically significant change in the common law. Given the role of the House of Lords, and subsequently the UK Supreme Court, as the apex court of the three jurisdictions of the UK, the Practice Statement also effected a change at a constitutional level, given the common law origin of some core constitutional norms, not least in relation to institutional boundaries and the balance of powers within the constitution.

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243 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
245 The UK Supreme Court has adopted a similar position: *Austin v Southwark BC* [2010] UKSC28, [2011] 1AC 355, at paras 24&25, and see too UKSC Practice Direction 3.1.3 (available online at https://www.supremecourt.uk/procedures/practice-direction-03.html)
It is that task of authoritative interpretation which is vested uniquely in the courts that places them at the heart of the practical working of the rule of law. What then is the relationship between the common law and the constitution? One view is that the common law is the repository of the rule of recognition for the British constitution. While it is undoubtedly correct that the senior judges are within the class of officials to whom Hart postulated such a rule as being directed, it is not necessary to go as far as to adopt that position for the purposes of this research; such a status for the common law is perhaps too heroic a leap, at least in one stage. On the other hand, it is at least consistent with observable institutional practice to agree with Allan that:

From the internal viewpoint of the lawyer or legal reasoner, parliamentary sovereignty is a general principle of law rather than an empirical fact. It expresses a commitment to honour the reasonable decisions of elected representatives, in accordance with the proper needs of democratic equality.

Acknowledged as a general principle of law, the notion becomes an illustration of the characterisation of law as a unifying principle of the British constitution, and expressed in that way, it avoids (perhaps wisely, perhaps not) some of the deeper conceptual problems about the nature of sovereignty outlined above.

That being so, by parity of reasoning, constitutional evolution by means which include judicial decision-making cannot be excluded in a non-codified structure, particularly where determination of some parts of inter-institutional boundaries must be determined by the judicial process. Given the character and method of the common law, that is all the more so in constitutional orders which are common law systems. This capacity for change via the methodology of the common law has been explicitly recognised by at least some of the senior judges, acting both in their judicial

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246 Miller v Sec of State for Exiting the EU ([2017] UKSC 5) [2018] AC 61 may be considered a striking recent example of this. The point was addressed directly by Lord Neuberger giving the majority judgment (see paras 2-4); none of the dissenting judges demurred on this point.

247 This appears to be the inevitable conclusion of the common law constitutional model in T Allan The Sovereignty of Law (OUP 2013).

248 Allan, op cit., p32 (emphasis in original).

249 The phrase is Sir John Laws’s; see The Common Law Constitution (CUP 2014), pp4-5.
capacity as well as in extra-judicial utterances. Thus Lord Hope of Craighead:

Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.²⁵⁰

That a member of the Appellate Committee of the House of Lords (and thereafter a Justice and Deputy President of the UK Supreme Court) should in that capacity give voice to the idea of progressive limitation on Parliamentary sovereignty is surely significant given the place of the Judicial Committee (and now the Supreme Court) in the British judicial hierarchy. While it is also true that some members of the court in the same case were noticeably reluctant to entertain the discussion,²⁵¹ that Lord Hope’s observation went only slightly further than other members of the Court who were prepared to conceive of the possibility that there might be limits in certain circumstances,²⁵² is indicative of the very incremental evolution of the common law method discussed above and applied to rules which are constitutional in character, rather than suggestive of a category error. Subsequent case-law does not go quite so far on this point, but does contain equally forthright assertion of the common law as a source of fundamental constitutional norms and the role of the judicial institutions in defining their boundaries.²⁵³

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²⁵⁰ *Jackson v Att Gen* [2006] 1AC 262, per L. Hope at 303, para 104.
²⁵¹ For example Lord Bingham, at pp 274H-275A, para 9; a position amplified in his extra-judicial writings: see Bingham *The Rule of Law* (Allen Lane 2010), p167.
²⁵² *Jackson*, at pp302-3, per L. Steyn para 102. See also p318, per L Hale para 159.
²⁵³ See for example *R (HS2 Alliance) v Sec of State for Transport* ([2014] UKSC 3) [2014] 1 WLR 234, per L. Reed para 79 (boundary questions to be determined by national courts); per LL. Neuberger & Mance para 206-7 (constitutional instruments); *Kennedy v Charity Commission* ([2014] UKSC 20) [2015] AC 455, per L. Mance para 46 (fundamental rights protection established in common law as well as in ECHR), and see too judgment of L. Carswell; *Miller v Sec of State for Exiting the EU* ([2017] UKSC 5) [2018] AC 61, per L. Neuberger para 4 (nature of the judicial task); para 42-43 (components of the constitution); *Miller/Cherry v Prime Minister* ([2019] UKSC 41) [2020] AC 373 (justiciability of prorogation of Parliament).
Given their non-codified form, it seems plausible that the rules of change of the British constitution are likely to be somewhat less rigid than in a codified model. That possibility is surely confirmed when it is accepted that the common law is the repository for many of those rules. For the reasons already discussed, in that model, the interpretation of the rules of change will be a matter for the judiciary. Thus in British constitutional discourse at least, it is an error to suppose that as a matter of structure, the constitution is unchanging, or that the senior courts play no role in policing such change when it occurs.254

The rule of law and constitutionalism
Equally long-standing and perhaps less clearly bounded, the notion of the rule of law is the second core doctrine of the British constitution.255 That too is closely bound up with common law methodology. There are two senses of the rule of law in this context: protection against arbitrary decision-making, and the subjection of administrative decision-making to the same law as ‘ordinary’ people and ‘ordinary’ decisions. In Dicey’s view, the latter aspect of the British constitution was its distinguishing virtue,256 and by far the largest part of Law of the Constitution is devoted to discussion of the rule of law in its various aspects. Discourse, and the substance of the law, has since moved decisively in the direction of fundamental rights; yet the centrality of the rule of law remains, and arguably, doctrines of fundamental constitutional (and human) rights have become part of its contemporary expression.

In character, fundamental rights are either absolute, or permissible interference is controlled by a test approximating to proportionality. In British constitutionalism, some fundamental rights have most recently taken expression from the European Convention on Human Rights, as mediated

254 That is not to say that judicial tools are the only mode of policing constitutional boundaries.
255 There are myriad possible citations, but an extended discussion is most conveniently found in Bingham op cit. In251.
256 Dicey Constitution pp189-190.
through the Human Rights Act, which follows exactly that model. However, it is also true that some fundamental rights have roots deep in the common law, and although proportionality is not the test which has hitherto applied to them, they have nonetheless been judicially delineated, delimited and the degree of permitted impingement measured. Thus, for example, freedom of expression is long judicially recognised (if rather unevenly protected) in the common law, though limited by rules concerning defamation and incitement, respectively originating in common law and statute. However fundamental rights are arrived at (that is, whether by long development in the common law, or by direct or indirect application of the rights elaborated in the Convention), the unifying premise is judicial delineation. On the hypothesis that fundamental rights are constitutional in character, it is then odd that judicial determination is to be limited in some areas of rights adjudication but not others, most clearly evident in the threshold for challenges under the Human Rights Act compared with the competence threshold in the Scotland Act and other devolution measures. This is a point which has not escaped judicial notice, and the devolution jurisprudence of the UK Supreme Court has brought the point into focus. Thus in the case of AXA, which is considered in more detail in Chapter 4, while acknowledging the democratic credentials of the Scottish legislature which entitles it to judge the best interests of the country as a whole, the Court considered that judges were best placed to protect the rights of individuals. Further, Lord Hope noted that the question whether “the principle of the sovereignty of the UK Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion.”

For some commentators, political constitutionalism is preferable because it seems to place democratic legitimacy (in the form of a legislature elected by universal adult suffrage) at the apex of determination of legal validity. For

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257 For example, the development of privacy rights blending inchoate common law protection of confidences with Art 8 ECHR: Campbell v MGN [2004] 2AC 457.
258 Indeed there is a judicial critique of Convention rights arguments to the effect that they frequently add little to existing rights and principles in the common law; see, for example, Robertson v HMA; Gough v HMA 2008 JC 146, per LJC Gill at pp165-6, paras 64-5.
259 AXA General Insurance Co Ltd v Lord Advocate ([2011] UKSC 46) 2012 SC(UKSC) 122, per L Hope, para 49.
260 AXA, per L Hope, para 50.
their holistic and republican formulation, Richard Bellamy and Adam Tomkins stand out in their articulation of a politically-centred British constitutional order. ‘Republican’ in this context is to be understood as providing a foundation for a conception of freedom as non-domination.\(^{261}\) That in turn underpins the centrality of the political constitution. A political constitutionalist critique might assert that judicial determination of the limits of constitutionality is undemocratic, or even anti-democratic.\(^{262}\) In the basic sense that the judges are unelected, this is of course true. However, this misses an equally basic truth which is that the judicial function includes a claimed guarantee of the universality of fundamental rights against both the tyranny of the majority and the bias to the short-term which are latent in a democratic polity.\(^{263}\) That understanding is inherent in the notion of the separation of powers, even in the pre-democratic age when Madison first propounded it in \textit{The Federalist}.\(^{264}\)

Variants of the ‘anti-democratic’ or ‘counter-majoritarian’ critique might also assert that judicial controls are ultimately unable to trammel arbitrary political or executive power. On the latter point, the picture is historically mixed; however, it is not obvious that Parliament is able to do that either, nor that Parliamentary supremacy is any more effective in securing fundamental civil rights.\(^{265}\) This is particularly so in the context of the incomplete delineation of the separation of powers between the executive and Parliament in the British constitutional model, and heightened in the post-war era of executive domination of the Commons. That is something

\(^{261}\) Their characterisation draws on the work of historians JGA Pocock and Quentin Skinner, and philosopher Philip Pettit; see A Tomkins \textit{Our Republican Constitution} (OUP 2005), Ch 2.

\(^{262}\) This critique may be found in a variety of forms, with varying underlying ideological premises (arguably validating Loughlin’s characterisation of scholarship in terms of styles rather than positions). See e.g. J Waldron ‘The Core of the Case against Judicial Review’ (2006) Yale LJ 1346, whose point of departure is the US Constitution, but makes a broader point argued from a position on democratic legitimacy. The attack of the Judicial Power Project (www.judicialpowerproject.org.uk) is altogether more overtly ideological, being an offshoot of a political think-tank, Policy Exchange. And cf. P Craig ‘Judicial Power, the Judicial Power Project and the UK’ (2017) Qld LJ 355.

\(^{263}\) This is one of the central concerns articulated in Hailsham \textit{The Dilemma of Democracy} (Collins 1978).


directly addressed in the notion of an ‘elective dictatorship’ postulated in the 1970s as one of the core problems of the British constitution by Lord Hailsham, a lawyer as well as a senior politician. Here it might be argued that the shadow of Dicey has obscured the historical context of his writing against a background of more pronounced Parliamentary control of the executive in the middle years of the nineteenth century than later came to be the case, something which Dicey himself comes close to acknowledging elsewhere in his later writing. This was certainly something about which Bagehot, writing just prior to Dicey, was quite clear; indeed it might be argued that Bagehot captured the dying embers of that model of effective Parliamentary government, where executive and parliamentary power were in closer balance. On any view, this is undoubtedly an aspect of the form of the apparatus of government which has developed significantly since the era in which Dicey was writing. It seems implausible to suppose the constitution is nonetheless unaltered.

*The shifting sands of British constitutionalism*

In the face of the self-evident absence of a clear judicial power to strike down legislation in a British constitution premised on parliamentary sovereignty, legal constitutionalism has only gained traction in the UK in the last 25 years. Murray Hunt’s pioneering work sets out an elegant account of the effect of the UK’s international obligations as a member of the EU and as a signatory to the ECHR on traditional notions of parliamentary sovereignty and justiciability of fundamental, constitutional, rights. Hunt’s work pre-dates enactment of the HRA which has arguably been central to growing interest in the legal constitutionalism model in the UK. However, the Act and the scope which it may offer for constitutional judicial review in the UK is central to the work of Aileen Kavanagh. For her, the constitutional review function conferred on the courts by the HRA is real, but not unlimited. There are “the inherent limits of judicial law-

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266 Hailsham op cit. In263.

267 This is one reading of the underlying premise of Dicey’s *Lectures on the relation between Law and Public Opinion in England during the Nineteenth century (2nd ed)(1914).* (Hereafter “Dicey Law & Opinion”)

268 W Bagehot *The English Constitution* [1867] (Collins 1963), Ch. 6, and cf. the Introduction by Richard Crossman to the Collins edition (1963).

269 M Hunt *Using Human Rights Law in English Courts* (Hart 1997).

270 A Kavanagh *Constitutional Review under the UK Human Rights Act* (CUP 2009).
making, but also the broader institutional concerns expressed in the doctrine of deference.” In Kavanagh’s view, judicial review of HRA compliance “gives individuals a meaningful opportunity to mount a rights-based challenge to primary legislation.” Critically, for her, the level of rights protection is more likely to be enhanced by the possibility of such review than if Parliament and the Executive alone have this function. That seems a plausible normative response to the arguable weakness of Parliament in maintaining effective control of the Executive - which is, in reality, the main source of legislative activity.

Hunt’s approach did not require particular engagement with the democratic accountability issue. Kavanagh presents both structural/institutional arguments, and arguments about participatory democracy. As to the latter, adopting Dworkin’s characterisation, she follows a thin, ‘procedural’ conception of democracy, as contrasted with ‘constitutional’ democracy, giving effect to the rationale that decision-making by the democratically accountable legislature needs to be subject to constitutional principle in order to secure higher order norms or values. In other words, there is an explicit acceptance in her model that democratic endorsement is not the highest or over-riding constitutional value. Responding to another challenge from anti-legal constitutionalists, with Jeremy Waldron at their head, namely an argument asserting primacy of citizen participation in a democratic polity, Kavanagh is robust in asserting the necessity of a model of representative democracy. These claims about the primacy of participation are “deeply unrealistic”, she argues, because in a complex modern democracy few decisions about fundamental rights are taken by citizens themselves, and the choice is really about “who should make

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271 Kavanagh, op cit., p271.
272 Kavanagh, op cit., p338.
273 A point made, somewhat paradoxically, by Tomkins, at that point an advocate of Parliamentary primacy in rights protection, in A Tomkins ‘What is Parliament for?’, in N Bamforth & P Leyland (eds) Public Law in a Multi-layered Constitution (Hart 2003), p76.
274 Kavanagh, op cit., Ch 12.
275 Kavanagh, op cit., Ch 13.
decisions about rights on our behalf”. A position which has the considerable merit of considerable empirical solidity.

In the last few years, there has been a developing literature describing a third version of constitutionalism, called by some of its promoters the ‘New Commonwealth Model’. This seeks to provide a basis for understanding constitutional protection from a position somewhere between the extremes. Described as the New Commonwealth Model because its proponents rely on examples drawn mainly (though not exclusively) from the British Commonwealth. The essential features of this model are of a legislative bill of rights, though not necessarily one which imposes a constitutional limitations on the legislature, and its enforcement by a combination of judicial and political processes, with the mode of review structured so that the legislature has the final word on the validity of an Act.

In this way, the new model treats legislatures and courts as joint or supplementary rather than alternative exclusive protectors and promoters of rights... and decouples the power of judicial review from judicial supremacy or finality.

There is “weak form judicial review but also weak form legislative supremacy, as compared with the traditional [form of political constitutionalism].”

Interestingly, given the traditional view of the British constitution outlined above, some writers include the UK in this model. That is on the basis that the traditional view requires a more sophisticated formulation in light of the constraints which are placed on the UK Parliament by the HRA in particular, but also taking account of the European Communities Act 1972. Gardbaum’s New Model comprises three stages: (i) pre-enactment political rights review; (ii) “respectful but unapologetic” review by judges in the

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278 Kavanagh, op cit., 375-6, emphasis in original.
280 Gardbaum, op cit., 2.
281 Gardbaum, op cit., 44. Tamas Gyorfi presents a much more abstract version, which does not adopt the nomenclature, but shares some of the premises: T Gyorfi ‘Between Common Law Constitutionalism and Procedural Democracy’ (2013) 32 OJLS 317.
282 Gardbaum, op cit., Ch 7.
context of concrete litigation; (iii) “the possible exercise of the final legislative word in light of the judicial review at the second stage.”

Instancing the UK Parliament’s Joint Committee on Human Rights as an example of stage (i), and the remedial powers mechanism in section 10 HRA as meeting stage (iii), the UK constitution post-commencement of the HRA is rather more consistent with this model than a superficial consideration might suggest. However, as Aileen Kavanagh observes in a penetrating critique, while the model promises an apparently universalisable structure to resolve the counter-majoritarian difficulty, the actual experience is less clear-cut. Thus declaration of incompatibility under section 4 of HRA and the ‘notwithstanding’ clause in section 33 of the Canadian Charter are both on the face of it structurally consistent with the model, since they both afford a form of ‘last word’ to the legislature. Neither has in fact been used to over-ride judicial determination of incompatibility. The question of the extent to which that is problematic in the context of broader protection of rights is surely an open one; that is to say, is there in fact a difficulty, as opposed to a conceptual problem? Be that as it may, Kavanagh suggests other, more systemic reasons to be cautious:

Do parliamentarians have the ability - let alone the willingness - to engage in detailed review of judicial rulings? Is it desirable that they should focus on such rulings, rather than engage in an open political debate on first principles? Would such a practice create a risk that parliamentarians will adopt at compliance-orientated mentality vis-a-vis court rulings rather than finding their own voice on rights issues?

In European legal thought and practice, dialogue is an established idea characterising the interplay between supra-national and national courts in the evolution of EU and ECHR norms. Some scholars have developed the notion of dialogue in the European context into normative account of inter-institutional engagement and an underpinning for a normative order characterised by post-national sovereignty. An approach characterised as

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283 Gardbaum, op cit., 77-87.
284 Gardbaum, op cit., 83.
286 Kavanagh, op cit., p836.
287 There is a good deal of literature on this, see, for example, N MacCormick’s Questioning Sovereignty cit. supra; N Walker ‘Sovereignty Frames and Sovereignty
dialogue has also been proposed as an alternative route to resolution of the tension between legal and political models of constitutionalism. With its genesis in American political science, and initially characterised for a legal-constitutional audience by some Canadian Charter scholars, some advocate it as a non-system-specific form of constitutionalism.²⁸⁸

Although the boundaries of the notion of democratic dialogue as a constitutional model seem to elude definitive description, this approach appears to adopt a midway position on the continuum of judicial and parliamentary rights protection models. Alison Young initially conceptualises democratic dialogue as occurring where the legislature has an institutional opportunity to respond to judicial determination of fundamental rights violations.²⁸⁹ She explores whether conceptualising democratic dialogue as an aspect of constitutional design may provide a distinct model of constitutionalism. Distinct, that is, both from legal and political models, and from the New Commonwealth Model, with which it clearly shares features.²⁹⁰ Young’s primary normative claim is that the model facilitates deliberation amongst constitutional actors and hence “a more effective means of resolving potential constitutional crises which arise” from the tension between stability and flexibility in constitutional design.²⁹¹ Her account of interactions between institutions as mode of protecting fundamental rights sits comfortably with other conceptions of a mixed conceptual model, though it is less persuasive as a model accounting for the totality of constitutional design, unless it is envisaged as a tool for redesign.²⁹²

Without necessarily adopting the ‘New Commonwealth’ label, nor all elements of its analytical position, acceptance of variations on a mixed model has gained currency with other commentators, including some

Claims’ cit. supra; and P Dobner & M Loughlin (eds) The Twilight of Constitutionalism (OUP 2010).
²⁸⁸ This summary of the origins of this approach owes much to A Young Democratic Dialogue and the Constitution (OUP 2017) ‘Introduction’.
²⁸⁹ Young, op cit. An example would be section 4 of the Human Rights Act, explored by Young op cit., Ch7.
²⁹⁰ Young, op cit., pp 30-31.
²⁹¹ Young, op cit., p31, and further developed in Ch3.
²⁹² Young, op cit., Ch6.
previously strong proponents (usually at a normative level) of one or other pole. In his most recent work, Trevor Allan not only provides a coherent explanation of why constitutional theory is central to understanding constitutional mechanisms (something which cannot be said of all contributions to the debate), but more importantly seeks to break the ‘polarity’ of legislative and judicial constitutionalism theses. He does so by giving new form to the idea of common law constitutionalism, and in the process seeks to provide a defence of Dicey fitted to modern conditions. For Allan, reconciling sovereignty and the rule of law is a central concern. In his account, liberty and autonomy are the core values of the common law, and he is concerned to elaborate safeguards so that the “fundamental freedoms on which they depend will not be swept away by a ‘sovereign’ legislature temporarily deaf to pleas on behalf of individual liberty.” Allan explicitly aligns his conception of liberty with Dworkin’s account human dignity as a rationale for protecting human rights. That conception underlies Allan’s account of the rule of law. It also provides the basis for his “counterbalancing” of Parliamentary sovereignty. In his view, the common law standards and modes of review are likewise to be understood as embodying constitutional values because they invariably involve judicial balancing of competing rights of a fundamental - liberty-related - character. In that way, Allan seeks to harmonise legal and political.

Coming from the other direction, Adam Tomkins elaborates his current analysis rather more dramatically thus:

...the constitution of the United Kingdom is seen either as a political constitution or as a legal constitution... More recently, several commentators have argued that this distinction is a false choice and that we can, and indeed in the UK do, have elements of both. On this revised view, the British constitution is neither exclusively political

293 T Allan *The Sovereignty of Law* (OUP 2013).
294 Allan, op cit., pp31-3.
295 Allan, op cit., p91.
298 Allan, op cit., Ch 4.
299 Allan, op cit., Ch 7.
nor exclusively legal. The revised view is correct. The British constitution is indeed now a ‘mixed constitution’.

Tomkins’s revised position represents both a normative and descriptive shift. Descriptively, it appears to be a recognition that as a result of a number of developments as much in recent parliamentary experience as in judicial activity, the British constitution can best be described by abandoning fixed models, and accepting that there are plainly elements of both. Normatively, Tomkins claims that the important question is not ‘political or legal?’, but ‘what is the appropriate balance?’ In the empirical realm, that formulation has attractions.

Searching for a coherent model
What are we to make of these tendencies in constitutional modelling that appear at once convergent and divergent? And what of the remaining polarities, which, it is suggested, are essentially normative rather than descriptive? Allan suggests that an account of any branch of law is “always a theory of how best to read the relevant legal materials, guided by notions of justice and coherence”; for him, it is not sufficient to identify the content of the law merely with a descriptive account of judicial practice.

As a starting point, this has something to commend it, since a purely descriptive account is almost bound to be unsatisfactory, coming as it must from an external perspective. Judicial practice is nonetheless important, especially in the context of constitutional interpretation generally, and in the context of a legal system founded on the common law in particular. What is required is an account of the interpretative methods and premises of the judicial method which is being described. In other words, a sufficient account will involve the rationale - or perhaps the range of rationales - available for resolving cases in one way or another according to particular constitutional rules. For

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302 Allan, op cit., p5, emphasis in original.
Allan, this is the way in which the interpretative task of the judiciary is to be understood and conceptualised.\textsuperscript{303}

It should also be borne in mind that, like all legal processes, constitutional law, like politics, in all developed polities, is not static.\textsuperscript{304} Its fundamental architecture in a given legal system may remain apparently unchanged over an extended period, however the content given to particular rights or structures may - almost certainly will - evolve, and the mechanism for recognising them may be altered, whether sharply by some decisive event, or by gradual development in the understanding and application of fundamental rights in novel situations.\textsuperscript{305} That, it is suggested, is not a controversial notion in relation to areas of law other than the constitution. However, one of the non-juridical roles of a constitution is to authorise continuity in the legal and the political orders; and at least in developed polities, that notion of continuity is generally valued. Indeed it is arguable that the very notion of continuity is one of the functional premises of the British constitution; it is certainly one of its rhetorical premises.\textsuperscript{306} Nonetheless, there is a risk of confusion between continuity and fixity, and one of the concerns of this research is to explore the significance of judicial recognition of constitutional statutes and constitutional rights in illustrating that the constitution is not fixed and immutable, and that its central legal values nonetheless continue at its core.

Loughlin’s categorisation of normativist and functionalist has the merit of recognising the different initial premises of these ‘styles’ of public law theorising. So described, that helps support a move away from ideology to method. However that is not of itself sufficient to resolve the strains in the debate; indeed as we have seen, Loughlin considers they are irreconcilable.

\textsuperscript{303} Allan, op cit., p6.
\textsuperscript{304} This is perhaps overlooked by some advocates of written/codified constitutions as an all-encompassing answer to current political or governmental difficulties.
\textsuperscript{305} Of course, this process may itself be controversial in operation, as, for example, the tensions between ‘originalist’ and ‘living constitution’ approaches to the US constitution amply demonstrate.
For the purposes of this research, a more helpful line of enquiry is the historically-informed analytical exploration of the notion of sovereignty. Given its rhetorical prominence in political terms, as well as its continuing valence in legal accounts of the British constitution, sovereignty is a notion to be bounded before the central argument of this research can be developed. MacCormick and Walker offer analytical accounts that are persuasive in identifying multiple, paired, dimensions: legal and political, internal and external, structural/framing and claim-supporting.

What can be said is that analysis suggests judicial use of sovereignty as a frame of reference has sometimes conflated the legal and political/government senses just as often as has academic and political commentary. That is likely to be a consequence of the ambiguity in Dicey’s characterisation, which describes Parliamentary sovereignty in the legal dimension, but also locates that analysis in an historical continuum suggestive of the government/state dimension. Resolving that conundrum is of especial significance in an uncodified constitutional order, since there is by definition no firm framing device to serve as the uncontestable basis for legal and judicial authority.
Chapter 3

Constitutional Statutes

The United Kingdom has no written constitution, but we have a number of constitutional instruments... The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation. 307

Introductory

It is against the background of the incompletely resolved, and perhaps irresoluble, contending analyses of constitutional fundamentals canvassed in the previous chapters, that the emergence of judicial recognition of constitutional statutes as a common law component of the constitution must be considered. As the case-law demonstrates, the principle of Parliamentary legislative supremacy is deeply embedded in the common law, and the history sketched out in Chapter 1 suggests that is also reflected in institutional consensus since the Glorious Revolution. So long as the institutional consensus amongst constitutional actors continues to affirm the primacy of the political dimension of the constitution in the shape of Parliamentary sovereignty, it is not for the senior judiciary alone to determine the character of the constitution as primarily political or legal. In the absence of a codified constitution, such institutional consensus is the next best model for understanding the essential character of the constitution. 308 However the courts face the practical and institutional necessity of engaging with the components of the constitution as these have developed. Many are creations of statute, and therefore the setting of


308 That insight almost certainly accounts for the creation of the Cabinet Manual in 2010. Originally published in draft, written comments were invited. Reports on the Draft Cabinet Manual were also produced by the Political and Constitutional Reform Committee, the House of Lords Constitution Committee and the Public Administration Select Committee. Nonetheless, Sir Gus O’Donnell, the Cabinet Secretary of the day was careful to eschew the suggestion that the Manual was a codified constitution in embryo: see his speech at a Constitution Unit event, 24 Feb 2011; https://bit.ly/2SqbRU8.
boundaries, interpretation of powers and defining of relationships lies squarely within the province of the courts. Parliament enacts, but it is for the courts to interpret, apply and explain.309

This is the context within which the judicial recognition of the category of constitutional statutes must be understood. The European Communities Act 1972, the Human Rights Act 1998, and the devolution legislation, are all constitutionally salient. On any view, individually and collectively they carry the burden of significant constitutional re-organisation. Whether or not they render the Diceyan model truly obsolescent, these enactments place the courts much closer to the centre of constitutional evolution. Obsolescence is a live question because a model of the constitution premised on permanent, fundamental rights-bearing is not readily compatible with the limited government model implicit in Diceyan Parliamentary sovereignty. It is not the primary goal of this research to enter into that argument, which continues to rage, as the previous chapter indicated. However, given the magnitude of re-framing both of the shape of the British state, and, less visibly, the constitution since the era in which Dicey was theorising the constitution, that is sufficient to justify the notion of constitutional statutes. Thus, as we have seen in Chapter 1, the institutions of the state are more expansive in scope, and the rights claims of those who are the objects of the constitution are more robust in character. Emergence of the notion of constitutional statutes is itself an evolutionary response in the judicial sphere to those developments, going with the grain of the reality of constitutional reordering by legislative means. That, it is suggested, does not necessitate any new or particular political/normative stance about the ultimate source of legal authority. However it can, and it will be argued, does, import limitations on the manner in which legislative power can be exercised.

309 Cf. X v Morgan-Grampian (Publishers) Ltd [1991] 1AC 1, at 48 per L Bridge: “In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law, and the sovereignty of the Queen’s courts in interpreting and applying the law.”
In *Thoburn*, Sir John Laws sought to distinguish ‘constitutional’ from ‘ordinary’ statutes, and that on “a principled basis.” Thus, to repeat, in his conception, a constitutional statute:

is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. Examples are Magna Carta, the Bill of Rights 1689, the Union with Scotland Act 1706, the Reform Acts... the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The European Communities Act [with which the case was directly concerned] clearly belongs in this family.\(^\text{310}\)

This chapter sets out to explore the notion of constitutional statutes in greater detail, following on from the context-setting of the previous chapters. Particular attention is given to questions of definition or characterisation. Constitutional statutes as a component of the constitution have been explicitly addressed by the courts in several cases since the notion was first articulated by the Divisional Court in *Thoburn*, and the direction of this judicial recognition and development will be traced. In addition to further judicial recognition, there has also been a range of scholarly commentary which will be considered in an effort to address questions about classification and boundaries which immediately suggest themselves. It is contended that this process of characterisation and analysis is of some importance, since a list, even one pronounced *ex cathedra* by the highest court, is necessarily fixed in time, whereas tools of definition or classification are likely to be of more general utility.

Qualifying enactments ought nevertheless to be identifiable with reasonable certainty. After all, the courts have indicated the class of constitutional statutes is not closed and it is entirely foreseeable that there may be additions to it at future points, reflecting constitutional development. That is clear from the judicial formulations in the cases where the issue has been considered, and it is also inherent in the common law methodology, where judicial definition is often open textured. In a functioning democracy, it is likely further additions will be incremental as conceptions of rights evolve.

over time. Moreover, an interesting related point arises that further development is likely to involve overlay with existing provisions, and thus amendment, of existing constitutional legislation.

Constitutional Statutes: questions of classification

Having called into consciousness the classification category of ‘constitutional’ statutes, it will immediately be apparent that Sir John Laws’ “principled basis” for characterising statutes as constitutional encompasses a series of examples spanning 300 years and more of English and British constitutional history. However, while his formulation indicates several essential characteristics, it is equally evident that it does not amount to a complete rubric for classification. This is problematic for a number of reasons. First, even if Laws LJ’s discussion is taken to be confined to the question of whether or not certain statutes are exceptions to the doctrine of implied repeal, which was the issue raised directly in argument in *Thoburn*, that is potentially troublesome in cases where a statute does not clearly, but may arguably, fall within the class (say, for example, the Cities and Local Government Devolution Act 2016). As David Feldman has pointed out in a contribution discussed below, it is also necessary to recognise that some statutes may contain provisions of constitutional significance, but that may not describe the whole enactment, and *mutatis mutandis*, not every provision of an avowedly constitutional statute will be constitutional in character. There might, though, be questions of degree where what appear to be merely executory provisions are nonetheless integral to the character of a particular enactment. In any case in which the question might arise, the court will of course seek to achieve a resolution, so that the point is not the impossibility of the task, but the challenge of discerning the tools available for doing so.

Secondly, while the juridical existence and utility of the class of constitutional statutes has subsequently been affirmed, and arguably extended, by the highest judicial authority, some questions are left open. On

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311 *Thoburn*, particularly at 186D-G para 62.
the one hand, by that affirmation, the court laid to rest the argument about whether the classification of some statutes as constitutional was meaningful in the British constitutional setting.\textsuperscript{313} Direct confirmation of the relevance of the notion of constitutional statutes was given by the UK Supreme Court in \textit{BH v Lord Advocate}, in which Lord Hope explicitly adopted Laws LJ’s formula, and further affirmed that the Scotland Act 1998 was indeed such a statute.\textsuperscript{314} On the other hand, in \textit{HS2}, the UKSC approved the formulation by Laws LJ, while doing so in terms which raise a question about whether the court postulates a larger class: constitutional \textit{instruments}.\textsuperscript{315} A non-exhaustive list was offered by Lords Neuberger and Mance: Magna Carta; the Petition of Right 1628; the Bill of Rights and the Claim of Rights Act 1689; the Act of Settlement 1701 and the Act of Union 1707; the European Communities Act 1972; the Human Rights Act 1998; and the Constitutional Reform Act 2005.\textsuperscript{316} It will be evident that this list goes some way beyond that in \textit{Thoburn}, not only because the 2005 Act post-dates that case. As we will see, that statute is significant in this context, not least because of its explicit invocation of the rule of law.

While there is little difficulty in recognising those examples as constitutional in their character or import because they are amongst the foundational components of the British state, it is suggested the classification question remains; perhaps with an added dimension of understanding the character of an ‘instrument’ in contradistinction to a statute. Paul Craig suggests that the phrase ‘constitutional instruments’ was used to accommodate Magna Carta.\textsuperscript{317} While that is plausible, it does not fully account for the Supreme Court’s observation in paragraph 208 that:

> although the focus [in \textit{Thoburn}] was the possibility of conflict between an earlier ‘constitutional’ and later ‘ordinary’ statute, rather

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\item[\textsuperscript{313}] Cf. A Young \textit{Parliamentary Sovereignty and the Human Rights Act} (CUP 2009) pp42-43; A Kavanagh ‘Constitutional Review, the Courts and Democratic Skepticism’ [2009] 62 CLP 293, at p306; G Goldsworthy \textit{Parliamentary Sovereignty: Contemporary Debates} (CUP 2010), Ch 10. As will become evident, the consequences of this addition to the constitutional architecture remains the subject of debate.
\item[\textsuperscript{314}] \textit{BH v Lord Advocate} ([2012] UKSC 24) 2012 SC(UKSC) 308.
\item[\textsuperscript{315}] \textit{HS2}, per LL Neuberger & Mance para 207.
\item[\textsuperscript{316}] Idem.
\item[\textsuperscript{317}] P Craig ‘Constitutionalising constitutional law: HS2’ [2014] PL 373, at p389.
\end{itemize}
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than, as here, between two constitutional instruments, which raises yet further considerations\textsuperscript{318}

In other words, it is evident that the court consciously chose to distinguish between statutes and other instruments, although it is not clear if its reasons for doing so are more than linguistic, and that a further class is identified. Use of slightly different formulae is of course apt to open questions about distinctions and their juridical significance. Equally, though, it may be that this point relates to the particular circumstances of HS2, where the instruments in contention in HS2 were the European Communities Act 1972 and the Bill of Rights of 1689. Although the latter is nonetheless a statute, albeit of unusual character, being enrolled as an Act with the long title ‘An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown’ (modern orthography substituted).\textsuperscript{319} Either way, the effect is that the class of ‘instrument’ appears apt to extend beyond statutes properly so called, to include texts such as Magna Carta, the Bill of Rights and the Claim of Right, albeit that several of these do in fact take the form of statutes.

It seems likely that the court’s underlying point in HS2 was that it faced a higher order question in constitutional terms in that case than was the Divisional Court in Thoburn. That is because the issue in Thoburn was whether the established doctrine of implied repeal was applicable as regards a constitutional statute, where the later instrument was very definitely not constitutional in character. By contrast, in HS2, the Supreme Court required to address the interplay of EU law obligations, given effect in the UK ultimately by means of the European Communities Act, on the one hand, with a long-established constitutional principle about the separation of the provinces and the respective competences of Parliament and the courts,\textsuperscript{320} on the other. That particular issue arose because part of the argument for the

\textsuperscript{318} HS2, per LL Neuberger & Mance para 208. Nor does it account for Law LJ’s reference to it in para 62 of his judgment in Thoburn.

\textsuperscript{319} The Bill of Rights, as indeed its Scottish equivalent, the Claim of Right, is without the usual words of enactment because, as the preamble recites, it was presented to William and Mary on their being jointly offered the throne in the culmination of the Glorious Revolution, and thus forms one of the cornerstones of the constitutional primacy of Parliament over the Crown. See e.g. E Vallance The Glorious Revolution (Little Brown 2006) Ch6.

\textsuperscript{320} As that principle is embodied in the Bill of Rights 1689, article 9.
claimants concerned the quality of public (i.e. parliamentary) scrutiny of the enabling legislation due to the type of Bill it was proposed to employ.

From the formulations used in both *Thoburn* and *HS2*, it is fairly clear the court envisages the respective lists are not closed.\(^{321}\) In the context of a non-codified constitutional order, that seems logical so long as the criteria for identification can also be discerned. That approach is also consistent with the common law methodology of incremental refinement of the legal conceptual apparatus. One historically significant omission from both lists is the Statute of Westminster.\(^{322}\) That may perhaps be because, if it is now thought of at all, the Statute of Westminster is considered to be something of a dead letter, since the Dominions benefitting from it are long since fully independent states. However, as will be discussed further later, the conceptual apparatus in the Statute of Westminster has continuing relevance in indicating an approach to mapping aspects of the juridical relations among the several components of the UK’s territorial constitution. On that account alone, it is worthy of inclusion.

In any event, the statute/instrument question is perhaps ultimately rather less important than the task of developing tools for identifying their constitutional character, if only because the protection accorded to them (in the form of exclusion of implied repeal) suggests modalities of identification may be important.\(^{323}\) In other words, a systematic analysis of what is meant by ‘constitutional’ in this context. In addition to the examples of constitutional instruments given by Lords Neuberger and Mance in their judgment in *HS2*, their Lordships went on to observe that the common law also recognises certain principles as fundamental to the rule of law, and that these too might be relevant in determining whether legislation had been subject to implied repeal, at least in the context of EU law obligations being

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321 This is evident from the formulae used to introduce the lists given in each case: “examples are...” (*Thoburn*); “They include...” (*HS2*).

322 In form, the Statute of Westminster is of course an Act of Parliament, but as the preamble makes clear, it is the embodiment of an inter-governmental agreement which on its face is of political and constitutional significance both for the United Kingdom and the Dominions.

translated into the domestic legal order.\textsuperscript{324} That hints at the level within the legal normative hierarchy of the provisions with which we are here concerned. While the UK Supreme Court did not offer a view about the identification question in HS2, Thoburn itself offers a number of possibilities. There Laws LJ speaks of a constitutional statute as one “which conditions the legal relationship between citizen and state in some general, overarching manner”, or which “enlarges or diminishes what we would now regard as fundamental constitutional rights.”\textsuperscript{325} Those are plainly separate and distinct characterisations which illuminate; however it may be questioned whether they are a sufficient account. There have been several valuable scholarly contributions which seek to challenge and elaborate those bounding definitions. It is convenient to consider these in turn, before exploring questions of synthesis and the judicial exposition of the concept.

\textit{Constitutional axes}

Paul Craig’s characterisation of what he calls the horizontal, vertical and territorial dimensions of a constitution is a useful starting point for considering these questions about classification, because those axes, as described, are certainly engaged in relationships between constitutional actors, and amongst constitutional structures.\textsuperscript{326} A vertical dimension, namely that containing rules governing the relationship between the citizen and state, is found in all constitutions. Indeed this is perhaps the archetypal constitutional structure, since the idea of a people, or group of peoples, organised by way of institutions is plainly at the heart of the idea of the state, and hence of a constitution.\textsuperscript{327} Arguably, that reflects the early-modern conception of the state centred on the powers of the monarch just as much as modern constitutional orders, whether truly democratic or not in fact. In the nature of the relationships on this axis, the norms are likely to be both legal and political in character, with a range of ways of expressing the boundary. Characterising relationships between individuals and institutions begins more usefully by considering the institution in question. Thus a political dimension is likely to be far less evident in individual interaction

\textsuperscript{324} HS2, per LL Neuberger & Mance para 207.
\textsuperscript{325} Thoburn at 186, per Laws LJ para 62.
\textsuperscript{326} P Craig, op. cit. fn317, at p389.
\textsuperscript{327} Cf. M Loughlin \textit{The Idea of Public Law} (OUP 2003), Chs 1 & 2.
with the judicial elements of the state (at least in a functioning democracy) compared to interactions with the legislative organs.

In Craig’s schema, the horizontal dimension is:

concerned with the rules that regulate the main organs of government, their constitution and powers. Constitutions typically contain both substantive and procedural norms of this nature.\textsuperscript{328}

This reflects the range of institutional structures and their character. Thus there are likely to be formal inter-institutional relationships, and a degree of political interface and understanding about interaction at the boundaries. It is this dimension in which the British constitutional order differs most from others, in that norms on this axis are located in constitutional conventions to a greater extent than they are in legal rules.

Finally, in a federal or in a devolved constitutional structure, there will be a territorial dimension, regulating relations between the centre and the sub-state units (and perhaps also between sub-state units). Such territorial dimension will establish both the character of the sub-state units and their formal relationship \textit{inter se} and with the centre. As the UK devolution scheme demonstrates, while there is an inevitable need for boundary policing mechanisms, that may take a mix of political and legal forms. What is striking about the British example is how thinly drawn this axis of the constitution is, a theme considered further in Chapters 4 and 5. Starting with that framework, for Craig, a constitutional statute (or, following the Neuberger/Mance formulation, a constitutional instrument, for Craig seeks to address both) is one that “deals with the horizontal, territorial or vertical dimension of the constitutional ordering and that adjudged by its content it is of normative importance on the overall constitutional schema.”\textsuperscript{329} Thus on Craig’s account, the presence of one or more of the constitutional axes is necessary, but not sufficient. Positive identification as a constitutional instrument requires in addition a normatively significant component which is content-focussed. That component, it may be supposed, will be a matter of context.

\textsuperscript{328} P Craig, op cit. fn317, at p389.
\textsuperscript{329} \textit{idem.}
**Feldman’s critique**

David Feldman makes the point, rightly recognised as important by Craig, that not all provisions of a particular statute may be of constitutional significance, and conversely that an ordinary statute may contain one or more provisions which are constitutional in effect.\(^{330}\) That serves as a reminder of the context in which such issues of identification will most typically arise, namely questions of statutory construction, especially where the argument is about the effect of a subsequent enactment. On this point, neither Craig nor Feldman investigates whether there is a real difference in substance in the statute/instrument distinction. It is suggested there is none, having regard both to the listing articulated by the courts in *Thoburn* and *HS2*, which overlaps substantially, as well as the obviously analogous character of those items which actually are included in the judicial listings.

While Feldman’s approach is also grounded in the necessity of a defensible conception of what the constitution is and does (or should do), he advances a three-fold objection to the fundamental rights element of the *Thoburn* characterisation of constitutional statutes.\(^{331}\) First, the category of fundamental rights is not closed.\(^{332}\) Secondly, tying characterisation to fundamental rights would result in mismatches of both inclusion and exclusion, while his third criticism is that “in other ways, Laws LJ’s test is over-inclusive”\(^ {333}\) in the sense that most, if not all, legislation is, at some level, concerned with relationships between the state and citizens. This may be in a profound way such as, for example, citizenship or regulation of the franchise, or at a rather different and more quotidian level with the myriad regulatory measures characterising the modern administrative state. The latter class, and examples in between these poles, surely do not really meet


\(^{331}\) In a subsequent essay, Sir John Laws agrees that Feldman has identified a practical challenge, without necessarily accepting his critique in full. He does find common ground on “the important point... that we cannot systematically identify constitutional legislation without a notion of the central function or functions of constitutions.” Feldman op. cit fn312, p357, quoted in J Laws ‘The Miller Case and Constitutional Statutes’ in M Elliott, J Williams & A Young (eds) *The UK Constitution after Miller* (Hart 2018) 203, at p206.

\(^{332}\) Feldman, op cit. fn312, p345.

\(^{333}\) Feldman, op cit. fn312, p347.
the threshold of constitutional significance implicit in Thoburn’s call for a general, overarching relationship.

While it is certainly true that in the British constitutional tradition, the category of fundamental rights is not closed, in places Feldman’s argument perhaps comes to be a critique of imprecise (rather than over-generous) boundaries, in a boundary-setting formula. This is surely an issue about refinement, rather than about the fundamental utility of the definition proposed in Thoburn. Perhaps the threshold might be reframed as legislation which characterises the relationship between citizens and the state in a direct way and which conditions the exercise of other rights and duties, whether contained in that legislation or for which that relationship is a necessary precursor.

Feldman approaches the characterisation issue from a different direction, testing and discarding several models. First is the ‘organic laws’ model, found in some constitutional orders, which he rightly observes is not compatible with the UK’s constitutional core principle of the legislative supremacy of Parliament. Feldman gives the example of the French constitution, in terms of which laws enacted on certain topics supplement the Constitution of the Fifth Republic. Those are designated ‘organic’ laws, and require to follow a special legislative procedure. While the British constitution has special Parliamentary procedures for certain types of measure, and while it is possible to conceive of manner and form protections for enactments, neither of these of itself makes legislation ‘constitutional’. Further, manner and form protections and the doctrine of constitutional statutes are the strongest protection available in British constitutional practice, in contrast to the French constitution, where an organic law takes precedence over an ordinary law.

Feldman’s second possible test is a rather more formal one: namely whether legislation is self-described as constitutional. As we have seen in a previous chapter, in the UK, that would throw up only two substantive instruments,

335 Ibid.
which strongly suggests this is also unsuitable, at least as a self-standing test. His third model “relates to the character of the body which made the legislation.”\textsuperscript{336} In this context, Feldman envisages the law-making body exercising the constituent power of the state when enacting legislation.\textsuperscript{337} Again, that sits uneasily with the UK’s constitutional order, though Feldman illustrates other constitutions where it might serve as a definition.\textsuperscript{338} His goal of identifying a characterisation which is not confined to the British constitution is also evident in his own preferred formulation, which is institutional:

constitutional legislation establishes state institutions and confers functions, responsibilities and functions on them [i.e. the institutions].\textsuperscript{339}

This appears to resolve into an argument about secondary rules of recognition. Feldman is surely correct following Hart in classifying as core constitutional rules those establishing institutions of the state:

On this view, rules about rights (and the rights themselves) are constitutional if and so far as they operate as part of the definition of the power of state agencies... Merely enumerating freedoms does not in itself produce constitutional legislation.\textsuperscript{340}

In the context of an enquiry into wider effect of constitutional statutes, Ahmed and Perry also consider the definition question.\textsuperscript{341} Taking up Feldman’s point that the whole of a constitutional statute may not be constitutional, and vice versa, they first consider whether a modified version of Laws LJ’s definition, asserting that at least part of a measure meets either limb of his definition, before recognising that too is under-inclusive.\textsuperscript{342} Arguing that the focus on subject-matters in Feldman’s characterisation is a limitation, Ahmed and Perry next consider whether normative importance

\textsuperscript{336} Feldman, op cit., p349.
\textsuperscript{337} Ibid.
\textsuperscript{338} E.g. the practice of promulgating ‘Basic Laws’ in Israel: Feldman, op cit., p348.
\textsuperscript{339} Feldman, op. cit., p350.
\textsuperscript{340} Feldman, op. cit., p351, under ref to HLA Hart \textit{The Concept of Law} (1\textsuperscript{st} ed) pp78-9, 91-
6; (2\textsuperscript{nd} ed) pp80-1, 94-8.
\textsuperscript{342} Ahmed & Perry, \textit{op cit.}, p466.
might provide an alternative basis for distinguishing constitutional from other statutes, even statutes which though relating to institutions of the state, are not principally constitutional statutes. However, this too turns out to be problematic if the normative dimension is characterised as being an instrument embodying constitutional principles, because this carries with it the introduction of another definitional boundary. To meet that objection, Ahmed & Perry propose instead that:

[t]o say that constitutional statutes are of normative importance is thus to say that constitutional statutes make a significant difference to, i.e. substantially influence, the normative positions of state institutions. This is a much more institutional and process-centred definition than those proposed by either Feldman or Craig. While there will no doubt be a process dimension to most, if not all, constitutional statutes (since law is not generally self-executing), the definition here seems to be a necessary but not a sufficient characterisation. A problem is that not only constitutional statutes “substantially influence” the normative positions of state institutions. For example, the constitutional principle of the rule of law may be said equally to do so; it is the basis in the common law tradition for judicial review of executive institutions and activities, from the administrative to constitutional planes. There is perhaps some acknowledgement of that in the final refinement of their definition by Ahmed and Perry:

A constitutional statute is a statute at least a part of which (1) creates or regulates a state institution, and (2) is amongst the most important elements of our constitutional arrangements, in terms (a) of the influence it has on what state institutions can and may do given our other governing norms, and (b) the influence it has on what state institutions can and may do through the difference it makes to our other norms.

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345 Ahmed & Perry, op cit., p469, emphasis in original
347 Ahmed & Perry, op cit., p471.
This is perhaps best viewed as an attempt to refine Craig’s insight about the normative dimension. Even so, as Ahmed & Perry acknowledge, it is not a definitive account:

[a]pplying our definition means making difficult judgments about, for example, a statute’s direct importance and the degree to which repealing a statute would lead to changes elsewhere in the legal system.348

So this formulation is a test for what is not a constitutional statute, rather than a bounding definition of what is one. It also appears to operate on a different, and lower, level in the constitutional normative structure compared with the characterisation advanced by Feldman and Craig.

Strikingly, amongst the formulations rejected by Feldman is legislation whose purpose is to limit or control the power of government, something which might be thought archetypically constitutional in nature.349 This is rejected on the basis that, in Feldman’s view, it does not reflect the reality of constitutions in general, and:

so far as it is intended to offer a normative rather than descriptive model it depends on our accepting a contentious political philosophy [liberal constitutionalism and limited government]. It is not a good basis for understanding the United Kingdom’s constitution, with the Westminster Parliament’s theoretically unlimited legislative power, or other constitutions founded on ideals of collectivism, social democracy or social structures which take any form other than liberal (in the economic sense) democracy. It is therefore not a useful tool for defining constitutional laws, at any rate in the United Kingdom.350

This arguably conflates factual claims about the British constitutional model, and normative claims about constitutions more widely, with which Feldman is also concerned. A definition of ‘constitutional’ tied only to limits on institutional power is certainly empirically problematic in the British constitutional order so far as the legislative competence of

348 Ahmed & Perry, op cit., p473.
350 idem.
Parliament is concerned. Whether the same holds good about limitations on executive power in constitutional (and other) statutes is another matter. That is striking because bounding the modes and, in a liberal order at least, the limits, on the exercise of governmental power is a paradigm function of the ideal constitution just as much as specification of institutional architecture and, putting the point neutrally, defining the place of the objects of the constitution. Arguably, that is most clearly illustrated by the process of creating the first modern codified constitution, that of the United States. In contrast to Feldman’s wider constitutional argument, Laws LJ does not, I think, pretend to universality. What is true, is that his characterisation does not, of itself, say anything about legislative supremacy in the British constitution. Perhaps a better view, informed by Craig’s three dimensional model, is that these two analyses are more usefully viewed in conjunction rather than as alternatives - arguably in that way, they are variants of Laws LJ’s formulation.

351 More recently, In an, as yet, unpublished paper on Constitutional Statutes, presented at i-ConS conference in Glasgow 24&25 Apr 2019, Robert Craig has proposed a new and radically alternative approach to the question, focussing on a specific functional dimension to the notion of constitutional statutes. Craig’s view is that in its legislative output, Parliament operates on two levels: enacting both constitutional and ordinary legislation. In this he is explicit in his desire to defend an orthodox Diceyan position about the character of statutes. Craig offers a definition of constitutional statutes to include statutes where Parliament intends to confer, alter or remove the ability to pass, alter or repeal primary legislation, or to amend, alter, suspend or dispense with future primary legislation. That latter point goes to the heart of the point in issue in Thoburn, but also has some of the characteristics of a Henry VIII clause. Craig’s definition is restricted to circumstances in which legislation is enacted where Parliament is intentionally acting in a constitutional capacity in relation to the allocation of primary legislative powers in relation to other bodies or Parliament itself. In his conception, enactments which confer the power to amend future Acts cannot be impliedly repealed although any such powers can be subject to express subsequent amendment. In Craig’s view the ECA and the European Union Act 2011 conform to this model. However, the other instruments listed in Thoburn and HS2 less obviously do, unless the definition is taken to constrain legislative supremacy. While it may be that Craig’s model is not yet fully developed, in its current outline, it is less than convincing. There are at least two reasons for that. First, it does not sit at all well with the judicial characterisation in Thoburn and the other cases discussed in this chapter. That is not of itself a fatal weakness if Craig’s aim is to reorientate the concept, rather than to explain the scope of its previous judicial use. There is a second, more substantive reason. In essence, Craig appears to be offering a definition which is cast in terms of a class of rules of change, of the kind explicated by Hart in The Concept of Law Ch.5. While such rules are certainly essential to a constitutional order, it appears unduly narrow to confine the notion of ‘constitutional statutes’ to that. Only within a puritanically orthodox Diceyan version of the constitution where the Scotland Act and the Dentists Act are conceived of as occupying the same constitutional plane would such a limiting characterisation of ‘constitutional’ find coherence in explaining constitutional statutes.

352 The legal and political landscape in that process of constitution creation is exhaustively surveyed in M Klarman The Framers’ Coup: The Making of the United States Constitution (OUP 2016).
Constitutional statutes and constitutional symbolism
Perhaps reflecting the depth of the empirical tradition in British political thought, a striking absence from both academic and judicial discussion of the notion of constitutional statutes is the place of the symbolism or symbolic value of at least certain enactments or parts of enactments. By contrast, the symbolic place of the constitution as such is a strong and recurrent strand of American constitutionalism,\textsuperscript{353} and, at least at moments of constitutional renewal, has valence in France and Germany.\textsuperscript{354} Ringing preambles are very much the exception in contemporary British legislative practice, nonetheless there is a symbolic dimension in at least some constitutional legislation. That might be seen from the terms of the measure, or by the circumstances - or even the very fact - of enactment. It is an open question whether these are intended to be primarily legal or primarily political in their effect.

It is convenient to illustrate the point by examples.

Somewhat neglected in contemporary constitutional scholarship, the Statute of Westminster 1931 is significant both as in constitutional historical terms and in its continuing conceptual significance. Its historical significance lies in the structure established for the independence of the Dominions of the British Empire, something evident from the preamble:

...And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal

\textsuperscript{353} Cf. B Ackerman \textit{We the People} Vol 1 (Harvard 1991), Chs 1 & 2.
\textsuperscript{354} As appears from the Preamble and opening articles of the Constitution of the Fifth Republic. Available online at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constititution_anglais_oct2009.pdf. In the Preamble to the German Basic Law, the country’s turbulent twentieth century history is acknowledged with elegant simplicity. Available online at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0014.
Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion...

Notwithstanding the ‘established constitutional position’, section 4 provides in terms that no Act of Parliament of the United Kingdom passed after commencement shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. Together sections 2 and 3 about the plenary legislative powers of the Dominion parliaments, these provide for legislative autonomy free from Westminster involvement save for the limited provision of section 4, and with it, substantive independence.

The constitutional symbolism for the Dominions was obvious.\textsuperscript{355} For the domestic constitution of the ‘imperial mother country’, the immediate intent and the wider effect are separable. It is suggested that section 4 was enacted for the purposes of the internal constitutional law of the United Kingdom, with the intent of giving legal form to the political statement reflected in the second recital quoted above. However, on further examination, the Statute and section 4 in particular contains a clear limitation on the previous legislative competence of the Westminster Parliament. On a strict Diceyan analysis, that competence might be revisited by subsequent legislation,\textsuperscript{356} but as the Judicial Committee of the Privy Council recognised as early as

\textsuperscript{355} For example, the Statute of Westminster laid the groundwork for moves towards the Irish constitution of 1937 and the transition from the Free State to Republic, something which the Judicial Committee of the Privy Council recognised in Moore v Att General of the Irish Free State [1935] AC 484, at 499 per Viscount Sankey.

\textsuperscript{356} Something postulated by Wheare, drawing the distinction between legality and constitutionality: K Wheare, The Statute of Westminster and Dominion Status (OUP 1953), p153.
1935, while as a matter of abstract argument that might be so, it simply could not be squared with political reality.\footnote{British Coal Corporation v The King [1935] AC 500, at 520 per Viscount Sankey.}

Elements of the Scotland Act 1998 have equally symbolic resonance. Perhaps the strongest instance may be found in section 1 of the Scotland Act 1998,\footnote{Section 1 provides “There shall be a Scottish Parliament.”} and in the comment of its long-time advocate Donald Dewar introducing the Bill which became the Act: “There shall be a Scottish Parliament. I like that.”\footnote{Dewar first made the comment announcing the publication of the Bill in December 2017, and it came to be repeated on a number of occasions. So closely associated with Dewar was the Bill, that section 1 is inscribed on the plinth of his memorial in Glasgow.} Section 1 established the Scottish Parliament, but its resonance was arguably wider, given the political history of the preceding twenty years, and Dewar’s gloss reflects that. A symbolic response to a later constitutionally significant event in Scotland is found in section 1 of the Scotland Act 2016.

63A Permanence of the Scottish Parliament and Scottish Government

(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.

(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

This section was one of a number of amendments made to the Scotland Act following the work of the Smith Commission, a direct response to the independence referendum in 2014. It makes provision which may or may not have been in the contemplation of the original promotors of the Scotland Bill in 1997-98, and presents a further challenge to the Diceyan model of the constitution. That said, one effect of the first Miller decision, insofar as it relates to the Sewel convention, is to open up that very question but in an unhelpfully opaque way, since the court’s reasoning on the point conflicts
with what would be expected from the ordinary approach to statutory construction, and this issue is considered further in Chapter 5.\footnote{360 Miller & ors v Secretary of State for Exiting the EU ([2017] UKSC 5) [2018] AC 61.}

Both examples mark important points in Britain’s constitutional as well as political history, with the former marking a response to politically significant shifts in the relationships between Britain and its overseas Dominions, while the latter forms part of the response to a domestic political convulsion in the shape of the Scottish independence referendum and the Smith Commission established in its aftermath. These events are given clear symbolic presence in the legislation. Significantly, both amount to manner and form limitations on the legislative supremacy of Parliament.

Hierarchies and Boundaries
There is yet a further issue, namely whether, within the field of instruments acknowledged as constitutional, there is a hierarchy of some kind. In a thoughtful contribution, Mark Elliott posed that very question in the wake of the UK Supreme Court decision in \textit{HS2}.\footnote{361 M. Elliott, ‘Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law’ U.K. Const. L. Blog (23rd January 2014) (available at \url{http://ukconstitutionallaw.org}).} Drawing on the judgment of Lords Neuberger and Mance, Elliott notes that the relationship between EU law and domestic law raises a question of juridical and constitutional primacy. Primacy here being employed in the sense that the question arose about whether EU law may require domestic courts to set aside a fundamental principle of national constitutional law, and how such a question falls to be characterised. That is, does the domestic constitutional court have the final word on determination of the question?\footnote{362 This is a question which has also troubled the apex courts of other EU member states, perhaps most clearly in Germany: \textit{Re Ratification of Treaty of Lisbon} (2BvE 2/08) [2010] 3 CMLR 13. Cf. A Pliakos & G Anagnostaras ‘Who is the ultimate arbiter? The battle over judicial supremacy and EU law’ [2011] 36 ELRev 109.} There is obviously also a related question about the modality of adjudicating such questions, and where that fits into the constitutional model. Elliott acknowledges that there is a discourse about the basis on which EU law has effect within UK domestic law, and in particular whether it is attributable to and hence potentially circumscribed by the European Communities Act
1972 ("the ECA").363 This question about the normative relationship between EU law and domestic law as a matter of UK constitutional law was of course answered by the UK Supreme Court in Miller, three years after Elliott’s piece was written.364

On whichever classification model is adopted, the ECA is unquestionably a constitutional statute, so that the question which arises is about its primacy not only over inconsistent non-constitutional statutes, but over other constitutional instruments. Elliott follows Lords Neuberger and Mance in suggesting that:

Instead, the extent of EU law’s qualified primacy is, on this analysis, delimited by other constitutional measures - including (some) other ‘constitutional’ legislation, and perhaps (some) common-law constitutional rights and principles - whose claim to constitutional fundamentality may prove more compelling than that of the ECA itself.365

It is difficult to disagree with Elliott’s conclusion that the court in HS2 hints at a significant shift from the Diceyan model, whose shadow still looms long over British constitutional thinking, and also that the judgment envisages “a far richer constitutional order in which the differential normative claims of constitutional and other measures fall to be recognised and calibrated in legal terms.”366 This developing order is not entirely new, of course; rather it may be seen as a consolidation of the thinking first articulated in Thoburn and developed in an incremental manner since then in accordance with the common law method. As has already been suggested, this evolution in judicial approach is a response from within the common law method to the scale of constitutional evolution. For that reason, it is useful to explore the key cases in which this process can be traced.

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363 The present tense is used here both because the ECA was fully in force at the time Elliott’s blog was originally posted, and at the time of completing this thesis, the transitional period is still running.
364 Miller and its constitutional context is discussed further in Chapter 5.
365 M Elliott, op. cit. fn 361.
366 Idem.
Judicial analyses

Both *Thoburn* and *HS2* arose in the context of legislation and other obligations derived from the implementation of EU law in the UK domestic legal order; however it is reasonably clear that the argument is not tied to legislation implementing EU law. That was put beyond doubt in *BH v Lord Advocate* which was a decision in which the premise of *Thoburn* was explicitly affirmed in the wholly domestic constitutional order, and that in the context of devolution in particular.\(^{367}\) In that case, the court was faced with provisions of the Extradition Act 2003, which expressly excluded appeals from the High Court of Justiciary to the UK Supreme Court, on the one hand, and, on the other, the Scotland Act 1998, which provided for appeals to the Supreme Court against the determination of devolution issues by the High Court of Justiciary. As the appeal was said to engage Convention rights of both the appellant and third parties (namely his children), on any view, the issue was acutely focussed. Thus it is evident that this part of the argument in *BH* directly raised the implied repeal issue foreshadowed in *Thoburn*, because the question was whether appeal to the UK Supreme Court was excluded because the 2003 Act was later in time, and thus could be said to have impliedly repealed the provisions about appeals in the Scotland Act. It was in that context that Lord Hope approved the earlier formulation, holding that an express provision in a later statute could override a provision of the Scotland Act, but that it was not susceptible of implied repeal. This, he said, is:

because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by express enactment.\(^{368}\)

In this context, “fundamental constitutional nature” sounds as more than a formal juridical characterisation and implicitly invokes the political background to the enactment of the Scotland Act and other devolution measures. There is here, it seems, a political valence which bleeds into the legal analysis.

\(^{367}\) *BH v Lord Advocate* ([2012] UKSC 24) 2012 SC(UKSC) 308.

\(^{368}\) *BH*, per L Hope, para 30.
*BH* confirms another important strand of the nature of constitutional statutes, namely that they are not simply part of the apparatus for accommodating EU law in the UK’s domestic legal orders. Some might have argued that the notion of constitutional statutes as articulated in *Thoburn* was concerned with reconciling the primacy of EU with domestic legal principles. It is suggested that is not the sense of Laws LJ’s judgment; in any event, that doubt was cleared by *BH*, which is avowedly about entirely domestic constitutional provisions. Even if Lord Hope gives an incomplete explanation of their constitutional character, nonetheless the Scotland Acts and the other devolution legislation are plainly constitutional statutes, so that it is reasonable to consider the issues of characterisation and hierarchy in that context too.

There are several strands to the devolution argument here. Inherent in the British devolution model, and particularly the Scotland Act, is another boundary question defined by reference to Convention rights and other limitations on legislative and administrative competence.\(^{369}\) Here the notion of the constitutional statute is reinforced both by judicial consideration of devolution statutes and the several rounds of the devolution process. *BH v Lord Advocate* has already been mentioned, and an even more significant decision in this context is *AXA General Insurance Co Ltd v Lord Advocate*.\(^{370}\) Described by one distinguished commentator as “of the highest constitutional importance”,\(^ {371}\) the case involved judicial consideration of a direct challenge to the competence of an Act of the Scottish Parliament, and contains the clearest judicial comment on the constitutional status of the Scottish Parliament, and therefore on situating juridical dimensions of the evolving territorial constitution in the wider British constitutional matrix. Giving the leading judgment, Lord Hope recognised that the question as to whether Acts of the Scottish Parliament (and measures passed under devolved powers by the legislatures in Wales and Northern Ireland) as well as being incompatible with Convention rights, which was the principal

\(^{369}\) Scotland Act 1998, s29.


ground of challenge, are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance. Lord Hope posed two questions: was the Scottish Parliament amenable to the court’s supervisory jurisdiction? If so, on what grounds? On the first question, in the court’s view there was no doubt that s.29 of the Scotland Act did not amount to a “comprehensive statement of the limitations of the powers of the Parliament”, and it followed that Scottish primary legislation is amenable to the supervisory jurisdiction.  

On the second question, Lord Hope’s starting point was the observation that:

as a challenge to primary legislation at common law was simply impossible while the only legislature was the sovereign Parliament of the United Kingdom at Westminster, we are in this case in uncharted territory. The issue has to be addressed as one of principle.

The vexed question whether the sovereignty of the UK Parliament was absolute and how far conflicting views about the relationship between supremacy and the rule of law were to be reconciled was “still under discussion” and did not require to be resolved in this case. Even so, that formulation is remarkable in its contingent characterisation of supremacy. However, Lord Hope held that, although the Scottish Parliament was not sovereign in the sense that the UK Parliament is generally thought to be,

[the Scottish Parliament] takes its place under our constitutional arrangements a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its

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372 AXA, at 141 & 142, per L Hope paras 45 & 47. It is not evident that the court’s reference to the pioneering case of Somerville v Scottish Ministers fully vouches this point: Somerville v Scottish Ministers ([2007] UKHL 44) 2008 SC(HL) 45, L Hope at para 28. In that case, the court considered, inter alia, the mechanism for challenging acts by devolved institutions on the basis they were outwith devolved competence. However, the focus of that case was on section 100 of the Scotland Act, which is more appropriately conceived of as concerning process rather than substantive rights. That is because section 100 is concerned with equiperating standing for complaints under the Scotland Act about acts (whether executive or legislative) which are incompatible with Convention rights, namely application of the ‘victim’ test from the Convention itself. Thus while it is certainly constitutionally significant, it is of a different normative order from sections 28-29, with which the court was concerned in AXA.

373 AXA, per L Hope para 48.
legislative competence enjoy, in that respect, the highest legal authority.\textsuperscript{374}

Thus the court took the opportunity to address two issues in the context of characterising the Scotland Act and the Scottish Parliament. First, the specific issue of legislative competence, and enunciation of the principle that while the Scottish Parliament does not have unfettered competence, there was no question of the legislation enacted by it being contingent or subordinate. Secondly, the court addressed a more political polarity with its characterisation of the political mandate of the Scottish Parliament as bearing on the exercise of its legislative powers. In this sense, the court was fleshing out a political dimension of a constitutional components of devolution, and affirming that those structures have juridically recognisable political and legal dimensions.

Whether one was considering a devolved legislature, or a parliament sovereign “according to the traditional view”, there were shared characteristics, and “the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate” were such that the courts should intervene, if at all, only in the most exceptional circumstances.\textsuperscript{375} To illustrate what might amount to such circumstances, and expressly drawing on Jackson, Lord Hope noted it was “not entirely unthinkable” that a government with a majority in the Scottish Parliament (which was the situation at the time of the AXA decision), with the power to dominate, through its majority, the Scottish Parliament, might seek to use its power:

- to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so.
- The rule of law requires that legislation of that extreme kind is not law which the courts will recognise.\textsuperscript{376}

As he observed,

\textsuperscript{374} AXA, per L Hope para 46.
\textsuperscript{375} AXA, per L Hope para 49.
\textsuperscript{376} AXA, per L Hope para 51.
It goes to the root of the relationship between democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of the relationship.  

Framed in this way, the court was not concerned directly with a challenge to a constitutional statute, rather it was engaged in the working out of its operation in the context of an evolving constitution in which legal and political considerations are closely intertwined. Equally, the discussion in AXA can be seen to be an exploration of deeply constitutional aspects of the juris-generative character of the devolved legislature (i.e. the Scottish Parliament) and of its place in the wider British constitutional order.

In BH, the ‘constitutional statute’ question presented merely as a preliminary issue; while AXA involved consideration of the status of and challenge to devolved legislation. However the UKSC has also addressed the question of constitutionality head on. In HS2, the Court had occasion to consider the relationship between particular aspects of the domestic legislative process and substantive EU environmental law obligations. That was because the claimants’ argument was, inter alia, that there should have been a strategic environmental assessment in accordance with article 3 of Parliament and Council Directive 2001/42/EC, since the Government policy document for the HS2 railway amounted to a plan for future development which fell within the scope of that, and further that employing a hybrid Bill procedure in Parliament would be contrary to Directive 2011/92/EU (about Environmental Impact Assessments). This argument was predicated on the quality of the information available and the modalities of parliamentary assent to the legislation. In order to succeed, the argument for the appellants would have necessitated a direct challenge to parliamentary procedure and proceedings because the argument, apparently drawing on observations by a number of Advocates General in earlier CJEU jurisprudence, was that the combined effects of the party whip and

377 AXA, per L Hope para 42 - against that background, it is unsurprising that both the Welsh and Northern Irish devolved administrations appeared in the case as interveners.

collective responsibility, together with the huge volume of documents involved was to preclude effective consideration of environmental information, contrary to the EIA Directive, which was one foundation of the challenge to the enabling legislation for the HS2 railway.\(^{379}\) It will immediately be apparent that one consequence of such an argument would be to require the court to consider directly the efficacy of internal proceedings of Parliament: self-evidently a constitutional matter, and one, moreover, subject to long-standing rules of law, both found in statute and common law.\(^{380}\)

While some of the judgments in the Supreme Court focus largely on purpose and textual interpretation of the relevant EU legislation, several members of the court addressed constitutional arguments directly, some of which were alluded to earlier in this chapter. In a section of his judgment headed ‘constitutional issues’, Lord Reed observed that the argument about scrutiny of the EIA, impinged upon “the long established constitutional principles governing the relationship between Parliament and the courts”, reflected for example in article 9 of the Bill of Rights 1689, as well as in a range of decisions about judicial scrutiny of parliamentary procedure. Interestingly, neither the Bill of Rights nor any of the authorities mentioned was referred to in the parties’ printed cases, nor was this issue mentioned in argument before until it was raised by the court.\(^{381}\) It is not clear whether that was due to forensic considerations, or to a constitutional blind-spot amongst parties.

His Lordship considered that:

> Contrary to the submission made on behalf of the claimants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that

\(^{379}\) HS2, per L Reed paras 70-73.

\(^{380}\) Bill of Rights, article 9; Wauchope v Edinburgh & Dalkeith Rly. Co (1842) 1 Bell 252.

\(^{381}\) HS2, per L Reed para 78.
conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89)* [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament...  

In their concurring judgment, Lords Neuberger and Mance reinforced the existence of applicable common law constitutional principles concerning the constitutional basis of EU legislation both as a matter of EU law and national law. Thus the courts in the UK have held, by reference to the European Communities Act 1972, that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law. By reference to the traditional orthodox view of the British constitutional norm hierarchy, that was a significant development, recognising the special status of the 1972 Act, as a new source of norms in the British juridical order, and of European Community law (as it then was) and the importance attaching to the United Kingdom and its courts fulfilling the country’s commitments under the Community/Union treaties to give effect to EU law. However, their Lordships considered that it “would go a considerable step further than any United Kingdom court has ever gone” to follow “the approach suggested by the two Advocates General without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights.”

Further:

Important insights into potential issues in this area are to be found in their penetrating discussion by Laws LJ in the Divisional Court in *Thoburn v Sunderland City Council* [2003] QB 151, *(The Metric Martyrs* case), especially paras 58—70, although the focus there was

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382 *HS2*, per L Reed, para 79.
383 *R v Secretary of State, Ex p Factortame Ltd (No 2) (Case C-213/89)* [1991] 1 AC 603.
384 *HS2*, per LL Neuberger & Mance, para 206.
the possibility of conflict between an earlier “constitutional” and later “ordinary” statute, rather than, as here, between two constitutional instruments, which raises yet further considerations.\footnote{HS2, per LL Neuberger & Mance para 208.}

This passage, whilst \textit{obiter} in the technical sense, can be read as a clear statement of willingness on the part of the senior judiciary to continue identifying and fashioning coherent components of a documented, if uncodified, constitutional order, and to do so as much from rights and principles constitutional in nature and forming an integral part of the common law, as from statutes having a constitutional character. Whilst is not perhaps an express endorsement of the common law constitutional model propounded by Sir John Laws and Trevor Allan, it certainly finds resonance there.\footnote{See particularly T Allan \textit{The Sovereignty of Law} (OUP 2013); J Laws, \textit{The Common Law Constitution} (CUP 2014).} It seems to do so from a perspective that the common law includes principles which are both fundamental and constitutional in character. That is articulated by reference to the rule of law, which is arguably at the same time one of the poles of the British constitution, and a common law principle.

\textit{Conclusions}

What interim conclusions can be drawn?

Whatever the reservations of some commentators, the Supreme Court has endorsed the notion of ‘constitutional statutes’ in the sense proposed by Laws LJ in \textit{Thoburn}.

Taking Sir John Laws’ description as a starting point, there are problems of classification in respect of extent, which can be addressed where necessary by refining the focus to provisions rather than simply the totality of an enactment, recognising that not every provision of a constitutional statute is constitutional in its import. Secondly, Laws’ focus on fundamental rights is not universally supported. On the other hand, as a conception of a constitutional component, that has much to commend it, since fundamental...
rights are surely an essential component of the modern conception of a constitution.

As the debate about classification questions in the literature indicates, neither listing nor exhaustive definition is possible. It is likely to be more effective to identify essential characteristics. Feldman and Craig present the most effective conceptualisations. Of these it is suggested Paul Craig’s notion of constitutional axes is a more helpful framing device, because it captures the range of relationships between the components of the constitutional order, and between them and the objects of the constitution (i.e. citizens of the state and others who engage with it).

Constitutional statutes have different normative valence. To the extent they contain enforceable rights (as opposed to institutional structures), they are not enforced in the same way as ordinary statutes. That is because they engage the state in fundamental obligations, whether in structural terms, or in relation to citizens. In this context, Elliott’s conception of hierarchy is helpful as a starting point. Legislation of the kind identified represents a fundamental shift in juris-generative authority, and thus needs to be recognised as a distinct category. Arguably, the political constitution is honoured by the requirement there be express and explicit legislation by Parliament to repeal or amend constitutional statutes: changing a constitutional component requires an active choice.

Finally, in the case-law, there is some recognition of both the political and legal dimensions of constitutional components. There may be a symbolic dimension, which the courts are less comfortable addressing, as the approach to the Sewel convention in Miller arguably shows. On the other hand, in AXA the Supreme Court very clearly recognised the political dimension of the Scotland Act and the character of the institutional structure created there. That view has since been fortified by the explicit approval of the Thoburn approach, in the context of the Scotland Act in BH, bringing together legal and political dimensions.
Devolution: Structures and Jurisprudence

Devolution is a process. It is not an event and neither is it a journey with a fixed end-point. The devolution process is enabling us to make our own decisions and set our own priorities, that is the important point. We test our constitution with experience and we do that in a pragmatic and not an ideologically driven way.387

But the question as to whether Acts of the Scottish Parliament and measures passed under devolved powers by the legislatures in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance. It goes to the root of the relationship between democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of the relationship.388

Introductory

As the previous chapters suggested, an important part of judicial discussion of the ‘constitutional’ character of legislative acts has taken place in cases arising in the context of the devolution powers, particularly in the Scots case law, but also in cases from the other devolved nations. This chapter aims to do two things: to outline the juridical structures of devolution in each of Scotland, Wales and Northern Ireland, and then to explore the case-law arising from their operation. While the first part of the chapter is broadly narrative in character, it provides essential context setting for the discussion which follows in this and subsequent chapters. These structural matters inform both the legal constitutional model embodied in the devolved institutions,389 and the interface of devolved institutions with political and legal dimensions of the wider British constitution. While the case-law section does not contain every decision arising from the operation of devolution, it does aim to address those illustrating the courts’ approach to understanding and explaining the constitutional structures and relationships.

387 Ron Davies, then Secretary of State for Wales, Devolution is a Process and Not an Event (Institute of Welsh Affairs 1998).
388 AXA General Insurance Co Ltd v Lord Advocate 2012 SC(UKSC) 122, at 141 per L Hope, para 42.
389 I.e. the primacy of a written constitutional instrument, namely the devolution legislation.


Models of devolution

Scotland

Governance of Scotland - the pre-history of devolution

In order to set the case law in context, it is necessary first to say something about the precursors to devolved administration and then to outline the structure and juridical character of the devolved institutions in Scotland. Given the evolution of the British territorial constitution in the late twentieth and early twenty-first centuries, it is of some interest to note that the (re)institution of the office of Scottish Secretary was a, contested, response to political discontent in Victorian Scotland prompted by unfavourable comparison with the political and administrative governance of Pre-Partition Ireland.\(^{390}\) While administrative devolution has existed in varying degrees since at least the inception of the Scotch Education Department in 1872,\(^{391}\) political accountability has taken a longer evolutionary trajectory. Creation of a Secretary for Scotland, later the Secretary of State for Scotland, dates from 1885, and relatively unusually for a Secretary of State, is a matter of legislative enactment.\(^{392}\) The original legislation coincided with one of the periodic peaks of Gladstonian urgency for Home Rule in Ireland, though it is clear that particular model was far from the minds of the Bill’s proponents.\(^{393}\)

However, that essentially administrative model has effectively been displaced by a structure whose key features are a legislature with substantial legislative competence in the form of the Scottish Parliament, and responsible government in the form of the Scottish Ministers accountable to the Scottish Parliament.\(^{394}\) In that respect, it is the strongest form of devolution within the UK, though as will be seen later, devolution has been and continues to be a dynamic process in each of the UK nations where it operates. In this research, no effort has been made to explore the notion of

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\(^{390}\) The office had been created in 1707, and was abolished following the Jacobite rebellion in 1745-6. The political pressures within late nineteenth century Scotland for creation of the office are sketched in D Torrance The Scottish Secretaries (Birlinn 2006), 1-4.

\(^{391}\) Education (Scotland) Act 1872 (35&36 Vict., c. 62)

\(^{392}\) Secretary for Scotland Act 1885 (48&49 Vict., c. 61); Reorganisation of Offices (Scotland) Act 1939.

\(^{393}\) Torrance, loc cit.

\(^{394}\) Scotland Act 1998, particularly ss 45(2), 47(2), and 49(3).
devolution in the context of English regions in the early 2000s, or, more recently in relation to city regions. While these experiments involve devolution in the sense of relocation of power, it is very much in the delegated form which has characterised local government in the past 100 years, and, it is suggested, fits better conceptually under that label. Arguably, that process also reflects a partial reversal of the accretion of power from (English) provincial city government to the centre. 395

In contrast to models previously proposed, the scheme adopted in the Scotland Act 1998 is a retained powers form in terms of which a range of matters and competences - some detailed, some broad - are expressly reserved to the centre, whilst everything else is devolved. That model may be contrasted with the conferred powers model proposed by the Scotland Act 1978, which failed to secure sufficient votes in a referendum in March 1979, and which envisaged a rather narrower range of areas of devolved competence. The Scotland Act 1998 may also contrasted with the models for Wales and for Northern Ireland, which are both different from Scotland and from each other; though as will become clear later, as a result of incremental changes since its inception, the Welsh model has become more like the Scotland, again emphasising the notion of devolution as a constitutional process and not a single event. These models are explored in more detail later in this chapter. Likewise, the level of support for change, at least initially, varied across the three nations. 396 Arguably the form chosen reflected both the depth of the local political demand, as well as the existing institutional environment including longstanding executive autonomy in Scotland. 397 Of particular relevance in this context are the traditionally separate Scots educational structures, 398 institutionally separate health

396 The 1997 referendum result may be viewed online at www.bbc.co.uk/news/special/politics97/devolution/scotland/live/index.shtml.
398 The early establishment of the Scotch Education Department has already been alluded to, while the position of the ancient universities is expressly preserved in the Act of Security, APS 1707, cap 6, and endorsed by the English Parliament in the Union with Scotland Act 1706.
service, and Scottish Office, and of course the Scottish legal system which was specifically preserved at the moment of Union with England.

Central to this model, then, is the approach to boundary definition. These are delineated in the Scotland Act 1998, and the key provisions are sections 29 and 57, which provide explicit legal limits on legislative and executive action by Scottish devolved institutions.

29 Legislative competence.
(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
(2) A provision is outside that competence so far as any of the following paragraphs apply—
(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
(b) it relates to reserved matters,
(c) it is in breach of the restrictions in Schedule 4,
(d) it is incompatible with any of the Convention rights or with EU law,
(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.
...

57. Community law and Convention rights
(1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.
(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law.
(3) Subsection (2) does not apply to an act of the Lord Advocate—
(a) in prosecuting any offence, or
(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland,
which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

There are several structural corollaries of adopting the reserved competence model. First, while the intent (and the reality) is significant devolution of powers, by definition there are limits on competence, both executive and legislative. Secondly, and in direct consequence, there are of necessity

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399 National Health Service (Scotland) Act 1978.
401 The requirement here and in section 57 to comply with EU law remains in effect until the end of the transition period following the UK’s exit from the European Union. Thereafter, complex provisions relating to the interface with ‘retained EU law’ apply: see European Union (Withdrawal) Act 2018, Schd 3, para 1.
boundary issues, and questions of overlap which arise. Such features are, of course, far from novel as constitutional questions, since they arise in some form in all non-unitary states; but they are challenging in the British context against the background of the history of political constitutionalism explored in chapter 2, and also in relation to the highly centralised twentieth-century British state.402 The traditional British mechanisms of Parliamentary oversight, and exercise of executive power by the Crown in the form of Ministers or Departments of State no longer provides a comprehensive account of the constitution in the devolved model, since the premise of the devolved model is separate, accountable government in the devolved nations. As will be argued later, the relationship between these administrations and the central institutions is not yet adequately conceptualised, and judicial analysis of constitutional statutes has pointed towards some of the areas of difficulty. In part that reflects the sparse provision about this aspect of devolution in the Scotland Act, and while this has been recognised from the outset of devolution, it has received relatively little attention until the onset of Brexit, perhaps because the informal mechanisms of inter-governmental agreements and regular meetings at official level have been relatively effective. However, at a political level, the Joint Ministerial Committee (JMC) has not been an effective tool for coordination and boundary management. There may be a number of reasons for that, but in part it reflects an imperfectly developed consciousness of devolution on the part of some elements of central government, something identified by (UK) Parliamentary scrutiny.403

As the structure of the Scotland Act is one of devolution rather than completely separate areas of competence, there is an explicit reservation of power to the UK Parliament to make laws for Scotland including within devolved areas.404 In order to avoid conflict between the legislatures, a constitutional convention (known as the Sewel convention after the minister who articulated it during the passage of the Scotland Bill in 1998) was

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402 These are not necessary consequences of each other: the nineteenth century British state was at once smaller and arguably more polycentric; cf. S Sedley Lions under the Throne (CUP 2015), Ch 2.
403 See, for example, Commons Public Administration and Constitutional Affairs Committee 8th report 2017-19 HC1485.
404 Scotland Act 1998, s 28(7).
established whereby the UK Parliament would not normally legislate on devolved matters without first obtaining the consent of the Scottish Parliament by what is known as a legislative consent motion.\textsuperscript{405} The constitutional effect of the Sewel convention received intensive political consideration in the Smith Commission process following the referendum on Scottish independence in September 2014. Its less than satisfactory consideration by the UK Supreme Court in \textit{Miller} is explored in Chapter 5.

That is not to say that Acts of the Scottish Parliament are in any sense contingent; as we shall see later in this chapter, Acts of the Scottish Parliament have been held by the UK Supreme Court to be primary legislation on the same juridical level as Acts of the UK Parliament, despite the limits on the legislative power of the Scottish Parliament.\textsuperscript{406} That determination is significant both juridically and politically, since it recognises that while the UK Parliament is the ultimate law-making institution of the United Kingdom, within the scope of its legislative competence the Scottish Parliament is not subordinate to it nor merely a delegated law-making body. Equally, and in keeping with a devolved government structure, legislation which is outwith competence in any of the respects described above is declared not to be law; that is, juridically null.\textsuperscript{407}

Against that background, the courts are of necessity the ultimate determiners of such questions, since they are questions of law and of statutory interpretation in particular.\textsuperscript{408} For that purpose, the court is required to determine a ‘devolution issue’, and the questions which may be encompassed are potentially wide in scope:

(a) whether an Act of the Scottish Parliament in its entirety or any provision is within the legislative competence of the Parliament,


\textsuperscript{406} \textit{AXA General Insurance Co Ltd v Lord Advocate} ([2011] UKSC 46) 2012 SC(UKSC) 122, per Lord Hope at 141-2, paragraphs 45&46 (hereafter “AXA”).

\textsuperscript{407} Scotland Act 1998, s 29(1).

\textsuperscript{408} AXA, per L Reed paras 138-9.
(b) whether any function (which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
(c) whether the purported or proposed exercise of a function by a member of the Scottish Government is, or would be, within devolved competence,
(d) a question whether a purported or proposed exercise of a function, or, equally, a failure to act by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or with EU law.\(^\text{409}\)

From a relatively early point, the courts have acknowledged that in this area, the constitution engages a legal constitutionalist model; that is, the court is empowered to determine the legal validity of legislative acts.\(^\text{410}\) Consideration will be given later to the question of how this is accommodated within the political constitutionalist model of the British constitution as a whole.

An additional dimension is now given to devolution in illuminating constitutional statutes by reason of sections 1 and 2 of the Scotland Act 2016. These respectively provide:

1 Permanence of the Scottish Parliament and Scottish Government

...  
(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.  
(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.  
(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.”


\(^{410}\) Whaley v Lord Watson 2000 SC 340, per LP Rodger at 348-9; AXA, per L Hope para 46; per L Reed para 138. These cases are discussed further below.
2. The Sewel convention

In section 28 of the Scotland Act 1998 (Acts of the Scottish Parliament) at the end add—
“(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

As originally introduced in the Scotland Bill, section 1, provided that “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.” It will immediately be evident that as enacted its form is subtly different: both broader (including the Scottish Government) and arguably more emphatic (minus the intriguing “recognised as”). These sections also both go significantly beyond the sort of protection against implied repeal envisaged in *Thoburn*, indeed in the case of section 1(3), bear to contain constraints on the power of the UK Parliament to legislate in several respects relating to Scottish devolution. 411 That is a clear example of a manner and form provision, and as such a radical challenge to the Diceyan model of Parliamentary sovereignty. 412

These provisions are also a striking example of the political dimension of constitutional legislation: both clauses were part of the outcome of the Smith Commission process in the wake of the 2014 referendum on Scottish independence. 413 There is therefore a strong political valence to them. As will emerge from the case-law considered later, the court would refuse to find that they had been impliedly repealed. It is interesting to speculate how the courts might respond to a challenge to a more direct attempt to legislate for repeal of these provisions. Given the analysis of the status of the Scottish Parliament in *AXA*, there is a tension, and it is at least possible that the line taken in *AXA* (and in *Jackson*) about the court drawing a line against interference with access to judicial review might in some circumstances be extended to safeguard the continued existence of the Scottish Parliament and the Scottish Government.

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412 For an elegant attempt to reconcile the two, see M Gordon *Parliamentary Sovereignty in the UK Constitution* (Hart 2017).

413 For a discussion of the genesis of these provisions and a commentary on their initial form see K Campbell ‘The “Scotland Clauses” and Parliamentary Supremacy’ [2015] Jur Rev 259.
Wales

In Wales, the structure of devolved government is different, and as in the other nations, the components have evolved through several stages over the last 20 years. However, the distance travelled in Wales is perhaps the greatest of all three nations. In some respects, this reflects the greater number of steps needed to reframe the long history of administrative and political integration of Wales and England, certainly by comparison with Scotland and Northern Ireland, where there are long-established legal and political institutions indigenous to each of those jurisdictions. One can see this long history of integration reflected in various aspects of the political and administrative culture of Wales, with administration by a department of UK central government and agencies covering England and Wales as one. Arguably those forms have also influenced the trajectory of devolution there. 414

Thus at the time of its establishment in 1998, the National Assembly for Wales was intended to operate on a rather modest list of functions transferred, rather than a retained powers model. 415 At that point too, the legislative competence of the Welsh Assembly extended only to secondary legislation. 416 Most striking of all, the initial form of devolution contained an elected, representative, law-making body (i.e. the Assembly) but no separate executive function. 417

In 2006 a revised structure was enacted following a referendum of the Welsh electorate, encompassing a separate Welsh Assembly Government and containing a complex mechanism in terms of which the Welsh Assembly might request and be provided additional legislative powers. 418

Under that model, the Assembly Government required first to obtain

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416 In British legal hierarchy, primary legislation comprises statutes enacted following extended parliamentary debate by national or devolved legislatures; secondary legislation, by contrast, comprises legislative acts made by ministers acting under powers conferred by primary legislation and involving significantly reduced scrutiny by the legislature.

417 The tensions built into this model and the process of their resolution are discussed in Rawlings op cit., Ch 3.

agreement in principle on the scope and content of the transfer from the relevant UK Government department. Following pre-legislative scrutiny by the Assembly and the Welsh Affairs Committee of the UK Parliament, a proposed legislative competence order required to be approved by the Assembly and then sent to the Secretary of State, who required to obtain the approval of both Houses of the UK Parliament. Reflecting the rather more limited form of devolution in Wales, there was an expectation that powers would be transferred incrementally, rather than giving the Assembly powers over the whole of any one field listed in Schedule 5 in one instalment. In perhaps the most explicit boundary dispute between central and devolved institutions, there was for a period tension between House of Commons Welsh Affairs Select Committee and the Welsh Assembly about the most apt level of scrutiny of proposed legislative competence orders, but a modus vivandi evolved between the two bodies whereby initial consideration would be by the Assembly, allowing the House of Commons committee to consider issues in light of its conclusions. Ironically, in light of the subsequent expansion of administrative and legislative devolution in Wales, similar structural problems may well be repeated in relation to the devolution consequences of the European Union (Withdrawal) Act 2018.

That model proved to be an interim formula, for in March 2011 a referendum was conducted in Wales, and while the turnout was low, a substantial majority voted in favour of further legislative competences being transferred from the UK parliament to the Welsh Assembly. As a direct consequence of the debate around that vote, a Commission on Devolution in Wales, chaired by Sir Paul Silk, a former Clerk to the House of Commons and former Clerk to the Welsh Assembly was established in October 2011 to consider further devolution. A report on the devolution of fiscal powers was issued in November 2012. That was followed by a report on the

419 Government of Wales Act 2006, s 95.
420 See Sherlock op cit. fn currently 53, at 26-27.
421 Namely, 35.4% of the electorate.
devolution of legislative powers in March 2014.\footnote{The Commission’s second report may be found at http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf.} The fiscal recommendations are the foundations of the Wales Act 2014, while many of the Silk Commission’s recommendations about devolution of further areas of executive and legislative competence were enacted into law by the Wales Act 2017. In act of political, and perhaps constitutional, symbolism, by its own legislative act, the Welsh Assembly was renamed the Senedd or Welsh Parliament in May 2020.\footnote{Senedd and Elections (Wales) Act 2020.}

As a consequence of the Wales Act 2017, the structure of devolution in Wales now resembles the Scottish scheme much more closely than has so far been the case. Thus there are taxation powers akin to those devolved to Scotland in 2012: land transactions tax, landfill tax, and provisions about a Welsh rate of Income Tax.\footnote{Wales Act 2014, s 6.} Reflecting the practical difficulties in the operation of a conferred powers model, there is a re-shaping of the domains of devolved competence around a reserved powers model, albeit more restricted in scope than in Scotland.\footnote{Wales Act 2017, s 3. Section 3 inserts a new section 108A and Schedules 7A & 7B into the Wales Act 2006 containing the detail of the reserved powers.} Like the Scotland Act 2016, there is provision made conferring competence on the Senedd to legislate in future about its own composition and electoral arrangements, subject to a super-majority to prevent arbitrary alteration.\footnote{Wales Act 2017, ss 5 & 9} There are also intriguing indicators in the 2017 Act of the development of a distinctly Welsh judicial system.\footnote{A commission chaired by Lord Thomas, a retired Lord Chief Justice published a wide-ranging report in October 2019, Justice in Wales for the People of Wales, available online at: https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf} At present, England and Wales are one conjoined jurisdiction, with a uniform system of courts and tribunals; by contrast, the courts and tribunals of Scotland and of Northern Ireland have always been separate, even prior to devolution. However, the 2017 Act makes provision for a Welsh tribunal structure comprising a number of Wales-only tribunals.\footnote{Wales Act 2017, s 59.} Perhaps most politically significant, and therefore of some constitutional
importance, is the provision made in sections 1 and 2 of the 2017 Act mirroring the Scotland Act 2016 in providing that the Welsh Assembly and administration are recognised as permanent parts of the UK constitution, and that the Sewel convention operates in relation to legislation affecting Wales. Aspects of those provisions is considered further later in this chapter.

Northern Ireland

In Northern Ireland, the structure of devolved government has a different starting point, reflecting both the politically troubled recent history of Northern Ireland, and the nature of the political process which preceded creation of the devolved institutions there. Thus the Northern Ireland Act 1998 established a Northern Ireland Assembly and an Executive, and did so on a model explicitly designed to require power-sharing between the two politico-religious cultures in Northern Ireland.431 Indeed some commentators view Northern Ireland devolution as fundamentally representing a new political settlement, in which explicit guarantees of rights and equality are given and are backed by agreement between states (i.e. the UK and Ireland) at international level.432 As will be seen later, that is a premise which has come to be tested in the context of the UK exit from the European Union.

Following extended efforts by the UK and Irish Governments to bring together actors across the communal divide, particularly from the mid-1990s onwards, a process towards peaceful resolution of the ‘Troubles’ was put in train resulting in a series of political agreements. Perhaps the first in importance is the Belfast Agreement of 1998 (also known as the Good Friday Agreement).433 It is a significant feature of Northern Ireland devolution, reflecting its particular political context, that, unlike the devolution structures in the other nations of the UK, the Belfast Agreement operates on multiple levels, comprising a multi-party agreement amongst

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local actors, and a separate agreement between two sovereign states (the UK and Ireland). The latter speaks of undertakings and binding obligations, and in light of the fact that it has been registered with the UN is highly suggestive that it is a treaty in international law. A further element which has since acquired greater significance is the key assumption of the shared EU membership of the UK and Ireland, rendering the border invisible and diluting thorny citizenship questions. One well-publicised consequence of the UK’s exit from the EU is to re-open these as areas of contention.

While implementation of the obligations agreed between the UK and Ireland respectively to legislate for devolved institutions and to amend its constitution to remove territorial claims, were completed by late 1999, and the Northern Ireland Assembly and Northern Ireland Executive were brought into existence. As a result of a variety of political and security difficulties, the initial operation of devolution was delayed by and the devolved institutions were suspended in 2002. In 2004, further discussions were held between the two governments and the leading political parties on either side of the communal divide, and while these were not immediately successful, they did identify potential changes to the Belfast Agreement which might pave the way to final agreement. Following the IRA announcement of weapons decommissioning in 2005, further multi-party negotiations took place in October 2006, leading to the St Andrews Agreement. Consequential modifications to the devolved institutions were made by the Northern Ireland (St Andrews Agreement) Act 2006. As a result of that agreement, elections took place in March 2007 and a cross-community executive was again established in May 2007.

434 There are three ‘strands’ to the Agreement: institutions in Northern Ireland, the North-South Ministerial Council, and British-Irish ministerial arrangements.
437 This possibility had been foreseen, and powers to suspend the institutions were granted to the UK Government by the Northern Ireland Act 2000.
While the electoral system in the Scottish devolution structure is premised on the emergence of single-party majority government being possible but unlikely,\(^{439}\) the Northern Ireland executive is designed to be representative of all communities and parties represented in the Northern Ireland Assembly. Thus the First Minister is to be nominated by the largest party in the Assembly, while the Deputy First Minister is to be nominated by the second-largest party.\(^{440}\) Similarly, the devolution scheme requires cross-community agreement about the number of ministerial portfolios, and the portfolios are to be allocated in accordance with formula reflecting the proportion of seats held by each party in the Assembly.\(^{441}\)

There is also a somewhat different delineation of the legislative competence of the Northern Ireland Assembly, compared with Scotland and Wales. There are three classes of legislative activity:

- (a) excepted matters, which remain with the UK Parliament (being similar to reserved matters in the Scottish model);
- (b) reserved matters, in which there is competence but which also requires the consent of the UK Government to an act; and
- (c) transferred matters, on which there is full competence.\(^{442}\)

It may also be noted that the 1998 juridical structures were subjected to judicial consideration at the highest level as long ago as 2002. In *Robinson v Secretary of State*,\(^{443}\) the House of Lords recognised that the Northern Ireland Act 1998 was a constitutional statute, and further that:

> The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and

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\(^{439}\) Thus far, this has happened only once, following the 2011 Scottish election.

\(^{440}\) Northern Ireland Act 1998, ss 16A(4)&(5).

\(^{441}\) Northern Ireland Act 1998, ss 17(5) & 18.

\(^{442}\) Northern Ireland Act 1998, section 4(1) and Schedules 2 & 3.

purposively, bearing in mind the values which the constitutional provisions are intended to embody.\textsuperscript{444}

As will be evident, the court placed the Northern Ireland Act on a constitutional level which was clearly different from other enactments, and also appears to propose a considerably more teleological approach than hitherto in ordinary British practice. As will be seen later in consideration of other devolution jurisprudence, that approach has not been carried further, nor has it been extended to devolved institutions in other parts of the United Kingdom. It seems likely that is in part a recognition of the particular circumstances of devolution in Northern Ireland. Later in its decision, the court went on to deal with the several agreements which form the foundations of the devolved structures:

...it is necessary to have regard to the background to the 1998 Act. It was passed to give effect to the Belfast Agreement concluded on Good Friday 1998. This agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland. A key element in the agreement was the concept of decisions being made with cross-community support, that is, by representatives of majorities of both the unionist and nationalist communities. The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.\textsuperscript{445}

While that is undoubtedly true, it does not provide a jurisprudential explanation for the more conventional approach to interpretation of equally constitutional legislation for Scotland and Wales. It may, however, be a recognition of a political constitutional boundary.

Not only is there a cross-community (or consocial) dimension to the institutional model, there is also an external dimension, in the sense of engagement not only of the constitutional centre (the UK government), but also of the Irish government. That external engagement is a consequence of twentieth century history of Ireland, and the close involvement of institutions from the Irish Republic in the peace process. It is unique within

\textsuperscript{444} Robinson, per Lord Bingham para 11.
\textsuperscript{445} Robinson, per Lord Hoffman para 25. A less rosy-tinted view of the character of the foundations of devolution can be found in later cases, discussed in the ‘devolution jurisprudence’ section of this chapter.
the UK devolution structures, and perhaps poses additional questions about constitutional boundaries. Two institutions to facilitate this engagement are envisaged: the North-South Ministerial Council, and the British-Irish Council.446

So far as executive power is concerned, there is an explicit reaffirmation that this is vested in the Crown (i.e. the executive branch of the UK state), with certain executive powers transferred in accordance with the Northern Ireland Act 1998.447 In other words, the Act is the sole basis for the exercise of executive power by the devolved institutions, and the exercise of such power is subject to the limitations it contains. Recognising the avowedly cross-community form of the Northern Ireland Executive, the Act also created a unique structure for executive decision-making, as well as for resolution of disputes between political factions. Known as the Executive Committee, this body comprises the First Minister, Deputy First Minister and the other ministers of the Executive.448 In other words, it is a plenary body of the executive branch of the devolved government. This structure was envisaged from the outset by the Belfast Agreement, and serves as a means of securing cross-community agreement to the programme of the Executive.449 Building on the necessary personal and political relationships which that structure was designed to engender, and after an uneasy start, did engender, the Executive Committee was given extended powers to consider petitions made by 30 or more members of the Northern Ireland Assembly.450 Such petitions may be about alleged breach by a minister of the Ministerial Code of Conduct, or ‘relate to a matter of public importance.’451 In the context of the British constitutional order, this an unusually strong

446 Belfast Agreement, Strands Two and Three, respectively. The Ministerial Council brings together “those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland - including through implementation on an all-island and cross-border basis - on matters of mutual interest within the competence of the Administrations, North and South.” Belfast Agreement, Strand Two, paragraph 1. A list of possible areas of cooperation is set out in an Annex to the Agreement.
448 Northern Ireland Act 1998, s 20(1).
449 Belfast Agreement, Strand One, paragraphs 17, 18, 19, 20 & 24.
450 Northern Ireland Act 1998, s 28B.
451 idem.
recognition in legislative form of a profoundly political control - or at least tool of accountability - directed to the executive element of government.

Despite the inter-community agreement foundation of the Belfast Agreement, and of its subsequent variation at St Andrews, the progress of devolved government in Northern Ireland has been much less smooth than in Scotland and Wales. In January 2017, the Northern Ireland Assembly ceased to operate when the leading Republican party withdrew in consequence of political disagreement. Eventually, after several false starts, devolved government was restored in January 2020, almost three years later.\textsuperscript{452} In the interim, the normative and practical administrative boundaries were tested several times in what is clearly a legal constitutionalist frame of reference. While much executive activity of government is conducted on a daily basis by officials without direct recourse to ministers, it is a long established principle of the common law that ministers nonetheless remain responsible for the acts of officials acting within delegated authority.\textsuperscript{453} Much more problematic both in practical terms and in terms of constitutional principle is the situation where there is an extended period without ministers in place to provide direction and to take those decisions reserved to ministers. Unsurprisingly that state of affairs has required the courts in Northern Ireland to resolve the question whether, in the absence of ministers, the Departments of the Northern Ireland Executive can exercise statutory functions and, if so, what legal constraints apply to the extent of Departmental decision-making.\textsuperscript{454}

The Northern Ireland Court of Appeal held that the Carltona principle did not apply in this context, and that the absence of a Minister was critical. Thus, any decision which would normally go before a Minister for approval lay beyond the competence of a senior civil servant in the absence of a Minister. While some aspects of the reasoning have been criticised,\textsuperscript{455} it is suggested that those criticisms may be overdone, and that in any event the

\textsuperscript{452} https://www.bbc.co.uk/news/uk-northern-ireland-politics-50822912
\textsuperscript{453} Carltona Ltd v Commissioners for Works [1943] 2 AllER 560.
\textsuperscript{454} re Buick’s Application for judicial review [2018] NIQB 43; and on appeal [2018] NICA 26.
\textsuperscript{455} A Deb ‘The legacy of Buick: NI’s chaotic constitutional crucible (2019) 23 ELR 259.
overall result is a correct application of the *Carltona* principle in the devolved setting.

While the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (“NIEFEFA 2018”) may have provided a degree of stability in the wake of the *Buick* case, questions remain. The decision of the UK Supreme Court in a subsequent reference by the Attorney General for Northern Ireland in terms of Schedule 10 to the Northern Ireland Act 1998 indicates the sort of issue which may arise. Like *Buick*, that application concerned a challenge to a decision on an infrastructure project; the Supreme Court allowed the challenge to proceed and noted that one of the questions was whether *Buick* and NIEFEFA 2018 had exhausted all the issues which might arise about executive powers. As noted above, from January 2020, accountable devolved government has for the moment been restored. Nonetheless, the episode from 2017-2020 exposes the boundaries of comparison of constitutional pragmatism, as against a more principled balance of institutional powers. Notwithstanding the strongly political background to the absence of an executive, the court exercised what might be termed constitutional jurisdiction to determine the proper boundaries of executive competence in the self-enforced absence of politically-accountable ministers.

**Devolution Jurisprudence**

Some form of competence limit inheres in the very notion of devolution. While it is evident that devolution has operated in a variety of structural forms across the devolved nations, and has developed across the period since 1998, a unifying theme is the testing of competence limits. That in turn requires mechanisms for boundary policing, and in important respects, this is the least developed aspect of the devolution architecture, at least in a formal sense. Thus the Scotland Act is silent about inter-governmental relationships, and the principal formal mechanism is court-centred: namely by judicial review of executive acts and of legislative competence. In this

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456 Attorney General for Northern Ireland’s reference of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland) [2019] UKSC 1
way the courts have a direct role in delineating the scope and application of an important group of constitutional statutes.

Over the twenty year evolution of devolution, the courts have had occasion to examine devolved powers and their place in the constitutional order from a range of angles. This is a relatively small body of cases, some of which we have already seen, but one representing a significant proportion of cases engaging with constitutionality.

How then have the courts undertaken this task?

**Whaley**

It is instructive to begin with *Whaley v Lord Watson*, which was the first Scottish round of the litigations to challenge legislation banning fox-hunting for sport, and was the earliest challenge to the legislative output of the Scottish Parliament. That decision, which was affirmed by the First Division, has little to say about the notion of constitutional statutes or constitutional rights as such; however, its value lies as a starting point in the arc of exploration by the courts of constitutional character of the Scotland Act. While there were both pre- and post-enactment challenges, the pre-enactment litigation is the more relevant to the present discussion.\(^{457}\) While at first instance Lord Johnson took a deeply conservative and limiting view of the Scottish Parliament’s powers, emphasising its ‘subordinate’ status;\(^{458}\) It is unclear whether it is the legislation or the legislature which was being characterised as subordinate. Equally he also considered that it was not competent for pressure groups to use the courts to tell the Parliament what to do.\(^{459}\) It will be noted that the case was determined at a very early point in the life of the institutions brought into existence by the Scotland Act. Indeed *Whaley* also preceded *Thoburn* by two years, and was also decided at a point where the courts in all UK jurisdictions were only just starting to

\(^{457}\) *Whaley v Lord Watson* 2000 SC 125, affd. 2000 SC 340. The pre-enactment challenge took the form of an attempt to prevent the minister proceeding with the bill, on the basis of an asserted conflict of interest.

\(^{458}\) *Whaley*, at 132A-C.

\(^{459}\) *Whaley*, per L Johnston at 132H-133B; cf. to like effect LP Rodger at 348F-G
grapple with the implications of new sources of fundamental rights to be protected.  

A good deal of the contemporary legal discourse was around the application and effect of Convention rights, both in the form of the Human Rights Act 1998 and the limitations in section 29(2)(d) of the Scotland Act 1998, and Convention arguments featured in Whaley. However the case also addressed what is arguably a constitutionally more fundamental issue, namely whether Scottish Parliament and its legislative output was justiciable at all. Taking a fairly conventional public law approach to review of decision-making by public bodies, the Inner House at least had little difficulty fitting the Scottish Parliament into the broader matrix of public bodies, and hence amenable to review, with reference to the competences in the Scotland Act. Lord President Rodger made clear that the Westminster Parliament was the outlier in that respect, and that, in relation to the notion of sovereignty:

certain inroads have been made into even that sovereignty by the European Communities Act 1972. By contrast, in many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments.  

There should, he continued, therefore be no “self-denying ordinance in relation to interfering with the proceedings” of the Scottish Parliament. The rule of law required enforcement of the law against the Scottish Parliament as against any other public body, otherwise the courts would be failing in their obligations to uphold the rights of parties. In this we can perhaps see the beginnings of a judicially-moderated approach to constitutionality. While subsequent cases elaborated distinct characteristics of the Scottish Parliament, Whaley affirmed the primacy of the rule of law and within that context, the subordinate character of all public bodies, including the Scottish Parliament. Subordinate, that is, to a higher, legal,

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462 Whaley, at 349.

463 Whaley, at 349-350.
norm. Its source in this case is the Scotland Act. That is not conceptually novel as a matter of legal constitutional analysis, though is is challenging to a parliamentary sovereignty-informed British constitutional understanding of justiciability.

**AXA**

If the court in *Whaley* was feeling its way to some extent, by contrast a dozen years later in *AXA General Insurance Co Ltd v Lord Advocate*, constitutional adjudication was rather more firmly established in the outlook and output of the UK Supreme Court. It is a decision of great importance for a number of reasons, some of which are outwith the scope of the present discussion. What is significant for present purposes is the direct challenge to legislation of the Scottish Parliament in which the petitioners sought declarator that the Act was unlawful and reduction (i.e. striking down) of it, both as being an unlawful interference in their A1P1 ECHR rights, but also on ground of common law irrationality. Note that there was no question that the Act involved a reserved matter in terms of Schedule 5 to the Scotland Act, so that the challenge to legislative competence was radical: namely seeking the striking down of legislation on the basis of breach of fundamental rights.

While the appellants' primary challenge was under A1P1 ECHR, it is the challenge at common law which is the central point for present purposes. While the common law challenge was not pressed as strongly as the A1P1 challenge by the time the case reached the UKSC, Lord Hope, giving the leading judgment, nonetheless dealt with this at some length. In doing so, his Lordship recognised that the question of whether Acts of the Scottish Parliament and measures passed under devolved powers by the legislatures

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465 The Damages (Asbestos-related Conditions)(Scotland) Act 2009, which was intended to overturn the effect of the decision of the House of Lords in *Rothwell v Chemical and Insulating Co Ltd* [2008] IAC 281 holding that the asbestos-related condition pleural plaques did not amount to a compensatable harm.

466 It will be recalled this was one of the questions implicit but not addressed in *Whaley*.

467 It was apparently accepted by the appellants that if the A1P1 argument were rejected on the basis that there was a legitimate aim and that it was proportionate, then this line could not succeed; see p 141, para 42.
in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance. As he observed, “[i]t goes to the root of the relationship between democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of the relationship.” Thus the court was not concerned directly with a challenge to a constitutional statute, rather it was engaged in the working out of its operation in the context of the evolving constitution, and the place of institutions created by that constitutional statute.

There is plainly a spectrum of analysis: at one extreme was the position articulated in the original petition for judicial review, namely that the legislation was unreasonable, irrational or arbitrary; and at the other “is the proposition that judicial intervention is admissible only in the exceptional circumstances that Lord Steyn hand in mind in R (Jackson & ors) v AG.”

It might be said that framing the spectrum of potential judicial analyses in this way is to tie the discussion too closely to the traditional administrative law conception of judicial review. Of course that is the form of process, and no doubt at some level has been influential on the judicial mind. On the other hand, more recent challenges outwith the devolution sphere appear to indicate that there is a deeper, constitutional, review function which the court is prepared to exercise using the same form of process, at least in clearly constitutional matters.

Observing that the Scottish Parliament has a democratic mandate that “is beyond question” by virtue of the structure of the Scotland Act 1998, Lord Hope went on to note “it is nevertheless a body to which decision-making powers have been delegated,” and further that “it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in R (Jackson & ors) v Att Gen (para 9) is the bedrock of the British constitution.

468 AXA, per L Hope para 42 - against that background, it is unsurprising that both the Welsh and Northern Irish devolved administrations appeared in the case as interveners. Of course, as Lord Rodger had observed in Whaley, while this was virginal territory in the British constitutional order, it would be unremarkable in a number of other constitutions with features of the ‘Westminster’ model.

469 AXA, per L Hope para 43.

Sovereignty remains with the UK Parliament. As will become apparent, despite that affirmation of sovereignty, it is clear that Lord Hope, at least, no longer considers that such sovereignty is without limit, a proposition which at the very least is suggestive of the problems inherent in using the notion of sovereignty in this context which were explored more fully in Chapter 2.

As has already been noted, the devolved institutions are subject to explicit limits on competence, and there being nothing excluding judicial review in the Scotland Act, it follows that Acts of the Scottish Parliament are amenable to the supervisory jurisdiction at common law. However the much more important question is the grounds, if any, on which they may be subjected to such review. Interestingly, Lord Hope observed that “a challenge to primary legislation at common law was simply impossible while the only legislature was the sovereign Parliament of the UK...” hinting that devolution has perhaps altered not only structures but also norms of the British constitution.

Perhaps adapting the respect for diversity inherent in devolution, his Lordship analysed the situation in terms of rights protection. Thus, while legislatures enjoy democratic credentials, and are best placed to judge what is in the country’s best interests as a whole, judges are best placed to protect the rights of the individual including those who are ignored or despised by the majority. He continued:

This suggests that judges should intervene if at all only in the most exceptional circumstances. As Lord Bingham observed in [Countryside Alliance] the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act

471 AXA, per L Hope para 46.
473 AXA, per L Hope para 48.
474 This is only a hint, and there is an intriguing Hartian question which suggests itself in light of Parliamentary debates about the then-European Union (Withdrawal) Bill. It is this: some but not all officials in the British constitutional order may recognise this, but in the absence of consensus, the rule of recognition cannot be said with certainty to have changed. However, with an increase in explicitly constitutional adjudication by the UK Supreme Court, a question may arise whether Hart’s account of the process of change of the rule of recognition requires revision.
475 AXA, per L Hope para 49.
achieve through the courts what they could not achieve through Parliament.476

Nonetheless, in his view, questions about whether the notion of the sovereignty of the UK Parliament is absolute or may in certain exceptional circumstances be limited by the court, “is still under discussion.”477

This is surely a significant point: having asserted that there was previously no limit on Parliamentary sovereignty,478 his position - and that of some of his colleagues - now appears to be that the position is not settled. Lord Hope goes on to acknowledge a range of judicial understanding,479 and to catalogue differing views of senior judges: Lord Bingham480 and Lord Neuberger481 being of what might be called the ‘judges may not run against the will of Parliament’ school; while in the other corner, Lord Steyn referred in Jackson to the dangers highlighted by Lord Hailsham a generation previously in The Dilemma of Democracy, and he (Lord Steyn) had gone on to observe that the UKSC might have to consider whether “judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament... could not abolish.” 482 Lord Mance dealt rather more briefly with the common law review point, and he plainly shared the view that there is scope in extreme cases for common law review, at least of devolved legislatures.483 In a noteworthy laying down of a marker, Lord Hope deliberately left open the question of judicial control as far as legislation of the UK Parliament is concerned.484 However, so far as the devolved legislatures is concerned, taking the well-rehearsed example of assault on the courts and judicial review as the totem, he observed “whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the

476 Idem.
477 AXA, per L Hope para 50.
478 AXA, per L Hope para 48.
479 AXA, per L Hope para 50.
480 In T Bingham The Rule of Law (Allen Lane 2020), 167.
481 In his 2011 Alexander lecture Who are the masters now?
482 Jackson v Att General [2006] 1AC 262, per L Steyn at paras 71 & 102.
483 AXA, per L Mance para 97. Cf. TRS Allan The Sovereignty of Law (OUP 2013), Ch3.
484 AXA, per L Hope para 51.
power to insist that legislation of this extreme kind is no law which the courts will recognise.\textsuperscript{485}

While treatment of legislation of the Scottish Parliament as being subject to constitutional review is unsurprising, Lord Hope’s approach also presents a direct challenge to the conventional view of the inviolability of the UK Parliament. Mark Elliott, himself generally a solid advocate of political constitutionalism, suggests that the very fact of judges pursuing the line postulated by Lord Hope may itself be one of the factors that invites restraint within the political constitution, rather than amounting to a harbinger of judicial constitutionalism.\textsuperscript{486} That is certainly a plausible analysis so far as it goes. In that sense, the methodology of legal constitutionalism deployed to manage the operation of one constitutional statute resonates in the wider British constitutional order. From this can be seen a gradual outworking of the consequences for the central institutions of the British state of the enactment of devolution to its periphery and that there are constitutional effects in the centre as well as in the devolved areas. Even when Dicey was codifying the notion of Parliamentary sovereignty, the idea had been part of constitutional practice for two centuries. The ascendancy of the rule of law as a dipole of the constitution, though present in Dicey, is more recent, particularly in the strong form discussed in Chapters 1 and 2. That is the normative background against which the constitutional realignment of 1998 occurred, featuring both codified enforceable fundamental rights, and restructuring of the territorial constitution. Superficially, the notion of Parliamentary sovereignty was not altered, but the judicial discourse points to a recognition by at least some senior judges of a potentially wider normative reordering.

Lord Reed was rather less outspoken, and was also the only judge to note that it was apparently accepted by the Lord Advocate that legislation of the Scottish Parliament was subject to “review on such grounds which [counsel] categorised as constitutional review, in distinction from administrative追究.”

\textsuperscript{485} Idem.
\textsuperscript{486} M Elliott ‘Holyrood, Westminster and judicial review of legislation’ [2012] CLJ 9, at 11.
review.”

This was envisaged as a power exercisable in exceptional circumstances and outwith the grounds of competence in the Scotland Act 1998, section 29(2). While it is not spelled out, it would appear to envisage the same sort of assault on fundamental or constitutional rights as Lords Hope and Mance addressed, since Lord Reed formulates this in terms of legislation offending against fundamental rights or the rule of law. That indicates some higher normative component. Of course, the notion of ‘constitutional review’ is recognised in structures where some form of legal constitutionalism is involved, and as we have seen, the court in Whaley recognised legal constitutionalism as a feature of devolution. However Lord Reed does offer support for the view that there might be sources of fundamental rights other than the Convention. Applying Robinson v Sec of State for Northern Ireland, his Lordship points to the relevance of context and the values which the constitutional provisions are intended to embody, observing that the UK Parliament cannot be taken to have established a body which was free to abrogate fundamental rights or to violate the rule of law. Thus section 29(2) of the Scotland Act is the starting point for grounds of challenge to legislation. In most cases, it will also be the finishing point. However, it is also clear that in exceptional circumstances, the court is not confined by section 29, and broader argument about constitutionality may be entertained.

Whether that reflects further on the principle of legality in relation to legislation passed by the UK Parliament is less clear; that principle is well established as a rule of construction, but it is far from certain that the court foreshadows a similar restraint on legislative action. On one view, the Human Rights Act is arguably a strong counter-example, given its mechanism for judicial determination of legislative (in)compatibility, but with final responsibility for alteration, or not, of the law remaining with

487 AXA, per L Reed para 149.
488 These are are not further distinguished.
489 AXA, per L Reed at para 149.
491 AXA, per L Reed para 153.
Parliament. On the other hand, as already seen, the court affirmed that fundamental rights are not found only in the ECHR. Lord Reed was also careful to reaffirm the centrality of rule of law principles. The principle of legality, and the presumption against power to override “fundamental rights or the rule of law” by means of “general or ambiguous words” applied both to the conferral of powers on the Scottish Parliament, and the exercise of powers by the UK Parliament. That is not in itself a new principle, but the affirmation of its operation in this setting.

**BH v Lord Advocate**

In narrower compass, but no less important, was *BH v Lord Advocate*, which we encountered in Chapter 3. This case raised the *Thoburn* question in a very pure form: the argument being, in essence, that the scope of the appeal provisions in the Extradition Act 2003 were restricted, and as that post-dated the Scotland Act 1998, a devolution issue appeal was not competent. In other words, it was argued to be an example of implied repeal of part of the Scotland Act. Giving the only fully reasoned judgment, with which the other members of the court agreed, Lord Hope was having none of that:

> It would have been open to Parliament to override the provisions of s 57(2) [Scotland Act] so as to confer more ample powers than that subsection would permit in the exercise of their functions under the [Extradition Act 2003]. But in my opinion only an express provision to that effect could be held to lead to such a result. This is because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by express enactment. Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute.

This is, at the very least, a strong affirmation of the inapplicability of implied repeal to constitutional statutes, which was, of course, one of the central planks of the court’s decision in *Thoburn*. Further, the UKSC has affirmed the principle, in a context other than EU law, thus removing any doubt about whether the *Thoburn* analysis was confined to questions

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493 AXA, per L Reed paras 151-2.
494 AXA, per L Reed para 152.
495 *BH v Lord Advocate* ([2012] UKSC 24) 2012 SC (UKSC) 308.
496 *BH*, per L Hope para [30].
involving the application of EU law in the domestic setting. With the explicit contextualisation in “the fundamental constitutional nature of the settlement that was achieved by the Scotland Act” it is suggested that the court unambiguously placed the Scotland Act in the category of fundamental constitutional statute/law, and by necessary implication gave force to the notion that such law exists on a somewhat different plane from other legislative enactment.

One effect of recognising devolution and other constitutional statutes as having a distinct character is that the protection against implied repeal is in a sense a weak form of entrenchment. Against this, Perry and Ahmed have suggested that the reaffirmation of Thoburn in BH amounts to quasi-entrenchment of a statute by judicial innovation. They further argue that Parliament is capable of making its intention to repeal a constitutional statute clear without making it express, and that the courts are bound thereby.\textsuperscript{497} That approach is unsound for a number of reasons.

First, it appears to overlook the function of judges in the common law constitution to determine what the law is.\textsuperscript{498} In applying the common law method, the courts in particular are required to fashion tools for interpretation. That is so whether the court is undertaking statutory interpretation in the ordinary course, or whether, as in the case of some provisions in constitutional statutes, the court is directed to address particular questions when interpreting legislation.\textsuperscript{499} Secondly, the dicta of Laws LJ in Thoburn about unambiguous but not express words of repeal represents a step in the argument of the Court, but not its totality. Perry and Ahmed perhaps place undue weight on this in framing their critique. Thirdly, and perhaps most importantly, the argument fails to acknowledge the political dimension of the political constitution - a political dimension both in the sense of the central place of the UK Parliament, but also the political character of the accommodation that devolution represents, and which is affirmed, for example, by the Scotland Act 2016 and the Smith

\textsuperscript{499} For example, Human Rights Act 1998, ss 3&4; Scotland Act 1998, s29.
Commission which preceded it. As we saw in Chapter 2, the contemporary interaction of political and legal dimensions means the better model is a mixed one.

**Martin**

In *Martin v Lord Advocate* the devolution issue concerned the boundary between devolved and reserved matters in the context of amendment by the Scottish Parliament of the operation of a UK statute in Scotland. While the Supreme Court was agreed that the impugned legislation did not fall foul of s 29(2)(b), the judges were not unanimous nor was their reasoning uniform on the remaining questions. These related to what might be described as incidental modification of legislation applicable on both sides of the border, and thus a quintessential constitutional boundary question because there is a sharp question of competence. In short, the issue was that section 45 of the Criminal Procedure etc. (Reform)(Scotland) Act 2007 increased the maximum sentence for certain road traffic offences when tried summarily to the same level as the existing maximum sentence if prosecuted on indictment. The Road Traffic Acts are a reserved matter. Having been convicted and sentenced, the appellants challenged the increase in sentencing power as being outwith legislative competence. That involved construing the statute in dispute by reference to the far from straightforward provisions of paragraphs 2 & 3 of Schedule 4. While the foundation principle in paragraph 2(1) is clear, namely that an Act of the Scottish Parliament cannot modify or confer power to modify the law on reserved matters, paragraph 3 contains a derogation. Thus:

3(1) Paragraph 2 does not apply to modifications which—
(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and
(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.

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501 The case is variously named as *Martin v Most*, *Martin v Lord Advocate*, and *Miller v Lord Advocate*. In the UKSC, the case is reported at 2010 SC(UKSC) 40; (neutral citation [2010] UKSC 10). For a critical commentary, see C Himsworth ’Nothing special about that? *Martin v HMA* in the Supreme Court’ (2010) ELR 487.
502 I.e. relating to the reserved matters listed in Schd 5.
(2) In determining for the purposes of sub-paragraph (1)(b) what is necessary to give effect to the purpose of a provision, any power to make laws other than the power of the Parliament is to be disregarded.

It was this provision which pulled the court in different directions.

For Lord Hope, as for other members of the court, the starting point was the inevitability of boundary questions in the devolution architecture, and the impossibility of dividing competence into “watertight compartments.”

This was familiar from other Commonwealth jurisdictions which have a federal constitutional model.

Lord Hope observed that determining a question of whether an Act of the Scottish Parliament is within the legislative competence of the Parliament is a question of law for the courts. His Lordship went on to note that “the judicial function in this regard has been carefully structured.” For example, it was not for the court to determine whether Holyrood or Westminster was the more appropriate legislator. That question must be determined in accordance with the Scotland Act.

But those rules, just like any other rules, have to be interpreted. That is the court’s function. It is for the court to say what the rules mean and how, in a case such as this, they must be applied in order to resolve the issue whether the measure in question was within competence.

There was Commonwealth jurisprudence of long standing in this area. Discerning the ‘pith and substance’ of legislation as an interpretative tool in this setting originally developed in case-law of the Judicial Committee of the Privy Council about state/province - federal questions in Dominion constitutions. In those constitutional structures, the impossibility of sharp division of competence was recognised at an early stage, and various formulations, most memorably pith and substance developed in an effort provide tools to manage the constitutional boundary. Lord Hope surveyed that Commonwealth jurisprudence, which had also been adopted in

503 Martin, per L Hope para 11.
504 Idem.
505 Martin, per L Hope para 5.
506 Idem.
507 Union Colliery Co of British Columbia v Brydon [1899] AC 580, per L Watson at p587.
Northern Ireland in the period of Home Rule from 1922-72.\(^{508}\) The issue and the historical solution had been canvassed during the Parliamentary progress of the Scotland Bill,\(^{509}\) however the notion of ‘pith and substance’ or an equivalent is not evident in the text of the Scotland Act. Thus, Lord Hope concluded, while the notion “informed the statutory language, and the rules to which the court must give effect... As to what they mean, the Scotland Act provides its own dictionary [referring to section 29]”\(^{510}\)

Lord Walker recognised the Scotland Act as “a monumental piece of constitutional legislation”, and the task of defining the legislative competence of the Scottish Parliament as “challenging”. However, in his view, it did not arise in the same manner as it would in a federal constitution, and his Lordship had in mind Australia and Canada in this context.\(^{511}\) As we have seen Lord Hope had mentioned the doctrine of ‘pith and substance’, and in Lord Walker’s view, that was aptly applied in problems arising in those constitutions. However, his Lordship went on to suggest that while the Commonwealth experience must have informed the drafters of the Scotland Act, and Hansard material supports that view,\(^{512}\) his conclusion was even more emphatic that “in the Scotland Act Parliament has gone further, and has used more finely modulated language, in trying to explain its legislative purpose as regards ‘reserved matters.’”\(^{513}\) So that the interpretation of the boundaries of the Scotland Act is an explicitly self-contained exercise.

Perhaps with section 101 of the Scotland Act in mind, Lord Brown appeared to favour an approach to construction with an implicit presumption in favour of competence, but without elaboration or reference to that section.\(^{514}\) That, writ small, is the broader question left unanswered. It is suggested the principle that a solution is to be found within the four corners of the Scotland Act is clear enough from Lords Hope and Walker, but the

\(^{508}\) Gallagher v Lynn [1937] AC 863.
\(^{509}\) Martin, per L Hope para 14.
\(^{510}\) Martin, per L Hope para 15.
\(^{511}\) Martin, per L Walker para 44.
\(^{513}\) Martin, per L Walker para 46.
\(^{514}\) Martin, per L Brown para 66.
approach is not categorically determined. In particular, there is no clear answer to whether the Scotland Act is to be treated as any other, non-constitutional, statute for the purpose of interpretation.

**Imperial Tobacco**

In *Imperial Tobacco Ltd v Lord Advocate,*[^515] the direction of challenge was different again. Here the argument was directed to legislative competence on the basis that the legislation related to a reserved matter, with the consequence that section 29(2)(b) of the Scotland Act applied, but also featured a challenge on the basis that the provisions modified Art 6 of the Union with England Act 1707 so far as it related to freedom of trade, and were therefore in breach of the restriction in para 1(2)(a) of sch 4 to the Scotland Act.

By Petition for judicial review, Imperial Tobacco challenged legislation of the Scottish Parliament to control the manner in which tobacco products could be displayed for sale, and which also prohibited the use of vending machines for the sale of tobacco products. There was a good deal of argument, particularly in the First Division, about the correct approach to interpretation of the Scotland Act 1998 as well as the interpretation of the impugned statutory provisions. This was the first occasion on which the challenge to legislation was made by reference to the reservations in Schedules 4 & 5 of the Scotland Act. *Robinson v Secretary of State,* discussed above, was invoked by the Scottish Ministers to argue that because the Scotland Act was a constitutional statute, the ‘generous and purposive’ construction propounded in that case should be applied in this context too. The Lord President observed that parties were in agreement that the court should favour constructions which render the constitutional settlement embodied in the devolution legislation “coherent, stable and workable.”[^516] However, the “clear background purpose” which was “discernible from the [Northern Ireland Act] itself”, namely implementation of the Belfast Agreement, was different in character from the “division of

[^515]: In the Outer House (L Bracadale) 2010 SLT 1203; in the First Division 2012 SC 297; in the UKSC ([2012] UKSC 61) 2013 SC(UKSC) 153.

[^516]: *Imperial Tobacco*, per LP Hamilton para 14.
Adopting a more generic purposive approach to construction, the First Division concluded that it was necessary to construe the provisions defining the legislative competence of the Scottish Parliament with regard to their purpose, and in particular with regard to the intention to create a rational and coherent scheme. Lord President Hamilton noted that issues concerning the competence of legislation were not new in the experience of the common law. A good deal of jurisprudence had accumulated in Australia and Canada over the past century and more, and his Lordship surmised that the framers of the Scotland Act had been mindful of that. Informed by Hansard material, Lord Hamilton noted that:

The role which appears to have had particular prominence in Parliament was the 'pith and substance' rule developed in the Canadian cases and deployed in the construction and application in Northern Ireland of the Government of Ireland Act 1920 (10 & 11 Geo 5 cap 67) (see Gallagher v Lynn [1937] AC 863). Quantum valeat, the explanatory notes to sec 29(3) state that:

The courts are ... required by statute to determine whether a provision "relates to" a reserved matter by reference to "the purpose of the provision". In determining its purpose, the courts are to have regard, amongst other things, to its effect in all the circumstances. It may be that it is thought that a provision might have two or more purposes but section 29(3) does not say that the courts are to determine what is the dominant purpose. It requires the courts to determine what is "the" purpose of the provision or, in other words, what the provision is about, what is its "true nature", its "pith and substance".

However, comparative models require to be treated with care, not least because the Scotland Act contains different language from the Canadian and Australian models. About this, Lord Hope had observed in Martin (discussed above):

While the phrase "pith and substance" was used while these provisions were being debated, it does not appear in any of them. The idea has informed the statutory language, and the rules to which the court must

517 Idem.
518 Hansard, HL vol 592, cols 818 et seq (21 July 1998), noted by Lord Hope in Martin v Most, cit. supra, at para 14.
519 Imperial Tobacco 2012 SC 297, per LP Hamilton at 311, para 26.
give effect are those laid down by the statute. As to what they mean, the Scotland Act provides its own dictionary.\textsuperscript{520} 

As Lord President Hamilton himself acknowledged, ‘pith and substance’ has been invoked often, without necessarily providing a clear account of the respective spheres of competence.\textsuperscript{521} It thus remains an open question as to the extent to which the Commonwealth jurisprudence illuminating in this context, but Lord Hope appears to be discouraging general reliance, for a more Scotland Act-focussed approach.

In one of his final judgments before his translation to the UKSC, Lord Reed declined to adopt an approach to the interpretation of Acts of the Scottish Parliament different from that applicable to other legislation, or different from that authorised by section 101 of the Scotland Act. The democratic legitimacy of the Scottish Parliament did not in itself warrant a different approach to interpretation from that applicable to Acts of the UK Parliament. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it.\textsuperscript{522} Lord Reed noted that the Scottish Ministers’ argument had been that the Scotland Act should be interpreted as a ‘constitutional instrument’, rather than in the manner of other statutes.\textsuperscript{523} That meant applying the principles articulated by Lord Wilberforce in \textit{Minister of Home Affairs (Bermuda) v Fisher},\textsuperscript{524} as well as \textit{Robinson}. Further, it had been argued that the reservations in Schedules 4 & 5 should be given a limited construction, otherwise, it was argued, “Parliament’s intention to create a parliament with plenary legislative powers would be frustrated...”\textsuperscript{525}

\textit{Minister for Home Affairs} undoubtedly did concern constitutional provisions, namely the Bermuda Constitution Order 1968,\textsuperscript{526} an Order in Council made in exercise of powers under the Bermuda Constitution Act 1967, a UK statute. Bermuda was then, and remains, a British Overseas

\begin{footnotesize}
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\item \textsuperscript{520} \textit{Martin v Most cit. supra}, per L Hope para 15.
\item \textsuperscript{521} \textit{Imperial Tobacco}, per LP Hamilton para 26.
\item \textsuperscript{522} \textit{Imperial Tobacco}, per L Reed para 58.
\item \textsuperscript{523} \textit{Imperial Tobacco}, per L Reed para 66.
\item \textsuperscript{524} \textit{Minister for Home Affairs (Bermuda) v Fisher} [1980] AC 319.
\item \textsuperscript{525} \textit{Imperial Tobacco}, per L Reed para 67.
\item \textsuperscript{526} Bermuda Constitution Order 1968, SI 1968/182.
\end{itemize}
\end{footnotesize}
Territory, and thus autonomous but not independent. Giving the advice of the Judicial Committee in that case, Lord Wilberforce noted that there were two approaches to construction in this context. The first was to consider that the constitution was in effect an Act of Parliament, and should be treated as such, but perhaps with “less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship.”

However, the second was more radical, and called for treating constitutional instruments like this as being sui generis, without “necessary acceptance of all the presumptions that are relevant to legislation of private law.” In a passage revisited in *Imperial Tobacco*, Lord Wilberforce observed:

> These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

Having noted the distinction in drafting of constitutional instruments between “guarantees of general purport” and the “austerity of tabulated realism”, Lord Reed concluded that the same approach to construction did not apply to every provision of a constitution or in “a statute of constitutional significance regardless of its subject matter or the form in which it is expressed.”

Having surveyed the authorities, Lord Reed concluded that the Scotland Act is not a constitution, but an Act of Parliament, and that “[t]here are material differences.” Those are found in the contextual differences between devolution of executive and legislative power within the UK, compared with establishing the constitution for an independent state or a British Overseas Territory. That was because the Scotland Act can be amended more easily than a constitution, which matters because “the difficulty of amending a constitution is often a reason for concluding that it was intended to be given

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527 *Fisher*, p 329C.
528 *Fisher*, p 329D.
529 *Fisher*, p 328H.
530 *Imperial Tobacco*, per L Reed para 68.
531 *Imperial Tobacco*, per L Reed para 71.
532 Idem. While the proposition is clear enough in respect of the constitution example, it is perhaps less obvious in relation to the Order in Council making constitutional arrangements for a British Overseas Territory.
a flexible interpretation.\textsuperscript{533} Of greater significance in his view, was the fact that Scotland Act established new constitutional arrangements “which were intended to be stable and workable”.\textsuperscript{534} As Lord Reed noted, the only special rule of interpretation applicable to Acts of the Scottish Parliament is that laid down by section 101 of the Scotland Act, which applies to any provision of an Act of the Scottish Parliament which could be read in such a way as to be outside competence, and requires the court to interpret such a provision as narrowly as is required for it to be within competence, if such a reading is possible.\textsuperscript{535}

Lord Brodie, the third member of the court, did not disagree with the proposition that the Scotland Act should be interpreted generously and purposively in order that “the constitutional settlement it embodies is coherent, stable and workable.”\textsuperscript{536} But, as his Lordship noted, that begged a question about identifying the purpose:

the principle derived from Robinson that legislation should be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody, is not readily applicable to resolving the issue of what has been devolved as opposed to what has been reserved. The provisions under scrutiny are undoubtedly constitutional but the values that they embody: that some powers should be devolved while others should be reserved, do not lend themselves to providing an answer to a question as to which precisely are the powers which have been devolved and which are the powers which have been reserved. I do not see the argument as being advanced by characterising a reserved matter, as counsel for the respondent did, as a limitation on the Scottish Parliament’s otherwise plenary legislative power.\textsuperscript{537}

By the time the case reached the Supreme Court, the question of whether a different interpretative approach was appropriate for the Scotland Act, and by implication other constitutional statutes, was less acute because it was agreed the object was to arrive at the statute’s true meaning.\textsuperscript{538} There remained dispute about the extent to which the purpose of the 1998 Act in

\textsuperscript{533} Idem.
\textsuperscript{534} \textit{Imperial Tobacco}, per L Reed para 72.
\textsuperscript{535} \textit{Imperial Tobacco}, per L Reed para 65.
\textsuperscript{536} \textit{Imperial Tobacco}, per L Brodie para 180.
\textsuperscript{537} \textit{Imperial Tobacco}, per L Brodie para 182.
\textsuperscript{538} \textit{Imperial Tobacco} ([2012] UKSC 61) 2013 SC(UKSC) 153, per L Hope para 10.
devolving plenary legislative powers was relevant in determining whether particular legislation fell within legislative competence. In order that this “unsatisfactory” situation might be resolved, Lord Hope set out three principles to guide the exercise of interpretation in this context.  

First, the question of competence must be determined in each case according to the particular rules that have been set out in sec 29 of, and Schedules 4 and 5 to, the 1998 Act. The court should avoid being drawn into questions about whether the devolved or central legislature was better placed to legislate on a particular matter. Further:

[the statutory language was informed by principles that were applied to resolve questions that had arisen in federal systems, where the powers of various legislatures tend to overlap... But the intention was that it was to the 1998 Act itself, not to decisions as to how the problem was handled in other jurisdictions, that one should look for guidance. So it is to the rules that the 1998 Act lays down that the court must address its attention, bearing in mind that a provision may have a devolved purpose and yet be outside competence because it contravenes one of the rules.

Secondly, the rules contained in the 1998 Act were to be interpreted in the same way as any other rules that are found in a UK statute. It was true that the rules in the 1998 Act must be taken to have been intended “to create a system that was coherent, stable and workable”, but in that the 1998 Act was no different from any other statutory scheme. Thereby confirming that while Robinson may be a guide to devolution in Northern Ireland, it is not applicable to other devolution cases, let alone in considering constitutional statutes more widely.

Thirdly, and following on from the last point, describing an Act as a constitutional statute “cannot be taken, in itself, to be a guide to its interpretation.” The purpose of the Scotland Act certainly informs the statutory language, but it must be interpreted like any other statute. That purpose, Lord Hope concluded, that “the Scottish Parliament should be able

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539 *Imperial Tobacco*, per L Hope para 12.
540 *Imperial Tobacco*, per L Hope para 13.
541 Idem.
543 *Imperial Tobacco*, per L Hope para 14.
544 *Imperial Tobacco*, per L Hope para 15.
to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved.”

Nonetheless, it remains necessary to identify the purpose of the provision if the challenge is brought under sec 29(2)(b), “bearing in mind that the phrase ‘relates to’ [i.e. to reserved matters] indicates something more than a loose or consequential connection. As is the case when any other statute is being construed, the context will be relevant to understanding the meaning of the words used by the 1998 Act.”

As we have seen, section 29 is central to defining the boundaries of devolved competence between Scottish and central institutions, and that formulation is a cautious, incremental approach employing ordinary tools of statutory construction. Although Lord Hope alludes to the statutory language being “informed by principles that were applied to resolve questions that had arisen in federal systems”, what is missing is a detailed discussion of how those, Commonwealth, antecedents might map onto the devolution relationships. It is avowedly not a firm federalist analysis.

National Assembly for Wales Commission
Each of the devolution structures includes provision for pre-enactment scrutiny by the UKSC of whether a measure is within legislative competence, and the first three references related to Welsh Assembly legislation. Probably the most significant case in this context is the first to reach the Court: Attorney General v National Assembly for Wales Commission. This arose from a Welsh Assembly Bill intended to streamline provisions for making and enforcing local authority byelaws by removing existing requirements for both Welsh Ministers and the Secretary of State to confirm the byelaw(s).

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545 Idem.
546 Imperial Tobacco, per L Hope para 16.
547 Equivalent provisions are found in the Welsh and Northern Irish schemes.
548 Imperial Tobacco, per L Hope para 13
549 In October 2012, Lady Hale gave an extra-curial speech in which she asserted that “The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts.” https://www.supremecourt.uk/docs/speech-121012.pdf
550 The single Scottish reference is considered in Chapter 5.
For the UK government, the Attorney General argued the provisions removing the Secretary of State’s role in confirming byelaws was invalid unless they were "incidental to, or consequential on" another provision contained in the Bill. Thus it was a boundary question, but of a different character from the issue of pith and substance arising in *Martin* and *Imperial Tobacco*. On examination of that threshold, the court held that the first disputed section was within competence because removing the Secretary of State's confirmatory powers relating to scheduled enactments would be incidental to, and consequential on, the Bill’s primary purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments, and, critically, the Bill’s primary purpose could not be achieved without this operative provision. The second disputed section was within the Assembly's legislative competence because it did not purport to extend the powers of Welsh Ministers, and was confined to the permitted purpose of removing, or delegating powers to remove, functions of the Secretary of State.

In his judgment, Lord Neuberger records that the court was presented with argument about the proper approach to interpretation of the Government of Wales Act “as a constitutional enactment.”552 In other words, the same line of argument invoked in *Robinson* and *Imperial Tobacco*. Lord Neuberger expressly reserved his view about this, because he was able to determine the reference on other grounds.553 Lord Hope indicated his agreement with Lord Neuberger, and went on to articulate three ‘general principles’ which, he said, “have guided the court when dealing with issues about the legislative competence of the Scottish Parliament.”554 In other words, the criteria applied in *Martin* and *Imperial Tobacco*. These he characterised in this way: first, the question of legislative competence is a question of law, for courts to decide. “The judicial function in this regard has been carefully structured.” It was not for court to say where law is better made, but

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552 Attorney General v National Assembly for Wales Commission, per L Neuberger para 69. Lords Clarke, Reed and Carnwath agreed with Lord Neuberger.
553 Idem.
554 Attorney General v National Assembly for Wales Commission, para 78ff. Lords Clarke, Reed and Carnwath agreed with Lord Hope.
whether made within scope of rules. Second, “the question whether the Bill is within competence must be determined simply by examining the provisions by which the scheme of devolution has been laid out.” However the description of the Government of Wales Act (or, by implication, any other instrument) as a constitutional enactment cannot in itself be taken to be a guide to its interpretation. The rules to be applied are those in the statute, albeit informed by the purpose of the Act, confirming the limitations of Robinson discussed in relation to Imperial Tobacco. Finally, amenability of legislation to judicial review is determined in accordance with the court’s decision in AXA. This, it is suggested, represents a solidification of the approach of the court in developing tools of legal constitutionalism for approaching devolution statutes.

Emerging themes
Although relatively few in number, this body of cases about the powers of devolved institutions engages very directly with notions of constitutionality. A number of themes emerge.

First, the factually simple but jurisprudentially significant point that the doctrinal approach of Laws LJ in Thoburn has been explicitly affirmed by the UK Supreme Court, both as to the juridical notion of constitutional statutes with particular valance, and Laws LJ’s characterisation of them as being an exception to implied repeal. As we have seen, the court has done so on several occasions, and that these have arisen in a number of contexts, including the Scotland Act. It is also noteworthy that the court’s affirmation of the class of constitutional statutes is not confined to situations engaging EU law obligations and the interaction with the European Communities Act. It is true that some of the definitional questions discussed in Chapter 3 are not directly resolved there, the fundamental concept has been affirmed as juridically sound.

555 Attorney General v National Assembly for Wales Commission, para 79.
556 Attorney General v National Assembly for Wales Commission, para 80.
557 Idem.
558 Attorney General v National Assembly for Wales Commission, p816, para 81.
Secondly, from the outset, the exceptionalist character of Parliamentary sovereignty has been confirmed. Sovereignty in that sense is not an attribute of the Scottish Parliament or the other devolved legislatures. Nonetheless, the Supreme Court, and indeed the Inner House, have been clear in affirming the constitutional character of the Scottish Parliament. While it was brought into being by legislation of the UK Parliament, its democratic accountability and plenary powers have been emphasised. Equally, the court has located the devolved institutions firmly in a legal constitutionalist framework, which is common in other constitutional orders. Acts of the Scottish Parliament are primary legislation and are also amenable to the supervisory jurisdiction. Challenges to primary legislation within the British constitution were inconceivable (other than on Factortame grounds) before devolution, but at least that primary legislation enacted by the devolved institutions is so challengeable. In so doing, the higher courts continue to develop rule of law tools of judicial constitutional analysis. While the court has made clear that starting point for assessment of competence is section 29 of the Scotland Act, it is also clear that it does not exclude the application of external, rule of law, norms as well. While the focus in the judgments is understandably on the Scottish Parliament, significantly in this context, the UKSC left open the question of the effect of this development on the UK Parliament.

However, because they take statutory form, the Scotland Act and other constitutional statutes are to be interpreted in the same manner as other statutes, rather than being subject to a more open approach evident in the constitutional jurisprudence of some other Commonwealth jurisdictions. Section 101 of the Scotland Act does contain an interpretative obligation to endeavour to read legislation as within competence if possible, but it is clear that the Supreme Court considers that ought to be in accordance with ordinary rules of statutory construction. It may be that some of the court’s observations about a purposive and generous approach in Robinson can now be seen to have been imbued with an overly rosy hue. Certainly, the cross-community history is accurately referenced, but the notion of devolution legislation as amounting to a constitution has not found resonance in the Scottish and Welsh cases, while the ‘generous’ construction the House of
Lords felt compelled to give in *Robinson* has been explained by reference to structural coherence in later cases.

In addition to its profound political effects, the UK’s departure from the European Union following the outcome of the referendum in June 2016 has provided further occasions for these and other constitutional components to be examined and tested. Those developments are considered in the next chapter.
Chapter 5

The European Union, devolution and the re-ordering of the British constitution

All changed, changed utterly:
A terrible beauty is born

When enacting the EU constraints in the NI Act and the other devolution Acts, Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union. But, in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the European Union.

Introduction

When devolution to Scotland, Wales and Northern Ireland began in 1998, the Maastricht Treaty and the European Single Market were each less than a decade old, and the UK was a querulous but anchoring member of the EU. All three devolution schemes assumed the UK’s EU membership, particularly acutely in the case of Northern Ireland. However, as the UK Supreme Court determined in Miller, while devolution might assume EU membership, it does not require it as a matter of law. It is a strange irony that, juridically speaking, little has become the United Kingdom’s relationship with the European Union quite like the aftermath of the referendum decision to leave the Union. European Community, and later, European Union, law was of course a completely new source of law in the UK legal order. It had no antecedent there, and further, a number of institutional and juridical features were innovations in British constitutional practice. For those reasons alone, the European Communities Act 1972 would be worthy of examination in the context of this research, since it is plainly profoundly constitutional in character.

559 Easter 1916, W B Yeats.
560 Miller v Sec of State for Exiting the EU ([2017] UKSC 5) [2018] AC 61, at 161 per L Neuberger para 129 (hereafter “Miller No1”).
562 Miller No1, loc cit.
563 For simplicity, ‘European Union’ or ‘EU’ will be used throughout in referring to the institutions and the legal regime, unless it is essential to the context to refer to the EEC or the European Community.
While the 1972 Act undoubtedly presents a constitutional puzzle which has attracted academic attention since the era of the political debates leading to the UK’s accession to the EEC Treaties, the organs of the constitution have largely contrived to shy away until forced to confront this puzzle by litigation and the parliamentary fallout of the vote to leave in June 2016.\footnote{Alternatively, this avoidance may be symptomatic of avoidance associated of issues focussed as sharp constitutional questions with the history discussed in Chapter 1.} This chapter explores the juridical nature of EU law in the British constitutional order, which by reference to the instruments that have defined the UK’s relationship to the EU engages the notion of constitutional statutes very directly. It then turns to the effect on the British constitutional order of the relationship between EU law and devolution structures, in particular the constitutional statutes that supply the architecture of devolution. Finally, the chapter reflects on the overall status of constitutional statutes both in the ‘external’ European domain and in the ‘internal’ devolution context, given the likely effects on the territorial constitution of the UK exit from the EU.

Such exploration is necessary both in amplification of the notion of ‘constitutional’ central to this research, and to set out the constitutional landscape in which the debate around the form of the European Union (Withdrawal) Act 2018 took place, both generally and particularly in its relationship with devolution structures. There are a number of significant landmarks en route. First, the \textit{Miller} decision which both definitively identifies the juridical character of EU law in the UK, and presents a number of intriguing puzzles as a consequence of its treatment of the Sewel convention. In turn, this sets the stage for the European Union (Withdrawal) Act 2018 and its interaction with devolution. That will be viewed from a number of points on the landscape, both in the parliamentary debates and in UK Supreme Court’s consideration of the competing legislation from the Scottish Parliament.\footnote{Reference re UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill ([2018] UKSC 64) 2019 SC(UKSC) 13.} It might be said that the 2018 Act is the ultimate cross-cutting constitutional statute: reframing the judicial basis of a significant body of law, while simultaneously impinging on the territorial constitution in a way unimaginable prior to the 2016 referendum. Those
effects are magnified by the sequel to the 2018 Act, the European Union (Withdrawal Agreement) Act 2020, which amends and elaborates on it. The 2018 Act, as amended, is hereafter referred to as the EUWA.

*Two Dimensions of Devolution and the EU*

It seems reasonably clear there are two principal ways in which EU law impinges directly on the UK’s internal devolution structures, at least until the end of the transition/implementation period following the UK’s exit from the EU.\(^{566}\) For the purposes of this study, these may be described as the jurisdictional dimension, and the interfacing dimension. In outline, the internal or jurisdictional dimension comprises legal limits on competence of devolved institutions, while the interfacing dimension concerns structures affecting relations between the levels of government within the UK.

Elaborating these in turn. Each of the devolution schemes contains an internal EU dimension. Framed in broadly similar terms, each scheme contains limitations on both legislative and executive competence framed with an EU dimension. Thus, taking Scotland as an example, one of the grounds on which legislation of the Scottish Parliament may be held not to be law is that:

> it is incompatible with... EU law;\(^ {567}\)

and similarly:

> [a] member of the Scottish [Government] has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible... with EU law.\(^ {568}\)

Why these limitations are included in devolution structures is readily discerned. As a matter of both international law and EU law, because the UK was the member state, it remains responsible for compliance with EU obligations (until the end of the transition period on 31\(^{st}\) December 2020), notwithstanding domestic allocation of powers. This is a general principle of

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\(^{566}\) Thereafter, the position is rather more complex, as the discussion of the European Union (Withdrawal) Act 2018 later in this chapter seeks to show.

\(^{567}\) Scotland Act 1998, s 29(2)(d), and see too Northern Ireland Act 1998, s 6(2)(d) and Government of Wales Act 2006, s 108A(2)(e).\..

\(^{568}\) Scotland Act 1998, s 57(2), and see too Northern Ireland Act 1998, s 24(1)(a). The Government of Wales Act 2006 ss 58B & 59 are structurally different but achieve a similar effect.
international law, but its specific applicability in EU law was noted by the UK Supreme Court in the *Reference re UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill*.

It follows that a limitation within each devolution scheme ensures such compliance by precluding acts incompatible with EU rules and principles by devolved institutions.

Given the mixed architecture of the British constitution it is reasonable to anticipate that the internal dimension has both political and legal features. The legal features are readily discerned in the form of the structural limits on legislative and executive competence in the devolution statutes. By contrast, the political dimension is perhaps more diffuse given the lack of definition given to inter-governmental dynamics in the Scotland Act. In other words, the absence of a formal mechanism does not mean there are no processes, rather that they operate on administrative or political planes. The position in Northern Ireland on inter-governmental relations is more clearly defined, though not specifically on this aspect of competence.

The interfacing dimension is related to the internal dimension, but operates on a different institutional level, and to a somewhat different effect. Notions of common policy or legislative harmonisation central to EU action necessarily require member states to share competence regarding certain areas of executive and legislative action. That produces legal and institutional effects at the level of interaction between member states, and also within member states, the precise character of which depends on their internal structures. So it is that in areas where there is EU competence, action by devolved actors requires to be coordinated with EU policy - whether in terms of responsibility for implementing legislative measures or administrative acts. In a practical sense, the EU has provided a framework for important parts of what has recently come to be described as the UK

569 *Continuity Bill reference*, cit supra fn565, at para 29.

570 It will be recalled that, by virtue of the doctrine of the primacy of EU law considered below, there are equally binding limitations on member states’ powers to act.


single market. But in fact this effect also extends to public policy e.g. justice and home affairs, which are not directly connected to market activity in an economic sense. As will become evident later, this interfacing aspect is apt to give rise to politically challenging questions within the UK in the post-exit environment.

*The European Communities Act 1972*

On a number of levels, the European Communities Act 1972 (hereafter “the ECA”) is a remarkable piece of legislation, whose juridical deeps are scarcely disclosed by the long title, being “an Act to make to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar.”

Section 2 is the key to the legal normative effect of the ECA, and served a number of purposes. First, it is the conduit for the delivery of EU legal norms into the British legal order, created by section 2(1), whereby:

1. All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.

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573 See e.g. *Legislating for the United Kingdom’s withdrawal from the European Union* HMSO (2017) Cm 9446, Ch. 4, *passim*.

574 The Channel Islands and the Isle of Man are dependencies of the Crown, but are not part of the United Kingdom, though aspects of their external relations are conducted by the UK government. Gibraltar is the only British Overseas Territory on the European mainland, so that it was perhaps inevitable that provision required to be made for it also.

575 The description of ECA is expressed in the past tense to reflect the UK’s exit and EUWA, s1. However the position is complicated linguistically as well as normatively by the saving of the ECA for certain purposes by EUWA ss 2&4, as well as the transition period which has not expired at the time of writing.
Secondly, sections 2(2) and 2(4) conferred implementation powers on Ministers of the Crown which not only authorised the making of subordinate legislation, but to do so achieve ends which would otherwise require an Act of Parliament.

Further, although not articulated in quite this way, section 2(4) was also the basis on which the principle of the primacy of EU law forms part of the domestic law of all parts of the UK. That is so because the Court of Justice has established that primacy as a doctrine flowing from the Treaties, and the obligation to recognise that primacy is therefore one arising “by or under the Treaties.”\textsuperscript{576} Further, as section 2(4) spells out: “any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to” the other provisions of section 2, and thus establishing the principle of primacy given effect by section 2(1), and doing so independently of any further legislative act.\textsuperscript{577}

It will readily be apparent this structure envisaged a process of law creation which is both dynamic and far-reaching. Dynamic, because without further primary legislation, legal norms created in the EU legal order became norms of the British legal order; it is the clearest and perhaps only example of an exogenous source of norm-creation in the British domestic legal order. Far-reaching first, because Ministers were empowered to make subordinate legislation which may do what would otherwise require an Act of Parliament; and secondly, and much more significantly, EU law was accorded priority over all other domestic sources of law in the UK legal order. As the UKSC observed in \textit{Miller}, the ECA provided a new

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\textsuperscript{577} The European Treaties have of course always contained provisions about direct applicability: Art 189 EEC Treaty, Art 249 EC Treaty, Art 288 TFEU. There are further conundrums in the institutional (self-)conception of the juridical character of the EU architecture. That is beyond the scope of this research, and there is a rich literature; representative examples include: JDB Mitchell \textit{The Sovereignty of Parliament and Community Law: The Stumbling-Block That Isn’t There} International Affairs Vol 55 No 1, 33-46; T Hartley \textit{The Constitutional Foundations of the European Union} (2001) 117 LQR 225; F Jacobs \textit{The Sovereignty of Law: The European Way} (CUP 2006), esp ch 4; N Walker \textit{The Place of European Law} in G de Burca & J Weiler (eds) \textit{The Worlds of European Constitutionalism} (CUP 2012).
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constitutional process for making law in the United Kingdom. In that sense, the ECA was plainly constitutional in character. However its effects are constitutional at a more fundamental level too, since in its practical operation as well as in its normative effect, the ECA impinged on the notion of parliamentary supremacy. Likely effects of the Community legal order on fundamental constitutional doctrines were evident to the observant even before UK accession. That has a political valence which has impelled the tide of ‘Euro scepticism’ in British politics since the original debates on membership of what was then the EEC. It is also a proposition which has intrigued several generations of constitutional scholars. It is instructive to consider the work of three of those scholars (HWR Wade, Neil MacCormick and JDB Mitchell), as well as the UKSC’s conclusions on the issue in the Miller case. Mitchell and Wade represent contrasting perspectives from the immediate period of UK accession; while MacCormick (and also Wade) provides commentary reflecting on the critical early challenge to Parliamentary sovereignty in the Factortame litigation.

Parliamentary sovereignty was a theme of concern to William Wade across his career. His earlier work in defence of the Diceyan orthodoxy in response to Ivor Jennings’s effort to accommodate the doctrine to the reality of democratic politics and the practicalities of the mid-twentieth century British administrative state has been mentioned in Chapter 1. However Wade was alive to the significance of British accession to the EEC from the outset, and in a much later paper, he sought to reconcile the consequences for the legal order as articulated in the well-known and not uncontroversial

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578 Miller, per L Neuberger para 62.
Factortame decision with the dominant constitutional theory.\textsuperscript{583} According to Wade, two views might be taken of the consequence of Factortame for Parliamentary sovereignty, as he characterised legislative supremacy. Either it was “at least in a technical sense, a constitutional revolution,” because in passing the ECA in 1972, that Parliament had bound the Parliament which passed the Merchant Shipping Act 1988; alternatively, the result could be explained away by “statutory construction under ordinary principles.”\textsuperscript{584} The latter position involving an implied condition that every statute after accession was to be construed as subject to EU law unless the contrary was expressly stated.\textsuperscript{585} Wade quotes a passage in which Lord Bridge dispels the notion that the principle of the supremacy of EU law in the legal orders of member states was somehow surprising and an imposition on Parliamentary sovereignty, unforeseen at the time the ECA was before Parliament.\textsuperscript{586} In Wade’s view, the court in essence asserted that by enacting the ECA, “Parliament voluntarily accepted a limitation of its sovereignty”,\textsuperscript{587} on the footing that the principle of primacy was known at the point of the UK’s accession. That was nothing short of revolutionary because the court was clearly accepting the notion that parliament acted to bind its successors, at least as regards the EU legal order.

It is clear that Wade found the reasoning of the court on this central issue unconvincing. Dismissing the analysis based on statutory construction on the perfectly reasonable basis that it does not fit with Lord Bridge’s reasoning, or with his express conclusion that Parliament voluntarily accepted a limitation on its legislative sovereignty, Wade was rather more exercised by the implications of that conclusion, since it went much deeper into the foundations of the constitution, touching on the ‘rule of recognition’ or ultimate legal principle of validity of statutes.\textsuperscript{588} As Wade observed, the rule of recognition carries with it rules of constitutional change, and in his view, it is the judges who are in a position to change the rule. That is because, in Wade’s view, “[i]t is for the judges and not for Parliament to say

\textsuperscript{583} HWR Wade, ‘Sovereignty - Revolution or Evolution?’ (1996) 112 LQR 568.

\textsuperscript{584} Wade, op. cit., p 568.

\textsuperscript{585} Wade, op. cit., pp 570-1.

\textsuperscript{586} Factortame, cit. supra, at 658.

\textsuperscript{587} Wade, op. cit., p 572.

\textsuperscript{588} Wade, op. cit., pp 573 & 574.
what is an effective Act of Parliament.”

Since, in Factortame the court had recognised a change in the rule that one parliament may not bind its successors, “this is a technical revolution.”

In the end, Wade concludes that while the construction-ist view might provide an attractive resolution to the “constitutional dilemma”, the reality was that “it can only be camouflage for the fundamental change which has evidently occurred.”

For Neil MacCormick, reflecting on Wade’s 1996 paper and a response from Trevor Allan, the picture was more complex and requires us to contemplate the rule of recognition at a deeper, conceptual, level. MacCormick is surely correct to characterise the question as being about “how it is possible to change a constitution in its fundamentals, while still acting in a constitutional and lawful manner and spirit.”

To which one might add, all the more so in a constitutional order where the rule of recognition and rules of change are not definitively described in a single source, and also where there is perhaps not consensus about the extent of the rules of change.

MacCormick approaches the matter by teasing out the distinction, originally drawn by Hart, between the rule of recognition, and rules of adjudication and rules of change. This is, in part, about the practical operation of the separation of powers, and in particular differentiating “those aspects of the constitution that confer powers, including conditions and restrictions on powers, and those that regulate the exercise of powers conferred.”

MacCormick founds strongly on this distinction in defending the decision in Factortame from the characterisation of revolution. In so doing, he founds on the necessity of the distinction, and does so in a way which emphasises

589 Wade, op. cit., p 574.
590 Wade, loc. cit.
591 Wade, op. cit., p 575. Support for that view may be found in subsequent cases in other areas of public law: see, for example, the discussion by the UK Supreme Court of the State Immunity Act 1978 in Benkhabreche v Sec of State for Foreign & Commonwealth Affairs ([2017] UKSC 62) [2019] AC 777.
596 MacCormick, op. cit., p 84.
reciprocal obligations on those who make and those who determine the scope of law. That is an evolutionary process, particularly in a constitutional order without a codified statement of the “fundamental empowering rules and... limits on the powers.”

Turning to the question at the heart of *Factortame*, MacCormick, differing from Wade, concludes that “it cannot be true that only the judges can change the rule of recognition, though certainly they have the last word on the question whether and how any change that Parliament may purport to make should have effect.”\(^{598}\) Citing the Reform Acts and the Parliament Acts, MacCormick notes that fundamental changes in the composition of Parliament and the franchise have always required express legislative change.\(^{599}\) That would be consistent with the these being constitutional statutes, and with the premise that express amendment of constitutional statutes is necessary. MacCormick goes on to consider case-law about extension of the franchise, and the notion that “a major and controversial change... could not be deemed to have been achieved merely by implication.”\(^{600}\) As a generality, that seems reasonable, though on the face of it, that approach appears not to acknowledge that necessarily places the task of recognition squarely in the domain of the courts.

How then does MacCormick consider section 2 of the ECA should be approached? His starting point is that section 2(1) “inserts a new criterion of recognition into an already functioning rule of recognition, and section 2(4) indicates its ranking above other criteria.”\(^{601}\) That, according to MacCormick, “transforms” the question, seemingly into one about operation of the rules of change in a manner consistent with the established constitutional doctrine that one parliament may not bind a later parliament. His solution is that section 2 of the ECA did indeed change the rule of recognition of the British constitution, but did so “with the implied

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598 MacCormick, op. cit., p 86.
600 MacCormick, loc cit.
condition that Parliament retained the power to reverse that change."  

Nonetheless MacCormick recognises the significance of the *Factortame* decision, and concludes its effect is to override the doctrine of implied repeal where EU law matters are concerned. That conclusion was of course confirmed by the Court of Appeal in *Thoburn*, but it might also be argued that this part of MacCormick’s account gives no place to the express reasoning of the court in *Factortame* which so troubled Wade. Perhaps a more fully rounded conclusion is that the court did not go far enough in recognising only the change in the rule of recognition, but not also recognising what MacCormick characterises as its conditionality. Since the Statute of Westminster at least, it is possible to conceive of constitutional legislation almost any change of which might be reversible in terms of abstract legal doctrine, but impossible in political terms. With that MacCormick does engage, noting that “understanding a constitution is not understanding any single rule internal to it as fundamental; it is understanding how the rules interact and cross-refer, and how they make sense in the light of the principles of political association that they are properly understood to express.”

A constitutionally more radical view may be found in the work of JDB Mitchell, whose career as Professor of Constitutional Law and thereafter Salvesen Professor of European Institutions at Edinburgh spanned both constitutional thought and the early foundations of what was then European Community law. In a series of papers before and after the UK’s entry into the Communities, Mitchell presented an analysis to the effect that the result of accession was a fundamental change in the British constitutional order, which could be characterised as a revolution, and in which the ECA was an instrument but not a cause.

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603 MacCormick, op. cit., p 93.
For Mitchell, it was axiomatic that at the point of accession, the UK came to a legal order which was already in existence and whose structural premises were not a matter of negotiation. Because the juridical and, implicitly, political character of the Community was more than merely an intergovernmental institution, the Community legal order would directly impinge on the domestic legal order.\(^{605}\) That is because of the fundamental EU doctrine of direct effect and, perhaps more controversially, the supremacy of EU law. Intrinsic to the institutional architecture is recognition that in order to achieve the aims of the Treaties, there requires to be uniform or at least harmonious scope and application of law in areas of EU competence, and the Treaties have always so provided.\(^{606}\) From this, consequences for the national legal order flow, particularly a legal order characterised by a dualist conception of international law, as well as a fundamental domestic norm of parliamentary legislative supremacy.\(^{607}\) For Mitchell, the question was one of meeting the assumed immutability of the British constitutional order, at least on its most fundamental level.

In order to meet the predictable counter-argument from a Diceyan analysis of Parliamentary sovereignty, Mitchell offers an analogy from earlier British constitutional history, namely the Union of 1707.\(^{608}\) That too was, he argued, a new legal order, wherein the parliaments of Scotland and England were superseded as sources of law by the Union Parliament of Great Britain by a reciprocal transfer of power between them,\(^{609}\) with the juridical consequence “the courts of the two jurisdictions had no choice about observing or not observing the laws formulated by the new Parliament created by the Acts of Union.” Mitchell developed an argument to the effect that from 1689 onwards,\(^{611}\) British revolutions have been essentially Parliamentary, citing in addition to the Union, the Great Reform Act and the

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\(^{605}\) Constitutional Aspects, p133.

\(^{606}\) See commentary in fn577, supra.

\(^{607}\) This is not the place to consider whether the dualist conception of international law is an inevitable consequence of Parliamentary sovereignty as the primary constitutional jurisdgenerative norm.

\(^{608}\) Mitchell’s views about the importance of the Union to the British constitutional order are developed in Constitutional Law (W Green 2d ed 1967) Chs 4 & 5.

\(^{609}\) What Happened, p70.

\(^{610}\) Sovereignty and Community Law, p 37. This theme also runs through What Happened.

\(^{611}\) Mitchell might have reached further back to the civil wars of the mid-seventeenth century and the Restoration.
Statute of Westminster in 1931. “Nothing in the history of the doctrine of the sovereignty of Parliament shows that there is an incapacity to change at [the level where the political and legal dimensions intersect].”\textsuperscript{612} On this footing, the objection to the form and the consequence of the European Communities Act 1972 can be met. On Mitchell’s analysis, the ECA was not the source of EU law rights and obligations as these are manifest in domestic law; rather, it derives legal consequences from a pre-existing situation.\textsuperscript{613} Those legal consequences were given form by the interpretative and other obligations in sections 2(1) and 2(4) discussed above. Acceptance of that pre-existing situation was, he argues, a political fact, and a political choice.\textsuperscript{614}

Because of the form of the analysis for the primacy of EU law, as well as its expression in domestic law, Mitchell went further in arguing that repeal of the ECA would be “immaterial” and that Treaty rights would remain effective so long as the UK remained a Member State, by virtue of the Court of Justice decision in \textit{Simmenthal}.\textsuperscript{615} On the analyses adopted by both majority and minority in \textit{Miller}, it is now clear that asserting immateriality of the ECA is a step too far, but the analysis of amenability of fundamental norms of the British constitutional order to change is not thereby negated. While critical of the opacity of some elements of the pre-accession domestic debate, Mitchell is surely correct that the nature of the Community legal order was not a mystery before 1972, even if some, though not all, in government may have not followed implications to their full extent.\textsuperscript{616} As the varied analyses formulated by Wade, MacCormick and Mitchell demonstrate, the character and operation of the ECA is, at the fundamental level, far from \textit{acte clair}. While the jurisdictional dimension discussed above is largely about identifying rules of EU law, and thus unaffected by this debate, the interfacing dimension may be directly engaged, a point to which we will return in relation to the European Union (Withdrawal) Act. In addition to spanning a period encompassing the first half of the UK’s

\textsuperscript{612} Sovereignty and Community Law, p39.
\textsuperscript{613} Sovereignty and Community Law, p41.
\textsuperscript{614} Constitutional Aspects, p142; What Happened, p75.
\textsuperscript{616} JDB Mitchell “‘What do you want to be inscrutable for, Marcia?’” (1967-68) 5 CMLRev 112; What Happened, p 75.
membership of the EU, it will be evident that Wade, Mitchell and MacCormick also span a range conceptions of the constitution. Having begun as a defender of the Diceyan position in opposition to Jennings’s new constitutional model, Wade’s response to EU membership, and to *Factortame* in particular, suggests a more nuanced position, accepting a legal constitutionalist analysis, at least as regards the EU law dimension of the constitution. By contrast, as we saw in Chapter 2, Mitchell’s public law work was very much in the functionalist style. His analysis of the nature of EU law and its relationship with the British constitutional order adopts a more nuanced view of Parliamentary legislative supremacy, acknowledging the primacy of EU law, but as a political choice. MacCormick perhaps stands between Mitchell and Wade, with his emphasis on primacy, but subject to an implied power for Parliament to change the position.

**Miller v Secretary of State:**

*constitutional adjudication, the Sewel convention and Brexit*

In what was the first of a series of constitutionally significant decisions delivered in the aftermath of the EU referendum, in *Miller v Secretary of State for Exiting the EU*,\(^{617}\) the UK Supreme Court addressed the nature of the relationship between domestic legal structures and European Union law, together with the interplay between those and prerogative powers in operating the mechanism for giving notice to leave the Union. While the circumstances of the case are sufficiently well-known not to require detailed recitation, it suffices to note that the principal focus of the court’s decision was on the question of whether Parliamentary legislation was required to authorise the notice under Article 50 of the Treaty on European Union, or whether use of executive powers under the foreign affairs prerogative would be sufficient. That was not the only issue canvassed in argument before the Court, though the only other matter addressed in the judgments was the Sewel convention, that is the convention which holds that the UK Parliament will not, normally, legislate in relation to devolved matters without the consent of the relevant devolved legislative body.\(^{618}\)

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617 *Miller & ors v Secretary of State for Exiting the EU* ([2017] UKSC 5) [2018] AC 61.

618 The literature on *Miller* is vast, and one particularly striking feature of the case, remarked on by the Court itself [L Neuberger at para 11; L Carwath at para 274] is the significance of legal blogging prior to and during (and indeed after) the progress of *Miller* and related cases through the courts. The UK Constitutional Law Association blog alone
Most of the majority judgment and almost the totality of the dissenting opinions are focussed on the nature of the European Communities Act 1972 as a constitutional instrument, and the juridical means by which rights and obligations derived from EU law come to be part of UK domestic law. Having noted that the ECA did two things, namely it:

- provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of domestic law.\(^{619}\)
- Secondly, it provided for a new constitutional process for making law in the United Kingdom, the majority went on to conclude that “although the 1972 Act gives effect to EU law, it is not itself the originating source of that law.”\(^{620}\) Once established as a source of domestic law, the EU’s own doctrine of primacy requires that unlike other rules of domestic law, EU law is not subject to implied repeal.\(^{621}\) The Court went on to endorse the notion that the ECA has a ‘constitutional character’ of the kind articulated both by Laws LJ in *Thoburn*, and Lords Reed, Neuberger and Mance in *HS2*.\(^{622}\) In reminding us that one of the “most fundamental functions of the constitution of any state is to identify the sources of its law” the court laid the ground for identifying the ECA as a component of the constitution, and an “entirely new, independent and overriding” one at that.\(^{623}\)

Both the court and commentators were sharply divided on the principal issue of the need or otherwise for legislative authority for notice under Article 50.\(^{624}\) It is not possible to reconcile those different positions, as it

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\(^{619}\) *Miller*, per L Neuberger para 62  
\(^{620}\) *ibid*, para 65  
\(^{621}\) *ibid*, para 66  
\(^{622}\) *ibid*, para 67  
\(^{623}\) *ibid*, para 80  
\(^{624}\) See amongst others: M Barczentewicz ‘*Miller*, Statutory Interpretation, and the True Place of EU Law in the UK’ [2017] PL (Brexit Special Issue) 10; P Craig ‘*Miller*, Structural Constitutional Review and the Limits of Prerogative Power’ [2017] PL (Brexit Special Issue) 48; R Craig ‘A Simple Application of the Frustration Principle: Prerogative Statute and *Miller*’ [2017] PL (Brexit Special Issue) 25; P Daly ‘*Miller*: Legal and Political Fault Lines’ [2017] PL (Brexit Special Issue) 73; M Elliott ‘The Supreme Court’s
sometimes is, as amounting to differences of emphasis; fundamentally, they engage differences of starting point or perspective.

Paul Daly argues persuasively that the decision highlights three ‘fault lines’: between form and substance, between ‘the old constitution and the new constitution’, and between political and legal accountability. In Daly’s account, these fault lines resulted in different emphases in the political and legal domains of the British constitutional order: the majority of the Court emphasised substance, whereas the Parliamentary progress of the European Union (Notification of Withdrawal) Act 2017 was a triumph of form. Given the importance placed on Parliamentary participation by the Court, and the rather cursory terms of the European Union (Notification of Withdrawal) Bill, as well as the short parliamentary progress of it there is some force in that analysis. Daly’s formula of fault lines captures the unresolved tension between the conceptually divergent views of the relationships along the boundary between the central components of the constitution to which we have returned a number of times previously.

In the context of this research, Miller is of significance because it is, in essence, a clear instance of constitutional adjudication by the UK Supreme Court. In doing so, the court was exploring the juridical nature of what it recognised as a deeply constitutional statute, namely the ECA. It was also


625 P Daly ‘Miller: Legal and Political Fault Lines’ [2017] PL (Brexit Special Issue) 73. In Daly’s account, the distinction between form and substance is whether or not the analysis of legal acts includes assessment of the wider effects or consequences (p75); the Old Constitution being the fruits of the Glorious Revolution and an affirmation of Parliamentary sovereignty as the apex norm, with the New in this analysis being the notion most fully articulated by Sir Stephen Sedley of bi-polar sovereignty, shared between Parliament and the courts (pp80-81); and the notion of legal and political accountability mirroring the location of primacy in the legal and political conceptions of constitutionalism discussed in earlier chapters (pp 88-9).

626 Daly, op cit. pp90-92.

627 This also throws into sharp focus Lord Reed’s strong reaffirmation of the constitutional limits on judicial scrutiny of the modalities of Parliamentary engagement with constitutional issues, in contra-distinction to judicial willingness to hold the field open for such Parliamentary action.
adjudicating on an issue of executive vs. legislature power: plainly a constitutional question. As the court observed, that is part of its function; assessment of political form is another matter entirely, for which responsibility lies elsewhere.\textsuperscript{628} The court’s discussion of the scope of prerogative powers and the ambit of the \textit{Case of Proclamations} is not central to the concerns of this research. However the court’s consideration of the ECA does directly engage the central question of recognition and construction of constitutional statutes, and the court’s approach contains insights which may be illustrative of a response to constitutional statutes more widely. While it may be said the court failed to engage with the issue of conventions as fully, the devolution statutes were also at large in the case because of arguments about the Sewel convention, considered in more detail later in this chapter.

In brief, the question about the juridical character of the ECA is one of extent. Both the majority and dissenting members of the court concurred in holding that section 2(1) gave domestic effect to the corpus of EU law, and with the clear intent that domestic law should mirror the EU \textit{acquis}. So that means that section 2(1) actualises a body of law which changes across time. In the view of the majority, while the form and language of the ECA could accommodate change to EU law made by EU institutions or treaty changes, complete withdrawal from the EU “is fundamentally different from variations in the content of EU law”, and the ECA was unable to accommodate that without further domestic legislation.\textsuperscript{629} On the other hand, Lord Reed concluded that there was “no basis in the language of the [ECA] for drawing any such distinction.”\textsuperscript{630}

As we have seen above, long before the Brexit debate, Sir William Wade postulated that the rule of recognition of the British constitutional order was varied by membership of the EU and the effect of the ECA.\textsuperscript{631} On this analysis, EU law has effect as law within the UK because the rule of

\textsuperscript{628} \textit{Miller No1}, paras 3 & 4 per L Neuberger. The point was also accepted by the Attorney General in his oral submissions: Day 1 transcript pp4-5.
\textsuperscript{629} \textit{Miller No1}, para 81.
\textsuperscript{630} \textit{Miller No1}, para 187.
\textsuperscript{631} HWR Wade ‘Sovereignty - Revolution or Evolution?’ (1996) 112 LQR 568.
recognition in the Hartian sense of the ultimate rule beyond which we cannot go because there is no further rule from which its authority is derived requires it by dint either of the Treaties or the operation of the ECA.\(^{632}\) Both Lord Neuberger and Lord Reed were at pains to disavow that, asserting instead that the position could be reconciled with Parliamentary sovereignty because “this unprecedented state of affairs will only last so long as Parliament wishes”.\(^{633}\) It is difficult to square that position with other elements of the majority analysis, because it sits uncomfortably with their conclusion that “although the [ECA] gives effect to EU law, it is not itself the originating source of that law”, rather it is the ‘conduit pipe’ analogy that so animated the oral argument.\(^{634}\) It is also difficult to reconcile with the majority’s soundly-made observation that “loss of a source of law is a fundamental legal change”.\(^{635}\) Lord Reed’s analysis does not require variation in the rule of recognition, but nor is it inconsistent with it. However, the better view is that section 2(1) of the ECA does strongly suggest such a variation in the rule of recognition insofar as (at the very least) it departs from the long-established dualist view of the application of non-domestic sources of law in the UK domestic legal order as indicated by this part of the provision: “…from time to time created or arising under the Treaties… are without further enactment to be given legal effect...” It is difficult to fit that formulation within “whatever the Queen-in-Parliament enacts is law”.

Perhaps more central to the concerns of this research is what Miller indicates about the role of the UK Supreme Court in constitutional adjudication, or what Paul Craig has called in this context ‘structural constitutional review’.\(^{636}\) That is likely to form part of the role of any apex constitutional court, but it is certainly so in an uncodified constitutional order. Craig’s account of the protection of the legislative power of Parliament from executive encroachment as exemplified by the Case of

\(^{633}\) Miller No1, paras 60 and 224.
\(^{634}\) Miller, para 65.
\(^{635}\) Miller, para 83.
\(^{636}\) P Craig ‘Miller, Structural Constitutional Review and the Limits of Prerogative Power’ [2017] PL (Brexit Special Issue) 48, at p56ff.
Proclamations and De Keyser’s Royal Hotel is persuasive. In turn, that brings us to the place of structural review and constitutional statutes. As we have seen in Chapter 3, one of the doctrinal characteristics of constitutional statutes is the reluctance of the courts to hold that provisions have been impliedly repealed; the threshold for that is set very high. Justifying this is the underlying principle that a statute of such structural importance ought not to be repealed or amended without the specific engagement of Parliament. Not least because the political dimension of the constitution calls for accountability for constitutional change, which, ex hypothesi, amending or repealing a constitutional provision of a constitutional statute would be. That was a key insight from Thoburn, affirmed in HS2 and H v Lord Advocate. Arguably that has a counterpoint in the legal dimension of the constitution in the form of the common law principle of legality.

Craig argues that by parity of reasoning, “a statute worthy of the denomination constitutional should not be rendered devoid of effect through recourse to the prerogative.” This is surely correct as consistent with long-standing authority. The structural balance of powers in the British constitutional order is partly comprised in the legislative embodiment of the Glorious Revolution and partly in the common law around the operation of the powers of the state, particularly the executive element. Although no doubt politically resonant in some cases, these are legal issues, and it is the courts which are given the task of explicating as a matter of law, the boundaries of powers exercised by other elements of the state. Arguably, that is not novel since it is an aspect of constitutional adjudication in most constitutional traditions; but in the uncodified constitutional order, it may be there are unavoidable additional conceptual boundary questions.

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638 Thoburn v Sunderland CC [2003] QB 151, at para [63].
639 See further Chapter 3.
641 Craig, op cit., p70.
642 Att Gen v De Keyser’s Royal Hotel Ltd [1920] AC 508.
643 It is suggested that provides an answer to the critique by Mark Elliott of the majority’s reliance inter alia on the scale of constitutional change made by EU membership as part of its reasoning for precluding use of prerogative powers. See M Elliott ‘The Supreme Court’s Judgment in Miller’ [2017] CLJ 257.
Given the shape of subsequent argument and judicial analysis, it is worth noting that the Sewel convention did not feature in argument in *Miller* in the Divisional Court.⁶⁴⁴ There, the debate centred only on the use of prerogative powers for the purpose of giving notice under Article 50 of the EU Treaty. In a more developed form, of course, that came to be the main point which divided the Supreme Court. However the Sewel convention was very much part of the argument in the two Northern Irish cases, *McCord* and *Agnew*, in the High Court in Belfast, where the issues were framed by reference directly to the particular features of the Northern Ireland devolution scheme which import cross-border and cross-community institutions, and to various consent mechanisms, including the Sewel convention.⁶⁴⁵

Once all three cases were before the Supreme Court, there were in addition interventions by, amongst others, all three devolved administrations.⁶⁴⁶ Interestingly, the devolved administrations did not speak with one voice: consistent with the common stance discussed above, the Scottish and Welsh governments pursued a common line, whilst the Northern Ireland Executive adopted an argument more consistent with that adopted by the UK Government. That divergence did not go unnoticed in the argument for the Secretaries of State.⁶⁴⁷

For the Scottish Government, the Lord Advocate argued that the UK constitution required an Act of Parliament for the notification required by Art 50, and because withdrawal from the EU would alter the competence of the Scottish Parliament and Scottish Government, and hence the law within

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⁶⁴⁴ *Miller & Dos Santos v Secretary of State for Exiting the EU and others* [2016] EWHC 2768 (Admin).
⁶⁴⁶ Unusually, and in recognition of the importance and level of public interest in the proceedings, the written arguments submitted by all parties were made publicly available online by the Supreme Court, along with a number of further documents. An online archive of this material remains accessible: https://www.supremecourt.uk/news/article-50-brexit-appeal.html. It is therefore possible to examine the lines of argument which were before the court to a far greater extent than would normally be the case, even allowing for the Supreme Court’s established practice of live broadcasting of its hearings.
⁶⁴⁷ Written Case on Devolution Issues for Secretaries of State, para 1.
devolved competence, the Sewel convention was engaged. It was further argued that proposition formed a ‘constitutional requirement’ within the meaning of Article 50, with the consequence that failure to comply with the convention would mean the UK had failed to comply with Article 50. That was so even though the Scottish Government accepted that the courts in the several jurisdictions of the UK “could not decline to recognise the validity of the resulting Act of Parliament” (i.e. an Act to give notice, passed without legislative consent from the Scottish Parliament).

Like the Scottish Government, the Welsh Government eschewed the argument which was popular in political circles immediately after the referendum result in June 2016 that the devolved legislatures had a legally enforceable right to “veto Brexit” by withholding consent to legislation to trigger Art 50. In his written case, Counsel General for the Welsh Government also invoked the Sewel convention to argue that the prerogative cannot be used to trigger Article 50 because that would have resulted ‘short-circuiting’ of the Sewel convention. To avoid that outcome, it was argued, the matter was for the UK Parliament, which, by operation of the convention, was bound to engage in dialogue with the devolved legislatures before deciding whether to authorise the triggering of Article 50.

By contrast, the UK Government argued that the Sewel convention simply was not engaged because there was no legislation before the court. At a basic level, that was correct, but, it is suggested, it is not to the point, because the de quo of the case was whether legislation was required. Further it might be argued that the court was being invited to engage in constitutional as much as legal analysis. In any event, it was said, the Sewel convention is “a political convention concerning the legislative functions of

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648 Written Case for Lord Advocate, para 5.
649 Article 50(1) of the Treaty on European Union provides: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”
650 Written Case for Lord Advocate, para 86.
652 Written Case for Welsh Ministers, paras 69&70
653 Written Case on the Devolution Issues for Secretaries of State, para 27.
the Westminster Parliament. It is not, and has never been intended to be, a justiciable legal principle."^{654} The Secretaries of State took as their starting point the conventional view of the supremacy of the Westminster Parliament; that is, there is no limitation on the legislative competence of the UK Parliament, in principle or in practice. That, it was argued, is expressly set out in the devolved legislation itself: s. 28(7) of the Scotland Act 1998, s. 5(6) of the Northern Ireland Act 1998 and s. 107(5) of the Government of Wales Act 2006. Thus, the argument ran, any attempt to enforce the convention directly or indirectly would be a straightforward impingement on that sovereignty.\(^{655}\) In this context, the argument was that the Scotland Act 2016 amendment including the Sewel convention on the face of the statute merely:

recognise[d] the terms of the political convention in legislation. That does not render the application of it in any particular instance a justiciable matter for the courts. It is trite that legislation may include provisions which do not give rise to justiciable legal issues. The content of s. 28(8) is the same as that of the convention, save that its purely political nature is further emphasised by (a) the opening wording that it is “recognised”, and (b) its placement immediately after s. 28(7) which affirms the unconstrained legislative competence of the Westminster Parliament.\(^{656}\)

At the hearing before the Supreme Court, the Advocate General for Scotland submitted on behalf of the UK Government that the Sewel convention could not be considered a constitutional requirement for the purpose of Article 50.\(^{657}\) Continued supremacy of the Westminster Parliament was a central plank of his case, referring to its ‘absolute sovereignty’ and saying that section 28(8) of the Scotland Act 1998 (which was inserted by the Scotland Act 2016, and which acknowledges the Sewel Convention), is no more than ‘a self-denying ordinance expressed by a sovereign Parliament … in qualified terms’.\(^{658}\) This strikingly ultra-Diceyan

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\(^{654}\) *idem*, at para 30.

\(^{655}\) Written Case on Devolution Issues for Secretaries of State, para 32.

\(^{656}\) *idem*, para 34.

\(^{657}\) The Advocate General for Scotland is the UK Government’s Scottish law officer.

\(^{658}\) Day 2 transcript of proceedings before the Supreme Court, pp 99-100.
position was also adopted by the UK Government in argument in the legislative competence reference to the Supreme Court under section 33 of the Scotland Act in relation to the Scottish EU law continuity Bill.\footnote{Reference re UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill (neutral citation [2018] UKSC 64) 2019 SC(UKSC) 13.} That position is plainly at odds with the background to introduction of section 28(8) and the cross-party political understanding from which it arises, namely the aftermath of the 2014 independence referendum and the Smith Commission.\footnote{K. Campbell, ‘The draft Scotland Bill and limits in constitutional statutes’ U.K. Const. L. Blog (30th Jan 2015) (available at: http://ukconstitutionallaw.org).}

**Miller: the Supreme Court’s view of the Sewel convention**

In his judgment for the majority, Lord Neuberger gave the only extended discussion of the Sewel convention point in the court’s decision. Of the dissenting justices, Lord Reed indicated that he agreed with the majority on the devolution issues, and also with the position that the Sewel convention was political in nature, and not legally enforceable,\footnote{Miller, per L Reed para 242.} while Lords Hughes and Carnwath simply agreed with him without further comment on the point. Lord Neuberger elaborated on the structures of devolution, and on the nature of constitutional conventions generally.\footnote{Miller, per L Neuberger, paras 136-145.} He also situated enactment of section 28(8) via the Scotland Act 2016 in “the evolving nature of devolution.”\footnote{Miller, per L Neuberger, para 147.} However, the discussion is arguably less fine-grained than that afforded to the prerogative powers issue. Perhaps the key points are (i) the approach to construction, and (ii) the decision to locate Sewel in the generality of constitutional conventions rather than affording it some enhanced status. As to the first of these, the formula ‘it is recognised’ and ‘will not normally legislate’ were held to be indicative of a political understanding, rather than of legal effects. “We would have expected [the] UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable in the courts.”\footnote{Miller, per L Neuberger, para 148.}
As to the place of Sewel as a convention, the court took the opportunity to observe that, more generally, “judges are neither the parents nor the guardians of political conventions, they are merely observers.” While recognising the importance of the role of the Sewel convention in particular “in facilitating harmonious relationships between the UK Parliament and the devolved legislatures”, the task of “policing... its scope and the manner of its operation does not lie within the constitutional remit of the judiciary.”

From the perspective of the territorial constitution (i.e. the structural relationship between devolved and central institutions), the biggest disappointment in the aftermath of Miller is failure of the Supreme Court to engage deeply with the argument about the Sewel convention. Of course, in any given case the court must select the key arguments to be addressed when arriving at a decision. Nonetheless, given the range and depth of material put in argument, the treatment of this issue in the judgments is not of the same degree of analytical depth as the prerogative powers issue. Whether or not that reflects the relative importance of the issue compared with the prerogative powers issue, the fact remains that the status and effect of the Sewel convention was one of the central points by the time the cases reached the Supreme Court, being integral to the McCord case throughout, and being a central argument in the intervention by the Scottish and Welsh Ministers. While enactment of the convention by the Scotland Act 2016 is considered, the treatment of this is, with respect, somewhat superficial. It may well be correct that the use of ‘it is recognised’ and ‘will not normally legislate’ are indicative of a desire to bolster the political constitution. However, given the court’s endorsement of the institutional mandate of the devolved institutions in general, and the Scottish Parliament in particular, there is a failure to engage with the legislative history of these provisions. Even at the level of simply providing support for the political constitution,

665 Miller, per L Neuberger, para 146.
666 Miller, per L Neuberger, para 151.
667 Miller, per L Neuberger at paras 148-9.
668 AXA General Insurance Co Ltd v Lord Advocate 2012 SC(UKSC) 112, at p142 per L Hope para 46; at pp171-2 per L Reed paras 146-7; UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill 2019 SC(UKSC) 13, judgment of the Court, p18 para 12.
this is a disappointing omission, since there must be taken to be a political
dimension to the territorial constitution too.

Even the analysis of legislative consent which commended itself to the court
taken at face value is not without difficulty. It is evident that the Sewel
convention relates to a significant constitutional interface, operating at the
boundary of the units of the territorial constitution. Politically significant,
certainly; but also significant in a broader constitutional sense too because
boundary questions are not confined to the strictly political realm. However,
the very political character of the convention means that the boundaries are
not clearly drawn, and the limits ill-defined.670 This would be a challenging
matter in any circumstances; however, given the current debate about the
reallocation of competences as consequence of the UK’s exit from the EU,
there is a real need for further thought about the place of the convention in
the constitutional architecture. In postulating a ministerial certification
mechanism analogous to existing practice in relation to Convention
compliance, Paul Reid suggests an interesting model recognising the
political character of the convention by heightening political responsibility
where it is proposed to legislate without regard to the convention.671 Whilst
constitutionally coherent, it remains to be seen whether there is political
appetite for such a model of overt Sewel certification of proposed Bills.
Acute political controversy in the wake of the EUWA again throws the
question into sharp relief.

However the judgment does nothing to elaborate on the ‘understanding’
about the place of the convention which was inherent in the Smith
Commission process, whether as to boundaries or processes for engagement
as between the legislatures. In the context of the evolving British territorial
constitution it is open to question whether that is a sufficient response. Of
course, the challenge for the next case in which this arises is that the very
decision of the Supreme Court to treat the matter in this way renders

670 Dicey’s attempt in Ch 15 of *Law of the Constitution* to describe ‘the sanction by which
the conventions of the constitution are enforced’ is perhaps one of the less convincing
chapters.

671 P. Reid, ‘Time to Give the Sewel Convention Some (Political) Bite?’, U.K. Const. L.
Blog (26th Jan 2017) (available at https://ukconstitutionallaw.org/)
reconsideration much more difficult. More generally it might be said that the opposing positions on the effect of the Sewel convention advanced by the UK Government on one side, and the Scottish and Welsh Governments on the other, disclose significantly divergent conceptions of the current British constitutional landscape. As will be evident, the UK Government argument was founded upon a very traditional understanding of parliamentary sovereignty, and on that analysis, the Sewel convention can be nothing more than a political consideration, indeed in oral argument the UK law officers came close to arguing that the Sewel convention was a matter of executive convenience, rather than comity between legislatures within the territorial constitution.672 It might be argued that there is no true comity when three legislatures are creations of statutes of the fourth. However, that could equally be argued to place no weight on the political dimension of inter-institutional dynamics. That position appears to be held irrespective of section 28(8) of the Scotland Act, enacting the Sewel convention. On this analysis, section 28(8) is devoid of legal effect, and is at best merely a political statement on the face of a legislative instrument. In the British legislative tradition, this is somewhat surprising. It is generally expected that the function of legislation is to state the law, so that it is juridically unattractive, though increasingly common in British (and Scottish) Parliamentary practice, for legislative provisions to be enacted which are to have no legal effect.673

By contrast, the written arguments for the Scottish and Welsh Ministers are reflective of a more dynamic view of the developing territorial constitution, and of its effects on more traditional aspects of the British constitution. As discussed above, the devolved institutions are subject to a more explicitly legal constitutionalist model of control, and it may be that also informed elements of the arguments advanced. It might be argued that the enactment of apparently entrenching provisions by the Scotland Act 2016 are consistent with an evolving constitution, in the sense of solidifying a more

developed (political) constitutional understanding. These are limitations which are based not only on the political fact of the ‘settled will’ of the Scottish people about the permanence of the devolved institutions, but also on what are at least manner and form limits on the UK Parliament’s freedom of action. In this context, the latter are to be found in sections 1 and 2 of the Scotland Act 2016. To that may be added the fact that members of the Supreme Court have even entertained the notion that Parliamentary supremacy may no longer be absolute. There are also constitutional precedents from another age; thus by the Statute of Westminster 1931, the Imperial Parliament undertook not to legislate for what were then the self-governing Dominions of the British Empire without the consent of the parliaments of those Dominions. That expedient facilitated self-rule and, ultimately, independence. Of course Scotland is not an overseas Dominion, but an integral part of the UK (as indeed are the other devolved administrations). Arguably, that makes the statutory embodiment of Parliamentary self-restraint all the more forceful, and the UK government position in argument less coherent and convincing.

The European Union (Withdrawal) Act 2018

Consideration of the full effects on the domestic constitutional order of the European Union (Withdrawal) Act 2018 (hereafter “EUWA”) before the final outcome of the UK-EU negotiations is necessarily tentative. However, a number of points emerge with a degree of clarity. First, and most obviously, the position of EU law within the UK domestic legal order is changed radically, if not necessarily immediately. That follows from the primary legal purpose of the Act, namely to provide a firm foundation in domestic law for legal structures currently owing their existence to the UK’s EU obligations, and, on the internal theory of EU law, to the EU legal order, but in a new context where the UK is no longer an EU member state and in which the European Communities Act no longer has effect. In other words, its purpose is to ensure there is no risk of legislation ceasing to have effect by default due to its juridical underpinning being removed by the UK’s exit,

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675 R (Jackson) v Attorney General ([2015] UKHL 56) [2016] 1AC 262; Moohan ([2014] UKSC 67) 2015 SC(UKSC) 1, per L Hodges para 35.
and repeal of the ECA. To the extent that retained EU law is not fully assimilated by domestic re-enactment (i.e. owing its continued existence solely to EUWA), the normative history of the ECA may remain of ongoing interest.

Shorn of its political baggage (namely the somewhat misleading rhetoric of the ‘Great Repeal Bill’, and the portentous framing of the first section providing for repeal of the ECA), the principal purpose of the EUWA is fundamentally legal, namely providing a new juridical basis for rights and obligations currently derived from EU law to facilitate legal continuity post-exit. While that purpose is relatively easy to describe, the structure of the Act is rather more complex, and has already attracted a substantial and diverse literature.  

There is at least one further complication in the fact that the EUWA will not be the final word in this. In addition to a number of sectoral continuity and enabling Bills, there has already been substantial amendment by the European Union (Withdrawal Agreement) Act 2020, and there will be a separate Bill to give effect to whatever final status agreement is reached between the UK and the EU27.

At a deeper, constitutional, level the EUWA is significant for several reasons:

- The sheer number of rights, obligations and rules for which it will become the juridical foundation in domestic law.
- The very fact that it represents a wholesale shift in the juridical basis for the existence and validity of those rights and obligations.
- The significance of the Act as what has been described in earlier chapters as a constitutional component (i.e. a core building block of the uncodified constitution).

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677 Legislating for the United Kingdom’s withdrawal from the European Union HMSO 2017 Cm 9446, esp.paras 1.21 & 1.22. This realisation has come late to political, as opposed to legal, discourse and arguably was one of the precipitants of the 2019 general election.
- The fact that the Act is plainly constitutional in character, but it can be argued goes beyond the description of ‘constitutional statute’ both as originally formulated in Thoburn, and in Feldman’s reformulation of the concept.
- The effects of the Act on the UK’s territorial constitution (in the sense of the institutional rearrangement consequent on devolution to Scotland, Wales and Northern Ireland).

It is convenient to explore these in turn.

**Scale of legislation affected**

Estimates for the number of instruments which come within the scope of the EUWA vary widely, but on any view, the number is large, and the range of areas covered is extremely broad. At a practical level alone, that is a matter of note, given the number of areas of substantive law involved. To that may be added the perhaps startling fact of the wholesale shift in juridical basis for the continuing validity of rights and obligations.

Amendment, repeal and re-enactment are of course common tools for altering existing statutes, and provisions originally found in the common law are sometimes subsequently embodied in statute. Statutory restatement of existing principle as a source of normativity is also found in legislation having obvious constitutional effect, for example in those enactments placing a statutory obligation on specified members of the executive to continue to secure judicial independence. However, the EUWA goes rather further. Part 1 of the Act creates a complex analytical framework for EU-derived legislation and case-law, and makes provision about its juridical character post-exit. Key concepts here are:

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678 The White Paper preceding the EU (Withdrawal) Bill quoted EUR-lex figures of 12,000 EU regulations, and House of Commons Library figures indicating around 7900 UK Statutory Instruments implementing EU obligations, and further unquantified number made by devolved administrations. *Legislating for the United Kingdom’s withdrawal from the European Union* HMSO 2017 Cm 9446, para 2.6.

679 For example, the working list in excess of 130 topics which forms the subject matter of exchanges between devolved and central government in the context of devolution and the UK exit.

680 For example, the Sale of Goods Act 1893 contained a statutory codification of many (English) common law rules.

681 Constitutional Reform Act 2005, s 3; Courts and Judiciary (Scotland) Act 2008, s 1.
• ‘EU-derived domestic legislation’ - legislation made under the ECA, but not including that Act;682

• ‘direct EU legislation’ - EU Regulations, EU Decisions, or EU tertiary legislation (essentially EU secondary legislation made pursuant to a Regulation);683

• ‘retained EU law’ - a catch-all for anything which continues to be part of domestic law by virtue of these saving provisions in Part 1;684

• ‘retained general principles of EU law’ - general principles of EU law, as they have effect in EU law immediately before the end of the transition period.685

Those legal structures all currently form part of domestic law on a particular basis, namely EU membership, and, during the transition period, the Withdrawal Agreement. In terms of the EUWA, after final exit, they will continue to have effect on a completely different basis, namely transmutation under authority of EUWA, so that these will have a self-standing domestic source of legal authority.686

There is also provision in the Act relating to case-law about EU law and EU-derived law. Under the rubric ‘retained EU case-law’, express saving is made for existing case-law, both EU and domestic.687 As might be expected, there is express provision that post-exit CJEU case-law is not binding in domestic law,688 but it may nonetheless be considered, so far as relevant.689 Rather more striking is section 6(4), which provides that the UK Supreme Court, and the High Court of Justiciary Appeal Court, is not bound by retained EU case-law, and also that these courts must apply the same test as would otherwise apply in deciding whether to depart from their own case-law.690 That may be thought a radical departure, in the sense the two highest appeal courts are expressly freed from the constraints of stare decisis in this

682 EUWA, s 2(2).
683 EUWA, s 3(2).
684 EUWA, s 6(7).
685 idem.
686 EUWA, ss 2, 3 & 6.
687 EUWA, s 6(7).
688 EUWA, s 6(1).
689 EUWA, s 6(2).
690 EUWA, s6(5).
respect. On the other hand, the rule of law requires that factually analogous cases are dealt with in the same way if the legal substructure is the same. It follows that unless the underlying retained law is altered, as it may very well be over time, from a legal normative perspective it is not obvious why the courts should decide cases differently. In a common law system, the validity of particular types of case law as a source of authority is primarily a matter for the courts, and those provisions of the EUWA specifically dealing with prior case law relating to EU law are therefore best understood as altering the hierarchy of recognition, rather than changing legal validity as such. Hierarchy of recognition is here being used in the sense of the sources to which the courts can properly have regard, and accordingly the weight to be given to them.

EU law is the original source of certain obligations and rights transposed to the national setting, and a central part of the UK Supreme Court decision in *Miller* was articulation of an analysis that EU-derived law (in a broad sense) has effect domestically through the conduit of the European Communities Act 1972. As a matter of national constitutional law, questions about the character of the relationship between national law and EU law are for the UKSC, rather than the CJEU to determine. In that sense, the EUWA is a necessary and appropriate solution for the future of these obligations.

*New juridical basis*

After exit day, EU-derived law will have effect by virtue of entirely domestic authority, namely the EUWA. Elements of the EU normative order will nonetheless continue to inform the interpretation, and, possibly, content of those domestic rules. That is a necessary consequence of preservation within the *acquis* of retained law of the existing body of case-law, both domestic and Luxemburgish, concerning EU-derived legal provisions. Legal stability is an aspect of the rule of law requirement for consistency of decision making in accordance with established legal norms. As such, the

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691 *R (HS2 Action Alliance Ltd) v Sec of State for Transport ([2014] UKSC 3) [2014] 1WLR 324*, per L Reed para 79.
692 2018 Act, s 6(7).
requirement for legal stability dictates that such domesticated provisions will be interpreted consistently with this body of case-law.

The EUWA as a constitutional component
Counterintuitively, at least when measured by ‘Great Repeal’ rhetoric, after the transition period ends, the EUWA will then become the conduit into domestic law for EU-derived norms, though it will be a conduit of a very different character from the ECA. The post-exit domestic legal order will contain a substantial body of rules whose ultimate source of authority is the EUWA; and notwithstanding they were not originally enacted in exercise of powers which it contains, their authority as legal norms will nevertheless be referable to the Act. Arguably that is to describe a shorter juridical connection between norm and ultimate authority than that of EU law given domestic effect via the standing authority in the ECA. In this way, the EUWA is a significant constitutional component as constituting the normative basis of many chapters of law, and in the manner by which it confers that juridical authority. In that sense as much as in the terms of section 1 repealing the European Communities Act, the EUWA is plainly constitutional in character.

EUWA as a constitutional statute
Supremacy and sovereignty are not synonyms, though, as discussed in earlier chapters, they have both been used in discourse about the essential character of Parliament as the ultimate source of law in the British constitution. In its political aspect, the EUWA is directed to reasserting parliamentary sovereignty in the sense it will provide a clear domestic source of ultimate legal authority for the continuing domesticated acquis. No doubt that is the true rationale for enactment of section 6(4) of the Act, for as we have seen, there is no legal normative necessity for it. In that connection too, the assertion of parliamentary sovereignty in section 38 of the European Union (Withdrawal Agreement) Act 2020 is little more than political sloganising embodied in statute. EU law ascribes a particular constitutional purpose to supremacy, indeed it is arguably the constitutional norm. That is to say, the supremacy of EU law over national law of member
states, at least to the extent that it does not conflict with fundamental constitutional norms/values of member states’ national constitutions. As we have seen, in the British constitution, that principle has effect via the ECA, during the period of British membership and the transitional period after exit.

Of course, for some spectators, sovereignty has a more political valence, but as Loughlin has shown, that is better understood as an attribute of the state as an entity. Nevertheless, in the debate about the UK’s continued membership of the EU, that notion of sovereignty as a political attribute of Parliament, rather than a description of the constitutional normative hierarchy has exercised considerable force on the Leave side of the argument. It is all the more striking, then, that the notion of supremacy of EU law is explicitly given limited continuing effect by the EUWA. While the EUWA repeals the ECA, and thus the conduit for EU law supremacy, it also provides for its limited continuation. Thus section 5(1) provides:

The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.

However, subsections (2) and (3) go on to provide:

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day if the application of the principle is consistent with the intention of the modification.

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693 The German Constitutional Court in particular has made clear that EU law applies subject to fundamental norms of the German Constitution. See eg Brunner 89 BverfGE 155 [1994] 1 CMLR 57, and the more recent decision about the ECB’s Eurozone stabilisation measures: Joined Cases 2BvR 859/15, 1651/15, 2006/15 & 980/16 5 May 2020. In the UK, the Supreme Court has affirmed that defining boundaries between norms of EU law and national constitutional law are matters for national constitutional courts: HS2 Ltd v Secretary of State for Transport cit supra, per L Reed para 79; Pham v Secretary of State for Home Dept. (2015) UKSC 19 [2015] 1 WLR 1591, per L Mance para 80. There is an unresolved tension between these decisions and the long-established train of authority from the Court of Justice that the validity of EU measures cannot be affected by arguments that the measure runs counter to fundamental constitutional rights in a particular Member State; cf. International Handelgesellschaft C11/70 [1970] ECR 1125, at 1134.

694 M Loughlin The Idea of Public Law (OUP 2003), Ch 5.
Mark Elliott and Stephen Tierney rightly call attention to the oddity of this continued use of an EU law concept in the post-exit legal landscape.\textsuperscript{695}

It seems plausible that the references to supremacy in section 5 were made for three reasons. First, because the notion of supremacy of EU law is well-established juridical concept with a known meaning, and mode of application.\textsuperscript{696} Secondly, so far as pre-exit measures are concerned, it was recognised that the notion needs to be preserved to maintain the integrity of the retained acquis. Further, the use of the nomenclature recognises both the EU origin, and the fact that EU principles will be the measure of the effect of particular legal instruments, even though those instruments will all have acquired a domesticated source of ultimate authority, in the form of the EUWA.

A further layer is added by the European Union (Withdrawal Agreement) Act 2020, which makes provision about the implementation of the Withdrawal Agreement between the UK and the EU, and amends the EUWA in a number of important respects. One of the key purposes of the 2020 Act is to continue the effect of EU law within the domestic legal order for at least the duration of the transition period.\textsuperscript{697} That is intended to give effect to the undertaking in Article 127 of the Withdrawal Agreement that EU law “shall be applicable to and in the United Kingdom during the transition period”. The politically-resonant repeal of the ECA is masked by the retention of its provisions as ‘retained EU law’ for the duration of the transitional period.\textsuperscript{698}

Further specific provision is made for general implementation of the Withdrawal Agreement by section 5, which adds a new section 7A to the

\textsuperscript{696} This doctrine is a direct consequence of the line of Court of Justice cases beginning with C26/62 Van Gend en Loos [1963] ECR 1; and C6/64 Costa v ENEL [1964] ECR 585.
\textsuperscript{697} Possibly beyond too, since the Withdrawal Agreement allows for an extension of the transition period for up to two years (Art. 132; clause 30 of the Bill).
EUWA. In its structure and wording, that section is strikingly similar to section 2 ECA.

7A General implementation of remainder of withdrawal agreement
(1) Subsection (2) applies to—
  (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
  (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
  as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
  (a) recognised and available in domestic law, and
  (b) enforced, allowed and followed accordingly.
(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).
(4) This section does not apply in relation to Part 4 of the withdrawal agreement so far as section 2(1) of the European Communities Act 1972 applies in relation to that Part.

Section 38 purports to subject the operation of section 7A (amongst others) to an express assertion of the sovereignty of the UK Parliament, notably undefined for this purpose. However, notwithstanding apparent prioritisation in subsection (2), it is not evident that this has any practical effect in terms of legal status of the obligations flowing from the Withdrawal Agreement in terms of domestic law. Mike Gordon rightly suggests “It may therefore be an affirmation of parliamentary sovereignty which fails to satisfy its primary audience – Parliament may well retain its legal sovereignty, despite having exercised that sovereignty in such a way as to give enhanced domestic status to rules contained in a treaty agreed with the EU.” 699

Paul Craig has suggested that since the essential purpose of the EUWA is to domesticate EU law norms, there is no need to accord a sui generis status to norms currently deriving validity from EU law.700 Though Craig

subsequently modified his view somewhat, the point is worth considering further because it has an intuitive attractiveness in the simplicity which it implies by assimilating those rules to existing domestic categories of norms (primary and secondary legislation). That model would be plausible if all of the provisions were demonstrably of the same character as domestic primary and secondary legislation. However it is reasonably clear that the structural differences between Regulations, Directives and Decisions, as well as the possible range of forms of Directive make this conceptually difficult.

In addition to the significant effect on the structure of the territorial constitution considered below, it is also necessary to reflect on the manner in which the EUWA informs the debate about ‘constitutional statutes’. On the face of it, the EUWA goes beyond the characterisation of such statutes given by Laws LJ in Thoburn, because it goes beyond “conditioning the legal relationship between citizen and state in some general overarching manner” and rather seeks to provide a new normative substructure for existing legal norms. However, it is suggested that the EUWA is rather better analysed with Feldman’s somewhat broader characterisation in mind. In particular, Feldman’s observation that some constitutional statutes are not concerned with fundamental rights seems particularly apt here. In particular, the primary focus of the EUWA is not with fundamental rights as such, rather with structures and with juridical authority for rights and obligations which are important but arguably not fundamental. On the other hand, it might be said that, at a very high level, the Act does condition legal relations between the state and citizens, because the juridical basis for certain rights and obligations will change, and the overall effect of the UK’s exit meets Laws’s second strand because there is diminution in fundamental constitutional rights. That diminution may be demonstrated in a number of ways:

- loss of the common interpretative mechanism represented by the CJEU
- deletion of the EU Charter and the rights which it contains - overlapping the ECHR, and, in some respects going further

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- loss of a legal constitutionalist framework

Taken in the round, the EUWA illustrates the richness of the idea of characterising statutes as constitutional, as well as affirming the definitional challenges which Feldman identifies, and which was discussed in chapter 3.

*The EUWA and the territorial constitution of the UK*

Further, the relationship between the central institutions of the British state, especially the executive, and devolved institutions will be altered. This has been most immediately manifested in political friction about the post-exit destination of competences currently vested in the EU, but there are equally significant effects at a deeper constitutional level. In part, this reflects what might be characterised as a gap or a missing link in the formal devolution architecture. There is no statutory inter-governmental machinery contained in the Scots and Welsh devolution schemes, while the machinery found in the Northern Ireland scheme is mainly directed towards facilitating institutional engagement north and south of the Irish border, where the cross-border dimension (both east-west and north-south) is an integral part of the Belfast Agreement.

All three devolution structures involve interaction with areas of EU law and EU competence, and that interaction is complex. As the devolution settlements are asymmetrical, a different range of powers is relevant to Scotland, Wales and Northern Ireland. While agriculture, which is common to all three devolved nations, and in Scotland also fisheries, would be the most high-profile, there are other significant policy areas too.

In an exercise first published in March 2018, and updated in April 2019, the UK government attempted to identify those areas of EU law that intersect with devolved competence in each devolved administration. The largest number are relate to Northern Ireland, closely followed by Scotland. Less

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703 See e.g. R Rawlings *Brexit and the Territorial Constitution Devolution, Reregulation and Inter-governmental Relations* (The Constitution Society 2017).
than half of the areas intersect with devolved competence in Wales. This provisional analysis also set out an assessment of the areas where the UK government considered there was likely to be a need for continued common rules or ways of working. In April 2019, these policy areas were broken down as follows:

- 63 policy areas where no further action was required;
- 78 policy areas where non-legislative common frameworks might be required; and
- 21 policy areas that were subject to more detailed discussion to explore whether legislative common framework arrangements might be required.

In that final group of 21, it is likely that further detailed discussion will be required and future arrangements may include a mixture of reserved and devolved competence. Economically-significant sectors which also have high political valence in this group include: food safety and labelling, agricultural support, fisheries management, mutual recognition of professional qualifications, and activities falling within the Services Directive. Some aspects, particularly concerning agriculture, are controversial and involve ongoing discussion with the devolved administrations. Both Scottish and Welsh governments have agreed that common frameworks will continue to be required in some areas. The principles agreed by the Joint Ministerial Committee (EU Negotiations) in October 2017 are relevant in this context.

While the UK was a member of the EU, some areas of devolved competence fell within EU policy and legislative competence. That is one of the reasons why the devolution structures include limits on executive and legislative powers by reference to EU law. In that sense, the UK’s internal market is, in part, facilitated by EU regulation. As the Withdrawal Agreement between the UK and the EU requires the UK to retain the acquis until the end of to the transition period, that remains the case until 31st December 2020. Thereafter, the question of regulating the UK internal market becomes a

706 The communique is available online:
domestic competence, though it is likely that there will remain an overlay of international standards in some areas. There will therefore be a question of managing boundaries between central and devolved authorities. That is one of the matters the common legislative frameworks are intended to address. It is likely operational Whitehall departments will make the legislative provision that they consider appropriate in consequence of, or in anticipation of, the UK’s withdrawal from the EU. Appropriateness is the test in the EUWA, despite a lively debate about whether necessity would be a more apt test.\(^707\) That is not really counter-balanced by any effective system for coordinating delegated law making on the scale which can be anticipated as being necessary post-exit. Alan Page and others have proposed creation of a high-level committee responsible for the co-ordination of control of the programme of legislation, and on which the devolved administrations would be represented, and which would have oversight of central departments’ legislative plans for what exactly would be done in the exercise of the powers.\(^708\) It was envisaged such a committee would have oversight of the division of labour between the UK and devolved administrations. Such a system would provide some opportunity for an effective check on the exercise of legislative powers contained in the EUWA. Such a body would also act as a focal point for parliamentary scrutiny, not only of individual statutory instruments (or more realistically, groups of instruments) but how the whole process was working, taking a considered view about whether the level of parliamentary scrutiny was appropriate, and whether a particular proposal was an appropriate use of ministerial law-making power.

That proposal has not attracted wholehearted support from the UK government. Nevertheless, there is a parliamentary sifting mechanism included in Schedule 7, paragraph 3 of EUWA. That provides for sifting where a Minister proposes that a statutory instrument be made subject to the annulment procedure. A committee of each House is to consider that proposal and make a recommendation; if the Minister disagrees and

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\(^707\) The point of distinction is the extent to which a decision rooted in appropriateness can be the subject of review, given the inherently subjective nature of such a decision, whereas necessity is rather more objective, and a threshold with which courts are quite familiar in judicial review proceedings.

proposes to insist in using the annulment procedure for the instrument, he or
she must make a statement giving reasons for the decision. While the
committee power is to make a recommendation as to the appropriate
procedure for enacting the statutory instrument, that is not binding on the
Minister as a matter of law.\footnote{EUWA, Schd 7 para 3(4).} However, the clear intent is to create a
political consequence for Ministers who choose to use the annulment
procedure in the face of a parliamentary committee expressing a different
view. The constitutional sensitivity of this is evident from exchanges
between the Minister of State at the Department for Exiting the EU and the
House of Commons Procedure Committee about the timing and manner of
such statements.\footnote{See further M Elliott ‘Executive law-making and Brexit: Are Parliament’s hard-won
safeguards being undermined?’ Public Law for Everyone blog 20 Sept 2018; M Elliott
‘Parliamentary control over Brexit-related delegated legislation: An important Government
climbdown’ Public Law for Everyone blog 15 Oct 2018.} At best, then, in this respect the EUWA provides a
useful support to the political dimension of the constitution.

These institutional tensions also emerged quite sharply in the devolved
sphere within a short period of publication of the European Union
(Withdrawal) Bill, with the Scottish and Welsh governments taking a
common and coordinated position.\footnote{Joint Statement by Nicola Sturgeon and Carwyn Jones 13 July 2017; see
https://news.gov.scot/news/eu-withdrawal-bill.} From a political perspective, this was
an interesting development, since one administration comprises a party
favouring Scottish independence, the other administration being led by the
Welsh part of a major pro-Union party. From the constitutional perspective,
this increasingly concrete sense of the territorial constitution and the
devolved actors asserting a political and institutional voice clearly distinct
from the central state is equally striking. For that reason, it is probably no
coincidence that the Scottish and Welsh administrations were able to find
common ground in defence of the structure of devolution. That common
position was maintained during negotiations with the UK Government about
proposals for amendment of the Withdrawal Bill, and while the UK and
Welsh governments came to terms about the mode of operation of the UK
legislation,\footnote{https://www.bbc.co.uk/news/uk-wales-politics-43880270.} the Scottish and Welsh governments maintained a common
stance on the broader question of the conduct of negotiations with the EU was maintained.\textsuperscript{713}

While this has been recognised from the outset of devolution, it has received relatively little attention until the onset of Brexit, perhaps because the informal mechanisms of inter-governmental agreements and regular meetings at official level have been relatively effective at management on an administrative level. Mention has already been made of the limitations of the Joint Ministerial Committee structure, and the absence of any other more formal constitutional architecture for managing relations between the institutions of the centre and the devolved administrations. However, the Joint Ministerial Committee (JMC) has not been an effective tool for policy coordination and boundary management, arguably because many Whitehall departments have not fully adapted to structural change in the administrative state, perhaps on account of the long-standing centralising tendency in the development of the administrative state.\textsuperscript{714} While some attempts have been made to use the JMC structure as a channel to resolve the problems which both the initial and final forms of the EUWA present, that has enjoyed mixed success at best.\textsuperscript{715}

\textit{The Continuity Bill litigation}

In its basic intent, the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill (“the Continuity Bill”) occupies some of the same ground as the EUWA, though both were bills at time the battle was joined.\textsuperscript{716} It will be recalled that at the time of publication of the European Union (Withdrawal) Bill (“the Withdrawal Bill”), the Scottish and Welsh governments took a common position against the provisions so far as relating to reallocation of EU powers falling within devolved competence.

\textsuperscript{713} https://www.bbc.co.uk/news/uk-wales-politics-44567487.
\textsuperscript{714} Commons Public Administration & Constitutional Affairs Committee 8\textsuperscript{th} Report \textit{Devolution and Exiting the EU} (2018) HC 1485, Ch. 8. A Trench ‘Whitehall and the Process of Legislating after Devolution’ in R Hazell & R Rawlings (eds) \textit{Devolution, Law Making and the Constitution} (Input Academic 2005) Ch. 6
Somewhat overshadowed by the *Wightman* saga,\(^{717}\) and the unscheduled Conservative leadership demarche, the UKSC decision in the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill compatibility reference was handed down in the same week in December 2018.\(^{718}\) It is suggested this decision contains more of lasting constitutional significance than *Wightman*, and perhaps also than *Miller*. This lies both in the court’s approach to Parliamentary sovereignty, and in the likely consequences for the territorial constitution/devolution settlement in the aftermath of Brexit.

Like the Withdrawal Bill, the Continuity Bill made provision for the domestication of EU law and the retention of existing EU-derived domestic law, and for the same reason, namely to ensure a high degree of continuity when the UK leaves the EU. The question in the reference to the Supreme Court was whether the Scottish Parliament acted within its legislative competence in enacting the Continuity Bill. The UK Government mounted a bold argument to the effect that the entirety of the Bill was invalid because it was outside the Scottish Parliament’s legislative competence because, it was said, the Bill related to international relations, which are reserved matters under Schedule 5 to the Scotland Act. The Supreme Court rejected that argument because the Continuity Bill “simply regulates the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters, which will result from the withdrawal from the EU already authorised by the UK Parliament”. Of more lasting interest is the reference to the status of the Scottish Parliament, and the approach to the Sewel convention and Parliamentary sovereignty.

**Status of the Scottish Parliament**

\(^{717}\) *Wightman v Secretary of State for Exiting the EU* 2019 SC 111 (neutral citation [2018]) CSIH 62); and before the CJEU C621/18, decision of the Full Court on 10 Dec 2018.

In light of the court’s subsequent discussion of what appears to be a multifaceted version of the legislative supremacy of the UK Parliament, it is of note that the Court’s analysis begins with an encapsulation of the character of the Scottish Parliament which elaborates on Lord Hope’s observations in AXA discussed in an earlier chapter. These observations are of note because they serve as a reprise of the plenary nature of the legislative power of the Scottish Parliament. Likewise the reader is reminded of the existence of limits on that competence prescribed by law are characteristic of the devolution scheme, and also of constitutional orders not characterised by parliamentary sovereignty. In other words, the court here gives an implicit normalisation of both the political legitimacy of legislative action by the Scottish Parliament, and of locating its competence within legal constitutionalism and with it, review of legislative competence by the court. That perhaps also provides context for the court having little difficulty in dismissing the rather surprising frontal attack by UK law officers on the Continuity Bill as whole on the basis of its being “contrary to the constitutional framework underpinning the devolution settlement”.\textsuperscript{719} In that respect, it is noteworthy that the court took care to confirm that section 33 of the Scotland Act provides exhaustive bases for assessing legislative competence in references of this kind.\textsuperscript{720}

Of wider application, the court also articulated an approach to interpretation:

The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.\textsuperscript{721}

\textsuperscript{719} Continuity Bill Reference, judgment of the Court para 23, quoting the first question referred.
\textsuperscript{720} Idem, Para 26.
\textsuperscript{721} Idem, Para 12.
That formulation is consistent with the interpretative approach articulated by the Supreme Court in the Scots devolution case-law discussed in Chapter 4, and affirms the move away from an overly expansive view.

Intergovernmental relations

As we saw in Chapter 4, it is now trite to notice that the arrangements for intergovernmental relations are the most opaque part of devolution within the UK. While the Northern Ireland Act does contain some provisions about this, these are largely directed to the north-south axis, rather than the east-west axis. By contrast, there is little formal provision in the Scots or Welsh schemes. Of course the practical lubricant for minimising many boundary problems is the Sewel convention, whose treatment by the UKSC in Miller is discussed above. In its judgment in the Compatibility Reference, the court notes, under reference to Lord Hope’s judgment in Imperial Tobacco v Lord Advocate:

> disputes between the Scottish Parliament and the UK Parliament as to legislative competence have been avoided, partly by the use of legislative consent motions passed by the Scottish Parliament and partly by the care which officials within the Scottish Parliament have taken to ensure that measures which the Scottish Parliament passes are within competence.\(^{722}\)

In its written argument in Miller v Secretary of State for Exiting the EU, the Scottish Government set out a table of legislative consent motions since the inception of the Scottish Parliament, and at the point when that case was argued in December 2016, there were 164 items listed.\(^{723}\) From this the operational importance of the convention can be clearly seen.

In May 2018, the Scottish Parliament voted 93-30 to withhold consent to the Withdrawal Bill. As is well known, the UK Government’s decision to press on with the bill was the first occasion on which legislation has been passed in the face of such a refusal of consent, and thus a politically significant moment. It might reasonably have been expected that the convention would feature in this case, for forensic reasons as much as any other. Against all of

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722 Imperial Tobacco v Lord Advocate [2012] UKSC 61, per L Hope para 20.
723 Available online at https://www2.gov.scot/Resource/0051/00510602.pdf
that background, it is interesting to note that the court simply referred to the convention, and affirmed its treatment of the topic in *Miller*. On one view, an opportunity for more extended exploration of the issues surrounding the convention and its statutory expression was passed up. Of course, the convention was not as central an issue as it was in *Miller*, at least in its Northern Ireland expression, and the court’s approach can be explained on that basis.

Politically, of course, legislating in the absence of consent has been extremely controversial. On one view, that is the convention operating as intended. In other words, the intent of sections 28(7) and 28(8) of the Scotland Act is to preserve the power of the UK Parliament to legislate in relation to devolved matters, but with an attendant political cost where legislative consent is withheld by the Scottish Parliament. That is an affirmation of the political constitution in operation. It might also be argued the extended discussions at both official and ministerial level between the UK and devolved governments about the shape and operation of the Withdrawal Bill is also an instance of the Sewel convention in operation, and in particular the important changes made to what are now sections 11 and 12 and schedule 2 to the EUWA. As is evident from *Miller* and *Imperial Tobacco*, such discussions are routinely used to establish a via media between the devolved and central executive institutions, and those discussions have continued even while the final shape of the Withdrawal Bill was being debated in the UK Parliament and beyond. Eventually, the Welsh Ministers came to be satisfied about the amended shape of the bill, so that consent was forthcoming. In that sense, the convention has operated as intended.

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724 Continuity Bill Reference, paras 18 & 19
726 https://www.bbc.co.uk/news/uk-scotland-scotland-politics-43584252
On the other hand, it might equally be said that the sequence of events points sharply to the limitations, if not outright gaps, in the institutional architecture. Section 28(8) was added to the Scotland Act as a result of the Smith Commission following the 2014 Scottish independence referendum. Post Miller, we know that it has no justiciable character, but its political valence is now unclear. That remains a constitutional conundrum which will require to be resolved, and the more so because of the position adopted by the UK law officers in argument in both Miller and the Continuity Bill reference that the Sewel convention is an executive convenience, rather than a matter of legislative comity essential to the notion of devolution. Of course, it might also be thought that the circumstances of this particular exercise of legislative power by the UK Parliament was not foreseen at the time of devolution, and that the nature of the issues arising in the wake of the Withdrawal Bill were (and are) so fundamental, that a more exacting threshold ought to apply. However, despite the undoubted effect of the EUWA on the structure of devolution, there is nothing in the language of section 28 of the Scotland Act to mandate the notion of such a higher standard, nor, it seems, was that the focus of parties’ argument before the Supreme Court.

Parliamentary supremacy/sovereignty

If the Sewel convention was the dog which barked faintly, if at all, in the court’s judgment, the legislative supremacy of the UK Parliament was the dog which barked loudly, if not always distinctly.

Here it is necessary first to set the context. Section 17 of the Continuity Bill contained a requirement for consent of the Scottish Ministers to UK subordinate legislation containing a “devolved provision” which modifies or otherwise affects the operation of - (i) retained (devolved) EU law, or (ii) anything that would be, on or after exit day, retained (devolved) EU law.

For this purpose, a ‘devolved provision’ means a “provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.” In other words, the
Scottish Ministers’ consent would be an essential step for the effectiveness of such UK subordinate legislation, at least in its application to Scotland.

Section 17 was the only provision which the court found to be outwith the legislative competence of the Scottish Parliament from the outset. In its discussion of this, the court distinguished devolution from a federal model. Paragraph 52 contains the key conclusion: the court there held that law-making by the UK Parliament which was dependent on consent of Scottish Ministers “would be inconsistent with the recognition by section 28(7) of the Scotland Act of its [the UK Parliament’s] unqualified legislative power” - including in relation to matters which are devolved. This was on the basis that the substantive effect was to limit an aspect of the UK Parliament’s capacity to legislate for Scotland, by including the conditionality of Scottish Ministers’ consent. For that reason, section 17 was outwith the legislative competence of the Scottish Parliament. It might be thought, that was simply a reaffirmation of parliamentary legislative supremacy, but the court went on to hold in terms that section 17 did not impinge on the sovereignty of Parliament. That was on the basis that the section did not purport to alter “the fundamental constitutional principle that the Crown in Parliament is the ultimate source of of legal authority nor would it have that effect”. Now it is true that this observation was made in the context of a different part of the UK law officers’ argument, namely whether section 17 impinged on the fact that the UK Parliament is a reserved matter under the devolution scheme, that is, the devolved legislature may not legislate about it.

Mike Gordon has suggested the court’s reasoning in these passages can be reconciled only if a ‘manner and form’ understanding of parliamentary supremacy underlies the court’s approach. He suggests that implicit in paragraph 64 is a conclusion that “legislative consent conditions aren’t per se incompatible with parliamentary sovereignty”, but that the formulation of

728 Continuity Bill Reference, judgment of the Court para 41.
729 Idem, para 63.
730 Idem, para 63, emphasis added. The court went on to observe “Parliament would remain sovereign even if section 17 became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.”
section 28 of the Scotland Act precludes this in legislation of the Scottish Parliament.\textsuperscript{731} While that is a plausible reading, it is also possible that the court is taking a step towards articulating a broader conception of parliamentary sovereignty consistent with modern constitutional practice. The notion of ‘parliamentary sovereignty’ is frequently invoked without elaboration in legal as well as political discourse, something Gordon acknowledges in *Parliamentary Sovereignty in the UK Constitution*.\textsuperscript{732} It is also a feature of Supreme Court case-law over the last several years that fundamental constitutional rights and principles have been reassessed through the prism of the common law, rather than Convention or EU law, for example in *AXA*, *HS2*, *Kennedy v Charity Commission*, *Pham v SSHD* and *Unison*.\textsuperscript{733} Until now, the court has perhaps not had to explore in detail what we mean by ‘parliamentary sovereignty’ in the current age, and it may be that the building blocks for doing so are in the process of being fashioned. As we saw in Chapter 1, conceiving of issues in specifically constitutional terms is a relatively recent phenomenon so far as the courts are concerned. In the absence of a codified order, judges require to adapt common law principles of legality and tools of construction to carry out the function of adjudicating on disputes which inevitably follow structural re-ordering. That process is likely to bring existing components into sharper focus, and perhaps also redefine them by their changed relationship to both new and existing components. It is sometimes reflected in judicial reasoning, thus in the dicta quoted above we have an affirmation of the traditional normative order (paragraph 63), and an attempt to fashion a more limited, statute-based, operationalisation of it (paragraph 52).

**Conclusions**

Perhaps there is a broader reconceptualisation too, since another dimension which requires further elaboration is the full consequence of calling into

\textsuperscript{731} https://twitter.com/mjg_constitlaw/status/1073199136957231106
\textsuperscript{732} M Gordon *Parliamentary Sovereignty in the UK Constitution* (Hart 2017), Preface & Ch. 1.
existence of concurrent legislative competence in the devolved legislatures. It may be that that does not affect the normative dimension of the UK Parliament as the ultimate source of legal authority, but some practical operational boundary is another matter. Further, the circumstances in which the Sewel convention came to be enacted into the Scotland Act in the aftermath of the 2014 referendum remain significant politically, if not (in light of *Miller*) in its apparent legal effects. It is perhaps understandable that the Supreme Court was not keen to revisit the convention question relatively soon after *Miller*, particularly given the Brexit context of the Continuity Bill. Nonetheless, it is possible to discern amidst the noise features which might be developed in future consideration of parliamentary supremacy/sovereignty. After all, as we have already seen, in *R (Jackson) v Attorney General*, Lords Hope and Steyn expressed doubts about whether parliamentary sovereignty was beyond judicial scrutiny in all circumstances. That was, of course, not the view of the whole court, and has been the subject of subsequent critique (including by members of the same court); nonetheless, that two members of the most senior court felt able to offer that view is significant, and key elements of the constitution have evolved further since that landmark decision. In the context of the UK territorial constitution, that evolution is revealed in part in the interfacing dimension of the devolution structure, as those have been engaged both by the legislative and judicial response to the UK’s exit from the EU.

As has been noted above, in the immediate aftermath of the EU referendum in June 2016, there was frothy political commentary about the possible effect of the legislative consent requirement as a barrier to the ability of the UK government to proceed with notice under Art 50. That political commentary surely proceeded on an overly optimistic reading of the scope of the Sewel convention.734 Equally, however, it might be said that the apparent plausibility of the argument points to the difficulty of defining the boundary of competing political competencies in a political constitution; for example, in his Written Case in *Miller*, the Lord Advocate contended that

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734 Mark Elliott’s deconstruction of this argument was amongst the first to appear, and remains an elegant account of the problems which appear on both sides of the argument: ‘Can Scotland block Brexit?’ *Public Law for Everyone* 26 June 2016 https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/
“the freedom of the UK Parliament is constrained...by the constitutional conventions which apply when Parliament legislates with regard to devolved matters". That proposition which is not directly referenced with authority, is consistent with at least two analyses. First, that the constitutional understanding has, or perhaps ought to have, moved on as a consequence of devolution, and that the Sewel convention is a real and substantial constraint. Alternatively, in a more traditional understanding, the convention means that the UK Parliament can act, but does so explicitly subject to (unspecified) political consequences. In light of the UK government’s approach to the operation of the Sewel convention during the passage of the EUWA, it is clear that it operates on the basis of the latter understanding. In the Continuity Bill case the UK Supreme Court did not require to answer that question directly and while its decision is more nuanced on the central question of legislative competence and parliamentary legislative supremacy, the decision is based on a view closer to the more traditional understanding, although at the same time rejecting the arguments based on a view of the constitutional order which appears to take little account of the changes wrought by the institution of devolution.736

During oral argument in the Continuity Bill case, the Lord Advocate submitted that in the event of the UK’s exit from the European Union it would not (as appeared to be the UK Government’s position in argument) be a matter of returning to the constitution of 1972 or even of 1998. In this he was surely correct: the constitution has evolved significantly on a number of levels, not least in consequence of the intervening advent of devolution. As the Commons Public Administration and Constitutional Affairs Committee made clear in its report Devolution and Exiting the EU: reconciling differences and building strong relationships, the full significance of the development of a territorial constitution is thrown into sharp relief by the exit process. The decision of the UK Supreme Court in the Continuity Bill case adds disappointingly little to the intergovernmental

relations dimension, but seems to open up questions about what parliamentary sovereignty, or legislative supremacy, might mean in the contemporary constitutional ‘settlement’.  

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737 2018 HC 1485.
Chapter 6

Conclusions

“But, with Brexit, the conflict between parliamentary sovereignty and devolution appears once again in stark form. What Brexit has revealed is that the United Kingdom, a multinational state comprising four territories, has not one constitution but four different constitutions, or perhaps four different interpretations of the constitution depending on whether it is viewed from Westminster, from Holyrood, from Cardiff Bay or from Stormont.”

Introductory
As we saw in Chapter 1, the past 60 years have seen significant changes in the British constitution, with juridically novel structural alterations grafted to a longstanding normative model, namely Parliamentary sovereignty, or legislative supremacy, tempered by the rule of law. Parliamentary sovereignty sits uncomfortably with the juridical character and political import of many of these alterations, and those inherent conflicts remain unresolved, indeed may be intensifying. The historically-informed approach proposed in our earlier discussion assists in contextualising the legal dimensions of that evolution. What this research has sought to explore is an important aspect of the judicial response, namely the emergence of the notion of constitutional statutes. Rather than a single conclusion or data-set, the methodology of intense critical analysis points to a number of broad themes. In elaborating these themes, it should be noted that it is not necessary to adopt a definitive normative position on the point at which the balance between political and judicial poles ought to be struck. That is not the aim of this research, which is instead directed towards characterising and situating constitutional statutes in a broader context and through the lens of devolution structures.

Framing devices
In contrast to almost every other constitutional order, the British constitution has no ‘pre-theoretical frame’, that is, no single, codified constitutional

document to frame normative analysis, constitutional decision making, and debate about constitutional interpretation. As Chapter 2 has indicated, a good deal of scholarly writing is expended on a quest to shape such a frame. In the absence of such a frame, in their engagement with the constitutional issues with which this research is concerned, judges in the British higher courts are compelled to make claims both about interpretation of the constitution and their own role in the constitution duly interpreted. This duality is a particular feature of the British constitutional order because in a codified constitution the role of the courts (including any limitations) would itself be written into the constitution. The reality of an uncodified constitution in which constitutional pedigree and authority must be asserted rather than derived from a canonical documentary frame means it is at once inevitable and challenging for judges to engage in an ‘assertive’ fashion; and as the survey of devolution case-law indicates, the higher courts take account of boundaries with the political dimension more carefully because of this absence of a constitutional frame, in order to minimise unfruitful arguments about legitimacy.

As the literature and case-law makes clear, notions of ‘the constitution’ and the ‘constitutional’ feature in British political and legal discourse from at least the seventeenth century. The intense frequency with which the idea of constitutionality is invoked is perhaps more recent, particularly in the context of litigated disputes. In Chapter 1, a number of aspects of post-War political and legal history were explored to propose reasons which help explain that. From the trend in the case-law, it seems reasonably clear that such reliance is now articulated by judges in a more self-conscious way; and in turn reflects a more developed and analytical public law in all three jurisdictions of the UK. That same public law methodology is also a response to the growth and complexity of the administrative state across the twentieth century and into the twenty-first, and particularly to the relative strength of the executive within that. In other words, on a separation of

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739 For an example of constitutional framing, see N Walker ‘Sovereignty Frames and Sovereignty Claims’ in R Rawlings, P Leyland & A Young (eds) Sovereignty and the Law (OUP 2013).
740 That particular combination of circumstances also accounts for the inherently fuzzy boundaries in the common law.
powers analysis, the components of the state do not exist in isolation and it is therefore unsurprising to observe a response to expansion in the executive/administrative state in other components. All the more so where the representative/legislative component is relatively weak in terms of governmental and legislative initiative, compared to the executive component, a point of particular importance given the shift of power away from Parliament to the executive in the period since the notion of Parliamentary sovereignty/supremacy crystallised in its modern form in the late nineteenth century. As we shall see, the same institutional forces have brought into focus the dissonance of the elements of political authority and legislative supremacy which are rolled together in that nineteenth century model. Nor is the judicial response novel or generally considered illegitimate: as we have seen, there is a long history of policing these boundaries by the court; as the court observed in Miller No1 “some of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom.”

Sovereignty - a problem of language or of theory?
There is an institutional continuity in the unfolding of the British constitution which, as early as Bagehot’s notion of a dignified constitution and an efficient constitution, has been considered to mask structural, and sometimes normative, change whilst retaining the outward appearance of existing forms. That continuity narrative has been especially strong in relation to the core constitutional principle of Parliamentary sovereignty. Amongst other things, this research has sought to interrogate the assertion of an unchangeable primacy in the notion of Parliamentary sovereignty in British constitutionalism, particularly in light of recognition by the higher courts of statutes with constitutional character. As Loughlin has demonstrated, in both legal and political discourse there is frequently an unhelpful conflation of sovereignty, truly the essence of the state and thus the very measure of statehood, and the separate question of the locus of

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741 Perhaps better conceived as balancing of powers, since there is no hard-edged separation of executive and legislative elements of the British constitution.
743 W Bagehot, The English Constitution [1867] (Collins 1963), Ch1. The creation of the UK Supreme Court and of devolved institutions are the striking counter-examples.
juridical supremacy within a given state. Once that distinction is grasped, it is possible to agree with Loughlin and Tierney that sovereignty has become something of a shibboleth in British constitutional discourse, which tends to distort understanding of the effect on ultimate legal authority of the shift in political authority across the twentieth century. In short, the Diceyan model is no longer a satisfactory description (if it ever was), because it does not address the constitutional consequences of the growth of the administrative state, the shift in relative strength away from Parliament to the executive, as well as the dispersal of juris-generative authority to sites above and below the level of the central state.

Constitutional statutes

What, then, of the notion of constitutional statutes? First, recognition of the class of constitutional statutes and, more importantly, the approach to their construction described in the cases surveyed, is a manifestation by the higher courts of a more sophisticated understanding of the constitution. Given the absence of a pre-theoretical frame discussed above, that recognition is itself significant as the emergence of, in effect, a new constitutional component. This enhanced institutional and normative understanding recognises the limitations of a model which is focussed on a Diceyan conception of Parliamentary sovereignty in the context of the structural and normative development in British constitution across the post-War era. In equal parts, this is a judicial response to the expansion in shape and form of the administrative state, and the inadequacy of Parliament as sole mechanism of oversight or control; a consequence of growth of a rights-based conception of politics, with concomitant changes in legal forms; and a contemporary manifestation of wider rule of law approaches which are a longer-standing institutional concern of the common law. In addition, the structures of devolution contain legislatures which are democratically-legitimated sources of law, which is, in the case of the Scottish Parliament, of equivalent status to an Act of the UK Parliament. Further, given what we have already said about the unavoidable creativity of

744 M Loughlin The Idea of Public Law (OUP 2003), Ch 5; M Loughlin Foundations of Public Law (OUP 2010), Ch7.
746 Of the kind elaborated, for example, in R (Simms) v SSHD [2000] 2AC 115.
the judicial role in a constitution lacking a canonical written frame, that exercise in judicial understanding is at the same time one of discovery and one of construction. The judges are both authoritative reporters of shifts in our constitutional fundamentals and active players in the production of an altered frame.

As we saw in Chapter 3, there continues to be intense debate about the boundaries of classification of constitutional statutes. While an exhaustive definition is unlikely to be possible, essential characteristics do emerge. Paul Craig’s notion of constitutional axes is a helpful framing device, because it captures the range of relationships between the structural or institutional components of the constitutional order, and, separately, between them and the objects of the constitution (i.e. citizens of the state and others who engage with it). Part of the function of courts is, of course, to find a resolution to cases within the parameters of the legal order, which, as noted, is a constantly evolving construct for which the judges themselves are partly responsible through their pursuit of the common law method. Recognition of constitutional statutes as a class is itself such an exercise of common law method, adapting tools to meet new circumstances and concerns. It is instructive that the same fundamentals are found in Lord Hope’s judgments in Jackson and AXA, and the court’s decision in Imperial Tobacco. In varying tones, all articulate a recognition of the exceptionalist character of Parliamentary sovereignty, and its uncomfortable relationship with the rule of law-focussed concerns in each of those cases.

Craig’s tripartite, axial model, explored in chapter 3,747 is perhaps the most satisfactory approach to characterisation. It is suggested that the structure of devolution validates his model developing as it does Laws LJ’s original formulation in several ways. Thus the first axis 1, the vertical dimension, namely that containing rules governing the relationship between the citizen and state. As we have seen, this is perhaps the archetypal constitutional structure, since the idea of a people, or group of peoples, organised by way of institutions is plainly at the heart of the idea of the state, and hence of a constitution.748 Devolution structures within the UK clearly contain such a

dimension; indeed the very nature of devolution is to provide additional strands to these relationships by interposing additional institutional structures at the level of the devolved nations.

Craig’s second axis is horizontal, and he characterises it as:

concerned with the rules that regulate the main organs of government, their constitution and powers. Constitutions typically contain both substantive and procedural norms of this nature. 749

This formulation seems designed to reflect the range of institutional structures and their character. As we saw in Chapter 4, the structural approach to competence, executive as well as legislative, within the devolution legislation has this at its heart.

The third axis is territorial, and that is of course the de quo of devolution, because the political dimension seeks to frame relations between the centre and the sub-state units. In its legal formulation, that is plainly borne out on examination of the devolution statutes.

Thus the devolution statutes certainly validate Craig’s model of constitutional statutes, assessed more broadly in chapter 3. It is suggested the case-law examined in previous chapters demonstrates that constitutional statutes have different normative valence from more quotidian legislation. To the extent they contain enforceable rights (as opposed to institutional structures), they are not enforced in the same way as ordinary statutes in terms of substantive claims as well as forms of process. Very often, their enactment is preceded by more extensive Parliamentary and extra-Parliamentary deliberation, as de facto processes of constitutional legitimation. 750 Equally, they are not amended or repealed in the same way as ordinary statutes. That is because they engage the state in fundamental obligations, whether in structural terms, or in relation to citizens. Legislation of this kind represents a fundamental shift in juris-generative authority, and thus needs to be recognised as a distinct category. Arguably, the political

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749 P Craig, op cit. fn747, at p389.
750 For example, the Silk Commissions preceding the Wales Acts 2006 & 2014, and afortiori, the Smith Commission and extended Parliamentary debates preceding the Scotland Act 2016.
constitution is honoured by the requirement there be express and explicit legislation by Parliament to repeal or amend constitutional statutes: changing a statutorily rendered constitutional component, likely to have been enacted following more exacting political process and scrutiny, itself requires an active political choice.  

Perhaps as significant is the range of statutes engaged in the relatively small body of cases involving direct judicial engagement with the character of constitutional statutes thus far, amidst a slightly larger body of identifiably constitutional adjudication. Laying one analysis to rest, these are not confined to domestic legal engagement with EU law, and instead reflect the breadth of legislation envisaged by Laws LJ in *Thoburn*. Nonetheless, judicial focus is often only on the rule of law dimension, since that falls more clearly within the constitutional competence of the courts. Such rule of law focus broadly conceived can, however, accommodate the more developed constitutional understanding alluded to above. While recognition of constitutional statutes tacitly acknowledges shifting political authority, the court will be slow to articulate that in political language in an area of constitutional discourse where the absence of a framing device (i.e. a codified constitution) renders the court open to legitimacy arguments which, in their tendency to infinite regression, are simply irresoluble. Nonetheless, that judicial constitutional understanding can be accommodated within what has been described as a relational understanding of sovereignty, in the sense of the appropriate and always unconditional ultimate political authority of the state and its institutions over (i.e. in relation to) its citizens.  

That is not to discount Parliament, nor its plenary legislative competence. Rather, it is an attempt to recognise that while Parliament may introduce fundamental rights, such as are found in the Human Rights Act, for example, or may alter the fundamental structures of constitutional architecture, as in devolution legislation or the European Communities Act, and while some aspects of constitutional meaning may be elaborated in conventions or other political

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751 The permanence clause requiring a referendum to be held before the Scottish Parliament could be abolished, introduced by the Scotland Act 2016, section 1, is an example of this; see further Chapter 4. The continuing political debate about the operation and amendment of the Fixed Term Parliaments Act 2010 is another instance.

752 Loughlin & Tierney, op cit., fn 743, p1009.
practice, it is primarily through the tools and modalities of the common law that these are delineated, explicated and enforced. Reflexive recourse to the notion of Parliamentary sovereignty tends to obscure the historical role of the judicial response to executive action in tandem with, rather than in opposition to Parliament, as it is sometimes projected.\textsuperscript{753}

How does devolution help illuminate this? A central contention of this research is that devolution both in its structures and in the jurisprudence provides a bounded, and novel juris-generative environment in which the working out of these ideas can been seen and explored. As Chapter 4 illustrated, devolution in its post-1998 form amounts to a profound reorganisation of the United Kingdom’s territorial constitution. Aside from the self-evident structural change in the form of new devolved institutions, the redistribution of competences, both executive and legislative, has, it is suggested, deeply affected notions of ‘constitutional’ both at the level of principle and of process. Judicial policing of the boundaries of devolution is an explicit part of the legislative scheme, and is structurally more fully developed than inter-governmental mechanisms for resolution of boundary disputes. Further, the devolution jurisprudence contains ideas about the protection of constitutional rights, and suggestions about practical limitations on parliamentary supremacy which may in time challenge some of the more robust current notions of political constitutionalism.\textsuperscript{754} The case law thus far indicates a progressive evolution in judicial thinking, and a legitimate exercise in legal constitutionalism in the assessment of executive and legislative competence. It is also the case that there is an institutional caution, particularly in more recent case-law, recognising the limits of judicial intervention as well as the power available when intervention is apt. In the creation of new sites of political authority, the devolution structures plainly challenge the Diceyan account of sovereignty as a singular site of authority. Yet that challenge itself may be seen as, fundamentally, a political matter largely beyond the realm of the courts. On one view, prudential

\textsuperscript{753} As we saw in Chapter 1.

\textsuperscript{754} For example, the political constitutionalist analyses advanced by Bellamy and Goldsworthy, discussed in Chapter 2.
recognition of this may account for the UK Supreme Court’s restrictive approach to the Sewel convention which was evident in *Miller No.1*.

As a consequence of the United Kingdom’s exit from the European Union, the EU law dimension of the devolution structures has come to assume greater legal and political significance for a range of reasons. In the first place, the British constitution at the end of the transition period will not be the constitution as it was when the ECA was enacted. There is no reversion to the status quo ante. The legal consequences of that are found in the European Union (Withdrawal) Act 2018. Secondly, devolution in Northern Ireland has particular assumptions about EU membership integrated in its cross-border structures, and the juridical character of those have not, yet, been fully explored, despite the provisions made about Northern Ireland in the Withdrawal Agreement. Finally, the juris-generative character of the EUWA and its interaction with devolution is complex. That will require to be unpacked after the transition period, and constitutional actors will of necessity require to engage with conflicting constitutional statutes.

*Concluding observations*

Can we say that the courts are crafting a common law constitution? Perhaps not in the sense that some writers in the enduring scholarly debate about primacy as between political and legal constitutionalism have used that phrase to signify a constitution comprised in the common law, and to which the political is subject by reason of the universality of the rule of law. As we have seen, rule of law concerns have a long history both in the common law and in British constitutional theory. What the recognition of constitutional statutes as a class makes more visible is the use of common law method as a source of fundamental rights and general principles which the courts are prepared to deploy and defend. Devolution takes the courts beyond their traditional zone of action, rights involving citizens and others, to broader constitutional questions of institutional balance, division of competence and the like. In this sense, they are confronted in the territorial constitution not only with discrete constitutional statutes, but a newly-evolved overall constitutional settlement, to manage. In the absence of a codified constitution and with it the presence of fundamental rights embedded in the
constitution along with national and international rights instruments, that is the exercise of the judicial function is unavoidably exercised in balancing the interests of constitutional actors - the institutions of the state and individuals - in this evolving constitutional settlement. In that sense, recognition of constitutional statutes can be seen as judicial reaffirmation of the rule of law as a core constitutional norm, and one which tempers Parliamentary supremacy in particular ways.

Devolution to Scotland (and to Wales and Northern Ireland) is obviously a significant structural reorganisation of the British state, including the creation of new sites of norm-generation. As we have seen, it has also necessitated new judicial tools and techniques. Because the competence of legislative and executive acts in this multi-level order are bounded by law, courts have a clearer boundary-setting role. This research has described the development of judicial views and methods for doing so. While those are primarily directed to the devolved context in which they arise, their form and articulation leaves open the possibility of further development, including, should the need or opportunity arise, in a context of adjudicating constitutional fundamentals in the form of constitutional statutes beyond the domain of devolution.

As we have seen, Ron Davies’s nostrum that devolution is a process and not an event has been amply vouched by events since 1997. That is evident on both the political and legal planes. On the latter plane, the higher courts continue to refine their analysis of the notion of constitutional statutes, anchoring the concept firmly in the architecture of the common law.
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