

THE QUASI-ENTRENCHMENT OF CONSTITUTIONAL STATUTES

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ABSTRACT: *The British constitution is famously unentrenched: constitutional laws are not intrinsically more difficult to override than ordinary laws. However, in the largely overlooked 2012 case of H v Lord Advocate, the Supreme Court said that the Scotland Act 1998 cannot be impliedly repealed due to its 'fundamental constitutional' status. Unless Courts in the future may treat constitutional statutes, like the Scotland Act, as capable only of express repeal, making such statutes 'quasi-entrenched'. In this article we argue that, as a judicial innovation, the quasi-entrenchment of constitutional statutes lacks a sound legal basis. Parliament can make its intention to repeal a constitutional statute clear without making it express, and judges cannot, on their own initiative, ignore Parliament's clear decision to repeal even a constitutional statute.*

KEYWORDS: *Constitutional Statutes, Implied Repeal, Entrenchment, Thoburn*

The British constitution is famously unentrenched: constitutional laws are not intrinsically more difficult to override than ordinary laws. However, in the 2002 case of *Thoburn v Sutherland City Council*¹, the Administrative Court suggested that constitutional statutes are more difficult to repeal than ordinary statutes. The Court said that

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¹ [2002] EWHC 195 (Admin); [2002] 3 WLR 247 (*Thoburn*).

constitutional statutes are susceptible to implied repeal in a narrower range of circumstances than ordinary statutes. Initially there was intense academic interest in *Thoburn*. As time went on, however, and no higher court gave its approval, *Thoburn* began to seem like an outlier, not a forerunner.

That is what makes the largely overlooked 2012 case of *H v Lord Advocate*² important. In *H* the Supreme Court repeatedly said that the Scotland Act 1998 cannot be impliedly repealed, under any circumstances, due to its ‘fundamental constitutional’ status.³ While these remarks were *obiter dicta*, they suggest the path the law will take. Unless judicial thinking changes, courts in the future are likely to treat constitutional statutes, including the Scotland Act, as capable only of express repeal. That would make constitutional statutes ‘quasi-entrenched’, to coin a term, with potentially significant consequences for Parliament’s powers and the role of courts.

In addition to showing that *H* deserves more attention from constitutional scholars than it has received thus far, our aim in this article is to demonstrate that, as a judicial innovation, the quasi-entrenchment of statutes lacks a sound legal basis. We shall argue that Parliament is capable of making its intention to repeal a constitutional statute clear without making it express, and that judges cannot, on their own initiative, lawfully ignore Parliament’s clear decision to repeal even a constitutional statute.

Our argument is relevant so long as there are constitutional statutes, however defined, so we shall not consider what makes a statute ‘constitutional’.⁴ We shall rather assume, consistent with *Thoburn*, that a constitutional statute is one that conditions our relationship as citizens with the state, or alters the scope of basic rights.⁵ This definition includes the Scotland Act, as well as the Human Rights Act 1998, the European Communities Act 1972, the Union with Scotland Act 1706, the Bill of Rights 1689, and Magna Carta 1215.

² [2012] UKSC 24; [2013] 1 AC 413 (*H*).

³ *H* [2012] UKSC 24; [2013] 1 AC 413 at [30]; also [31] and [32].

⁴ For a recent, thorough discussion of this issue, see David Feldman, “The Nature and Significance of “Constitutional” Legislation” 129 L.Q.R. 343.

⁵ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 W.L.R. 247 at [62].

I. THE PATH TO *H*

AV Dicey wrote in 1885 that 'fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws'.⁶ Perhaps nothing Dicey said about the constitution has entirely escaped criticism, but at least until recently it was generally accepted that constitutional laws are not *per se* more difficult to change than ordinary laws.⁷ In 1998, for example, Eric Barendt was able to say with confidence that 'fundamental laws ... can be as easily repealed as, say, the Animals Act 1971 or the Estate Agents Act 1979'.⁸

The one exception, according to Barendt, was the European Communities Act 1972 (hereafter 'ECA'). By the combined operation of s 2(1) and s 2(4) of the ECA, subsequent Acts of Parliament only 'have effect' subject to directly enforceable European Community (now European Union) law. The operation of these sections was, of course, the issue in the *Factortame* litigation.⁹ Simplifying greatly, the Merchant Shipping Act 1988 imposed nationality-based restrictions on the registration of fishing vessels. These restrictions were inconsistent with directly enforceable EU law, and hence inconsistent with the ECA. The doctrine of implied repeal says that a later statute brings about the repeal of an earlier statute to the extent of their inconsistency, provided that the later statute is not more 'general' than the earlier statute.¹⁰ According to that doctrine, the Merchant Shipping Act, as the later statute, should have taken priority over the ECA. Instead, in *Factortame* (No 2), the House of Lords 'disapplied' the Merchant Shipping Act.¹¹

⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (Macmillan 1915), p. 37.

⁷ Skepticism traditionally centred around the Anglo-Scottish and Anglo-Irish union legislation. See text at n 86-88.

⁸ Eric Barendt, *An Introduction to Constitutional Law* (Oxford 1998) p. 27.

⁹ *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others* [1990] UKHL 7; *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others* (No. 2) [1991] 1 A.C. 603; Paul Craig, "United Kingdom Sovereignty after *Factortame*" [1991] 11 YEL 221.

¹⁰ In what follows we shall simply say that a later statute repeals an earlier and inconsistent statute and leave it implicit that the repeal is to the extent of the inconsistency and that there is an exception when the later statute is more general.

¹¹ *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others* (No. 2) [1991] 1 A.C. 603, 676 per Lord Goff.

Contrary to the doctrine of implied repeal, 'the Merchant Shipping Act ... yielded to the superior force of an earlier statute'.¹² The justification for and exact significance of *Factortame* are contested, but it is now generally recognised that the ECA cannot be repealed except by express words¹³ (or, some would add, by necessary implication¹⁴).

In the 2002 case of *Thoburn*, the Administrative Court sought to justify similar protection from repeal for a much larger class of statutes. As with *Factortame*, the facts in *Thoburn* are so well documented that they do not need to be described here.¹⁵ In essence, the issue was whether the Weights and Measurements Act 1985 had impliedly repealed s 2(2) of the ECA (which deals with subordinate legislation). Laws LJ, with whom Crane J agreed, held that the statutes were consistent.¹⁶ Thus, no issue of implied repeal arose. In case he was wrong on that point, Laws LJ considered whether the ECA could be impliedly repealed; in light of *Factortame*, he held it could not.¹⁷

Laws LJ then went a step further. It is not only the ECA that is protected from implied repeal, he said; every constitutional statute is, to some degree, protected from implied repeal. At first Laws LJ put the point categorically: 'Ordinary statutes may be impliedly repealed. Constitutional statutes may not.'¹⁸ Some commentators, perhaps reading

¹² Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 7th edn (Cambridge 2011), p. 350; cf Adam Tomkins, *Public Law* (Oxford 2003), pp. 116-118.

¹³ See, e.g., Paul Craig, "Britain in the European Union" in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford 2011), p. 96; John Laws, "Law and Democracy" [1995] PL 72, p. 89.

¹⁴ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), p. 287.

¹⁵ For a thorough account of the proceedings in *Thoburn*, see Mark Elliott, "Embracing "Constitutional" Legislation: Towards Fundamental Law?" (2003) 54 NILQ 25.

¹⁶ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [50]. According to some commentators, Laws LJ also accepted or ought to have accepted that the doctrine of implied repeal only applies to statutes that have the same 'subject matter': Barber and Young, "The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty" [2003] PL, pp. 112, 116; Tomkins, *Public Law*, p. 119. Cf Goldsworthy, *op. cit.*, pp. 291-293.

¹⁷ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [61].

¹⁸ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [63].

this statement in isolation, took it to reflect Laws LJ's considered view.¹⁹ But he immediately explained that, under some conditions, even constitutional statutes can be repealed by implication:

For the repeal of a constitutional Act ... the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive, or presumed – intention was to effect the repeal or abrogation? I think the test could only be met 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*. The ordinary rule of implied repeal does not satisfy this test.²⁰

Laws LJ also said that a constitutional statute can be repealed by 'unambiguous words', which may not be express.²¹ So, according to Laws LJ, the test of whether a constitutional statute is repealed is whether there are express words or words that are 'unambiguous' or so 'specific' that the inference of an intention to repeal is 'irresistible'.²² The second branch of this test imposes a more exacting standard than the traditional doctrine of implied repeal, which requires a 'mere' ²³ implication. Thus, Laws LJ concluded, the traditional doctrine has 'no application to constitutional statutes'.²⁴

¹⁹ Goldsworthy, *op. cit.*, p. 312; Geoffrey Marshall, "Metric Measures and Martyrdoms" (2002) 118 LQR 493, p. 495.

²⁰ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [63]. Emphasis on 'actual' in original, otherwise added.

²¹ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [63]. Extrajudicially Laws LJ has said that a constitutional statute may be repealed so long as Parliament 'makes clear what it is doing': John Laws, "Constitutional Guarantees" (2008) 29 Statute Law Review 1, p. 7. But cf John Laws, "The Common Law and Europe" (Hamlyn Lectures, 27 November 2013) [17] <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf>> .

²² For a similar reading of *Thoburn* see Elliott, "Embracing "Constitutional" Legislation", pp. 31-32.

²³ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [60].

²⁴ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [63]. Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford 2008) pp. 42-43 makes a similar point. She observes that if 'there is a misunderstanding of the scope of the doctrine of implied repeal here ... it is to fail to recognise that the doctrine of implied repeal is the exception as opposed to the rule'.

In addition to *Factortame*, Laws LJ argued that the ‘principle of legality’ favoured giving a special status to constitutional statutes.²⁵ According to the principle of legality, Parliament is presumed not to legislate contrary to common law constitutional rights and principles.²⁶ There was at one time a debate about whether this principle could be overridden impliedly as well as expressly, but that debate has been settled.²⁷ In *R v Secretary of State for the Home Department, ex p Simms*, which Laws LJ cited in *Thoburn*, Lord Hoffman said that the principle of legality could be overridden by ‘express words or necessary implication’.²⁸ A ‘necessary implication’ in this context is an implication that is especially obvious – or what could be described, in Laws LJ’s terminology, as an ‘irresistible’ or ‘unambiguous’ implication.²⁹ Unsurprisingly, then, Laws LJ claimed (extrajudicially) that *Thoburn* does ‘for statutory constitutional guarantees what the law already does for common law constitutional guarantees’.³⁰

After *Thoburn* was decided there was a surge of academic interest in implied repeal and constitutional statutes, in part due to the perceived

²⁵ *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [62].

²⁶ Francis Bennion, *Bennion on Statutory Interpretation*, 5th edn (London 2008), pp. 822-823.

²⁷ In *Raymond v Honey* [1983] 1 AC 1, Lord Bridge said that the common law constitutional right to access the courts could only be overridden expressly (at 14), whereas Lord Wilberforce, for the majority, said that it could also be overridden by necessary implication (at 10). That Lord Wilberforce’s view represented the *ratio* of *Raymond* was confirmed by the Court of Appeal in *R v Home Secretary Ex p. Leech* [1994] QB 198 CA at 210. See also *R v Lord Chancellor Ex p. Witham* [1997] 2 All ER 779 HC at 787-788 and *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 HL at 592.

²⁸ *R v Secretary of State for the Home Department Ex p. Simms* [1999] UKHL 33; [2000] 2 AC 115 at 131 (per Lord Hoffman) (*Simms*). In *Mohammed Jabar Ahmed v Her Majesty’s Treasury* [2010] UKSC 2; [2010] 2 AC 534, the most recent Supreme Court case on the principle of legality, four out of the five judges to write an opinion held that the common law constitutional rights could be overridden by necessary implication. The fifth judge, Lord Rodger, did not express an opinion on this point.

²⁹ For a detailed discussion of the nature of ‘necessary implication’ in legislation, see Jeffrey Goldsworthy, “Implications in Language, Law, and the Constitution” in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Sydney 1994), pp. 168-170.

³⁰ John Laws, “Constitutional Guarantees” (2008) 29 Statute Law Review 1, p. 1 (emphasis in original).

novelty of Laws LJ's remarks.³¹ Ultimately, though, *Thoburn* was a decision of the Administrative Court and leave to appeal had been denied. Laws LJ's remarks were *obiter*. The cases that cited *Thoburn* relied on it to show that there are constitutional statutes or that EU law is supreme, or for guidance as to the interpretation of constitutional statutes.³² When the Supreme Court cited *Thoburn* in its judgment in *Watkins v Home Office*, it was in relation to the idea of a 'constitutional right'.³³ What no case did was rely on, or develop, Laws LJ's remarks on the implied repeal of constitutional statutes, leaving the status of his remarks uncertain.³⁴

That brings us to *H*, a decision of the Supreme Court, and the first clear judicial statement about the implied repeal of constitutional statutes since *Thoburn*. *H* has not yet been discussed in the constitutional context, so we shall describe it in some detail here.³⁵ The proceedings began when the United States sought the extradition of a husband and wife, H and BH, on charges relating to the importation of

³¹ Tomkins, *Public Law*, p. 124 characterises the relevant claims in *Thoburn* as 'wholly novel'. See also Goldsworthy, *Contemporary Debates*, p. 313; Geoffrey Lindell, "The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?" (2006) 17 *Public Law Review* 188, pp. 197-8; Aileen Kavanagh, "Constitutional Review, the Courts and Democratic Scepticism" [2009] 62 *Current Legal Problems* 293-306, esp. p. 306; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge 2009), p. 302.

³² *Brynmawr Foundation School, R (on the application of) v Welsh Ministers & Anor* (Rev 1) [2011] EWHC 519 (Admin); *Levi Strauss & Co v Tesco Stores Ltd* [2002] EWHC 1625 (Ch); *Imperial Tobacco Limited* [2010] CSOH 134. *Brynmawr* and *Levi Strauss* quote Laws LJ's remarks on the repeal of constitutional statutes in course of the judgments, but they were not the focus on those judgments. For a recent discussions of the interpretation of constitutional statutes, see Stephen J. Dimelow, "The Interpretation of 'Constitutional' Statutes" (2013) 129 *LQR* 498 and Tarunabh Khaitan, "'Constitution' as a Statutory Term" (2013) 129 *LQR* 589, pp. 593-595.

³³ *Watkins v Home Office* [2006] UKHL 17; [2006] 2 AC 395 at [62]. One other case does arguably suggest in passing that constitutional statutes (or at least the HRA) cannot be impliedly repealed: *Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2007] NIQB 115 at [16].

³⁴ Turpin and Tomkins, *British Government and the Constitution* p. 167; Nicholas Bamforth, "Courts in a Multi-Layered Constitution" in Nicholas Bamforth & Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Oxford 2003) pp. 278, 279; Khaitan, "'Constitution' as a Statutory Term" (2013) 129 *LQR* 589, p. 593.

³⁵ Stephen Dimelow is the only person to mention *H* in the constitutional context, and then in passing: Dimelow, "The Interpretation of 'Constitutional' Statutes" p. 503.

chemicals normally used in the manufacture of methamphetamine. H and BH, who were resident in Scotland and had children there, argued before Sheriff McColl that their extradition would be incompatible with their rights under the European Convention on Human Rights within the meaning of the Human Rights Act 1998, specifically their Article 8 right to respect for a family life. The Sheriff rejected this argument and, in accordance with the Extradition Act 2003, sent the case to the Scottish Ministers to determine whether H and BH ought to be extradited. The Ministers ordered their extradition. H and BH appealed to the High Court of Justiciary, where their appeal was dismissed.

H and BH then sought to appeal to the Supreme Court. At that point the issue with which we are concerned arose. There were two sets of provisions relevant to the competency of the appeal. Under the Extradition Act, a decision of the Scottish Ministers made under that Act can only be appealed against under that Act, and the Extradition Act does *not* provide a right of appeal to the Supreme Court from the High Court of Justiciary. So, on first sight, the Extradition Act prevented H and BH from appealing to the Supreme Court. However, the Scotland Act *does* provide a right of appeal to the Supreme Court from the High Court on a 'devolution issue'.³⁶ Section 57(2) of the Scotland Act prohibits the Scottish Ministers from acting inconsistently with any of the convention rights, and whether the Ministers have violated s 57(2) is a devolution issue. There was therefore at least the possibility of a conflict between the Extradition Act and the Scotland Act. Under the doctrine of implied repeal, the Extradition Act, as the later statute, would take priority. Although none of the parties contended that the Supreme Court lacked jurisdiction to hear the case, the Court decided to consider the issue due to its 'general public importance', and did so with the assistance of written submissions from the counsel for the Scottish Ministers.³⁷

Lord Hope, with whom the other judges agreed on the issue of competency, concluded that the Court had jurisdiction to hear the appeal because, properly interpreted, the provisions of the Extradition Act and the Scotland Act were consistent. The Extradition Act only

³⁶ We are simplifying, but the complications (such as a leave requirement) are not relevant.

³⁷ *H* [2012] UKSC 24; [2013] 1 AC 413 at [25].

prevented appeals from decisions of the High Court of Justiciary that were based on the Extradition Act. The system of appeal under the Scotland Act, meanwhile, 'lies outside the contemplation of the sections of the ... [Extradition] Act'.³⁸ It provides a 'parallel remedy'.³⁹ Such is the *ratio* of *H* on this issue.

What interests us here is the *obiter dictum*. The crucial passage comes when Lord Hope comments on what would have happened had the Extradition Act conflicted with the Scotland Act. He says:

It would perhaps have been open to Parliament [in the Extradition Act] to override the provisions of s 57(2) so as to confer on ... [the Scottish Ministers] more ample powers than that section would permit in the exercise of their functions under the ... [Extradition] Act. *But in my opinion only an express provision to that effect could be held to lead to such a result. This is because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by an express enactment.* Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth *expressly* on the face of the statute.⁴⁰

Lord Hope adds that the provisions of the Extradition Act cannot be understood to preclude resort to the appeal procedure in the Scotland Act 'because they do not exclude resort to it *expressly*'.⁴¹ It is difficult to think how Lord Hope could have been clearer: the Scotland Act can only be expressly repealed; it cannot be impliedly repealed; that is because of its 'fundamental constitutional nature'. Unlike Laws LJ in *Thoburn*, Lord Hope in *H* never qualifies these claims or suggests that there are conditions under which the Scotland Act can be impliedly repealed.

Ultimately the Court in *H* went on to dismiss the appeals, and to uphold the extradition order against *H* and *BH*.

The *dictum* in *H* is significant for several reasons. First, whereas *Thoburn* was a decision of the Administrative Court, *H* is a Supreme

³⁸ *H* [2012] UKSC 24; [2013] 1 AC 413 at [32].

³⁹ *H* [2012] UKSC 24; [2013] 1 AC 413 at [33].

⁴⁰ *H* [2012] UKSC 24; [2013] 1 AC 413 at [30]. Emphasis added.

⁴¹ *H* [2012] UKSC 24; [2013] 1 AC 413 at [32]. Emphasis added.

Court decision, and on the issue of competency, it was unanimous.⁴² Second, whereas *Thoburn* said that a constitutional statute can be impliedly repealed by a particularly clear implication, and the principle of legality says that a common law constitutional right can be overridden by necessary implication, *H* says that the Scotland Act cannot be impliedly repealed – no exceptions.

There is a third reason why *H* matters. Lord Hope says that the Scotland Act cannot be impliedly repealed due to its ‘fundamental constitutional nature’. The Scotland Act is undeniably important, but it is not more fundamental or constitutional in nature than, for example, the ECA, the Human Rights Act, or the Government of Wales Act 2006.⁴³ Lord Hope’s reasoning therefore seems to support a general exemption for constitutional and fundamental statutes from implied repeal. *H* has the likely scope of *Thoburn* but, as we have indicated, greater stringency. That makes *H* not just significant, but quite radical.⁴⁴

Why, if *H* is so important, has it not been discussed before? Of course it is a recent decision, but two other factors suggest themselves. One is that the implied repeal of the Scotland Act was a preliminary issue in *H*. The main issue was one of extradition law. Also, although *Thoburn* was

⁴² Lord Mance said that ‘it could have been desirable to have the point argued adversarially’, but that he agreed that the appeal was competent for the reasons Lord Hope gave: *H* [2012] UKSC 24; [2013] 1 AC 413 at [73]. All the other judges simply stated their agreement.

⁴³ The Sewel Convention requires Westminster to obtain the consent of the Scottish Parliament before varying the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (as well as before legislating on devolved matters). This convention makes it particularly unlikely that Parliament would impliedly alter those parts of the Scotland Act dealing with competencies. That does not distinguish the Scotland Act from the Welsh devolution legislation, because there is a similar (albeit somewhat less clear) convention with respect to Wales. Nor does it distinguish the Scotland Act from other constitutional statutes generally, because there are parts of that Act that are not about competencies, and the *dictum* in *H* suggests they too are exempt from implied repeal.

⁴⁴ There is another, more speculative consequence of *H*: if one accepts that common law and statutory constitutional guarantees ought to receive the same protection, as Laws LJ seemed to in *Thoburn*, then one would conclude on the basis of *H* that the principle of legality ought to be narrowed to make common law constitutional guarantees capable only of express override. There have been some suggestions in this direction, e.g., *Raymond* [1983] 1 A.C. 1 HL at 10 (per Lord Bridge); *R v Lord Chancellor Ex p. Witham* [1997] 2 All ER 779 HC at 787-788.

extensively cited by counsel for the Scottish Ministers, it was not cited in the judgment itself.

Whatever the reason, *H* raises the strong possibility (or the real danger, we shall argue) that courts in the future will take a new approach to constitutional statutes. Unless there is a change in judicial thinking, courts will not treat constitutional statutes as exempt from express repeal, but they will treat them as exempt from implied repeal. Constitutional statutes will thus not be fully entrenched, but they will be quasi-entrenched.

II. LEGAL REASONS

Significant changes to the law need strong reasons in their support. Unfortunately Lord Hope did not identify a legal reason for why the Scotland Act cannot be impliedly repealed. But there are only two possibilities. In this section, we shall explain what they are, starting with a brief discussion about statutory meaning and Parliament's powers.

A. Meaning and Power

The meaning of a statute is, roughly, the meaning it is reasonable to infer that Parliament intended the statute to have.⁴⁵ What it is reasonable to infer as to Parliament's intention will depend on the available evidence, including the words that Parliament chose, along with relevant rules of syntax and semantics, the statutory context, the reasons for which the statute was enacted, and so on.⁴⁶ Courts piece together this evidence using interpretive presumptions, like the principle of legality. Interpretive presumptions are guidelines or rules of thumb as to Parliament's intentions, and by nature they can be rebutted by sufficient contrary evidence.

⁴⁵ See, e.g., *Regina v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (per Lord Nicholls) ('the task of the court is ... to ascertain the intention of Parliament expressed in the language under consideration'); also Goldsworthy, *Contemporary Debates*, p. 248; Bennion, *Statutory Interpretation*, pp. 345-348.

⁴⁶ Laws LJ objected to the use of legislative history as evidence of an intention to repeal a constitutional statute: *Thoburn* [2002] EWHC 195 (Admin); [2002] 3 WLR 247 at [63]. We do not agree, but the point is not important for present purposes. For a related discussion, see Goldsworthy, *Contemporary Debates*, p. 183, esp. n 27.

The meaning of a statute may be express or implied. An express meaning is one that it is spelt out on the face of the statute. A statute expressly says that another statute is repealed when it names or describes that other statute and says it is 'repealed' or of no 'force or effect' or it uses words understood to be synonymous.⁴⁷ We shall have much to say about implied meaning in the next section. For now it is enough to say that an implied meaning of a statute is one that is not express but that is nonetheless reasonable to infer that Parliament intended. In the typical case, a statute implies that another statute is repealed when it is later than, and inconsistent with, that other statute. (Courts seem to assume that this typical case is the only case in which a repeal is implied, an opinion we do not share, and one we shall criticise shortly.) This claim about implied meaning is one half of the traditional doctrine of implied repeal (the other half is set out below).

Parliament clearly has the power to expressly repeal any statute. That is to say, Parliament's use of express words to communicate its intention to repeal a statute brings about the change in the law it intended. Until *Factortame*, most commentators believed that Parliament also had the power to impliedly repeal any statute. That idea formed the other half of the traditional doctrine of implied repeal. After *Factortame*, many believed that Parliament no longer had the power to impliedly repeal one statute, namely, the ECA.⁴⁸

B. Two Reasons

It seems obvious that the Scotland Act *can* be impliedly repealed if two conditions are satisfied: it is possible for there to be a statute the implied meaning of which is that the Scotland Act is repealed, and such a statute would in fact bring about the repeal of that Act. So, conversely, if the Scotland Act *cannot* be impliedly repealed, it must be for one of two reasons. Either:

- (1) Parliament cannot convey its intention to repeal the Scotland Act by implication (*i.e.*, there cannot be a statute the implied meaning of which is that the Scotland Act is repealed); or

⁴⁷ Bennion, *Statutory Interpretation*, pp. 189, 192, 201.

⁴⁸ See note 67.

- (2) Parliament may be able to convey its intention to repeal the Scotland Act by implication, but even were it to do so, it would not thereby bring about the repeal of that Act.

Here is the argument for (1) in outline. Courts rely on presumptions to guide their inferences as to Parliament's intentions. The more unlikely Parliament is to have intended some change in the law, the stronger the presumption it did not have that intention. Also, meanings which are express are generally easier to identify and understand than ones which are implied. Putting these points together, one might think there are some meanings that are so unlikely to be Parliament's intended meaning that, absent express words, it could never be reasonable to suppose that is what Parliament actually intended. Such a meaning could only be express; it could never be implied. One might then think that the repeal of the Scotland Act, or another constitutional statute, is a sufficiently unlikely thing for Parliament to intend that it cannot be a matter of implication. In short, the Scotland Act cannot be repealed by implication because such an implication is impossible.

The alternative is to argue for (2). If (2) were true, then to bring about the repeal of the Scotland Act it would not be enough for Parliament to convey its intention to bring about that Act's repeal. It would have to convey its intention in a particular form, *i.e.*, through express words. In that case it would be possible for Parliament to intend to repeal the Scotland Act, to communicate that intention, and yet fail to bring about the repeal of that Act because it did not use the 'right' form of words. Parliament's will, in that case, would be frustrated. That Parliament's powers are so limited is not a conceptual impossibility. Some scholars think that Parliament limited its power to repeal the ECA in a similar way.⁴⁹ But each new limit on Parliament's powers must have a legal basis. The starting point of any argument for (2) must, therefore, be an explanation of how Parliament's power to repeal the Scotland Act came to be limited.

In short, defending (1) is a matter of showing that Parliament cannot be understood to intend the repeal of the Scotland Act absent express words. Defending (2) is a matter of showing that Parliament lacks the power to repeal the Scotland Act absent express words.

⁴⁹ See note 67.

We shall consider these alternatives in the next two sections. Rejecting both, we shall conclude that neither the Scotland Act, nor constitutional statutes generally, are quasi-entrenched. To be clear, our focus in the rest of the paper is on the potential *legal* reasons for quasi-entrenchment. We are deliberately setting aside broader normative considerations.

III. IMPLICATIONS, MEANING, AND CONSISTENCY

Is it true that Parliament cannot convey its intention to repeal the Scotland Act by implication? That is to say, is Parliament unable to make its intention to repeal a constitutional statute clear without making it express?

A. Repeals from Defective Expressions

Let us start by distinguishing two kinds of implications.⁵⁰ *Deliberate implications* arise when there is a gap between what someone – a ‘speaker’ – says expressly, and what he or she obviously intends, such that it is reasonable to infer that the speaker intends his or her audience to ‘read between the lines’. For example, if, when asked whether someone is a fast runner, you reply ‘Perhaps Usain Bolt could beat him’, you imply without saying expressly that the runner in question is indeed fast. Deliberate implications are common in ordinary life, but rare in law.⁵¹

More common in law, and more important for present purposes, are *implications from defective expressions*. These implications are related to deliberate implications, except that here the gap between what is express and what is obviously intended makes it reasonable to infer a mistake on the speaker’s part, or an incompleteness in what he or she has said. For example, if at a pub you order a ‘pint of crisps and a packet of lager’ the bartender will know that you ‘really meant’ a pint of lager and a packet of crisps. That is not what you expressly said, but it is implied in what you said, because it is obvious it is what you intended.

⁵⁰ This paragraph and the next draw on Jeff Goldsworthy’s work on implications. See, in particular, his “Implications in Language, Law, and the Constitution”, pp. 154-161 and “Constitutional Implications Revisited” (2011) 30 U. Queensland LJ 9, 13-15.

⁵¹ But cf. J Kirk, “Constitutional Implications (I): Nature, Legitimacy, Classification, Examples” (2000) 24 Melb. U. L. Rev. 645, 659-660.

In the statutory context, an implication from a defective expression typically arises when Parliament's intended meaning is obvious but it has not been made express due to a drafting error. Courts in such cases will give effect to the statute's implied meaning – which is also its intended meaning – rather than to its defective, express meaning.⁵² This general point holds true when Parliament intends to repeal one statute or part of a statute but, as a result of a drafting error, expressly says that it repeals another. Here is a real example. The Repeal Schedule of the Interpretation Act 1978 says that part of 'paragraph 48' of 'Schedule 5' of the Medical Act 1978 is repealed. In fact there is no paragraph 48 in Schedule 5; that paragraph is in Schedule 6. There is no doubt as to Parliament's intended meaning. There is also no doubt that courts would read the reference in the Interpretation Act in its 'intended form', as Francis Bennion says in his discussion of this example.⁵³

The kind of mistake that occurred in the Interpretation Act and that occurs in other statutes⁵⁴ could occur in a statute designed to repeal a part of the Scotland Act. Parliament could attempt to expressly repeal a part of the Scotland Act, but fail to do so because of a drafting error. It might intend to repeal s 84(5), for instance, but due to a typo say that s 85(4) is repealed. Parliament's intended meaning could still be clear, taking into account all the available evidence. In that case, Parliament's intention to repeal part of the Scotland Act would be conveyed by implication.

B. Inconsistency and Implicit Assumptions

So far we have been taking Lord Hope's remarks at face value and assuming he meant to rule out *any* kind of implied repeal of the Scotland Act. Perhaps, though, he meant merely that the Scotland Act cannot be repealed by operation of the doctrine of implied repeal. If that is true, and it is true because of the meaning of statutes, then either

⁵² *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586 HL (the court must also be clear on what Parliament would have said, had it not been for the drafting error); Bennion, *Statutory Interpretation*, p. 875.

⁵³ Bennion, *Statutory Interpretation*, p. 880.

⁵⁴ See, e.g., *R (on the application of the Crown Prosecution Service) v Bow Street Magistrates' Court and Smith and others* [2006] EWHC 1765 (Admin); [2007] 1 W.L.R. 291, where the court ignored the express meaning of a repeal provision because of 'an error and inadvertence on the part of the draftsman and Parliament' (at [44]).

there cannot be a later statute that is inconsistent with the Scotland Act, or even a later and inconsistent statute does not imply that the Scotland Act is repealed.

Starting with the first possibility, there is a well-established presumption that Parliament intends to legislate consistently with the existing law.⁵⁵ That presumption favours interpreting a later statute in a way that is consistent with an earlier statute. It is a strong presumption, and it is even stronger when the earlier statute is important.⁵⁶ Plausibly, because constitutional statutes are *very* important, there is a *very* strong presumption that Parliament did not intend to legislate inconsistently with them.⁵⁷ With this very strong presumption at their disposal, could courts *always* find a way to interpret later statutes to be consistent with constitutional statutes?⁵⁸

The difficulty is that even a very strong interpretive presumption can be rebutted by very strong evidence to the contrary (as courts have acknowledged with respect to s 3(1) of the Human Rights Act⁵⁹). And there can be very strong evidence indeed that Parliament intended to legislate contrary to a constitutional statute. Consider s 45 of the Scotland Act, which states: ‘The First Minister shall be Keeper of the Scottish Seal.’ Suppose Parliament enacts the Keeper of the Scottish Seal Reform Act 2014. Its only provision says: ‘Henceforth the Lord Advocate of Scotland shall be sole Keeper of the Scottish Seal.’ (This is not an express repeal of s 45 of the Scotland Act because neither that section

⁵⁵ *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] 1 All ER 257 at 273, [2001] QB 388; cited by Lord Hope in *H* [2012] UKSC 24; [2013] 1 AC 413 at [30].

⁵⁶ Bennion, *Statutory Interpretation*, p. 305.

⁵⁷ Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (2008), p. 45. For the view that exceptionally clear language is required before inferring that Parliament intended to legislate contrary to fundamental ‘values’, see *Chorlton v Lings* (1868) LR 4 CP 374, 392; *Nairn v University of St Andrews* [1909] A.C. 47 HL 61.

⁵⁸ *Factortame* can be understood in similar terms: Paul Craig, “United Kingdom Sovereignty after *Factortame*”, p. 251.

⁵⁹ Conor Gearty said in “Reconciling Parliamentary Democracy and Human Rights” (2002) 118 LQR 248 at 254 that ‘if the courts were to interpret so that it was possible [to make legislation compatible with Convention rights] in every case, then a type of entrenchment against implied repeal would have been smuggled into UK law’. Gearty warned against that possibility, and it has not come to pass. As Aileen Kavanagh says in *Constitutional Review under the Human Rights Act* at p. 318, ‘there are limits to interpretation under section 3(1)’.

nor the Scotland Act is named or described, nor is that section said to be ‘repealed’ or of no ‘force or effect’ or anything similar.) There is overwhelming evidence in the form of statutory text and context that Parliament’s intended enactment is inconsistent with the Scotland Act. No matter how strong an interpretive presumption is at the disposal of courts, there is no plausible, consistent interpretation of these statutes.

Even if later statutes can be inconsistent with the Scotland Act, would the implication be that the Scotland Act is repealed to the extent of the inconsistency? Could both statutes remain ‘on the books’? It helps to see why such an implication arises when ordinary statutes are inconsistent. That requires some explanation of a third kind of implication, in addition to the two we have already discussed. An *implicit assumption* is what a speaker reasonably takes for granted as likely to also be taken for granted by his or her audience.⁶⁰ It is what goes without saying; what is too obvious to be worth making express. For example, if you order a hamburger in a restaurant, you ‘would not think to add that the hamburger should not be encased in a cube of solid lucite plastic that can only be broken by a jackhammer’.⁶¹ Your order implicitly requires a hamburger that can be eaten without great difficulty, so this is part of the meaning of what you have said.

Courts regularly interpret statutes to include what Parliament would reasonably have taken for granted. As Richard Ekins says, the ‘legislature may safely leave various points unsaid, say that the offence its enactment creates or regulates is limited to acts within its jurisdiction, does not apply retrospectively and does not oust the standard criminal law defences’.⁶²

The kind of implication at work in the doctrine of implied repeal is also an implicit assumption. In the most basic terms, Parliament enacts a statute to change the law, and it aims to change the law so as to change the way that we, the law’s subjects, act. Its aim is to guide our

⁶⁰ Goldsworthy, “Implications in Language, Law, and the Constitution”, pp. 157-161; Patrick Emerton, “Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unintended Legal Consequences” (2010) 38 Fed L. Rev. 169, 173-174.

⁶¹ Jeffrey Goldsworthy, “Constitutional Implications Revisited” (2011) 30 U. Queensland LJ 9, p. 13. The example is originally John Searle’s: see his *Expression and Meaning* (Cambridge 1979) p. 127.

⁶² Richard Ekins, *The Nature of Legislative Intent* (Oxford 2012) p. 260.

conduct, in other words.⁶³ But normally the law cannot guide our conduct to the extent it is inconsistent.⁶⁴ To take a simple example, if the law tells you to drive on the left of the road, and also to drive on the right, you have not just received poor guidance; you have not received any guidance at all. It would be self-defeating, therefore, for Parliament to enact a statute without at the same time repealing earlier and inconsistent statutes. That this is obvious is precisely why Parliament can safely leave it unsaid – as *implicit* – that when it enacts a statute, it also intends to repeal inconsistent provisions of earlier statutes.

So we grant that it is unlikely that Parliament intends to repeal a constitutional statute, and that this is a strong reason for thinking that the implied meaning of a later statute is *not* that a constitutional statute is repealed. It is even less likely, however, that Parliament would act in a transparently irrational and self-defeating way, which it would do were it to enact a statute while leaving inconsistent statutes intact.

In summary, Parliament can make its intention to repeal a constitutional statute clear without making it express. It can do so by attempting to expressly repeal a constitutional statute and failing because of a drafting error. It can also do so by enacting a statute that is obviously inconsistent with a constitutional statute.

One final point. We have said that there needs to be very strong evidence to infer that Parliament intended to repeal a constitutional statute, but that such evidence need not come in the form of express words. That is consistent with the test articulated in *Thoburn*, because *Thoburn* allows for the repeal of a constitutional statute so long as the evidence of an intention to repeal is ‘irresistible’. Laws LJ did not justify his decision on interpretive grounds (as we shall explain shortly). Our point is simply that he could have.⁶⁵ We shall return to this aspect of *Thoburn* in the final section of this paper.

⁶³ Ekins, *op. cit.*, pp. 125-127, 136-137.

⁶⁴ See, *e.g.*, Lon L. Fuller, *The Morality of Law* (New Haven 1969) pp. 46, 65-70. Nick Barber argues that rules may be inconsistent without people being forced to choose between them in “Legal Pluralism and the European Union (2006) 12 *European Law Journal* 306, 316ff. For our purposes all that is necessary is that inconsistency inhibits guidance in the normal case.

⁶⁵ Alison Young argued that this is, in fact, the best way to interpret *Thoburn*: Alison Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 41-45. But see

IV. JUDGES, POWERS, AND RECOGNITION

If Parliament were to communicate its decision to repeal a constitutional statute by implication, but the effect would not be the repeal of that statute, then Parliament's will would be frustrated. Parliament would lack the power to bring about the repeal of that statute by implication. Does Parliament actually lack that power?

Let us be clear about what is *not* at issue here. Had Parliament said that the Scotland Act could only be expressly repealed, we would need to know whether, and to what extent, Parliament's powers include imposing requirements as to 'form' on itself.⁶⁶ There would be a parallel with s 2(4) of the ECA, which might be understood as imposing a requirement as to the form of future legislation, to the effect that Parliament must use express words to effectively repeal the ECA.⁶⁷ The question would be whether *H* could be justified by analogy with a prominent interpretation of *Factortame*. But of course Parliament has *not* said that the Scotland Act can only be expressly repealed, or that later statutes only take effect insofar as they are consistent with it. It has not said that expressly. Nor has Parliament said as much by implication: clearly not by deliberate implication or by implication arising from a defective expression; and not by implicit assumption, either.⁶⁸ We know

Goldsworthy, *Contemporary Debates*, p. 313 and Laws, "Constitutional Guarantees" (2008) 29 *Statute Law Review* 1, 8-9.

⁶⁶ *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590; Han-Ru Zhou, "Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty" 129 *Law Quarterly Review* 610-638.

⁶⁷ Goldsworthy, *Contemporary Debates*, pp. 290, 298; Craig, "United Kingdom Sovereignty after *Factortame*" 221-253; Craig, "Britain in the European Union", p. 96; Laws, "Law and Democracy", p. 89; see also Lord Bridge's remarks in *R v Secretary of State for Transport, Ex parte Factortame Ltd. and Others* (No. 2) [1991] 1 A.C. 603, 658-659. Nicholas Bamforth writes that the essence of these remarks is that 'Parliament has managed to bind *itself*' (emphasis in original), "Courts in a Multi-Layered Constitution", p. 280. The literature on the ECA and *Factortame* is, of course, vast, and there are competing interpretations. For example, a minority of constitutional scholars believe that the ECA imposed a requirement, not as to the form, but as to the substance of future legislation. See, e.g., Nicholas Barber, "The Afterlife of Parliamentary Sovereignty" [2011] *Int J Constitutional Law* 9 (1): 144-154, 151; Craig, "United Kingdom Sovereignty after *Factortame*", p. 251.

⁶⁸ There are other kinds of implications, but not ones relevant here. Goldsworthy discusses logical implications in Goldsworthy, "Implications in Language, Law, and the Constitution", p. 152. Jeremy Kirk claims there are also implications arising from

there was no such implicit assumption because Parliament could not have reasonably taken it for granted that the Scotland Act cannot be impliedly repealed. That is a novel, or at the very least controversial, proposition. It is not a proposition that is too obvious to be worth mentioning in the way it is too obvious to mention that a hamburger should not come encased in lucite.

What is at issue, then, is whether Parliament can be bound in a way not of its own choosing and, if so, how. Here we come to the theory that the common law is the basis of Parliamentary sovereignty. We shall refer to this as ‘common law constitutionalism’, although we recognise that some other ideas attract the same label.⁶⁹ Supposing for the sake of argument that common law constitutionalism is correct, and supposing also that judges are able to unilaterally change the common law, it follows that judges can unilaterally limit Parliament’s powers. That suggests a possible legal basis for *H*: the Supreme Court in *H* did not recognise an existing constraint on Parliament’s powers; it created one. Put another way, *H* might be legally justified because the Supreme Court had the authority to impose on Parliament what is in effect a requirement as to form.

Both Laws LJ and Lord Hope appear to favour this kind of common law constitutionalism. Laws LJ, for example, said in *Thoburn* that although Parliament cannot impose manner and form requirements on itself, judges can impose equivalent requirements.⁷⁰ Lord Hope said in *Jackson v Attorney General* that ‘[t]he principle of parliamentary sovereignty ... in the absence of higher authority, has been created by the common law’.⁷¹ He recently expanded on his remarks extrajudicially:

‘internal tensions’ within constitutions. See Kirk, “Constitutional Implications (I)”, pp. 660-661.

⁶⁹ For discussion as to the meaning of ‘common law constitutionalism’, see, e.g., Justin Leslie, “Vindicating Common Law Constitutionalism” (2010) 30 *Legal Studies* 301, esp. 302-305 and Thomas Poole, “Questioning Common Law Constitutionalism” (2005) 25 *Legal Studies* 142, 145ff. See generally, Goldsworthy, *Contemporary Debates*, ch 2.

⁷⁰ *Thoburn* [59]-[60]. Unsurprisingly, then, Laws LJ would disagree with the interpretation of the ECA at text to n 67 (see *Thoburn* [59]).

⁷¹ *Jackson* [126]. Lord Steyn similarly said that the principle of parliamentary sovereignty ‘is a construct of the common law. The judges created this principle’ [102]. See also Lady Hale’s judgment. For an alternative reading of Lord Steyn’s remarks, see Alison Young, “Sovereignty: Demise, Afterlife or Partial Resurrection?” [2011] 9

[A] law does not simply exist. It has to come from somewhere. It is either enacted law, for which Parliament is the source, or it is a product of the common law by the judges. There is, as Lord Bingham says, no statute to which the principle [of parliamentary sovereignty] can be ascribed.⁷²

Lord Hope also said that judges are able to change the principle of parliamentary sovereignty by themselves.⁷³

This type of common law constitutionalism has come under stinging criticism. The main objection is that the above analysis – i.e., parliamentary sovereignty derives from either statute or the common law; it does not derive from statute; therefore it derives from the common law – is misleading. The reason for thinking that parliamentary sovereignty cannot be based on a statute is that Parliament cannot confer power on itself. By the same reasoning, the common law, if it is judge-made law, cannot be the source of judicial power. If we then accept that all legal power derives from either statute or the common law, we must conclude that Parliament was given its powers by judges, and judges their powers by Parliament. In that case, judges and Parliament are not pulling themselves up by their own bootstraps; they are pulling each other up by each other's bootstraps, which is to say, the argument is circular. The point has been well-made by others and we shall not labour it here.⁷⁴

Not every common law constitutionalist believes that judges can change the common law. Trevor Allan, for example, adopts a Dworkinian conception of the common law according to which the common law is a set of norms based on the fundamental principles of political morality that are best able to justify the legal system as a whole.

International Journal of Constitutional Law 163,171. Cf Lord Hope's remarks in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 at [51].

⁷² David Hope, "Sovereignty in Question" (WG Hart Legal Workshop, 28 June 2011) <www.supremecourt.gov.uk/docs/speech_110628.pdf>.

⁷³ After quoting a statement of Lord Bingham's, which ended with 'judges did not by themselves establish the principle [of parliamentary sovereignty], and they cannot, by themselves, change it', Lord Hope said he 'cannot find fault' with it 'apart from the last few words in the last sentence': Hope, "Sovereignty in Question", p. 13. Lord Hope is not alone in these views. See Tomkins, *Public Law*, p. 103 and Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Cambridge 2001), pp. 239-240.

⁷⁴ Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, pp. 239-242; Young, "Sovereignty: Demise, Afterlife or Partial Resurrection?", p. 165.

These principles include (Allan says) liberty and democracy, and although they may change over time, judges cannot deliberately alter them. Judges are limited, therefore, to identifying and expounding the common law. Because on this theory the common law is not judge-made law, it is not vulnerable to the bootstrapping objection, above. Does this theory lend any support to *H*? In outline, an argument for a positive answer would presumably go like this: following *Factortame*, the law on implied repeal is unsettled; because the law is unsettled, we should make sense of the rival positions in light of constitutional principle; and the best interpretation of constitutional principle is that constitutional statutes cannot be impliedly repealed.

To this line of thinking (which, to be clear, we are not attributing to Allan, and which he may well not support⁷⁵) we have two responses. First, we do not accept that, before *H*, the law on implied repeal was unsettled in any general sense (more about why in a moment). As a result, the suggested limit on Parliament's power does not 'fit' official practice in the way that Allan (following Dworkin) would require.⁷⁶ Second, it is far from clear that constitutional principle favours a general, absolute exemption from implied repeal for the Scotland Act or constitutional statutes generally. Such an exemption is unnecessary for the prevention of grave injustice, say, or the violation of basic rights.⁷⁷ Also, while an exemption would help ensure that Parliament accepts the 'political cost'⁷⁸ of interfering with fundamental statutes, an exemption

⁷⁵ Allan shows discomfort with the creation of the category of 'constitutional statutes' and their protection from implied repeal: TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford 2013) p. 148-149.

⁷⁶ See text to n 84-88 on *Thoburn* and *Factortame*. Allan himself cautions against assuming that any limit on sovereignty imposed by *Factortame* can be extended to other contexts: TRS Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 LQR 443, p. 447; Adam Tomkins' interpretation of *Factortame* according to which the court was enforcing EC law, not English law, in disapplying the provisions of the ECA clearly limits the impact the decision has on the doctrine outside EC law: Tomkins, *Public Law*, pp. 116-118. See also Goldsworthy, *Contemporary Debates*, p. 287.

⁷⁷ If it were necessary, Allan may think it justified. TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford 2013), 167.

⁷⁸ The justification for the principle of legality given by Lord Hoffman in *Simms* [1999] UKHL 33; [2000] 2 AC 115 at 131.

from implied repeal would run counter to the democratic principle that favours giving effect to the clear 'will of an elected assembly'⁷⁹.

Let us now set aside common law constitutionalism. In truth most constitutional scholars and judges accept that the foundation of legal authority, including Parliament's sovereignty, is not a common law rule but rather what Sir William Wade called a 'political fact'⁸⁰ and what HLA Hart termed an 'ultimate rule of recognition'.⁸¹ For our purposes there are two crucial points to make about an ultimate rule of recognition. First, an ultimate rule of recognition sets out basic criteria of legal validity. Depending on what those criteria are, a constitutional statute may or may not be 'recognised' as valid. Second, an ultimate rule of recognition is a social rule that exists amongst law-applying officials, including, but not limited to, judges. That is to say, it is a rule that exists because law-applying officials generally accept it and conform to it.⁸²

From this second point it follows that the Supreme Court, and even judges as a whole, cannot unilaterally alter the rule of recognition.⁸³ They need the cooperation, or at least the acquiescence, of other law-applying officials. We know, as a result, that the Court in *H* did not change the ultimate rule of recognition. It could not have.

But did the Court *need* to change that rule? Perhaps, before *H* was decided, the ultimate rule of recognition *already* recognised the quasi-

⁷⁹ TRS Allan, *The Sovereignty of Law*, p. 141; See also Allan, "Law, Politics, and Revolution", p. 445.

⁸⁰ HWR Wade, "Sovereignty - Revolution or Evolution?" (1996) 112 L.Q.R. 568, 574.

⁸¹ Lord Hope also indicates he accepts that legal authority is based on a rule of recognition: *R (Jackson) v Attorney General* [2005] UKHL 56, [126] (per Lord Hope); David Hope, "Sovereignty in Question" (WG Hart Legal Workshop, 28 June 2011) 13. That is hard to square with his belief that it is also based on the common law. (Others share our puzzlement, e.g., Turpin and Tomkins, *British Government and the Constitution*, pp. 93-94.) Perhaps Lord Hope believes that the rule of recognition is a common law rule, but that would clearly be a mistake if, as Lord Hope seems to think, the common law is capable of being changed by judges alone. See also Laws, "Constitutional Guarantees", p. 9.

⁸² One of us has commented at length on the kind of 'acceptance' that underlies an ultimate rule of recognition in [citation omitted for peer review].

⁸³ Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, pp. 240-242; Goldsworthy, *Contemporary Debates*, p. 54; Young, "Sovereignty: Demise, Afterlife or Partial Resurrection?", p. 168. Nor for that matter can Parliament, acting alone, change the rule of recognition: see Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford 1999), p. 89.

entrenched status of constitutional statutes, and the Court in *H* simply acknowledged that fact. Whether this is true depends on what law-applying officials accepted and how they acted prior to *H*. Was their practice consistent with a rule that recognised constitutional statutes as quasi-entrenched, or as susceptible to implied repeal?

It seems clear that, traditionally, officials accepted that Parliament was able to impliedly repeal *any* statute. True, there were *dicta* in several cases, most notably *MacCormick v Lord Advocate*⁸⁴, to the effect that certain 'Articles' of the Acts of Union 1706 and 1707 could not be repealed.⁸⁵ But these *dicta* were narrow. They do not support an exemption from implied repeal for other Articles, let alone for the Scotland Act, let alone for constitutional statutes generally. More importantly, they were never widely adopted. Indeed, traditionally, almost all judges presented the doctrine of implied repeal as applicable to all statutes.⁸⁶

Judges did not just say that they accepted that constitutional statutes could be impliedly repealed. They *acted* on that basis, too, as did other law-applying officials. The Anglo-Scottish union legislation is, in fact, a good example. Consider Article XXI, which says that the 'Rights and Privileges' of Scotland's 'Royal Burroughs' are to 'remain entire' notwithstanding the union with England. Article XXI has never been expressly repealed. However, the Local Government (Scotland) Act 1973 stripped the royal burghs of their powers, and s 1 of that Act provided that 'all local government areas existing immediately before' the Act came into force 'cease to exist' at that point. No court has been asked to determine whether Article XXI remained valid after the Local Government (Scotland) Act came into force. But judges and other law-applying officials have clearly proceeded on the basis that the royal burghs have been abolished, that local government business is now to be conducted by the bodies established by the Local Government

⁸⁴ 1953 SC 396, CS. The Articles in question are those concerned with the Court of Session and Scots private law.

⁸⁵ See also *Gibson v Lord Advocate* 1975 SLT 134, CS, 144. Lord Hope said that the argument that Parliament's powers are restricted by the Anglo-Scottish union legislation 'cannot be dismissed as entirely fanciful': *Second Report from the Select Committee on Privileges*, HL 108-I of 1998-99.

⁸⁶ Francis Bennion, *Bennion on Statutory Interpretation*, 5th edn (London 2008), pp. 254-255.

(Scotland) Act (i.e., regions, districts, and so on) instead, and that Article XXI is no longer of force or effect. Other Articles of Union have been treated as impliedly repealed, too.⁸⁷

The rule of recognition could have changed recently, so that what officials accept and act upon is different than it was in even the 1970s, but there is no real evidence of that change having occurred. Since *Factortame*, it may have been accepted that Parliament cannot impliedly repeal the ECA, but that is for reasons specific to that statute.⁸⁸ In *Thoburn*, Laws LJ and Crane J may have accepted that Parliament's powers are limited more widely, but, as we explained, that view was not widely adopted. Overall, therefore, the practice of law-applying officials pre-*H* was consistent with a rule that allows Parliament to impliedly repeal even a constitutional statute (other than, perhaps, the ECA). In other words, pre-*H*, Parliament possessed a power that, on one reading of his *dictum*, Lord Hope claimed that it lacked.

To say that the ultimate rule of recognition does not *currently* support the quasi-entrenchment of constitutional statutes is not to deny that it could develop in that direction. And to say that the Supreme Court cannot unilaterally alter that rule is not to deny that it can influence its development. After all, the ultimate rule of recognition is a consensus among law-applying officials, and *H* is a powerful expression of the Supreme Court's views. Indeed, *H* may be best thought of as part of a larger trend. Following *Factortame* and *Thoburn*, and more recently *Jackson v Attorney General*⁸⁹ and *AXA General Insurance Ltd v HM Advocate*⁹⁰, judges are increasingly willing to contemplate limits to Parliament's powers. Parliament may be willing to do the same.⁹¹ *H* may represent one more 'milestone' in the 'journey' towards a narrower

⁸⁷ For example, Article XX, regarding heritable jurisdictions, was never expressly repealed, but heritable jurisdictions were abolished by the Heritable Jurisdictions (Scotland) Act 1746. For a helpful overview of the changes to the Articles of Union, express and implied, see the *Second Report from the Select Committee on Privileges*, HL Annex 1-Part 1 of 1998-99.

⁸⁸ Particularly s 2 of the ECA.

⁸⁹ *R (Jackson) v Attorney General* [2005] UKHL 56.

⁹⁰ [2011] UKSC 46.

⁹¹ The European Union Act 2011 may constitute Parliament's most recent attempt to bind itself, in this case through a series of referendum 'locks'. But cf Goldsworthy, *Contemporary Debates*, pp. 175-6.

conception of parliamentary sovereignty.⁹² However, that journey is not over yet, and the possibility of a change in the law in the future does not absolve judges of their duty to apply the law as it stands. Nor, of course, do existing limits to Parliament's powers in themselves justify the imposition of new ones.

V. CONCLUSION: CONTEXT AND IMPLIED REPEAL

So we do not accept that, as a matter of law, the Scotland Act or other constitutional statutes can only be expressly repealed. *Factortame* can potentially be justified on the basis that Parliament chose to exempt the ECA from implied repeal, but Parliament did not choose to exempt the Scotland Act, or constitutional statutes generally, from implied repeal, and judges cannot give them a quasi-entrenched status on their own. The narrow test for implied repeal set out in *Thoburn* can be justified on the basis that it is unlikely that Parliament intends to repeal a constitutional statute, but *H* cannot be justified on that basis, because Parliament can make its intention to repeal a constitutional statute 'irresistibly' clear without making it express.

It must be said that the Scotland Act, the Human Rights Act, the ECA, and many other constitutional statutes are far-reaching responses to complex problems. The constitution is evolving and some traditional doctrines may not have kept pace. We think it is Parliament that ought to initiate fundamental legal change. At the same time, the understanding of implied repeal ought to take into account the constitutional changes that have already occurred. Let us conclude, then, with two guidelines we think appropriate for the implied repeal of statutes in a changed constitutional context.

The first guideline is implicit in what we have already said:

- (1) An ordinary statute repeals a constitutional statute if: (a) it says expressly that the constitutional statute is repealed; (b) it would

⁹² Mark Elliot, "Parliamentary Sovereignty under Pressure" (2004) 2 International Journal of Constitutional Law 545, 551. For similar views see Craig, "United Kingdom Sovereignty after *Factortame*", 253; Bamforth, "Courts in a Multi-Layered Constitution", p. 280; Wade famously said *Factortame* had turned sovereignty into a "a freely adjustable commodity" (573) and suggested that predicting what changes lay in store amounts to "guesswork" (575), Wade, "Sovereignty - Revolution or Evolution?"

have said that expressly, had it not been for a drafting error; or (c) the two statutes are clearly inconsistent.

What is the meaning of 'clearly' in (c)? We gave an example earlier of a clear inconsistency earlier, involving the Keeper of the Scottish Seal. The inconsistency between the Acts of Union and the Local Government (Scotland) Act is another. The standard we have in mind is, we think, the same standard that Laws LJ articulated in *Thoburn*, when he said that an 'irresistible' implication could bring about the repeal of a constitutional statute.⁹³ This is also the standard applied to statutes that endanger common law constitutional rights and principles, as articulated in *Simms* and subsequent cases.⁹⁴ What we favour, therefore, is allowing for the implied repeal of a constitutional statute, but in narrower circumstances than ordinary statutes. We favour a departure from the traditional doctrine of implied repeal (according to which a repeal is effected by a 'mere' implication), but not the radical change proposed in *H*.

As we explained, if two statutes are inconsistent, and both remain 'on the books', then the law fails to guide our conduct to the extent of the inconsistency. In other words, the law fails to 'rule' to that extent. The rule of law, in this formal sense, is part of the British constitution. When a court chooses to uphold an ordinary statute over an inconsistent constitutional statute, it protects the rule of law, and thus a constitutional principle, albeit at the expense of a constitutional statute. Once we reflect on this tension within the constitution, it is easy to see the possibility of another. For it is possible that two constitutional statutes will conflict (e.g., the Scotland Act 1998 and an earlier constitutional statute⁹⁵). In that case, there is no reason to privilege the earlier constitutional statute over the later one. The presumption that Parliament does not intend to legislate contrary to constitutional statutes has no application. There is no reason to depart from the traditional rules of implied repeal. So:

⁹³ To be clear, we are agreeing with the standard set out in *Thoburn*, not with Laws LJ's theory of common law constitutionalism.

⁹⁴ See references at n 28. We caution that we are not adopting the justification for this standard proposed in *Simms*: see text at n 78.

⁹⁵ A possibility anticipated in s 37 of the Scotland Act, according to which the Acts of Union take effect subject to the Scotland Act.

- (2) The traditional doctrine of implied repeal applies when there is an inconsistency between two constitutional statutes.

We said earlier that we would not consider what makes a statute 'constitutional'. It seems possible, however, that not all constitutional statutes are equally important or fundamental. If that is true, then a less fundamental constitutional statute may need to be especially clear in its implication to bring about the repeal of a more fundamental one.

These points are designed to give due weight to parliamentary intent while acknowledging the existence of constitutional statutes and the absence of a fundamental shift in the rule of recognition. They are meant as an alternative to the *dictum* in *H*, and as such do not give constitutional statutes quasi-entrenched status.