

Constitutional Statutes

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Abstract – In recent years, British courts have treated constitutional statutes differently from ordinary statutes. This article sets out to explain: (1) how courts have treated constitutional statutes differently from ordinary statute; (2) what a constitutional statute is; and (3) why constitutional statutes should be treated differently from ordinary statutes. Courts have made it harder for ordinary statutes to repeal constitutional statutes by implication, and easier for constitutional statutes to repeal ordinary statutes by implication. A constitutional statute is a statute which regulates state institutions, and which possesses importance of a particular type that we describe. The nature of a constitutional statute largely – but not entirely – justifies the special treatment they have been given. These conclusions have wider implications, including for proposals to codify the British constitution.

1. The Death of an Orthodoxy

The most distinctive feature of the British constitution, compared with other constitutions, used to be its lack of distinctiveness, compared with the rest of the legal system. Constitutions elsewhere tend to be supreme or entrenched. It matters, in most other jurisdictions, whether a law is part of the constitution. Nothing used to turn on that point in Britain, legally

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speaking.² No one worried much about the lack of a precise definition of the constitution or of the statutes that are part of it, as a result. Definitions were useful for textbook writers, perhaps, as a way of organizing material, but they were not something judges and lawyers needed to worry about.

Things have been changing, though, and quickly. In *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)*,³ the House of Lords seemed to suggest that the doctrine of implied repeal, according to which later statutes imply that earlier and inconsistent statutes are repealed, did not apply to the European Communities Act 1972 ('ECA'). The judgment in *Factortame* had not clearly explained why the ECA deserved this special treatment, however, which by the early 2000s had become a significant source of confusion and dissatisfaction.⁴ Over the same period, the courts began breathing new life into the 'principle of legality', that is, the interpretive presumption that Parliament does not intend to violate important rights or principles. Courts increasingly relied on this presumption to narrowly interpret a range of legislation, often in the name of protecting 'constitutional' common law rights.⁵

Against this backdrop *Thoburn v Sunderland City Council*⁶ was decided in 2002.⁷ *Thoburn* involved a possible conflict between the ECA, a constitutional statute, and the Weights and Measurements Act 1985, an ordinary statute. Laws LJ (with whom Crane J agreed) held that the two statutes did not, in fact, conflict.⁸ In any case, he added, the ECA is not subject to the doctrine of implied repeal.⁹ That much could perhaps be inferred from *Factortame*. But Laws LJ went further to offer a rationale for

² AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 37. See also *McCawley v R* [1920] AC 691 (PC) 703-5; Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Constitutional Change in the United Kingdom' in Richard Rawlings, Peter Leyland, and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* 51-52; Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) *European Constitutional Law Review* 379.

³ [1991] 1 AC 603 (HL).

⁴ See, eg, Adam Tomkins, *Public Law* (OUP 2003) 116-20; Paul Craig, 'Britain in the European Union' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 115-21.

⁵ *R v Secretary of State for the Home Department; ex p Pierson* [1998] AC 539, 573-4 (Lord Browne-Wilkinson); *R v Secretary of State for the Home Department; ex p Simms* [2002] 2 AC 115, 131 (Lord Hoffmann). The principle of legality is nothing new: Oliver Jones, *Bennion on Statutory Interpretation: A Code* (6th edn, LexisNexis 2013) 938.

⁶ [2002] EWHC 195 (Admin), [2003] QB 151.

⁷ For a thorough account of the proceedings in *Thoburn*, see Mark Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54 *Northern Ireland Legal Quarterly* 25.

⁸ *Thoburn* [50].

⁹ *Thoburn* [62] - [63].

the ECA's special status. The ECA is a 'constitutional statute',¹⁰ he said, and constitutional statutes are not subject to the doctrine of implied repeal. The doctrine of implied repeal is triggered by a 'mere' implication,¹¹ but a constitutional statute can be repealed only by express or exceptionally clear words – a higher standard. In this way, the statutory parts of the constitution were said to receive the same degree of protection as the common law parts receive under the principle of legality.

The idea that constitutional statutes are difficult to impliedly repeal was not entirely new. *Re Parliamentary Privileges Act 1770*¹² and *The Earl of Antrim's Petition*¹³ had advanced similar ideas. But *Thoburn* was the first time that a court had said that *every* constitutional statute is protected from implied repeal. A decade after *Thoburn*, the Supreme Court agreed. In *H v Lord Advocate*, Lord Hope said for a unanimous court that the Scotland Act 1998, due to its 'fundamental constitutional' status, is 'incapable of being altered otherwise than by an express enactment'.¹⁴ Two years later, in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,¹⁵ Lord Neuberger and Lord Mance praised Laws LJ's judgment in *Thoburn* for its 'important insights' into the circumstances under which constitutional statutes could be impliedly repealed.¹⁶

Besides protecting them from implied repeal, courts have begun treating constitutional statutes specially in a second way. In the 2011 case of *R (Governors of Brynmarwr Foundational School) v The Welsh Ministers* ('*Brynmarwr*'),¹⁷ one issue was the resolution of a possible conflict between a provision of the Government of Wales Act 2006 ('GOWA'), a constitutional statute, and a more specific provision of the School Standards and Framework Act 1998, an ordinary statute. Normally courts are slow to invoke the doctrine of implied repeal due to the 'presumption of consistency'¹⁸, according to which Parliament is presumed to intend to

¹⁰ *Thoburn* [62].

¹¹ *Thoburn* [60].

¹² [1958] AC 331 (PC).

¹³ [1966] 3 WLR 1141 (HL).

¹⁴ [2012] UKSC 24, [2013] 1 AC 413 [30] (Lady Hale and Lord Kerr agreeing); Farrah Ahmed and Adam Perry in 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73 Cambridge Law Journal 514 explain the difference between *H* and *Thoburn*, and argue that the court's position in *H* is unjustified.

¹⁵ [2014] UKSC 3, [2014] 1 WLR 324 ('*HS2*').

¹⁶ *HS2* [208] (Lady Hale and Lords Kerr, Sumption, Reed and Carnwath agreeing). See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [82] (Lord Mance); Lady Hale, 'Keynote Address: UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014) <<https://www.supremecourt.uk/news/speeches.html>> accessed 24 February 2016.

¹⁷ [2011] EWHC 519.

¹⁸ This presumption is commonly known as the 'presumption against implied repeal'. We avoid that label because it could suggest that the presumption is that a later statute

legislate consistently with existing statutes. This presumption is especially strong when the later of two potentially conflicting statutes is more general (or less ‘special’) than the earlier statute. Hence the maxim: *generalia specialibus non derogant*.¹⁹ In *Brynmarwr*, this maxim would have suggested that GOWA, as the more general statute, ought to be interpreted narrowly to avoid conflicting with the School Standards and Framework Act 1998, as the more specific statute. However, Beatson J held that this reading would not reflect the ‘constitutional nature’ of GOWA.²⁰ Drawing on *Thoburn*, Beatson J said that ‘a provision in GOWA ... should not, absent clear words, be avoided or circumvented by resort to a specific provision in a non-constitutional statute’.²¹

Brynmarwr stands for the proposition that the *generalia specialibus* maxim does not apply to potential conflicts between earlier ordinary and later constitutional statutes. What has been overlooked is that *Brynmarwr* entails a still more significant proposition: if the constitutional status of a statute rebuts the presumption of consistency when that presumption is especially strong (i.e., when the later of two statutes is more general than the earlier statute), then *a fortiori* it rebuts that presumption in all other cases, too. Suppose, for example, that a provision of GOWA potentially conflicts with an equally general provision of an earlier statute. Normally we would presume that Parliament intended to legislate consistently with that earlier statute. However, because GOWA is a constitutional statute, it follows from *Brynmarwr* that we ought to hold that the presumption of consistency is rebutted. So the case law tells us that there is no presumption that a constitutional statute is consistent with an earlier ordinary statute.

The cases detailed so far all involved conflicts between constitutional statutes and ordinary statutes. In *HS2*, by contrast, the potential conflict was between two constitutional statutes: the ECA, which seemed to require the court to review the adequacy of Parliament’s consideration of certain information, and the Bill of Rights 1689, article IX of which prohibits the impeaching or questioning by any court of debates or proceedings in Parliament. The Supreme Court ultimately held that the conflict between the two statutes was merely apparent. Lord Neuberger

does not repeal an earlier inconsistent statute (rather than that the two statutes are consistent).

¹⁹ The rationale for the *generalia specialibus* maxim is that, if Parliament made a special provision regulating a situation, it is unlikely that it later intended the situation to be regulated under the umbrella of a general provision. See *Halsbury’s Laws of England* (4th ed, 1995) vol 44(1), para 1300.

²⁰ *Brynmarwr* [77].

²¹ *Brynmarwr* [77]. Courts in Canada and South Africa have likewise exempted constitutional legislation from the *generalia specialibus* maxim: *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 137 DLR (3d) 219 (SCC); *Sasol Oil (Pty) Ltd v Metcalfe NO* [2006] 2 All SA 329, 2004 (5) SA 161 (W).

and Lord Mance did suggest, however, that a conflict between two constitutional statutes would raise ‘further considerations’, not canvassed in *Thoburn*. Their lordships did not say what these considerations are.²²

Thoburn, *Brynmarwr*, *H*, and *HS2* all challenge the Diceyan orthodoxy that a statute’s constitutionality is irrelevant in law. Together, these four cases would make it especially hard for a constitutional statute (compared to an ordinary statute) to be repealed, and especially easy for a constitutional statute (compared to an ordinary statute) to bring about the repeal of another statute. These developments are no constitutional revolution, but they are something novel, and perhaps something more: the first steps towards a graduated legal system, where the constitutional is systematically set apart and above the non-constitutional.²³ Any step in that direction is an important step, and our aim in this article is to understand and eventually to defend the special treatment of constitutional statutes for the purposes of implied repeal. (To be clear, in the absence of a potential conflict, constitutional statutes *do not* receive special treatment; Lord Bingham’s suggestion that they should be interpreted especially ‘generously and purposively’²⁴ has been recently and firmly rejected by the Supreme Court in *Imperial Tobacco Ltd v Lord Advocate*²⁵ and *Attorney General v. National Assembly for Wales Commission*.²⁶)

We will consider two open questions. The first is definitional. If constitutional statutes are to be treated differently from ordinary statutes, then we need to be able to tell the two apart. But what *is* a constitutional statute? We consider this question in Section 2. The second question is justificatory. Constitutional statutes currently receive special treatment when they potentially conflict with another statute. Is there any *legal* reason for this special treatment of constitutional statutes? Without such a justification, judges leave themselves open to the criticism that their treatment of constitutional statutes is illegitimate. We take up this justificatory question in Section 3, before considering the implications of our answer for constitutional codification in Section 4.

2. Definition

²² *HS2* [208].

²³ Mark Elliott, ‘Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution’ (2014) *European Constitutional Law Review* 379.

²⁴ See *R (Robinson) v Secretary of State for Northern Ireland* [2002] UKHL 32 [11]. It is not clear that Lord Bingham’s views commanded the majority of the court in that case.

²⁵ [2012] UKSC 61 [14].

²⁶ [2012] UKSC 53 [80]. The court was emphatic in its rejection of the proposition, but did not explicitly overrule *Robinson*.

The courts have provided many examples of constitutional statutes: the Petition of Right 1628, the Bill of Rights 1689, the Act of Settlement 1701, the Act of Union 1707, the Treaty of Union with Ireland Act 1800, the Representation of the People Acts 1832-84, the ECA, the Human Rights Act 1998 ('HRA'), the Scotland Act 1998, the Northern Ireland Act 1998, the Constitutional Reform Act 2005, and the Government of Wales Act 2006.²⁷ A similar list put forward in a report for the Political and Constitutional Reform Committee also included the Parliament Acts 1911 and 1949 and the Life Peerages Act 1958.²⁸ Ultimately, though, we want a definition, not a list. We want to know not just *that* a statute is constitutional, but *what makes it* constitutional.²⁹ This is partly for intellectual reasons, but also practical ones: we need a definition to identify constitutional statutes (including newly-enacted ones), and to understand whether the special treatment accorded to constitutional statutes is justified.

A. *Subject Matter*

Judges have so far declined to define a constitutional statute, with one exception. The exception is Laws LJ, who in *Thoburn* said that a constitutional statute is a statute that either:

- (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.³⁰

There is certainly something to this definition. It is true that a constitutional statute has a certain subject matter, and clearly the subject matter of many constitutional statutes – the Bill of Rights 1689, the Representation of the People Acts, the HRA, etc. – is either (a) or (b). Nonetheless, there are two problems with Laws LJ's definition, one minor, the other major.

Laws LJ is not, we think, using 'constitutional' as a term of art. He is trying to reflect the ordinary understanding of what is part of the

²⁷ See, eg, *HS2* [207] and *Thoburn* [62]. Magna Carta 1215 is part of the constitution, but it is not technically a statute, which may explain the Supreme Court's choice of the word "instrument" rather than "statute" in *HS2*: [207].

²⁸ Andrew Blick, *Codifying - or Not Codifying - the United Kingdom Constitution: The Existing Constitution* (Centre for Political and Constitutional Studies 2012) 80. The Constitution Unit also produced a similar list: James Melton, Christine Stuart and Daniel Helen, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes* (The Constitution Unit, UCL 2015) 12.

²⁹ Tarunabh Khaitan, "'Constitution' as a Statutory Term" (2013) 129 *Law Quarterly Review* 589-609.

³⁰ *Thoburn* [62].

constitution, at least as it exists in the legal community. One problem, it follows, is that there are few, if any, statutes the whole of which would ordinarily be thought of as constitutional. Even paradigmatic examples of constitutional statutes contain parts (that is, sub-sections, sections, sets of sections, etc.) that are not 'constitutional' on any ordinary understanding of the term.³¹ This is only a minor problem because it is easily fixed: Laws LJ's definition could be amended to say that a constitutional statute is a statute *at least part of which* is constitutional, i.e., about (a) or (b).

The major problem with this definition is its underinclusiveness.³² Not every statute that would ordinarily be regarded as part of the constitution is about citizens or their rights. The Parliament Acts 1911 and 1949, for example, strike us (and others) as obvious examples of constitutional statutes, but they are wholly about the relationship between the House of Commons and the House of Lords. Parts of the Act of Union 1707 that are clearly constitutional are about state institutions, such as the Parliament of Great Britain, not citizens and their rights. The problem these counterexamples raise for Laws LJ's definition cannot, as far as we can see, be easily smoothed over. That means we need a new definition of a constitutional statute, one that better tracks ordinary understanding.

David Feldman criticizes Laws LJ's definition on much the same grounds as we have done. Feldman then proposes an alternative definition:

[C]onstitutional legislation establishes state institutions and confers functions, responsibilities and powers on them. Such legislation constitutes the state and lays out its structure. ... [T]he key function of a constitution is (in my view) to constitute the state and its institutions and confer functions, powers and duties on them.³³

Feldman's definition extends to the Parliament Acts 1911 and 1949 and the Act of Union 1707, all of which establish state institutions and confer functions, responsibilities, and powers on them. His definition is focused on institutions, so it might at first seem to exclude, for example, sections of the HRA, which are mainly about the rights of individuals. However, the rights conferred by the HRA limit the powers of state institutions, so on a wide reading, Feldman's definition accommodates statutes of this kind, too.³⁴

Although Feldman's definition avoids some of the problems with Laws LJ's definition, it suffers from the opposite problem, which is to say it is

³¹ David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 *Law Quarterly Review* 343, 353-354.

³² *ibid* 346-348.

³³ *ibid* 343, 350.

³⁴ Were Feldman's definition to exclude the HRA, he probably would not regard that as problematic, because he does 'not regard the relationship between institutions and individuals as part of the core of a constitution': *ibid* 343, 351.

overinclusive. Consider the Coroners and Justice Act 2009. This statute ‘establishes’ the state institution that is the office of Chief Coroner. It confers ‘functions’ or ‘powers’ on the Chief Coroner, including the power to assign other coroners to investigate deaths. It imposes ‘responsibilities’ on the Chief Coroner, including the responsibility to monitor investigations into the deaths of service personnel. The Act satisfies Feldman’s definition, but it does not fit our common understanding of the constitution, and no court, commentator, report, etc. has ever claimed it is constitutional. To give one other example, the Crown Prosecution Service Inspectorate Act 2000 creates the office of Chief Inspector of the the Crown Prosecution Service; it also attaches a variety of duties and powers to the role. This Act satisfies Feldman’s definition, too, but it is no more a part of the constitution than is the Coroners and Justice Act 2009. These statutes are not special cases. Indeed, any statute that contributes to the machinery of state administration would satisfy Feldman’s definition.

Why is Feldman’s definition vulnerable to these counterexamples? Feldman’s account of the subject matter of a constitutional statute (or constitutional part of a statute) seems reasonable to us. We agree, in other words, that all constitutional statutes create or regulate state institutions. However, like Laws LJ, Feldman has supposed that the right subject matter is *sufficient* for a statute to be constitutional. In fact, the right subject matter is merely a *necessary* condition. Something else is needed for a statute to be constitutional, in addition to the right subject matter. The question is: what is missing?

B. Normative Importance

Paul Craig gives us the beginning of an answer:

There may be many statutory rules that in some way touch on, for example, the workings of the legislature, but which do not have the qualitative importance to warrant the appellation constitutional statute It is for this reason that the statute must in addition be of normative importance in the overall constitutional schema.³⁵

It does seem intuitive that constitutional statutes are of greater normative importance than other statutes about state institutions. The Act of Union 1707, say, is important to a degree that the Coroners and Justice Act 2009 is not. But what, exactly, does it mean for a statute to be of ‘normative

³⁵ Paul Craig, ‘Constitutionalising Constitutional Law: *HS2*’ [2014] Public Law 373, 389–90. Other authors give similar definitions. See, eg, Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet & Maxwell 2001) 1: ‘A constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country’.

importance'? What makes one statute of greater normative importance than another?

One idea, often suggested or assumed in the literature, is that constitutional statutes are especially normatively important because they promote or embody constitutional principles. David Jenkins writes:

[Fundamental] [s]tatutes ... have such normative significance that they themselves embody or generate higher-order principles that weave into a common law constitutional fabric.³⁶

There are some clear supporting examples. The Bill of Rights 1689 gives effect to the rule of law; the Act of Settlement 1701 helps establish the independence of the judiciary; the Representation of the People Acts promote democracy; and so forth. By comparison, other public law statutes, like the Coroners and Justice Act 2009 and the Crown Prosecution Service Inspectorate Act 2000, do not 'embody or generate' constitutional principles.

There are, however, at least two problems with using constitutional principles to define constitutional statutes. First, it trades one definitional challenge for another. It is not obvious which principles are part of the constitution (the rule of law is a constitutional principle, but is equality?³⁷ Is freedom of religion?).³⁸ Nor is it obvious what the content of these principles is, and therefore what statutes promote or embody them (the Bill of Rights 1689 gives effect to the rule of law, but does the HRA?). Second, and more importantly, there seem to be clear examples of constitutional statutes that do not promote or embody any constitutional principle. The ECA, for example, gives effect to Britain's international law obligations, and promotes the aim of European integration, but in neither respect does it serve a constitutional principle. Likewise, it is hard to see what existing principle was advanced by the devolution statutes; 'regionalism' is perhaps

³⁶ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 201. For a similar proposal in the Canadian context, see Vanessa MacDonnell, 'Quasi-Constitutional Legislation: A Theory' *Osgoode Hall Law Journal* (forthcoming).

³⁷ Colm O'Cinneide, 'Equality: A Constitutional Principle?' (September 14, 2011) available at <https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/>; Colm O'Cinneide and Jeffrey Jowell, 'Values in the UK Constitution' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* 357, 377, 383-385.

³⁸ For a brief statement of an account which though attractive, does not overcome the definitional challenge, see: Timothy Endicott, *Administrative Law* (OUP 2011) 10-12.

the most promising suggestion³⁹, but its status as a constitutional principle strikes us as tentative at best.⁴⁰

Having rejected one account of importance, let us propose an alternative. Given that a statute is a set of norms, when we think about a statute's normative importance, we should be thinking about the difference a statute makes to the things norms are about, namely, requirements, permissions, and powers. Because our particular interest is statutes that create and regulate state institutions, we should be thinking of the difference a statute makes to the requirements, permissions, and powers that apply to state institutions. We should be thinking of the difference a statute makes to what state institutions can and may do; or, more simply still, of the difference a statute makes to state institutions' 'normative positions'. To say that constitutional statutes are of normative importance is thus to say that constitutional statutes make a substantial difference to, i.e. substantially *influence*, the normative positions of state institutions.

This is progress of a sort – it does clarify the concept of normative importance – but it raises a new and difficult question: how do we know whether a statute substantially influences what state institutions can and may do? We do not want to overpromise. We know of no sharp test for the degree to which a statute influences what state institutions can and may do: some inexactness is inevitable. What we shall offer is a distinction between two modes by which a statute affects what state institutions can and may do. Awareness of that distinction helps us determine the overall influence that a statute has. The distinction we have in mind is roughly that between the difference a statute makes on its own and the difference it makes through its effect on other norms – or, in other words, between a statute's direct and indirect importance.

C. Direct and Indirect Importance

Many legal and non-legal norms apply to state institutions: statutes, regulations, common law rules, legal and constitutional principles, administrative policies, standing orders, constitutional conventions, and so on. Let us call a norm that applies to a state institution a 'governing norm'. With respect to any statute, we can ask: taking all of our other governing norms as given, what difference does *this* statute make to what state

³⁹ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 International Journal of Constitutional Law 183, 204.

⁴⁰ To clarify, there are certainly principles such as accountability that are realized by the *internal* structure of the devolved legislatures and governments. Further, while there may be an emerging principle of 'quasi-federalism' or something similar, which is premised (in part) by the devolution statutes, the constitutional status of the devolution statutes does not depend on this being the case.

institutions can and may do? In other words, were we to repeal just *this* statute, while leaving all other governing norms intact, what could or may state institutions do (or not do) that they could not or may not have done (or have done) otherwise? The answer is a measure of a statute's influence, holding our other governing arrangements constant. It is a measure of a statute's 'direct influence', in other words. A statute might be of great direct influence because it confers wide-ranging powers, for example, or because it makes unlawful large swathes of state action.

A statute may also be of 'indirect importance': it may influence what state institutions can and may do by making a difference to *other* governing norms. A statute's indirect importance is assessed with reference to the norms that 'depend on' that statute, where a norm depends on a statute when the repeal of that statute can be expected to lead to a change, in the sense of the abolition or alteration, of that norm. A norm may depend on a statute for its *validity*, such that the repeal of that statute would lead to the invalidity of that norm. If a regulation is created under an authorizing statute, for example, then the repeal of that statute would bring about the repeal of that regulation. A norm may depend on a statute for its *meaning*, such that the repeal of that statute would lead to a change in the meaning of that norm. If a statute's interpretation is influenced by another statute (as the meaning of many statutes is influenced by the Interpretation Act 1978), then the repeal of that second statute would change the meaning of that first statute. Finally, a norm may depend on a statute for its *effectiveness*, in which case the repeal of that statute would make that norm a less effective means to its end. If a bylaw builds on or exploits a statutory framework to achieve its end, for instance, then the repeal of that statute would make that bylaw less effective.

A statute's indirect importance is then a function of three factors. The first factor is the *number of dependent norms*: the more norms that depend on a statute, the greater its indirect importance. The second is the *direct importance of the dependent norms*: the more directly important the norms that depend on a statute, the greater that statute's indirect importance. The third is the *intensity of the norms' dependence on the statute*: a norm's dependence on a statute is more intense when the repeal of that statute would abolish rather than alter that norm, and more intense when the alteration would be major rather than minor. Of course each of these statements is subject to a *ceteris paribus* clause.

Taken together, these three factors tell us a statute's indirect importance. They tell us the difference a statute makes to what state institutions can and may do through the difference it makes to other norms. Other things being equal, the greater the number of norms that depend on a statute, the greater their direct importance, and the greater the intensity of their dependence on the statute, the greater is that statute's indirect importance.

A statute might be of great indirect importance, for example because it authorizes the creation of many important regulations; because it controls the interpretation of many important statutes; or because it facilitates many common law rules, statutes, and principles.

D. Our Definition

With the elements identified, our definition of a constitutional statute is easy to state. A constitutional statute is a statute at least a part of which (1) creates or regulates a state institution; and (2) is among the most important elements of our government arrangements, in terms of (a) the influence it has on what state institutions can and may do, given our other governing norms; and (b) the influence it has on what state institutions can and may do, through the difference it makes to our other norms. Simplifying a bit, a constitutional statute is a statute that is about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do.

A few examples will help show the advantages of this definition. Take the Scotland Act 1998. The Act has a constitutional subject matter, of course; it fulfils condition (1). It is also of great direct importance: it creates the Scottish Parliament and the Scottish Executive, and confers vast powers on them. The Act is also of great indirect importance. Much depends on it, including the many Acts of the Scottish Parliament and the delegated legislation those Acts authorize; the various statutes that presuppose the existence of the Parliament and the Executive; the common law rules that have developed to regulate those institutions; and the huge range of non-legal rules, including the Sewel Convention, which have emerged to govern the interactions between Westminster and the Scottish institutions. Much of this superstructure depends on the Scotland Act 1998 to a high degree, and is itself of great direct importance. Now take the Coroners and Justice Act 2009 for point of contrast. Like the Scotland Act 1998, the Coroners and Justice Act 2009 fulfils (1). It, too, creates substantial new powers and responsibilities – but by no means does it influence state institutions as much as the Scotland Act 1998 does. Moreover, compared with the Scotland Act 1998, few norms, and even fewer influential ones, depend on the Coroners and Justice Act 2009. The knock-on effects of the repeal of the Coroners and Justice Act 2009 for what state actors can and may do would be minor compared with the repeal of the Scotland Act 1998. The Scotland Act 1998 fulfils condition (2); the Coroners and Justice Act 2009 does not.

Consider the ECA next. Obviously it fulfils condition (1). What about condition (2)? The ECA is of great direct importance: it structures the relationship between British and EU institutions, and alters the

relationship between British institutions (eg, Parliament and the courts). The indirect importance of the ECA is possibly even greater: to the extent EU law norms are part of the British legal system, their validity depends on the ECA⁴¹; and many important EU-related statutes and common law rules depend on the ECA for their meaning and effectiveness.⁴² Now compare the ECA with the Crown Prosecution Service Inspectorate Act 2000. That Act fulfils condition (1), and it certainly has a worthy purpose. Even so, it is not of great importance. The direct difference it makes to what state actors can and may do pales in comparison to the direct difference the ECA makes. Nor is the Crown Prosecution Service Inspectorate Act 2000 of great indirect influence; indeed, as far as we know, not a single other governing norm depends on it. The ECA satisfies condition (2); the Inspectorate Act does not.

The Scotland Act 1998 and the ECA are both constitutional partly because of the quantity of norms that depend on them for their validity. Some statutes are constitutional for other reasons. Consider the HRA. The HRA is hugely important in a direct sense: among other things, ss 3 and 4 give courts substantial new powers, and ss 6 and 10 respectively constrain and empower the executive. But the HRA is also of great indirect importance: the effectiveness of sections of many other important statutes, such as the Scotland Act 1998 and the Scottish Commission for Human Rights Act 2006 and various departmental policies and rules of parliamentary procedure depend on it; and, most significantly, through s 3 the Act determines the interpretation and thus the meaning of many other statutes, some of which are themselves of great direct influence (for example, anti-terrorism legislation). Similarly, while the Bill of Rights 1689 is not the basis for other norms' validity, it is of great direct importance; the meaning and effectiveness of whole bodies of law concerning, for example, juries and bail depend on it, as do constitutional principles including the rule of law, the separation of powers, and parliamentary sovereignty. (Thus there is a kernel of truth in the principle-based definition: embodying or promoting a constitutional principle *does*

⁴¹ For discussion of whether EU norms are part of the British legal system, see J Dickson 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union' (2008) 2 Problema 9, 31-45.

⁴² Eg: European Parliament (Representation) Act 2003 regulates the number of MEPs for the UK and their distribution between electoral regions; part 7 of the Pensions Act 2004 regulates cross-border activities within European Union; the Mutual Recognition of Criminal Financial penalties in the European Union (Scotland) Order 2009 enables Scottish fines and fixed penalties to be enforced elsewhere in the EU and vice versa; section 79 of the Local Government Act 1972 qualifies EU citizens to hold office as member of local authority in the UK.

help make a statute constitutional.) Both the HRA and the Bill of Rights 1689 easily fulfil condition (2).

To conclude: Feldman proposed a subject matter-based definition for a constitutional statute, but counterexamples (the Coroners and Justice Act 2009, the Crown Prosecution Service Inspectorate Act 2000, etc.) showed that there was more to a constitutional statute than having the right subject matter. Craig proposed normative importance as a second condition, but he left the condition obscure. We considered whether a statute's importance could be explained by reference to constitutional principles, but again there were counterexamples (the ECA, the Scotland Act 1998, etc.), this time showing the proposed definition was underinclusive. We have offered an alternate account of normative importance, and a definition safe from all these counterexamples.

The proposed definition will not bring an end to questions about which statutes are constitutional. It is not a silver bullet against controversy; we doubt any definition could be. Applying our definition means making difficult judgments about, for example, a statute's direct importance and the degree to which repealing a statute would lead to changes elsewhere in the legal system. Reasonable people may disagree about how to answer such questions, and so there may be genuine borderline cases of constitutional statutes. Against these drawbacks, we can set a number of advantages. Our definition includes every statute that is clearly constitutional. It excludes every statute that is clearly non-constitutional. It accords with the common understanding of what is constitutional, and with the understanding implicit in many judicial decisions. Our definition suggests that it is possible for a statute to acquire or lose constitutional status over time, as its indirect importance waxes or wanes, an implication which accords well with the 'historic'⁴³ or incremental nature of the British constitution. Perhaps most importantly, our definition accounts for how constitutional statutes ought to be treated for the purposes of implied repeal, as we shall explain shortly.

3. Legal Justification

Is there any *legal* reason for treating constitutional statutes specially for the purposes of implied repeal? If so, what is that reason? The answer may depend on the type of treatment at issue, whether it is the implied repeal *of* a constitutional statute (as in *Thoburn*, say) or an implied repeal brought

⁴³ The term is from Dicey's unpublished lectures on the Comparative Study of the Constitution, held in the Codrington Library, All Souls College, Oxford: MS 323 LR 6 b 13, and quoted in V Bogdanor, *The New British Constitution* (Hart 2009) 12. For a discussion of Dicey and the decline of the historic constitution, see JWF Allison, *The English Historical Constitution* (CUP 2007) 17.

about *by* a constitutional statute (as in *Brynmarwr*). In any case, the question is not to be taken lightly. Perhaps it is right, as *Thoburn*, *Brynmarwr*, *H*, and *HS2* suggest, that there is something about constitutional statutes that calls for special treatment when it comes to implied repeal. But this ‘something’ must either be a recent feature of constitutional statutes, or one that has escaped notice by generations of scholars, judges, and lawyers. As with the definitional question, however, judges have largely avoided the justificatory question. Again, the only exception is Laws LJ in *Thoburn*.

A. *Fundamental Rights?*

We can summarize Laws LJ’s answer to the justificatory question as follows. First, fundamental constitutional rights ought to be protected.⁴⁴ Second, exempting constitutional statutes from the doctrine of implied repeal would give some protection to fundamental constitutional rights. Third, judges have the authority, through their development of the common law, to change the doctrine of implied repeal.⁴⁵ Fourth, therefore, judges should exercise their authority to exempt constitutional statutes from the doctrine of implied repeal.⁴⁶ That is the argument. (To be clear, this argument is limited to the type of special treatment relevant in *Thoburn*, i.e., the protection of a constitutional statute from implied repeal. Laws LJ’s justification would need to be developed further to explain the special treatment relevant in *Brynmarwr*, i.e., the relative ease with which constitutional statutes repeal earlier ordinary statutes.)

Given what we said about Laws LJ’s definition of a constitutional statute, one objection to his justificatory argument is obvious. His argument at most justifies special protection for statutes that concern (a) the legal relationship between citizen and state or (b) fundamental rights. However, as we explained, not all constitutional statutes have one of these two subject matters. So, Laws LJ’s argument does not justify the special treatment of all constitutional statutes, correctly understood.

There is another, less obvious, objection to Laws LJ’s justificatory argument. As has been argued elsewhere recently, there is no plausible understanding of parliamentary sovereignty that would allow judges to unilaterally impose new limits on Parliament’s powers, or to assign a meaning to a statute at odds with the one Parliament intended.⁴⁷ Laws LJ’s argument that judges should modify the doctrine of implied repeal

⁴⁴ John Laws, ‘Constitutional Guarantees’ (2008) 29 Statute Law Review 1, 4.

⁴⁵ *Thoburn* [60]; John Laws, ‘Constitutional Guarantees’ (2008) 29 Statute Law Review 1, 7.

⁴⁶ John Laws, ‘Constitutional Guarantees’ (2008) 29 Statute Law Review 1.

⁴⁷ Farrah Ahmed and Adam Perry, ‘The Quasi-Entrenchment of Constitutional Statutes’ (2014) 73 Cambridge Law Journal 514, 527ff.

requires them to do both: it requires them to limit Parliament's power to make legal change by implication, and to assign a meaning to statutes based partly on the desirability of preserving fundamental rights, rather than honouring Parliamentary intent. The modification of the doctrine of implied repeal cannot therefore be justified on the grounds that Laws LJ offers us.

With the rejection of Laws LJ's justificatory argument comes a choice. It could be concluded that the line of cases outlined in Section 1 is misguided, insofar as it suggests there is something special about constitutional statutes with respect to implied repeal. Or, it could be concluded that the fault lies with Laws LJ's argument, in which case the task is to seek a justification for the special treatment of constitutional statutes that is consistent with parliamentary sovereignty and widely-accepted views about intention in interpretation.⁴⁸

We shall opt for the second alternative, drawing on our definition of constitutional statutes to offer an alternative, more plausible justification for their special treatment. Without defending their every detail, we shall defend what we take to be the broad claims made in *Thoburn* and *Brynmarwr*: that the bar should be set high for the implied repeal of a constitutional statute, and low for the implied repeal of another statute by a constitutional statute. We shall also address the questions raised by *HS2* regarding how courts should respond to situations where two constitutional statutes potentially conflict. We should clarify that this is a justification for the special treatment of the constitutional *part* (or *parts*) of a constitutional statute. If a part of a constitutional statute is non-constitutional, then our justification will not apply to it.⁴⁹

B. *Conflicts and Consistency*

At the heart of our justification is the presumption of consistency. To recall: this is the presumption that Parliament intends to legislate consistently with existing statutes. The strength of this presumption is not constant. As we said, one factor that increases the strength of the presumption is that the later of two potentially conflicting statutes is relatively general. Another factor that increases its strength is that the two statutes were enacted in the same session.⁵⁰ These and other factors determine the strength of the presumption that any two statutes are consistent. The strength of that presumption in turn determines the

⁴⁸ *ibid.*

⁴⁹ We caution, however, that some form of special treatment might be appropriate for the a non-constitutional part of a statute on which a constitutional part of a statute depends for its meaning or effectiveness.

⁵⁰ Daniel Greenberg, *Craies on Legislation* (Sweet & Maxwell 2013) 663.

strength of the evidence needed to conclude that, in fact, Parliament did intend to legislate inconsistently with the earlier statute.

Does a statute's constitutionality affect the strength of the presumption of consistency? If so, how? These are the crucial questions, and so it is worth proceeding methodically. Suppose that two ordinary statutes potentially conflict. Given all of the relevant factors – their relative generality, the sessions in which they were enacted, and so on – the presumption that the two statutes are consistent will be of a certain strength. This strength sets a 'baseline'. Now let us hold everything else constant and change the status of each statute from ordinary to constitutional, one at a time. This yields three scenarios:

- (1) an ordinary statute potentially conflicts with an earlier constitutional statute (as in *Thoburn*);
- (2) a constitutional statute potentially conflicts with an earlier ordinary statute (as in *Brynmawr*); and
- (3) two constitutional statutes potentially conflict (as in *HS2*).

Now we can be more precise: in any of scenarios 1–3, is the presumption of consistency different from our baseline strength? If so, is it stronger or weaker?

We can arrive at the answers by reflecting on the reasons for the presumption of consistency. The general rationale for the presumption is that it gives effect to parliamentary intent. Parliament's intention in enacting a statute can only be properly understood with reference to the legal and political context in which Parliament acted. In a society undergoing period of revolution or transformation, frequent or radical change might be normal, and continuity 'noteworthy news'.⁵¹ If the post-apartheid South African National Assembly had chosen to preserve racial segregation in schools, this would have been noteworthy news. In the contemporary British legal system, continuity is taken for granted and change is noteworthy news. In our society, 'it disserves the drafters of legislation to take a casual...attitude towards change.'⁵² We are more likely to understand their intent by taking them to intend continuity where they do not expressly indicate an intention to create change.⁵³ This, of course, is what the presumption of consistency instructs courts to do. But it begs the question: *why*, in the contemporary British legal system, is change noteworthy news? There are two, highly contextual, reasons.

⁵¹ Geoffrey Miller, 'Pragmatics and the Maxims of Interpretation' [1990] Wisconsin Law Review 1179, 1197.

⁵² David Shapiro, 'Continuity and Change in Statutory Interpretation' 67 (1992) NYU Law Review 921, 942.

⁵³ *ibid*

The first reason, suggested by Coke in *Dr Foster's Case* is that 'Acts of Parliaments are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth'⁵⁴... that they ought not be lightly taken to be repealed.⁵⁵ Certainly Parliament might be expected to give weight to its own past decisions, and not overturn them readily. The second reason is the British commitment to rule of law values.⁵⁶ Those subject to the law plan their lives and activities partly based on what the law tells them they can and may do, and what the state can and may do with respect to them. When the relevant norms change, the danger is that expectations will be unsettled, and plans disrupted – consequences which Parliament can naturally be taken to want to avoid.⁵⁷ Parliament can be presumed to favour stability over disruption, and continuity over change. Other things being equal, then, the greater the weight Parliament can be expected to accord a statute, and the greater the potential disruption of that statute's repeal, the stronger the presumption of consistency will be.

In what follows we consider whether the presumption of consistency in scenarios (1)-(3) justifies the special treatment afforded to constitutional statutes in those scenarios.

SCENARIO (1). Both rationales for the presumption of consistency are relevant when an earlier constitutional statute potentially conflicts with a later ordinary statute. Is Parliament likely to accord the same weight to *all* its past decisions? No; like other rational actors, it is likely to give greater weight to decisions which it made with particular deliberation and care.⁵⁸ Parliament is likely to have appreciated the significance of, and deliberated particularly carefully about, constitutional statutes, because they substantially influence what state institutions can and may do. It is easy to see that the second reason we offered for the presumption of consistency is also relevant here. According to our definition, the repeal of a constitutional statute would be highly disruptive: it would dramatically alter what state institutions can and may do, and it would lead to the alteration or abolition of the various norms that depended on that statute.

⁵⁴ *Dr Foster's Case*, 77 Eng. Reports 1232.

⁵⁵ Karen Petroski, 'Rethorizing the Presumption against Implied Repeals' (2004) 92 California Law Review 487, 500, 502.

⁵⁶ Geoffrey Miller, 'Pragmatics and the Maxims of Interpretation' [1990] Wisconsin Law Review 1179, 1198; David Shapiro, 'Continuity and Change in Statutory Interpretation' 67 (1992) NYU Law Review 921, 943-944.

⁵⁷ David Shapiro, 'Continuity and Change in Statutory Interpretation' 67 (1992) NYU Law Review 921, 937.

⁵⁸ As opposed to particularly uninformed or hurried decisions, for example those made under emergency conditions.

For both reasons, the presumption of consistency ought to be stronger in Scenario (1) than in our baseline scenario.

Other things being equal, stronger evidence should be required to show that a later ordinary statute and an earlier constitutional statute are inconsistent than that two ordinary statutes are inconsistent. This is an alternate justification for Laws LJ's conclusion in *Thoburn*, namely, that constitutional statutes can be repealed only expressly or by a very clear implication. It is not, to be clear, a justification for the view expressed by Lord Hope in *H v. Lord Advocate*, to the effect that a constitutional statute can only be repealed expressly, never by implication.⁵⁹ As Farrah Ahmed and Adam Perry have recently explained in detail, no matter how strong the presumption to the contrary, Parliament is capable of making its intention to repeal a statute clear without making it express.⁶⁰ To say that a statute can only be repealed expressly is thus to say that a statute cannot be repealed despite Parliament's clear intention to do so. That amounts to a limit on Parliament's sovereignty – something which, we have said, judges cannot unilaterally impose.

SCENARIO (2). The presumption of consistency, we said, is justified where continuity is given and change is noteworthy news. This is generally the state of affairs in our legal system. When Parliament passes a constitutional statute, it generally signals its intention to make constitutional change. It signals a departure from the usual state of affairs, in other words. This broadly is why the presumption of consistency has no purchase in Scenario 2, where an earlier ordinary statute potentially conflicts with a later constitutional statute. Doubtless, the repeal of the earlier ordinary statute would be disruptive, but disruption, not continuity is now given. To put the point differently, it is unlikely that Parliament intends *both* to enact a statute which dramatically alters what state institutions can and may do *and* to leave all existing provisions of ordinary statutes intact. It is likely rather to intend the cracking of a few eggs in the making of an omelette. Other things being equal, it ought to be easier to show that a later constitutional statute and an earlier ordinary statute are inconsistent than to show that two ordinary statutes are inconsistent. Here, then, is a justification for the conclusion in *Brynmarwr*.

SCENARIO (3). So far we have showed that relative to the baseline scenario, the presumption of consistency ought to be especially strong in Scenario (1), and especially weak in Scenario (2). Put another way, the presumption of consistency ought to be especially strong if the earlier statute is

⁵⁹ [2012] UKSC 24, [2013] 1 AC 413 [30].

⁶⁰ Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73 Cambridge Law Journal 514, 525-527.

constitutional, and especially weak if the later statute is constitutional. That brings us to the strength of the presumption of consistency in Scenario (3), where both potentially conflicting statutes are constitutional. In this scenario, one factor increases the strength of the presumption (the constitutionality of the earlier statute), while another factor decreases the strength of the presumption (the constitutionality of the later statute). The factors pull in opposite directions. We cannot say that they cancel each other out, because we cannot determine the weights of the factors exactly. We can say, however, that if both of two potentially conflicting statutes are constitutional, then other things being equal, the presumption of consistency is *neither especially strong* (as in Scenario (1)) *nor especially weak* (as in Scenario (2)). Courts would therefore not be justified in according special treatment to constitutional statutes in Scenario (3), merely because of their constitutional status.

That constitutional status *per se* does not justify special treatment in Scenario (3) leaves courts to rely on other interpretive tools. They must look to other indicators of legislative intent. Two cases that tend to be overlooked in this context – *Mills v HM Advocate (No 2)*⁶¹ and *Somerville v Scottish Ministers*⁶² – are good examples. At issue in both cases were potential conflicts between the Scotland Act 1998 and the HRA. In both cases the courts were clearly alert to the constitutional status of the statutes. But they concluded that the statutes did not conflict based on other factors, including that the statutes were passed in the same session,⁶³ rather than being guided by their constitutionality. The Supreme Court in *HS2* seemed to follow the same approach. While acknowledging the fact that the Bill of Rights 1689 and the ECA are both constitutional, the court considered factors such as the context of the ECA’s enactment, which tended to suggest that it was intended to take effect subject to existing constitutional law.⁶⁴

In summary: The repeal of a constitutional statute would likely cause a great deal of disruption. For that reason, and because Parliament is likely to attach significant weight to its important past decisions, the presumption of consistency ought to be especially strong in Scenario (1), other things being equal. The enactment of a constitutional statute signals that disruption, rather than continuity, is to be taken for granted. For that reason, the presumption of consistency ought to be especially weak in Scenario (2), other things being equal. It follows that the presumption of consistency is neither especially strong nor especially weak in Scenario (3), and that courts in this scenario ought to look to other guides to legislative

⁶¹ 2001 SLT 1359.

⁶² [2007] UKHL 44; [2007] 1 WLR 2734.

⁶³ *Mills* [19]; *Somerville* [24], [28].

⁶⁴ *HS2* [111], [202].

intent. These conclusions are consistent with *Thoburn* and *Brynmarwr*, but not *H*⁶⁵; and they provide some progress on the question that puzzled the court in *HS2*.

4. Codification

Scenario (3) involves two constitutional statutes which potentially conflict. This scenario is of current relevance because there is currently more than one constitutional statute. Things could be otherwise, however. The various parts of the constitution could be brought together in a single instrument – a constitutional code. The type of constitutional code we are thinking of is not a mere *consolidation* of previous enactments.⁶⁶ The constitutional code would ‘give coherent expression’⁶⁷ to the rules in the previous enactment and this may require significant restructuring and redrafting.

Constitutional codification is unlikely in the near future, but it has attracted the attention not only of academics, but also parliamentary committees and political parties.⁶⁸ The debate so far has focused on the practical and political merits of codification. It has neglected the *legal effects* of codification. We recognize that there has been much discussion about the legal reforms that could be implemented at the same time as the constitution is codified (the abolition of the House of Lords, for example).⁶⁹ What has been neglected is whether codification *per se* has any legal effects, and if so whether these are desirable.⁷⁰ The discussion in the last section helps to resolve these issues.

What we have been calling the presumption of consistency says that *two separate statutes* are presumed to be consistent. There is a second and equally well-known interpretive presumption, according to which *two parts*

⁶⁵ Farrah Ahmed and Adam Perry in ‘The Quasi-Entrenchment of Constitutional Statutes’ (2014) 73 Cambridge Law Journal 514 explain why the court’s position in *H* is unjustified.

⁶⁶ Oliver Jones, *Bennion on Statutory Interpretation* (Lexis Nexis 2013) 558-558.

⁶⁷ *ibid* 558-559.

⁶⁸ Political and Constitutional Reform Committee, *A New Magna Carta?* (HC 2014-2015); James Melton, Christine Stuart and Daniel Helen, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom’s Constitutional Statutes* (The Constitution Unit, UCL 2015).

⁶⁹ Political and Constitutional Reform Committee, (n 69) 26-27; James Melton, Christine Stuart and Daniel Helen, (n 69) 31.

⁷⁰ See, eg, NW Barber, ‘Against a Written Constitution’ [2008] Public Law 11, 12 (‘If ... the aim of a written constitution is simply to formalise the existing constitution, the point of the enterprise is thrown into doubt’).

of one statute are *very strongly* presumed to be consistent.⁷¹ Now imagine that Statute A and Statute B are statutes in the same area of law (they are about liens or mortgages or whatever). They are potentially inconsistent. Applying the first presumption, a court would try hard to reconcile A and B. Imagine, further, that Parliament repeals A and B and replaces them with Statute C, which reproduces the material in A and B, including the potentially inconsistent material. Applying the second presumption, a court would try *very* hard to reconcile the material within C. Here, codification made a legal difference. Specifically, it strengthened the presumption that the codified material is consistent.⁷²

The extension to constitutional codification is straightforward. We said in our discussion of Scenario (3) that the presumption that two (separate) constitutional statutes are consistent is neither especially strong nor especially weak. Imagine that a constitutional code replaced all constitutional statutes. The presumption that the material currently in those statutes is consistent would be much stronger. In other words, codification would generate a strong ‘presumption of constitutional consistency’. This presumption would strongly incline the courts to interpret the law of the constitution as a coherent whole – that is to say, holistically. This is a legal effect of codification *per se*, and potentially an important one. Additional support for this conclusion can be found in the fact that courts in jurisdictions with broadly similar interpretive traditions to ours, like Australia⁷³ and Canada⁷⁴, interpret their constitutions holistically. A British codified constitution would likely be interpreted holistically, too.⁷⁵

⁷¹ The best work on inconsistency within and between statutes is by JF Burrows: ‘Inconsistent Statutes’ (1976) 3 Otago Law Review 601; *Statute Law in New Zealand* (4th edn, LexisNexis 2009) ch 14.

⁷² There is sometimes said to be a presumption that a statutory codification does not change the law in the area it codifies. However, according to Lord Herschell’s rule on the interpretation of codes, an interpreter should ‘in the first instance, [] examine the language the statute, and [] ask what is its natural meaning, uninfluenced by considerations derived from the previous state of the law, and not [] start with enquiring how the law previously stood, and then, assuming that it intended to leave it unaltered, [] see if the words of the enactment will interpretation in conformity with this view.’ Oliver Jones, *Bennion on Statutory Interpretation* (Lexis Nexis 2013) 558–559. The whole point of a codification is to bring together the law in some area. Surely we can presume that the legislature intends the law in that area to make sense taken together. See, further, *ibid*.

⁷³ Eg *R v Barger* (1908) 6 CLR 41, 72: ‘The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions’.

⁷⁴ Eg *Reference re Secession of Quebec* [1998] 2 SCR 217, [50]: ‘The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole’.

⁷⁵ Could Britain codify its constitution without giving rise to a presumption of constitutional coherence? Yes, if it went about it explicitly. It would need to add words to the codification like: ‘The parts of the constitution are to be interpreted as if the

The same point could be expressed negatively: distributing constitutional material across many statutes inhibits a holistic interpretation of that material, and hence of the constitution. If constitutional holism is of value – an intuitive idea, but not one we can defend here – then we have arrived at a distinctively legal reason favouring constitutional codification.

5. Conclusion

LS Amery once wrote that ‘[n]o picture of ... [the British constitution] in any one generation is wholly true of it in another, any more than the picture of a man at some particular stage of his life can hold good for a later stage’⁷⁶. Now that courts treat constitutional statutes specially for the purposes of repeal, the British constitution has changed its appearance once again. This change may seem dramatic. In fact, it is consistent with familiar principles of parliamentary sovereignty and legislative intent, once the nature of a constitutional statute is understood. Just as a person remains recognizable later in life, the British constitution ‘retain[s] its essential and original character’⁷⁷ despite the rise of constitutional statutes.

constitution was not codified’. So, the generation of a presumption of constitutional coherence is not an inevitable byproduct of codification. But it is not like the abolition of the House of Lords – a change that could be implemented at the same time as the constitution is codified. It is a substantive change we would need to take steps to *avoid*, rather than to take steps to *introduce*.

⁷⁶ LS Amery, *Thoughts on the Constitution* (OUP 1947) 2.

⁷⁷ LS Amery, *Thoughts on the Constitution* (OUP 1947) 2.