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The United Kingdom’s statutory constitution.

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Abstract—The emergence of the United Kingdom’s statutory constitution has challenged the old Diceyan adage that ‘neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered supreme law.’ This article reconceptualizes constitutional statutes offering a three-pronged approach to identifying such legislation. This new model examines the content of the statute, the history of enacting the constitutional statute (the ‘life of the Bill’), and the post-enactment history (the ‘life of the statute’). The proposed framework reflects a historical approach to constitutionalism and gives weight not only to judicial practice but also to the interactions between other constitutional actors and to popular endorsement. Four case studies of statutes demonstrate how the new model adds layers to, and diverges from, the current judicial approach. Finally, the article describes the implications of ‘taking constitutional statutes seriously’ under the proposed approach.

Keywords: constitutional statutes, parliamentary sovereignty, legislative history, Dicey, Thoburn, National Health Service (NHS)

1. Introduction.

25 July 1991: The Dangerous Dogs Act 1991 is enacted after a series of dog attacks in the UK. The aim of this Act is to prohibit the possession of dogs belonging to types bred for fighting and to enable restrictions on other types of dogs which present a ‘serious danger’ to the public.

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3 November 1994: The Criminal Justice and Public Order Act 1994 is enacted. Section 63(1) provides police powers regarding raves and defines ‘music’ to include ‘sounds wholly or predominantly characterised by the emission of a succession of repetitive beats’.1

9 November 1998: The Human Rights Act (HRA) is enacted to incorporate the European Convention on Human Rights into UK law. Section 3(1) empowers all courts to read and give effect to primary legislation and secondary legislation in a way which is compatible with the Convention rights ‘so far as it is possible to do so’.2 Under section 4 of the HRA, courts can issue a declaration of incompatibility if they find that a provision in primary legislation is incompatible with a Convention right. The combined effect of these and other HRA provisions has enhanced the position of human rights protection and the role of the courts.

6 November 1946: The National Health Service Act is enacted providing for the creation of a tax-funded, universal, and comprehensive health care system which began operating in July 1948. Sixty-six years later, the National Health Service (NHS) had a prominent place in the opening ceremony of the London Olympics. Danny Boyle’s ceremony featured dancing doctors and nurses, as well as children bouncing happily on luminous beds. The acronym ‘NHS’ was formed with lights on the stadium floor.3 Described as both a ‘sentimental paean to the best of Britishness’4 and the ‘oddest of all [in] a parade of British whimsy’,5 this feature demonstrated the central position of the NHS in British culture.

A reader, even if unfamiliar with the British constitutional system, would probably find the first pair of statutes qualitatively different from the latter two. Yet, in a system of parliamentary sovereignty, the Dangerous Dogs Act and the Human Rights Act enjoy the same formal legal status. The attempt to define music in a statutory provision and the landmark NHS legislation emerging after World War II and consistently reaffirmed as a key aspect of the British political identity have the same position in the legal system. In the words of Albert Venn Dicey, the most influential exponent of parliamentary sovereignty, ‘neither the Act of Union with Scotland nor the

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1 I wish to thank Timothy Endicott for bringing this example to my attention.
2 Courts have interpreted this provision in ways that allow them to depart from the intention of Parliament and even to read in words which change the meaning of the enacted legislation to make it Convention-compliant. Ghaidan v Godin-Mendoza [2004] 2 AC 557 [30]-[33] (Lord Nicholls).
Dentists Act 1878 has more claim than the other to be considered supreme law.\textsuperscript{6} This counterintuitive position did not escape the attention of commentators\textsuperscript{7}—indeed, as Part 2 will discuss, Dicey himself was concerned about the implications of this position. The late Sir John Laws noted that rules establishing the constitutional framework ‘possess, on the face of it, no different character from any other statute law.’\textsuperscript{8} In the same vein, Ian Cram reiterated the equivalence in form between an Act of Parliament amending the constitution and non-constitutional legislation. However, he added the caveat that ‘most would accept that there are qualitative differences between say the Fixed-term Parliaments Act 2011 and the Scrap Metal Dealers Act 2013 or the Dangerous Dogs Act 1991.’\textsuperscript{9}

There are clear undertones in these accounts suggesting that, as a substantive matter, the orthodoxy of the formal equivalence of all statutes is not tenable. Indeed, as Part 2 will outline, the judiciary, beginning with Thoburn in 2003,\textsuperscript{10} has qualified the Diceyan orthodoxy by endorsing a category of constitutional statutes and a hierarchical relationship between these and ordinary statutes. However, this move and its reflection in parliamentary processes comes with important limitations (Part 3). In Part 4, I propose a new conceptualisation of constitutional legislation and outline different criteria to identify constitutional statutes; these criteria build on but also revise the judicial test in Thoburn. My proposed three-pronged approach examines the content of the statute, the history of enacting the constitutional statute (the ‘life of the bill’), and the post-enactment history (the ‘life of the statute’). These new criteria reflect a historical approach to the British constitution and give weight not only to judicial practice but also to the interactions between other constitutional actors as well as to popular endorsement. Part 5 applies these criteria to different statutes to demonstrate how my model adds layers to, and sometimes departs from, the current judicial approach. Part 6 describes the implications of ‘taking constitutional statutes seriously’ under the proposed approach. Part 7 concludes.

\textsuperscript{6} A. V. Dicey, Introduction to the Study of the Law of the Constitution (10th end, Macmillan 1959) 145.
\textsuperscript{7} As early as 1928, Carl Schmitt had commented on the formal equivalence of ‘important organizational’ statutes and other statutes that are ‘in comparative terms entirely unimportant’: ‘All statutes without exception can be established through parliamentary decision, so that formally the constitution would not be different from such a regulation regarding dentists. The inadequacy of such a type of “formalism” already reveals itself in the absurdity of this example’ (Carl Schmitt, Constitutional Theory (first published 1928, Jeffrey Seitzer ed, tr, Duke UP 2008) 71-72).
\textsuperscript{9} Ian Cram, ‘Amending the constitution’ (2016) 36 Legal Studies 75, 75-76.
\textsuperscript{10} Thoburn v Sunderland City Council [2003] Q.B. 151 [59].
2. The Ideal of Parliamentary Sovereignty and the First Cracks in the Diceyan Orthodoxy.

The orthodox approach to parliamentary sovereignty was most famously elaborated in Dicey’s work which had an ‘immense influence upon the development of public law in England’\(^{11}\) and dominated not only the thinking of his contemporaries but also reverberated well into the second half of the 20\(^{th}\) century. The fundamental tenet in Dicey’s *Law of the Constitution* was that Parliament has ‘the right to make or unmake any law whatever,’ and ‘no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’\(^{12}\) In other words, no body, not even Parliament itself, could bind the will of future Parliaments by entrenching legislation that could not be repealed by a future ordinary statute.

However, Dicey’s gradual disillusionment with Parliament and party politics\(^{13}\) prompted him to clarify the operation of parliamentary supremacy with respect to constitutional change. In a letter to Leo Maxse in January 1895, Dicey explained that on matters of constitutional change ‘a small majority [did not have] any moral right to act with vigour’ and this type of change ‘ought not to be made by any body of men who do not clearly represent the final will of the nation.’\(^{14}\) Echoing this idea in a later essay, Dicey added to his classic definition of parliamentary sovereignty the ‘strong public opinion’ that ‘the constitution and the more important laws of the realm ... should be treated as practically unchangeable, unless their amendment were unmistakably demanded by the voice of the nation, or, in other words, of the electors.’\(^{15}\) The institutional mechanism favoured by Dicey to secure popular approval for constitutional change was the referendum.\(^{16}\) The referendum would be a negative constitutional safeguard, a ‘veto lodged in the hands of a sovereign people [to secure] the Constitution against any change that the Sovereign does not deliberately approve.’\(^{17}\) Dicey proposed that the requirement for a referendum could be incorporated either in the specific bill seeking to effect constitutional change or in a general Act that would cover future

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\(^{12}\) Dicey (n 6) 39-40.

\(^{13}\) See, eg, A. V. Dicey, ‘Will the Form of Parliamentary Government Be Permanent?’ (1899) 13 Harvard LR 67, 74 (noting the ‘widespread distrust of representative systems under which it, occasionally at least, may happen that an elected Parliament represents only the worst side of a great nation’).


\(^{16}\) A.V. Dicey, ‘Ought the Referendum to be Introduced into England?’ (1890) 57 Contemporary Review 489.

\(^{17}\) ibid 496-97.
enactments. He further acknowledged that a general election might function as a referendum when voting was almost exclusively determined by the people’s views on a specific bill, such as the 1831 election on the Great Reform Bill. However, these examples were a ‘rare occurrence’ and, generally, elections were about selecting representatives rather than a verdict on a specific statute.

Dicey’s discussion of the referendum and his assertion that the ‘true political Sovereign’ is the electorate has prompted the observation that ‘Dicey was not Diceyan.’ However, as Mark Walters has argued convincingly, there is no evidence in Dicey’s work supporting the conclusion that constitutional change enacted without the electorate’s consent would be unlawful. Dicey insisted on distinguishing between Parliament as legally sovereign and the electorate as politically sovereign and explained that an Act of Parliament could be ‘opposed to the spirit of the English constitution’ without being rendered void. The nuances in Dicey’s account point to lessons with resonance for this article, notably the importance of popular consent that may be expressed through a ratifying general election. However, three caveats are in order. First, Dicey viewed the referendum as a veto to constitutional change, while the discussion below will suggest that elections may have an affirmative role in prompting constitutional change. Second, Dicey’s definition of constitutional change is narrow as it only covers the ‘distribution and exercise of Sovereign power.’ Third, Dicey’s influence on the actual development of British constitutional law stemmed primarily from his treatment of parliamentary sovereignty rather than the qualifications introduced in his discussion of the referendum. All the references to the ‘Diceyan orthodoxy’ in this article refer to the former rather than the latter. At the same time, it is important to keep in mind that Dicey’s account was more nuanced than what may be perceived as the ‘Diceyan orthodoxy.’

Judges had also noted early in the 20th century that Parliament must use ‘plain language and express statement’ to enact ‘vast constitutional change’ and there had been references to

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18 ibid 498-99.
19 ibid 494.
20 ibid 498.
21 Rivka Weill, ‘Dicey was not Diceyan’ (2003) 62 CLJ 474.
22 Mark D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: ‘A Legal Turn of Mind’* (forthcoming). I wish to thank Mark Walters for sharing his manuscript with me.
23 Dicey (n 16) 491. Interestingly, however, Dicey describes potential changes to the poor law as constitutional change ‘affecting the fundamental institutions of the state’ (ibid 502).
24 For a valuable critique of ‘the orthodox view of Diceyan constitutional theory as analytical, formalist, scientific, descriptive and positivist,’ see Mark D. Walters, ‘Dicey on Writing the Law of the Constitution’ (2012) 32 OJLS 21.
‘fundamental laws’ since the 17th century.\textsuperscript{25} However, at the same time, teaching at Oxford and Cambridge had focused on the common law while statutes had been ‘deliberately excluded’ from the teaching materials, because they had ‘for the most part only a fleeting interest.’\textsuperscript{26} Similarly, there had been no indications in the case law that there should be any legal distinctions drawn between different types of statutes.\textsuperscript{27}

The first judicial cracks in the Diceyan orthodoxy came in \textit{Thoburn}: in important dicta, Laws LJ stressed that if the traditional doctrine of sovereignty is to be modified, ‘it certainly cannot be done by the incorporation of external texts,’ such as EU law. The conditions of parliamentary supremacy, Laws LJ explained, ‘necessarily remain in the United Kingdom’s hands.’ In fact, they had been modified ‘by the common law, wholly consistently with constitutional principle.’\textsuperscript{28} Laws LJ continued that the common law should recognize a hierarchy of Acts of Parliament: ‘ordinary’ statutes and ‘constitutional’ statutes. He defined a constitutional statute as 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.’\textsuperscript{29} The implication of this recognition was that constitutional statutes can only be repealed by ‘express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.’\textsuperscript{30} According to \textit{Thoburn}, the European Communities Act 1972 was clearly a constitutional statute and thus not subject to implied repeal. This ‘previously unheard of category of constitutional statutes’\textsuperscript{31} also included Magna Carta, the Bill of Rights 1689, the Acts of Union, the Reform Acts, the Human Rights Act 1998, and the devolution legislation of 1998.

\textsuperscript{25}Tarunabh Khaitan, “‘Constitution’ as a statutory term’ (2013) 129 LQR 589, 589 (with further citations).
\textsuperscript{26}Martin Loughlin, ‘Modernism in British public law, 1919-79’ [2014] PL 56, 60.
\textsuperscript{27}However, the distinctive nature of an Act of Parliament was recognized in \textit{Edwards v Attorney General of Canada} [1930] AC 124. The case involved the interpretation of what was then called the British North America Act, 1867, an ordinary Act of the Westminster Parliament establishing the Dominion of Canada. Section 24 of the Act stipulated that the Governor General ‘shall summon qualified persons’ to the Canadian Senate and the question was whether the reference to ‘persons’ included women or not. The Privy Council held that ‘persons’ in s. 24 did include women. Interestingly for present purposes, their Lordships (per Lord Sankey) noted that ‘there are statutes and statutes’: ‘The object of the [British North America] Act was to grant a Constitution to Canada. Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.’ This is an interesting early example demonstrating judicial appreciation of the distinctive nature of certain statutes but, as Part 3 will argue, the application of special interpretative rules has been inconsistent.
\textsuperscript{28}\textit{Thoburn} (n 10).
\textsuperscript{29}ibid [62].
\textsuperscript{30}ibid [63].
\textsuperscript{31}Adam Tomkins, \textit{Public Law} (OUP 2003) 123.
Laws LJ’s concept of constitutional statutes attracted scholarly attention and was endorsed by the Supreme Court in dicta over a decade later. In HS2, Lords Neuberger and Mance used the term ‘constitutional instruments’ to encapsulate the same idea.32 The concept of constitutional statutes later did some of the work in the Miller (No 1) litigation supporting the argument that Article 50 of the Treaty on European Union (TEU) could not be triggered through the use of prerogative powers so as to begin negotiations on the UK’s withdrawal from the European Union. More specifically, the Supreme Court in Miller (No 1) reiterated that the European Communities Act 1972 has a ‘constitutional character’ and ‘constitutes EU law as an entirely new, independent and overriding source of domestic law.’33

In terms of the political process, it has been common practice since Clement Attlee’s post-World War II administrations that ‘first-class constitutional bills’ are considered by a committee of the whole House of Commons rather than sent to a public bill committee (what was then called a standing committee) at the committee stage as is the case with ordinary statutes.34 The normative underpinning of this practice was that this divergence from the ordinary parliamentary process for such important bills would allow input from all MPs, as is appropriate for constitutional matters.

The previous section described how the case law and parliamentary practice introduced a distinction between ordinary and constitutional legislation, a move that departed from the orthodoxy of the formal equivalence of all primary legislation. These developments manifest the intuitive idea that not every statute is the same; however, they also come with important limitations which qualify the novelty of recognizing constitutional statutes in the current form.

Beginning with parliamentary process, we should note the lack of consistency in the type of procedures used for constitutional bills,35 including rules mandating the consideration of constitutional bills by a committee of the whole House. Indeed, consideration by a committee of the whole House has been common, but not universal, practice and there is no clear definition of

32 R (HS2 Action Alliance Limited) v Secretary of State for Transport [2014] UKSC 3 [207].
33 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [67], [80] (“Miller (No 1)”). Miller (No 1) is discussed later in the text.
35 Constitution Select Committee, The Process of Constitutional Change (HL 2010-12, 177) paras 51, 55.
‘first-class constitutional bills.’ Moreover, while the rationale for this procedural choice is that considering a Bill in committee of the whole House allows broader participation from MPs, it is contested whether the process actually facilitates more detailed scrutiny of significant legislation.

Moving to judicial practice, the only clear implication of the recognition of a constitutional statute is, as noted in the previous section, that this statute can be repealed only by ‘express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.’ This judicial test implies a weak hierarchy especially considering that it is for the courts to draw the inference of an actual determination to repeal the constitutional statute. Furthermore, there are indications in the case law that labelling a statute as constitutional triggers the application of special interpretative rules. However, this interpretative approach appears internally inconsistent.

On the one hand, in some cases, judges have interpreted constitutional statutes in a generous or purposive manner. On the other hand, some judges have opted for a strict and literal approach to constitutional statutes. Overall, the main objection to the current model of constitutional statutes is that it is a common law creature: the criteria and implications of designating statutes as constitutional were driven by the judiciary. This emphasis on the judiciary downplays the role of other constitutional actors. Paradoxically, this includes

36 Erskine May (n 34) 555. See also Political and Constitutional Reform Committee, Ensuring Standards in the Quality of Legislation (HC 2013-14, 85) para 142 (noting the lack of transparency in the process of identifying bills of constitutional importance).

37 R. Hazell, N. Smith and K. Donnelly, ‘Delivering Constitutional Reform’ (Constitution Unit, 1996) para 86; Hazell (n 34) 276.

38 Thoburn (n 10) [63]. In 2012, the Supreme Court noted in dicta that the Scotland Act was ‘incapable of being altered otherwise than by an express enactment’ (BH v Lord Advocate [2012] UKSC 24 [30] (Lord Hope)). For a critique of this judgment, see Farrah Ahmed and Adam Perry, ‘The quasi-entrenchment of constitutional statutes’ (2014) 73 CLJ 514.

39 Khaitan (n 25) 593.

40 Pepper v Hart [1993] AC 593, 638 (Lord Browne-Wilkinson): ‘Article 9 [of the Bill of Rights] is a provision of the highest constitutional importance and should not be narrowly construed’; Robinson v Secretary of State for Northern Ireland [2002] UKHL 32 [11]: ‘The [Northern Ireland Act 1998] is in effect a constitution. … [T]he provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.’

41 HM Advocate v R [2004] 1 AC 462 [155] (describing the Scotland Act 1998 as ‘a constitutional settlement of immense social and political significance’ and adding that courts ‘must loyally give effect to the decision of Parliament on this sensitive matter, even if—or perhaps especially if—there are attractions in a different solution’); Khaitan (n 25) 595. See also Attorney General’s Reference (Local Government Byelaws (Wales) Bill 2012) [2012] UKSC 53 [80] (recognising the ‘great constitutional significance’ of the Government of Wales Act 2006 but noting that this description cannot be ‘taken to be a guide to its interpretation … and the statute must be interpreted like any other statute’). More recently, in The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64 [12] (‘Scottish Continuity Bill case’), a unanimous Supreme Court reiterated that the Scotland Act ‘must be interpreted in the same way as any other statute’ and that the rules on competence in the Act must be interpreted ‘according to the ordinary meaning of the words used.’
Parliament even though it is Parliament’s constitutional creativity that is reflected in constitutional statutes.\(^{42}\) This is not to say that Parliament labelling a statute as ‘constitutional’ is a necessary condition for a judicial finding to this effect.\(^{43}\) Conversely, a statute should not become constitutional just because a court has held so. We need a contextual account that reflects the contributions of different constitutional actors over a period of time, including the people themselves, before a statute can be described as ‘constitutional.’


A. A Theory of Landmark Statutes for the UK?

I argue that a more textured account of constitutional statutes should move beyond the formalist criterion of judicial recognition to consider both the role of other actors involved in the enactment of these statutes and the post-enactment history of this legislation. Here we can draw inspiration from the theory of ‘landmark statutes’ and ‘super-statutes’ developed in US constitutional theory. William Eskridge and John Ferejohn have shown that normative commitments can be ‘entrenched not through a process of Constitutional amendments or Supreme Court pronouncements but instead through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration.’\(^{44}\) Elevating these statutes to Constitutional status, Bruce Ackerman has argued that certain landmark statutes, such as the Civil Rights Act 1964, embody the ‘considered judgments of the People’ and should be included in the constitutional canon with the same standing as formal amendments under Article V of the Constitution.\(^{45}\)

A sceptical reader would pause at this point. She might say, ‘Surely Americans (or Canadians for that matter) need a theory of (quasi-)constitutional statutes because their entrenched, codified Constitution is difficult to amend. This is why Ackerman observes that on the way to the twenty-first century Americans “have lost [their] ability to write down our new constitutional

\(^{42}\) See also Gavin Phillipson, ‘EU Law as an Agent of National Constitutional Change: Miller v Secretary of State for Exiting the European Union’ (2017) 36 Yearbook of European Law 46, 89-91 (noting that it is ‘quite incoherent’ to argue that courts can endow statutes with unique constitutional status, but Parliament cannot). As will be argued later in the text, the multi-institutional approach advanced in this article turns the spotlight on the interactions between different constitutional actors.

\(^{43}\) Khaitan (n 25) 596.


\(^{45}\) Bruce Ackerman, We The People: The Civil Rights Revolution (Harvard UP 2015) 8-9.
commitments in the old-fashioned way.” However, the UK doesn’t have an entrenched, codified constitution, so we don’t need a fully-fledged theory of constitutional legislation. I would respond that the UK should not take the enterprise of constitutional statutes any less seriously because these statutes do not ‘compete’ with or seek to complement a codified Constitution as the normative foundations of the polity. In fact, quite the opposite is true. We need to pay more attention to constitutional statutes in the UK as these statutes constitute the source of the written constitution.

Even so, the sceptic would continue, US constitutional theory or history cannot offer applicable lessons owing to the fundamentally different institutional structures in the US and the UK that make passing legislation in the US much more difficult. Ackerman himself, the criticism would go, would not find his model applicable to the UK, ‘where a single election can indeed generate sweeping changes.’ I would respond that the accounts proposed by Ackerman and Eskridge and Ferejohn are helpful in elucidating the role of the different institutional actors and their interactions in a way that distinguishes certain landmark statutes from ordinary statutes within the same system. These constitutional statutes reflect inter-institutional deliberation and consensus, as well as popular endorsement over a period of time. Therefore, the comparative inquiry should not be taken to suggest equivalence between the UK and the US background constitutional architecture. There is, however, another type of comparative inquiry that emerges when looking at the US system. This helpful inquiry does not compare US to UK constitutional statutes but rather zooms in on each domestic system. The key comparative question is how different constitutional statutes are from ordinary statutes in each respective system. Therefore, the focus in my proposed model is not on evaluating UK constitutional statutes using US super-statutes as my benchmark but rather on evaluating UK constitutional statutes against the domestic yardstick of ordinary legislation. In proposing this alternative model, I adopt a non-formalist, multi-institutional approach that looks both to the process of enacting constitutional legislation and to post-enactment history following Ackerman, Eskridge and Ferejohn.

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46 ibid 26.
47 ibid 43 (contrasting this to the US, where a similar political movement cannot ‘ram its transformative initiatives into law on the basis of a single electoral victory [but must instead] undertake an arduous march through the Presidency, Congress and the Court before it can legitimately enact sweeping changes’).
48 See Eskridge and Ferejohn (n 44) 6 (explaining that ‘entrenching deliberation’ involves several institutions cooperating and occurs over a long period of time to the point when former opponents endorse or accept the super-statute).
Indeed, a historical approach is particularly well-suited to studying the UK statutory constitution. If the constitution is ‘what happens,’ we need an account of how these constitutional statutes ‘happened’: how they were enacted, implemented, interpreted, debated in public, and reaffirmed by subsequent legislation or lack of legislative repeal—briefly put, a biography of constitutional statutes. A historical approach that takes institutional practice seriously is consistent with other aspects of the UK constitution, notably the recognition of constitutional conventions. Furthermore, as Sir John Laws, the author of the Thoburn judgment, had written extra-judicially, the absence of ‘a sovereign text means that the legal distribution of public power consists ultimately in a dynamic settlement, acceptable to the people, between the different arms of government.’ The following sections will explore this dynamic settlement which involves different constitutional actors, but also encompasses what the people themselves consider fundamental.

B. A New Proposal for Identifying Constitutional Statutes in the UK.
In light of the previous discussion, I propose a revised set of criteria to identify constitutional statutes in the UK. The proposed three-pronged approach builds on but moves beyond Thoburn and examines the content of the statute, the history of enacting the constitutional statute (the ‘life of the bill’), and the post-enactment history (the ‘life of the statute’). The conclusion of this section addresses the interface between these different criteria.

i. The content of the statute.
The first prong of this model begins where Thoburn began, namely the subject-matter of constitutional statutes. Thoburn stated that a constitutional statute ‘(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.’ Both parts of the definition seem to speak to one of the key components of constitutional law, ie fundamental rights that citizens can exercise vis-à-vis the state. It would, therefore, be

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49 See, e.g., J.W.F. Allison, ‘History to Understand, and History to Reform, English Public Law’ (2013) 72 CLJ 526, 529 (noting that determining the extent of the change associated with constitutional statutes ‘necessitates, inter alia, an enquiry that is partly historical’).
51 Laws (n 8) 81 (emphasis added).
straightforward to suggest that constitutional statutes also cover norms that constitute the other major part of constitutional law: namely, rules that set out the key state institutions and their powers, and regulate the relationship between these public institutions.\textsuperscript{52} Indeed, other authors have stressed the institutional focus in their definition.\textsuperscript{53}

However, this definition is narrow in the sense of prioritising provisions on the major state institutions and negative rights at the expense of affirmative rights. As Eskridge and Ferejohn have argued convincingly, a ‘deeper constitutionalism’ endorses a wider role for the state which includes the promotion of positive rights, for instance a social security net.\textsuperscript{54} If we include human rights legislation in the subject-matter of constitutional statutes, there is a strong argument that this should also apply to the fundamental principles of welfare legislation. Human rights legislation safeguards the humanity and dignity of individuals. It also promotes the idea of citizens as autonomous moral agents exercising, for instance, free speech or voting rights to participate in the political community. Legislation establishing the basic architecture of the welfare state similarly protects the core of being human.\textsuperscript{55} Therefore, there is no reason for this legislation not to be considered as expressing fundamental normative commitments. Indeed, many codified constitutions recognize such affirmative commitments. For example, 138 constitutions currently in force refer to the right to health care; 126 constitutions to social security.\textsuperscript{56} There is a further empirical argument that citizens identify social security protections as fundamental aspects of their political and national identity. We will return to this argument when considering the NHS as one component of the welfare state. However, it is helpful to note here that the fundamental status of the welfare state was captured eloquently in Franklin D. Roosevelt’s State of the Union Address, on 11 January 1944. The speech set out Roosevelt’s vision for a Second Bill of Rights that included rights to ‘a decent home,’ ‘adequate medical care,’ ‘adequate protection from the economic fears

\textsuperscript{52} See Vanessa MacDonnell, ‘A Theory of Quasi-Constiutional Legislation’ (2016) 53 Osgoode Hall LJ 508, 511 (arguing that constitutional statutes implement ‘constitutional imperatives.’ The latter term encompasses obligations emanating ‘from the rights-conferring aspects of the Constitution as well as from those aspects of the Constitution that establish the institutions and procedures of government’).

\textsuperscript{53} See eg David Feldman, ‘The Nature and Significance of “Constitutional” Legislation’ (2013) 129 LQR 343, 350 (‘constitutional legislation establishes state institutions and confers functions, responsibilities and powers on them’). Ahmed and Perry have noted the over-inclusiveness of Feldman’s definition and instead defined as ‘constitutional’ a statute which concerns ‘state institutions and which substantially influences, directly or indirectly, what those institutions can and may do’ (Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37 OJLS 461, 471.

\textsuperscript{54} Eskridge and Ferejohn (n 44) 42.


\textsuperscript{56} Data drawn from ‘The Constitute Project’ <https://www.constituteproject.org>.
of old age, sickness, accident, and unemployment.\textsuperscript{57} In a similar vein, Clement Attlee’s government in 1945 proposed ‘a new contract between the individual and the state: a British “New Deal”. It was, as Attlee saw it, a great evolutionary leap in the ideal of citizenship which set Britain apart from so many nations.\textsuperscript{58}

In conclusion, the content of a constitutional statute reflects the content of constitutional law as typified in most modern codified constitutions (state institutions, negative rights, and affirmative rights). Linking the content criterion to modern codified constitutions anchors this delineation exercise in a concrete examination of constitutionalism worldwide. It also both broadens and narrows the scope of the proposed approach. It broadens the scope as it allows consideration of a wider set of constitutional fundamentals compared to older constitutions, such as the US. As the number of constitutions drawn upon to give meaning to ‘constitutional content’ increases, the breadth of constitutional commitments that meet the requirements of this first prong is not, at this preliminary stage, linked to any single jurisdiction (eg to the UK, where the absence of a codified constitution presents a clearer challenge of \textit{a priori} delineation) and includes broader principles, such as affirmative rights. At the same time, the content-based criterion limits the number of statutes that can be recognized as constitutional since it delineates the scope of constitutional content along the three dimensions identified in this section and links constitutional content to concrete patterns in constitutional texts. The range of constitutional statutes is further constrained by the recognition that this content-based criterion is complemented by two further criteria that examine the life of the bill and the life of the statute analysed in the next two sections. Therefore, the content-based criterion is a necessary but not sufficient condition to label a statute as constitutional.\textsuperscript{59}

\textit{ii. The history of enacting the constitutional statute (the ‘life of the bill’).}

The fundamental nature of the commitments outlined previously—organizing state institutions, protecting constitutional rights, providing a social security net—may also be reflected in the process

\textsuperscript{57} Eskridge and Ferejohn (n 44) 46 (arguing that the ‘New Deal represented a fundamental (though rarely radical) reconsideration of basic public entitlements in this country’ and describing Roosevelt’s speech as ‘the most mature expression of this new philosophy’).

\textsuperscript{58} Bew (n 4) xiv.

\textsuperscript{59} Cf Rivka Weill, ‘Exploring constitutional statutes in common law systems’ in Richard Albert, Joel I. Colón-Ríos (eds), \textit{Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications} (Routledge 2019) 68 (noting that content is neither a necessary nor a sufficient condition for identifying constitutional statutes).
resulting in the enactment of a constitutional statute. We examine here indicia of institutional and public deliberation throughout the process of enshrining fundamental norms into a statute. I call this stage the ‘life of the bill’ to indicate that legislative history will be an important consideration and to distinguish this phase from post-enactment history, which will be the third and final prong. However, this examination should also cover precursors to the constitutional bill—for instance, previous attempts to enact less ambitious measures with similar constitutional aims, albeit more limited in scope or binding effect. It should also look to statements of relevant constitutional actors before the introduction of the bill into the legislative process, for instance in party manifestos prior to general elections. Our examination should further include the pre-legislative stages, especially public consultations on Green and White Papers that put forth the idea of future constitutional changes. These procedural mechanisms allow broader participation over a longer period of time and, importantly, the inclusion of opposing views.

Legislative history, for instance statements at various stages in the legislative process on the constitutional significance of the bill, will also be an indication. One procedural element that distinguishes constitutional bills is, as mentioned previously, that these are considered by a committee of the whole House rather than a public bill committee. However, this procedural particularity is neither a necessary nor a sufficient condition to label a statute as constitutional but should be treated as one indication among many. In fact, there have been cases where some bills that were ‘obviously not constitutional (e.g. the Firearms Amendment Bill)’ were examined by a committee of the whole House. Conversely, other arguably constitutional bills, including the Bank of England Act 1998 and the Freedom of Information Act 2000, were sent to public bill committees. Another important aspect of the life of the bill will be inter-institutional tensions—most often, between the House of Commons and House of Lords—that are resolved by institutions compromising and coalescing in the enactment of constitutional statutes. This reflects the previous point about the importance of discussing opposing views.

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60 See Select Committee on the Constitution, Parliamentary Voting System and Constituencies Bill (HL 2010-11, 58) para 12: ‘In general, we regard it as a matter of principle that proposals for major constitutional reform should be subject to prior public consultation and pre-legislative scrutiny.’

61 Khaitan (n 25) 608.

62 Cram (n 9) 86n.48.

The majority by which a bill was passed may be an indication of broad agreement across party lines. Conversely, the potentially significant constitutional effects of a bill may intensify opposition to it. This expressly stated opposition along party lines can become significant after the enactment of the statute. As the later discussion of the third prong (‘the life of the statute’) will indicate, political entrenchment of a constitutional statute that had not garnered inter-institutional consensus during the enactment process may emerge after the statute has operated in practice and former opponents of this originally controversial statute have endorsed it, most likely over multiple electoral cycles. In sum, super-majorities should not be used independently as a crude numerical tick box. Instead, they should be considered against the broader backdrop of the legislative history described in this section—for instance, in conjunction with cross-party statements about the constitutional significance of passing the bill in question.

At this point, an objection could be raised as to whether my proposal is constitutionally permissible in light of parliamentary privilege. Article 9 of the Bill of Rights 1689, ‘the most important statutory expression of parliamentary privilege,’\(^{64}\) states that ‘the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.’ The commitment to parliamentary privilege is reflected in a ‘deep-seated and long-standing aversion within the British constitutional tradition to the idea of judges consulting Hansard.’\(^{65}\) However, the consultation of parliamentary material proposed in this section helps to complete a historical narrative rather than to criticise statements made in Parliament, and is thus uncontroversial.\(^{66}\) There is further support for this argument in the case law. Pepper v Hart,\(^{67}\) which allows courts to rely on clear ministerial statements in cases of statutory ambiguity, is not particularly relevant in this context: the recognition of constitutional statutes will not normally turn on the interpretation of an ambiguous statutory provision.

\(^{64}\) Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013-14, HL 30, HC 100) para 16.


\(^{66}\) Joint Committee on Parliamentary Privilege, *Parliamentary Privilege (first report)* (1998-99, HL 43-I, HC 214-I) para 86 (‘It is difficult to see how there could be any objection to the court taking account of something said or done in Parliament when there is no suggestion that the statement or action was inspired by improper motives or was untrue or misleading and there is no question of legal liability’); Joint Committee on Parliamentary Privilege (n 64) para 121 (‘parliamentary proceedings are admitted as evidence where they are referenced as a matter of history, or as part of a narrative, to explain what happened, without the content as such being questioned. Such references to parliamentary material are uncontroversial’).

\(^{67}\) [1993] AC 593.
However, there may be useful insights by analogy in other case law which considers the use of parliamentary material in cases involving the compatibility of primary legislation with Convention rights under the Human Rights Act. The leading case here is *Wilson v First County Trust (No 2)*, in which the House of Lords stated that the courts ‘would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information.’ Such ‘additional background material may be found in published documents, such as a government white paper, [or] provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill [or] in explanatory notes prepared by the relevant government department and published with a Bill.’ It was further noted that ‘by having regard to such material the court would not be “questioning” proceedings in Parliament [but] would merely be placing itself in a better position to understand the legislation.’

It is precisely this type of ‘background information’ that courts could find by tapping into the legislative record in the process of designating a statute as constitutional. The House of Lords was quick to add a cautionary note: ‘the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. … [I]t is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments.’ Again, nothing in this judicial statement suggests that the approach proposed here is constitutionally impermissible. Courts would not question Parliament but use *Hansard* as one of several sources of background information. In fact, my proposal is not only constitutionally permissible but also constitutionally desirable: courts in the past have designated constitutional statutes without relying on the will of Parliament as stated expressly in the text of the statute. The alternative approach proposed here cabins judicial discretion in recognizing constitutional statutes by adding a list of criteria that can guide the judicial enterprise without requiring complex empirical research.

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68 [2003] UKHL 40. For an excellent analysis of this case, see Kavanagh (n 65).
69 ibid [64] (Lord Nicholls). Lord Hope made a similar point, ibid [117]-[118].
70 ibid [66]-[67].
71 See the earlier criticism in Part 3 of constitutional statutes as a common law creature. Cf Ahmed and Perry (n 38) 528-32.
72 Besides, as Kavanagh notes ((n 65) 455) courts rely on other extrinsic aids, such as ‘legislative antecedents to the statute, legislation in pari materia, Explanatory Notes, White Papers, Green Papers, Law Reform Commission reports, Select Committee reports and even government circulars and Home Office discussion papers.’
iii. The post-enactment history (the ‘life of the statute’).

An important aspect of recognizing a statute as constitutional is the treatment of the statute by the relevant institutional actors and the people after its enactment. Judicial identification of a statute as constitutional will be one element of this inter-institutional recognition but, as already noted, this does not exhaust the inquiry. A statute may be constitutional even if it does not appear on the list in Thoburn. Other indicia here will be popular endorsement as expressed in referendums (eg the 1975 referendum on the UK’s membership of the EU following the European Communities Act 1972); or through the election of parties that promise in their manifestos the consolidation of previous constitutional reform; or through subsequent legislation endorsing key constitutional principles (eg statutes after every EU Treaty revision, such as the European Union Act 2011, or reaffirmation of a constitutional statute that had originally included a sunset clause).

An important clarification is in order here: while referendums are themselves a constitutional mechanism, popular endorsement expressed through a referendum may not always equate to popular endorsement of a proposal as ‘constitutional.’ For example, a law could be widely endorsed because it serves the interests of a majority, regardless of its status as ‘constitutional’ or ‘fundamental.’ Historically, these referendums (eg on the UK’s continued membership of the EU in 1975 and 2016, the Scottish and Welsh devolution referendums in 1997, the Northern Ireland referendum on the Belfast Agreement in 1998) did indeed pertain to fundamental constitutional reorganization and were presented as part of resolving key constitutional questions. However, this may not always be the case. For example, a referendum endorsing a legislative price cap for alcoholic beverages would not qualify as a ‘constitutional referendum.’ Indeed, this legislation would fail under the content-based prong of my model as it would not reflect the content of constitutional law (state institutions, negative rights, and affirmative rights). This hypothetical referendum might signal wide popular endorsement of the law but not endorsement of this measure as constitutional. However, as a matter of constitutional history, the referendums that took place in the UK were different from this hypothetical example:

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73 See Weill (n 59) 72.
these referendums contributed to a new constitutional settlement that was not only ‘acceptable to the people’ but affirmatively endorsed by the people.

In other cases, opponents of a constitutional statute may promise to repeal a constitutional statute but fail to do so even if elected. The post-enactment history may, therefore, provide a rich source of material pointing to the political entrenchment of a constitutional statute. Looking to the ‘life of the statute’ is also consistent with case law. Indeed, courts have reviewed post-enactment political practice, including notably subsequent legislation, in combination with other evidence, to confirm their holdings.

iv. Preliminary conclusion: The scope of the new model of constitutional statutes.

The model for identifying constitutional statutes advanced in this article proposes a holistic assessment of a statute over a period of time which typically involves multiple electoral cycles. Furthermore, the proposed three-pronged approach employs both content-based and process-based criteria. Much of the existing scholarship has focused on the former set of criteria, namely, the types of rules and principles included in a constitutional statute. This approach has given rise to the critique that certain content-based definitions may be over- or under-inclusive. To address these concerns, Paul Craig has argued that a statute is constitutional not only when it ‘deals with the horizontal, territorial or vertical dimension’ of the constitution but also when it is ‘of normative importance in the overall constitutional schema.’

The challenge then shifts to defining ‘normative significance.’ This is where the process-based criteria under the second and third prongs of my proposed model offer assistance. The emphasis in these two stages is not on an externally pre-determined hierarchy of ‘normative significance’ but on what the key institutional actors, including the people themselves, have

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75 Laws (n 8) 81.
76 This is the example of the HRA discussed later.
77 See R (Jackson) v Attorney General [2005] UKHL 56 [68]-[69], [124], [171], in which several members of the House of Lords considered the post-enactment consistent practice by Parliament not challenging the validity of the Parliament Act 1949 as evidence for the nature of the 1949 Act as valid primary legislation. See also, in a different context, R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29 [28] (referring to post-legislative activities, such as an investigation by a Select Committee, followed by a government response, a Private Member’s Bill, and a written answer by the Secretary of State). The contextual approach advocated in the text is consistent with other judicial pronouncements: cf, in a different context, Wilson (n 68) [61] (Lord Nicholls) (‘When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture’).
78 See the previous discussion in Part 4.B.i and notes 53-54. An exception is Weill (n 59).
endorsed as fundamental over a long period of time based on the indicators presented earlier in this section. Inter-institutional and popular endorsement and reaffirmation over time are important. For example, the ‘life of the bill’ (stage 2) may suggest that a legislative provision was not regarded as ‘constitutional’ when it first came into force. However, during the ‘life of the statute’ (stage 3) this provision may, over time, come to be perceived as expressing fundamental normative commitments and become constitutional. This process occurs as this provision begins developing its effects and multiple institutions, including opponents of the original legislative reform, endorse its fundamental precepts—often over multiple electoral cycles.

The emphasis on inter-institutional and popular deliberation and consensus also delimits the extent of constitutionalisation. While we generally talk of ‘constitutional statutes,’ more precisely this term does not cover every provision of the Act but rather those key principles that have been the subject of deliberation and reaffirmation over time. This further means that a statute can be described as constitutional in this sense even though specific, often more detailed and technical, provisions may have been amended over time. For a similar reason, subordinate legislation will lack this element of inter-institutional and popular endorsement, although administrative implementation may highlight the constitutional significance of the primary legislation.  

5. The Case Studies.
This section applies the proposed criteria to a series of case studies that cover both rights and constitutional structures or processes. The examples further demonstrate that certain criteria will apply to varying degrees in different cases or, as in the case of the Fixed-term Parliaments Act 2011, may not apply sufficiently to designate a statute as constitutional. The discussion in this section is far from exhaustive. My primary aim in this article is to set up the general framework and suggest examples of its application.

i. Content.

80 The Freedom of Information Act, discussed in Part 5, is one such example.
81 I intend to provide more detailed ‘biographies’ of statutes, and additional case studies, such as other examples of welfare legislation (eg social security and education), the electoral constitution, and the Abortion Act 1967, in future work.
It is easy to establish that the HRA meets the criterion of constitutional content: it provides a range of civil rights. It has also had a significant impact on the powers of state institutions, notably those of courts as sections 3 and 4, cited in the introduction, demonstrate. Moreover, section 19 provides that the minister in charge of a bill under consideration must make a statement in either House of Parliament that in her view the provisions of the bill are compatible with the Convention rights.

**ii. The life of the Bill.**

The UK had ratified the European Convention on Human Rights (ECHR) in 1951 but had not incorporated it into domestic law. Therefore, owing to the UK’s dualist system, individuals could not seek the enforcement of rights provided in the ECHR before domestic courts prior to domestic legislation, the HRA, coming into effect. However, as Harlow and Rawlings have noted, *Brind* ‘closed the door to judicial incorporation’ but not to the ECHR. Rather, it ‘fuelled the argument for legislative incorporation.’ This argument was also advanced by senior judges in extra-judicial lectures. The time for legislation had come in 1997-1998. The Labour manifesto of 1997 promised to incorporate the ECHR into UK law to ‘bring these rights home’ and allow the British people access to them in their national courts. The manifesto highlighted this reform as part of a series of proposals to improve the constitution. By contrast, the Conservative Party had included no reference to human rights legislation in the manifesto. Tony Blair’s Labour won a landslide and, as promised, brought forward a Human Rights Bill. The legislative history of the Bill contains numerous references to the constitutional significance of the proposal.

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85 See Roger Masterman and Ian Leigh, ‘The United Kingdom’s Human Rights Project in Constitutional and Comparative Perspective’ in Roger Masterman and Ian Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP 2013) 3 (noting that the HRA was one of the key elements of the new constitutional landscape under New Labour and ‘marked the culmination of a 30-year campaign for access to the Convention rights in domestic courts’).
86 See, eg, the following statements by key political actors from all sides of the debate in the second reading in the House of Lords. The Lord Chancellor, Lord Irvine of Lairg, said that the Bill ‘occupies a central position in our integrated programme for constitutional change.’ (HL Deb 3 November 1997, vol 582, col 1227). The shadow Lord Chancellor, Lord Kingsland, also stressed the constitutional significance of the Bill: ‘If the Bill becomes law it will be a defining moment in the life of our constitution. Perhaps the only other examples this century of such defining moments were the passage of the Parliament Acts of 1911 and 1949’ (HL Deb 3 November 1997, vol 582, col 1235). Other peers emphasized the same point: ‘The Bill is the beginning of a very important constitutional chapter in our history’ (Lord Scarman, HL Deb 3 November 1997, vol 582, col 1256); ‘this Bill is a major plank in the Government's
iii. The life of the statute.

The HRA came into effect in 2000. This constitutional reform was reaffirmed and consolidated through the re-election of the Labour Party in 2001 and 2005. In 2001 the Labour manifesto acknowledged the ‘major legal change’ they had brought about, adding: ‘now is the time to build the inclusive society in tune with British values. Our commitment to protection for every citizen is expressed in the 1998 Human Rights Act.’ The reference to fundamental legal reform reflecting British values sounded in constitutional language. By contrast, the Conservative Party manifesto contained no specific reference to the HRA other than a commitment that, on the international plane, a Conservative government would exempt the armed forces from the ECHR. The Labour Party won on an agenda of consolidation and continuation of the 1997 reforms. The 2005 Labour manifesto stated that they were ‘proud to have brought in the Human Rights Act,’ using the constitutional language of rights and democracy. This discussion was explicitly linked to Labour’s ‘unprecedented programme of constitutional reform.’ On the contrary, the Conservative manifesto again included just one reference to the HRA in a way that did not imply any intent to repeal it. In the 2005 general election, the Labour Party won a reduced majority in a (weak) reaffirmation of its domestic agenda.

The HRA came back to the forefront in 2015 when, for the first time in a party manifesto, the Conservatives stated explicitly their intention to repeal and replace the Act. By contrast, the Labour Party reiterated their firm commitment to the HRA. In a surprise result, the Conservatives won the majority of the seats in the House of Commons. The Queen’s Speech of 2015, outlining the government’s legislative agenda, mentioned that the government would ‘bring forward proposals for a British Bill of Rights.’ This was repeated in the Queen’s Speech for 2016, but no

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programme of constitutional reform.’ (Lord Holme, HL Deb 3 November 1997, vol 582, col 1258); ‘We are looking at what is pulsing across our constitutional Rubicon. I believe that when we look back we shall all be proud to have been here on this day’ (Baroness Williams, HL Deb 3 November 1997, vol 582, col 1299).

89 ibid 103 (emphasis added).
91 Conservative Party (n 74) 73.
specific proposals were brought forth, possibly because of intra-party opposition. These developments have contributed to the political entrenchment of the HRA. However, this is an example of reaffirmation by tacit acquiescence, which can be analogised to the ‘dog that didn’t bark’ argument in statutory interpretation: the inference of reaffirmation this time is not drawn from affirmative activity by relevant political actors but rather by their failure to act (their silence).

The future of the HRA is currently uncertain following the result of the 2019 General Election. However, if one thing remains constant across multiple electoral cycles and administrations, it is that key political and institutional actors refer to the HRA in explicitly constitutionalist terms.


i. Content.

The subject-matter criterion is met: The Act provides an individual right of access to information while also promoting government openness and accountability. The Information Tribunal in a 2007 decision referred to a ‘new fundamental right to information held by public bodies.’

ii. The life of the Bill.

The British system had been characterised by a long-standing culture of secrecy and confidentiality, supported by legislation such as the Official Secrets Act of 1911. The Major government took an important, albeit limited, step toward more open government with the Code of Practice on Access to Government Information in 1994. Although the Code created a presumption of disclosure thus reversing the long-standing default position, this was a non-

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95 Alison L Young, *Democratic Dialogue and the Constitution* (OUP 2017) 296.
99 *Department for Education and Skills v Information Commissioner and the Evening Standard*, EA/2006/0006 (19 February 2007) [61].
statutory and essentially non-enforceable duty. New Labour took issue with the lack of legislative teeth of this reform and included in its manifesto for the 1997 election a commitment to enact freedom of information legislation. Indeed, within six months after its election, the New Labour government published a ‘hugely encouraging’ White Paper proposing the introduction of such legislation. However, the Bill itself was less ambitious. Moreover, the Bill had not been considered by committee of the whole House.

iii. The life of the statute.

The UK FOIA was originally met with scepticism, occasionally couched in very strong terms: ‘The [FOIA] is not only a sheep in wolf’s clothing but a fraud on democratic accountability.’ Indeed, the FOIA only took effect five years after its adoption. Tony Blair himself, whose administration had introduced this legislative reform, later described it as an enormous blunder. Nevertheless, the operation of the FOIA in practice and its robust enforcement by the Information Tribunal as a fundamental right has contributed to transparency; the Act has therefore gained support by the press, the public, and academics. These actors often expressed this support in explicitly constitutionalist terms. For example, when an Independent Commission on Freedom of Information was tasked with reviewing the FOIA, it engaged in extensive consultation with organisations, including media bodies, and individuals. Responses to this consultation exercise described the FOIA as a ‘constitutionally important piece of legislation,’ ‘a welcome constitutional development,’ and even ‘the modern counterpart of universal suffrage and democracy.’ Indeed,

104 Rodney Austin, ‘The Freedom of Information Act 2000 – A Sheep in Wolf’s Clothing?’ Jeffrey Jowell and Dawn Oliver (eds), The Changing Constitution (5th edn, OUP 2004) 415; see also Tomkins (n 103) 136 (‘in many respects the regime under the Act allows for less openness than had been the case under the non-statutory scheme of the Code of Practice’).
writing three years after the opening quote to this section, Rodney Austin qualified his earlier position noting that the FOIA ‘remains a sheep in wolf’s clothing but its operation may, despite its limitations, save it from becoming a fraud on democratic accountability.’

This example illustrates the importance of administrative implementation in the life of the statute. Our attention here moves from political actors to agency officials. Eskridge and Ferejohn have placed significant weight to these actors and proposed the concept of ‘administrative constitutionalism’: this is defined as ‘the normative, problem-solving vision held by political (as opposed to judicial) officers as they work to enact, implement, and administer landmark statutes.’

The robust administrative enforcement of the FOIA reaffirmed the position of the fundamental principles of the Act, notably the value of openness, in the constitutional canon in the UK. This was coupled by subsequent legislative reaffirmation. The main principles of the FOIA have been kept in place even though exemptions reflecting other constitutional values, such as privacy, have become wider.

C. The National Health Service (NHS) legislation.

i. Content.
The NHS Act 1946 introduced a system of comprehensive, universal, and free health care. This was Clement Attlee’s version of a ‘British New Deal.’ His post-World War II administration delivered on a promise of a ‘fuller definition of rights’ that covered what Sir William Beveridge had identified in his famous 1942 Report as the ‘five giants’: want, disease, squalor, ignorance, idleness. The principle of universality, in particular, ushered in ‘a new concept of citizenship.’

ii. The life of the Bill.
The role of precursors is salient in this case study: As early as in 1926, the Royal Commission on National Health Insurance had stated that ‘the ultimate solution will lie, we think, in the direction of divorcing the medical service entirely from the insurance system and recognising it as a service

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108 Austin (n 102) 406.
109 Eskridge and Ferejohn (n 44) 46.
110 See eg the new s. 40.4A FOIA, introduced in response to the General Data Protection Regulation and the Data Protection Act 2018.
111 Bew (n 4) 389-90.
to be supported from the general public fund." On 19 October 1942, Attlee and Bevin wrote a letter to the National Executive outlining ‘the benefits that had accrued to the working classes as a direct result of the presence of Labour Members’ in the wartime coalition government. Interestingly for our purposes, Harold Laski thought that these piecemeal benefits did not go far enough and refused to their doctrines ‘the status of fundamentals.’ In other words, these were only timid first steps in the process of introducing more ambitious constitutional legislation.

Indeed, the originally cautious approach changed with the publication of the Beveridge Report in 1942 which laid the foundations for the welfare state in the UK. In the words of the Report, ‘restoration of a sick person to health is a duty of the State.’ The report found itself at the centre of political discussion demonstrating an emerging consensus on the redefinition of the role of the state. Upon its publication, citizens formed a line one-quarter of a mile long to purchase it. Abroad, ‘it was parachuted into occupied territories as an expression of the ideals for which the Allies were fighting.’ As John Bew has described this, ‘the bold shock of idealism galvanized those who had argued that the war must be fought for a new order, at home and abroad.’ Labour’s manifesto for the first post-WWII election on 5 July 1945 sold 1.5 million copies, thereby ‘easily outstripping the Beveridge Report.’ The popularity of both the Beveridge Report and the Labour manifesto reflect the public salience of these proposals and the subsequent popular endorsement of these fundamental changes as part of a post-WWII vision for a ‘New Britain,’ evidenced in the landslide victory of the Labour Party. After this electoral victory, the Labour government started implementing the Beveridge Report. However, the promises that Attlee’s government delivered upon after 1945 had a longer heritage and constituted a ‘culmination of campaigns which Attlee had fought since long before WWI.

iii. The life of the statute.

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115 Bew (n 4) 293-94.
116 Beveridge (n 112) para 427.
118 Bew (n 4) 296.
119 ibid 396.
121 Bew (n 4) 390.
After the enactment of the NHS (and other legislation supporting the creation of a welfare state), the Labour Party’s emphasis switched to consolidation rather than further advance.\(^{122}\) In the October 1951 general election, the Labour Party was defeated, but cross-party consensus around the NHS as a key facet of the welfare state was secure. Indeed, ‘Conservatives after 1951, from the Butskellite era of the fifties down to the Heath period of the early seventies, stressed their anxiety to retain the essence of the achievements of the Attlee government.’\(^{123}\) By the 1970s, welfare legislation had become embedded in the national culture with institutions such as the NHS ‘seen as an embodiment of national virtue.’\(^{124}\) Even during Margaret Thatcher’s premiership, when the *Economist* published a leaked memo from the Central Policy Review Staff, a Cabinet Office think tank, which suggested a move to private insurance, the ensuing public furore forced the proposal off the agenda and Thatcher to declare ‘The National Health Service is safe with us.’\(^{125}\)

The fundamental principle as enshrined in section 1 of the 1946 Act remained the same in all the subsequent statutes in 1977, 2006, and 2012 (‘comprehensive service’ and ‘free of charge except in so far as the making and recovery of charges is expressly provided’).\(^{126}\)

What stands out throughout the years from the establishment of the NHS until today is the strong and continuous popular endorsement of the NHS which ‘has attained a near-mythic status in British political life.’\(^{127}\) A study covering the 1960s had concluded that the ‘rise and endurance of the welfare state was directly related’ to public support.\(^{128}\) The images from the London Olympics, with which this article began, demonstrate the same idea. More strikingly, an Ipsos poll from October 2017\(^ {129}\) illustrates that, at a moment of national division, the highest percentage of respondents (45%) identified the NHS, the main principles of which are enshrined in the NHS legislation (eg public funding, universality), as the most important element of national pride (over the country’s history and system of democracy that came second and third).

\(^{122}\) ibid 472. See also Lowe (n 117) 92 (‘Attlee in 1948 chose not to herald the dawn of a new egalitarian age’).


\(^{124}\) Lowe (n 117) 19.

\(^{125}\) Timmins (n 123) 390-91.

\(^{126}\) It is worth adding here the explicit use of constitutional language in the Health Act 2009. Part 1 of the Act refers to the ‘NHS Constitution’ which ‘establishes the principles and values of the NHS in England.’

\(^{127}\) Bew (n 4) xiv.


\(^{129}\) Ipsos MORI, ‘Shifting Ground: 8 Key Findings from a Longitudinal Study on Attitudes Toward Immigration and Brexit’ (2017) 14.
D. The negative case: Fixed-term Parliaments Act (FTPA).

Mark Ryan has argued that the FTPA would ‘clearly fall within Lord Justice Laws’ category of constitutional statutes immune from implied repeal. In any case, it is contended that the Act will become politically entrenched over time.’ I suggest that, while the former part of the statement is accurate, the latter part is not. In fact, the FTPA is an example of a statute that would be constitutional under the traditional model but has not yet achieved this designation under my proposed model.

i. Content.

This criterion is met. The Act determines the term of the House of Commons and removes the prerogative power of dissolution. As such, it affects the distribution of powers between two key institutions and the timing of elections.

ii. The life of the Bill.

The Bill was part of the Coalition Agreement but had not been included in the Conservative Party’s 2010 manifesto. However, the Liberal Democrats’ manifesto had stated the commitment to introduce fixed-term parliaments ‘to ensure that the Prime Minister of the day cannot change the date of an election to suit themselves.’ The Bill did not receive any form of pre-legislative scrutiny and was not preceded by a public consultation process. The House of Commons Political and Constitutional Reform Committee decried that ‘a Bill of this legal and constitutional complexity [had] not been the subject of any prior consultation or pre-legislative scrutiny’ especially considering that it had not been in the Conservative Party manifesto. The Committee further described the Bill as ‘rushed.’ However, the Bill was considered by a committee of the whole House.

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133 Ryan (n 130) 216.
134 Political and Constitutional Reform Committee, Fixed-term Parliaments Bill (HC 2010-11, 436) para. 5.
iii. The life of the statute.

The House of Lords Constitution Select Committee was similarly critical, commenting that ‘the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles or sustained public demand.’ In other words, the enactment of this statute stemmed from strategic considerations—the Liberal Democrats’ insistence to sustain the coalition for the full term—rather than genuine constitutional principles. Indeed, this has played out in practice as the provisions on early dissolution were used strategically by PM Theresa May in April 2017 to call for a general election. In the autumn 2019, after Boris Johnson’s government failed three times to secure the required two-thirds majority, separate legislation, the Early Parliamentary General Election Act 2019, was passed to provide for a general election in December 2019. The future of the FTPA is far from secure as both the Conservative and the Labour parties had promised in their manifestos for the 2019 general election to repeal this Act. It is indicative that both the party which introduced the FTPA in the first place and the major opposition party doubt the continued operation of the Act.

One last interesting point about post-enactment deliberation comes from the legislative history of the Bill. In the House of Lords, the cross-bench peer Lord Pannick had sought to amend the Bill to insert a sunset clause. This clause would have required a resolution by both Houses in 2015 to revive sections of the Act which would have otherwise lapsed. This would have allowed for post-enactment deliberation, an opportunity which was missed as the Government defeated the amendment. However, under section 7(4) of the Act as it currently stands, the Prime Minister must make arrangements for a committee to carry out a review of the operation of the Act and, if appropriate, make recommendations for the repeal or amendment of this Act. This review should take place between June and November 2020. The broader point is that both the deficiencies in the legislative process and the scant post-enactment record, which includes a repudiation of the principles of the Act by the party that first introduced it, suggest that the FTPA has some way to go before it can take its place as a constitutional statute in the UK legal order.

135 Select Committee on the Constitution, Fixed-term Parliaments Bill (HL 2010-11, 69) para 20.
137 Ryan (n 130) 217.
In conclusion, this section has applied the proposed model of constitutional statutes to a series of examples. This application suggests that the approach proposed in this article is, in some respects, more generous than the traditional Thoburn approach since my proposal includes key principles of welfare legislation as part of the constitutional canon. On the other hand, my approach is narrower in that it excludes statutes, such as the FPTA, which have not reached constitutional status yet. We should heed Vanessa MacDonnell’s warning that ‘the more we characterize legislation as quasi-constitutional … the more the exceptional nature of this label is compromised.’ My proposal on how to achieve a proper balance is to look beyond just the substantive content of the statutes and include the pre- and post-enactment history. This historical approach can point to the degree in which different actors have engaged self-consciously in the process of enacting, implementing, and interpreting constitutional statutes. Once a statute has reached this constitutional status, there are implications that should follow from this label which I sketch below.

6. The Implications of the New Model of Constitutional Statutes.

A. Principle of Mutuality not as an Enforceable Rule but a Political Principle.

I argue that once a statute has been properly recognized as constitutional, this should trigger the ‘principle of mutuality.’ This is not a judicially enforceable rule but a principle that should guide political practice. Richard Albert draws a distinction between a constitutional amendment, which ‘continues the constitution-making project in line with the current design of the constitution,’ and a constitutional dismemberment which is ‘incompatible with the existing framework of the constitution and instead seeks to unmake one of its constituent parts.’ The rule of mutuality suggests a ‘principle of symmetry’ whereby a constitutional dismemberment ‘can be legitimated only by the same or similar configuration of constitution-making bodies that made the commitment that dismemberment later seeks to undo.’

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138 Cf Scott Stephenson, ‘The Supreme Court’s renewed interest in autochthonous constitutionalism’ [2015] PL 394, 397 (noting that the ‘expansive list of statutes’ in HS2 indicates a ‘preference for a generous approach to conferring constitutional status’).
139 MacDonnell (n 52) 519.
140 I borrow the term from Richard Albert, ‘Constitutional Amendment and Dismemberment’ (2018) 43 Yale Journal of International Law 1, 5-6 (referring to the ‘rule of mutuality’ (emphasis added)).
141 ibid 5.
142 ibid 5, 66. See also Ackerman (n 45) 83 (arguing, in the context of landmark statutes, that ‘an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive popular mobilization equal in force, but opposite in effect, to the civil rights movement that generated these landmarks in the first place’).
There are institutional obstacles to applying the principle of mutuality to UK constitutional statutes since the UK constitution does not have ratification thresholds or amendment requirements such as Article V of the US Constitution or Part V of the Canadian Constitution Act, 1982. However, the underlying principle should remain the same across systems, namely, that the level of institutional engagement in repealing a constitutional statute should mirror (but not necessarily match perfectly) that in the process of enacting and entrenching the statute as constitutional.

We can see the operation of this political (again, not judicially enforceable) principle in the context of Brexit which has resulted in major constitutional change in the UK by terminating the country’s membership of the EU. One could begin with an attempt to apply Ackerman’s stages of major constitutional change to Brexit.

(1) Signalling.

On 23 January 2013, Prime Minister Cameron delivered his ‘Bloomberg speech’ promising a referendum on the UK’s membership of the EU by the end of 2017 if the Conservative Party won the 2015 general election. The Conservative Party manifesto for the 2015 election provided more detail on this promise. By contrast the Labour Party manifesto prioritised the NHS and opted against a referendum. The Conservatives’ win of the majority of seats in 2015 put Brexit on the agenda.

(2) Proposals.

The second stage came with the advisory referendum in favour of Brexit which was then followed by the Article 50 TEU notification on 29 March 2017: the proposal was to exit the EU.

(3) Triggering Election.

What Ackerman describes as the triggering election came in June 2017 with the snap general election. On 1 June 2017, a week before the general election, Theresa May had urged

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144 Conservative Party 72-73.
145 Labour Party 77.
voters to use the general election to ‘affirm’ the decision to vote to leave the EU. However, there are certain traits in a ‘triggering election’ that were not salient in the June 2017 election. In the lead-up to the election, ‘a large proportion of the electorate will recognize that the country is reaching a constitutional crossroads; they will understand that the leading candidates for public office are pointing the country in very different directions; and they can explain the basic outlines of the collective choice at stake.’ In the UK case, the British people knew that there was a watershed election in June 2017. However, the two major parties were not offering clear, detailed (or very different) agendas as to what Brexit means, so Ackerman’s scheme would not apply aptly at this particular stage.

(4) Mobilised Elaboration.

From June 2017 to December 2019, the UK was in the process of elaborating rules that aimed to give effect to Brexit. These rules were proposed in a series of legislative initiatives, such as the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Bill (as it then was), which would have transformative effects. Indeed, the European Union (Withdrawal) Act 2018 had such broader repercussions by bringing to the fore the UK’s territorial constitution. The UK Government’s decision to proceed with the 2018 Act without the Scottish Parliament’s legislative consent, the Scottish Parliament’s response with the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018, and the Supreme Court’s judgment on a reference challenging the Scottish Bill demonstrated how the reverberations of the 2018 Withdrawal Act reached the devolution settlement.

(5) Ratifying Election.

The results of this process of norm elaboration were put to the test and ratified in the general election of December 2019. Brexit was the focal point of the electoral campaign and the Labour

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147 Ackerman (n 45) 42.
148 See, eg, HC Library, Briefing Note on Repeal Bill (September 2017) (noting that the EU Withdrawal Bill was ‘the most significant constitutional bill which has been introduced by the Government since the Bill for the European Communities Act itself in 1972’).
149 Scottish Continuity Bill case (n 41).
Party’s attempt to expand the scope of the discussion (with an emphasis on ‘change’)
was crowded out by the Conservative Party’s overwhelming, and in the end electorally successful,
message to ‘get Brexit done.’ Of the 58 constituencies that switched to the Conservative Party,
55 had voted Leave in the 2016 EU referendum.

(6) Consolidating Phase.

The new constitutional regime after Brexit will be consolidated if the future government
that emerges after the next election, especially if this is led by a different party, applies the
legislation enacted until that point and accepts the full implementation of Brexit as it will have
been developed by the current majority Conservative government.

Ackerman offers a formalised model that can provide clarity in the process of ascertaining
constitutional change. However, even if his model cannot apply aptly in the context of Brexit (eg
because of the different operation of the ‘triggering election’), both his and my approach highlight
similar key points: an important constitutional change involving the repeal and introduction of
constitutional statutes; a constitutional subject matter that enjoys salience in public and legislative
debates; inter-institutional deliberation which may involve the public directly (albeit in an
impoverished fashion in the context of a referendum); legislative reaffirmation (or political
entrenchment through multiple elections). The principle of symmetry is in operation here: the same
three keys that were required to unlock the chest of EU membership in the 1970s—exercise of
prerogative powers to enter the Treaties, legislation in the form of the European Communities Act
1972, and the referendum in 1975—are required and have been in operation, albeit in slightly
different order, in the process of unlocking the chest of withdrawal from the EU.

B. Implications for Political Actors.

150 Labour Party, ‘Manifesto 2019. It’s Time for Real Change’ (2019) 6 (‘Some people say this is the Brexit election. But it’s also the climate election, the investment election, the NHS election, the living standards election, the education election, the poverty election, the fair taxes election. Above all, it’s the change election’).
151 Conservative Manifesto 2019 (n 97). In addition to the title of the manifesto, the phrase ‘get Brexit done’ appears twenty-two times in the main text.
As already noted, the principle of mutuality is not legally enforceable. It could, however, guide political practice. More broadly, the proposed model of constitutional statutes can provide arguments in political and legislative debates.

Mark Elliott has argued that ‘the conclusion that particular legislation is, or would be, suspect in constitutional (as distinct from legal) terms sounds in the political realm, in that it ... generates the political difficulty that would attend an attempt to legislate in breach of fundamental constitutional values.’ This argument could apply to attempts to repeal constitutional legislation in a rushed way–namely another type of attempt that would be ‘suspect in constitutional terms.’ This attempt would provide political arguments in favour of applying the principle of mutuality. This principle could entail more extensive deliberation in the Houses of Parliament or the need for popular endorsement through multiple electoral mandates before significant constitutional change takes place.

Constitutional bills should be subject to public consultation as the House of Lords Select Committee on the Constitution has already highlighted. This process should be complemented by building a public reading stage into the legislative process. The latter process has been piloted for certain bills and allows more specific public involvement in drafting the legislative language. Furthermore, constitutional change should not be effected by using Henry VIII clauses. This prohibition is expressly provided for in the Legislative and Regulatory Reform Act 2006 but should develop into a constitutional convention. In addition, constitutional statutes should not be passed under the Parliament Acts of 1911 and 1949. The reason is that the requirement for broader inter-institutional consensus to pass constitutional statutes should be reflected in the decision of both Houses of Parliament to enact the statute. This requirement is stronger when the

153 See also Richard Ekins, ‘Legislative freedom in the United Kingdom’ (2017) 133 LQR 582, 582 (suggesting that while constitutional statutes ‘do not legally qualify Parliament’s legal power to legislate, they ... impose constitutional or practical limits on that power’).
155 Select Committee on the Constitution (n 60).
156 But see Cram (n 9) (describing public consultation processes as top-down and arguing for a more bottom-up approach).
A constitutional bill proposes to repeal or replace a constitutional statute that itself had been enacted with the agreement of both Houses of Parliament.158

C. Implications for courts.
Political entrenchment does not equal legal entrenchment. This means that courts should not refuse to apply a statute that expressly repeals a prior constitutional statute. However, this is not to say that courts cannot be creative in drawing implications from the recognition of a statute as constitutional, within the limits of the proposed theory of constitutional statutes. For instance, under my model which recognizes the NHS legislation as having constitutional status, Parliament could repeal the NHS Act expressly through a process of sustained deliberation and inter-institutional cooperation. However, in the absence of express repeal and if the administration of this constitutional legislation were to result in practice in turning the exception in s. 1 (ie free, universal healthcare except otherwise provided) into the rule (ie an obligation to pay for most health services) thus undermining the fundamental principles of this constitutional statute, courts would be constitutionally empowered to not apply any changes that do not explicitly state that the NHS legislation and its principles are repealed.

Miller (No 1) could be read as providing another example of constitutionally permissible judicial creativity. One of the majority’s conclusions in the case was that ‘major’ constitutional changes, such as withdrawing from the EU, cannot be made via the prerogative and that this ‘appears ... to follow from the ordinary application of basic concepts of constitutional law.’159 Several academic commentators have criticized this reasoning for failing to articulate what these basic concepts and principles are.160 Indeed, Timothy Endicott has argued that Lord Reed’s dissent

158 One objection to this suggestion could be that a version of this approach had been proposed by the Court of Appeal in the Jackson litigation. The Court of Appeal had suggested in dicta that ‘the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act’ ([2005] EWCA Civ 126 [100]). However, this distinction between ‘modest and fundamental constitutional changes’ was rejected in the House of Lords (Jackson ibid [96] (Lord Steyn), [127] (Lord Hope), [158] (Baroness Hale). I would respond with three points. First, these statements are dicta. Second, the three justices themselves acknowledged potential qualifications to their position in exceptional circumstances (Jackson ibid [102] (Lord Steyn), [104], [107] (Lord Hope), [159] (Baroness Hale). Third, the model of constitutional statutes proposed in the text suggests a more expansive list of criteria to determine which statutes introduce fundamental constitutional changes. As such, they support the argument in the Court of Appeal and would address Lord Steyn’s concerns in particular.

159 Miller (n 33) [81]-[82].

is ‘unanswerable.’ Endicott continues that ‘the best explanation for the decision is that a large majority of the Justices decided that triggering Article 50 of the TEU is just too constitutionally important for the Prime Minister to do it without legislation’ and concludes that ‘the real problem with Miller (No 1) is not that there was no legal basis for it, but that there was no constitutional need for it.’

Both the criticism that constitutional principles are not articulated clearly by the majority and Endicott’s explanation of the outcome of the case are accurate representations of the majority’s approach. However, I would suggest that the theory of constitutional statutes reflecting the principle of mutuality as advanced in this article could be the constitutional principle that would lend support to the majority. The European Communities Act 1972 is a constitutional statute that has shaped the UK constitutional landscape. Therefore, the government could not alter fundamentally this constitutional state of affairs by triggering Article 50 TEU using prerogative powers. Instead, there was a constitutional requirement (or need, to use Endicott’s terminology) that all branches of government, including Parliament, be engaged in the process of effecting such constitutional change. Miller (No 1) would thus stand in favour of inter-institutional collaboration in the spirit of constitutional statutes as conceptualized in this article. Contrary to Sir John Laws’s suggestion in his recent commentary on Miller (No 1), this constitutional principle would not be conferred by the common law. It would rather be a manifestation of the judiciary, the political branches, and the people dynamically working out constitutional commitments on the basis of constitutional statutes. In fact, this account aligns with Sir John Laws’s own description more broadly of a ‘partnership between judiciary and legislature in maintaining the health of our constitution.’

7. Conclusion.

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161 Timothy Endicott, ‘Lord Reed’s Dissent in Gina Miller’s Case and the Principles of our Constitution’ (2018) 8 UK Supreme Court Yearbook 1.

162 ibid 9, 11, 23.

163 It is worth noting that in this case the Court would still use deductive reasoning, drawing on an updated understanding of the nature of the UK constitution; cf Alison L Young, ‘Miller and the Future of Constitutional Adjudication’ in Mark Elliott, Jack Williams, Alison L Young (eds), The UK Constitution after Miller: Brexit and Beyond (Hart, 2018) 289-96.


165 ibid 215.
I conclude with two opposing accounts of the British constitution. In 1795, the US Supreme Court stated: ‘in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: [The Constitution is] delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land.’ In 2013 Martin Loughlin suggested that, under the Burkean or ‘traditional idea’ of the constitution, which the UK is ‘almost unique in retaining,’ ‘the better the constitution the fewer the written constitutional laws since laws only reinforce a mode of conduct that has not been fully absorbed in the manners, traditions, and practices of a people.’ Following through on this reasoning, attempts to commit constitutional norms to writing may imply a ‘dire diagnosis for the state of Britain’s constitution of tradition.’

This article suggests that the Court’s 18th-century description of the British constitution is not accurate. However, contrary to the ‘traditional understanding,’ I would argue that this development is not unwelcome if we endorse the model of constitutional legislation advocated in the previous sections. One can adopt an approach to constitutional statutes that takes account of the ‘traditional idea’ of the constitution, that is, the role of tradition and interactions between constitutional actors. This can be achieved if tradition, long-standing institutional interactions, institutional reaffirmation, consistent popular endorsement of these rules infuse our definition of constitutional statutes and ensure that a statute is ‘constitutional’ not just because it has been labelled as such by a court or even Parliament. Therefore, I endorse the role of tradition, the importance of interactions between actors, and a historical approach to the constitution. The suggestion in this article is not part of ‘the widespread conviction that the so-called unwritten rules of constitutional practice must now be formalized’ but rather an interpretation of our constitutional arrangements in a way that takes both the formal statutes but also the history and institutions seriously. My response may also speak to Loughlin’s ‘great challenge for states adopting a new constitutional settlement,’ namely ‘to ensure that its principles and values are embraced by its people.’ As Grégoire Webber has put it in his review of Loughlin’s book, ‘can

166 Vanhorne’s Lessee v. Dorrance, 2 U.S. 304, 308 (Patterson J.)
168 Grégoire Webber, ‘Eulogy for the constitution that was’ (2014) 12 International Journal of Constitutional Law 468, 484.
169 Loughlin (n 167) 39-40.
170 ibid 12.
the constitution’s traditions of behavior be reformed without losing the “general consent” which sustained them and which must sustain the new constitutional arrangements?\textsuperscript{171} My proposal incorporates the idea of general consent channelled both through state institutions but also through public endorsement of these constitutional fundamentals as enshrined in constitutional legislation. In the ‘new chapter’ in British constitutional history,\textsuperscript{172} the statutory constitution can have a prominent place without displacing custom and practice.

\textsuperscript{171} Webber (n 168) 485.
\textsuperscript{172} Loughlin (n 167) 118.