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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overlooked 2012 case of* H v Lord Advocate*, the Supreme Court said that the Scotland Act 1998 cannot be impliedly repealed due to its "fundamental constitutional" status.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 judicial thinking changes, 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 Sunderland City Council*,[1] the Administrative Court suggested that constitutional statutes are more difficult to repeal than ordinary statutes. The Court said that 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 In *H*, the Supreme Court repeatedly said that the Scotland Act 1998 cannot be impliedly repealed, under any circumstances,

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[1] [2002] EWHC 195 (Admin), [2003] Q.B. 151 ("*Thoburn*").
[2] [2012] UKSC 24, [2013] 1 A.C. 413 ("*H*").

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, consistently 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.

I. The Path to *H*

A.V. 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

[3] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [30]; also paras. [31], [32].
[4] D. Feldman, "The Nature and Significance of 'Constitutional' Legislation" (2013) 129 L.Q.R. 343.
[5] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [62].
[6] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London 1915), 37.
[7] Scepticism traditionally centred on the Anglo-Scottish and Anglo-Irish union legislation. See text at notes 86–88 below.
[8] E. Barendt, *An Introduction to Constitutional Law* (Oxford 1998), 27.

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] 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 words[13] (or, some would add, by necessary implication[14]).

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 L.J., 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 L.J. considered whether the ECA could be impliedly repealed; in light of *Factortame*, he held it could not.[17]

Laws L.J. 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 L.J. put the point categorically:

[9] *Regina v Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] 2 A.C. 85 ("*Factortame*"); *Regina v Secretary of State for Transport, ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 A.C. 603 ("*Factortame No. 2*"); P. Craig, "United Kingdom Sovereignty after *Factortame*" [1991] 11 Y.E.L. 221.

[10] In what follows, we shall 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.

[12] C. Turpin and A. Tomkins, *British Government and the Constitution*, 7th ed. (Cambridge 2011), 350; cf. A. Tomkins, *Public Law* (Oxford 2003), 116–18.

[13] See e.g. P. Craig, "Britain in the European Union" in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford 2011), 96; J. Laws, "Law and Democracy" [1995] P.L. 72.

[14] J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), 287.

[15] For a thorough account of the proceedings in *Thoburn*, see M. Elliott, "Embracing 'Constitutional' Legislation: Towards Fundamental Law?" (2003) 54 N.I.L.Q. 25.

[16] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [50]. According to some commentators, Laws L.J. also accepted or ought to have accepted that the doctrine of implied repeal only applies to statutes that have the same "subject matter": N.W. Barber and A.L. Young, "The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty" [2003] P.L. 112; Tomkins, *Public Law*, p. 119. Cf. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, pp. 291–93.

[17] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [61].

"Ordinary statutes may be impliedly repealed. Constitutional statutes may not."[18] Some commentators, perhaps reading this statement in isolation, took it to reflect Laws L.J.'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 L.J. also said that a constitutional statute can be repealed by "unambiguous words", which may not be express.[21] So, according to Laws L.J., 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 L.J. concluded, the traditional doctrine has "no application to constitutional statutes".[24]

In addition to *Factortame*, Laws L.J. 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*

[18] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [63].
[19] Goldsworthy, *Parliamentary Sovereignty*, p. 312; G. Marshall, "Metric Measures and Martyrdoms" (2002) 118 L.Q.R. 493.
[20] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [63] (emphasis on "actual" in original, otherwise added).
[21] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [63]. Extrajudicially, Laws L.J. has said that a constitutional statute may be repealed so long as Parliament "makes clear what it is doing": J. Laws, "Constitutional Guarantees" (2008) 29 Statute Law Review 1. But cf. J. Laws, "The Common Law and Europe" (Hamlyn Lectures, 27 November 2013), para. [17], <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), [2003] Q.B. 151, at para. [60].
[24] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [63]. A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford 2008), 43, observes: "… the doctrine of implied repeal is the exception as opposed to the rule."
[25] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [62].
[26] F. Bennion, *Bennion on Statutory Interpretation*, 5th ed. (London 2008), 822–23.
[27] In *Raymond v Honey* [1983] 1 A.C. 1, Lord Bridge said that the common law constitutional right to access the courts could only be overridden expressly (at p. 14), whereas Lord Wilberforce, for the majority, said that it could also be overridden by necessary implication (at p. 10). See also *R. v Home Secretary ex p. Leech* [1994] Q.B. 198, 210, C.A.; *R. v Lord Chancellor ex p. Witham* [1997] 2 All E.R. 779, 787–88, H.C.; *Pierson v Secretary of State for the Home Department* [1997] 3 All E.R. 577, 592, H.L.

the Home Department, ex p Simms, which Laws L.J. cited in *Thoburn*, Lord Hoffman said that the principle of legality could be overridden by "express words or necessary implication".[28] In *Mohammed Jabar Ahmed v Her Majesty's Treasury*,[29] the most recent Supreme Court case on the principle of legality, four out of the five Justices to write an opinion held that common law constitutional rights could be overridden by necessary implication.[30] A "necessary implication" in this context is an implication that is especially obvious – or what could be described, in Laws L.J.'s terminology, as an "irresistible" or "unambiguous" implication.[31] Unsurprisingly, then, Laws L.J. claimed (extrajudicially) that *Thoburn* does "for *statutory* constitutional guarantees what the law already does for *common law* constitutional guarantees".[32]

After *Thoburn* was decided, there was a surge of academic interest in implied repeal and constitutional statutes, in part due to the perceived novelty of Laws L.J.'s remarks.[33] Ultimately, though, *Thoburn* was a decision of the Administrative Court and leave to appeal had been denied. Laws L.J.'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.[34] 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".[35] What no case did was rely on, or develop, Laws L.J.'s remarks on the implied repeal of constitutional statutes, leaving the status of his remarks uncertain.[36]

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

[28] *R. v Secretary of State for the Home Department ex p. Simms* [2000] 2 A.C. 115, 131, per Lord Hoffman ("*Simms*").

[29] *Mohammed Jabar Ahmed v Her Majesty's Treasury* [2010] UKSC 2, [2010] 2 A.C. 534.

[30] The fifth Justice, Lord Rodger, did not express an opinion on this point.

[31] On the nature of "necessary implication" in legislation, see J. Goldsworthy, "Implications in Language, Law, and the Constitution" in G. Lindell (ed.), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Sydney 1994), 168–70.

[32] Laws, "Constitutional Guarantees", p. 1 (emphasis in original).

[33] Tomkins, *Public Law*, p. 124, characterises the relevant claims in *Thoburn* as "wholly novel". See also Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 313; G. Lindell, "The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?" (2006) 17 P.L.R. 188; A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge 2009), 302.

[34] *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.), [2002] EuLR 610; *Imperial Tobacco Limited* [2010] CSOH 134. *Brynmawr* and *Levi Strauss* quote Laws L. J.'s remarks on the repeal of constitutional statutes, but they were not the focus of those judgments.

[35] *Watkins v Home Office* [2006] UKHL 17, [2006] 2 A.C. 395 at [62]. One other case does arguably suggest in passing that constitutional statutes (or at least the Human Rights Act 1998) cannot be impliedly repealed: *Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2007] NIQB 115 at [16].

[36] Turpin and Tomkins, *British Government and the Constitution*, p. 167; N. Bamforth, "Courts in a Multi-Layered Constitution" in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003), 278, 279; T. Khaitan, "'Constitution' as a Statutory Term" (2013) 129 L.Q.R. 589.

Thoburn. *H* has not yet been discussed in the constitutional context, so we shall describe it in some detail here.[37] The proceedings began when the US sought the extradition of a husband and wife, H and BH, on charges relating to the importation of 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".[38] 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.[39]

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 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

[37] Stephen Dimelow is the only person to mention *H* in the constitutional context, and then in passing: S.J. Dimelow, "The Interpretation of 'Constitutional' Statutes" (2013) 129 L.Q.R. 498.
[38] We are simplifying, but the complications (such as a leave requirement) are not relevant.
[39] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [25].

contemplation of the sections of the … [Extradition] Act".[40] It provides a "parallel remedy".[41] 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.[42]

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*".[43] 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 L.J. 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 Court decision and, on the issue of competency, it was unanimous.[44] 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

[40] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [32].
[41] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [33].
[42] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [30] (emphasis added).
[43] *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [32] (emphasis added).
[44] 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 A.C. 413, at para. [73]. All the other Justices simply stated their agreement.

Human Rights Act, or the Government of Wales Act 2006.[45] 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.[46]

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 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.[47] 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

[45] The Sewel Convention requires (among other things) that Westminster obtain the consent of the Scottish Parliament before varying the competencies of the Scottish Parliament or the Scottish Ministers. Consequently, it is especially unlikely that Parliament would impliedly alter the parts of the Scotland Act dealing with competencies. However, there are parts of the Scotland Act that are not about competencies, and the dictum in *H* suggests they, too, are exempt from implied repeal.

[46] 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 L.J. 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. In this respect, see *Raymond* [1983] 1 A.C. 1, H.L., at p. 10, per Lord Bridge; *R. v Lord Chancellor ex p. Witham* [1997] 2 All E.R. 779, 787–88 (High Court).

[47] See e.g. *Regina v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd.* [2001] 2 A.C. 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, *Parliamentary Sovereignty*, p. 248; Bennion, *Bennion on Statutory Interpretation*, pp. 345–48.

enacted, and so on.[48] 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.

The meaning of a statute may be express or implied. An express meaning is one that 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.[49] 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.[50]

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

[48] Laws L.J. objected to the use of legislative history as evidence of an intention to repeal a constitutional statute: *Thoburn* [2002] EWHC 195 (Admin), [2002] 3 W.L.R. 247, at para. [63]. We do not agree, but the point is not important for present purposes. For a related discussion, see Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 183, esp. note 27.

[49] Bennion, *Bennion on Statutory Interpretation*, pp. 189, 192, 201.

[50] See note 69 below.

(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.[51] 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.

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 at this point is on the potential *legal* reasons for quasi-entrenchment. We are deliberately setting aside broader normative considerations until section V.

[51] See note 69 below.

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.[52] *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.[53]

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.

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.[54] 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

[52] This paragraph and the next draw on Jeff Goldsworthy's work on implications. See in particular note 31 above, pp. 154–61, and J. Goldsworthy, "Constitutional Implications Revisited" (2011) 30 U. Queensland L.J. 9.

[53] But cf. J. Kirk, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples" (2000) 24 Melb.U.L.Rev. 645.

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

Interpretation Act in its "intended form", as Francis Bennion says in his discussion of this example.[55]

The kind of mistake that occurred in the Interpretation Act and that occurs in other statutes[56] 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 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.[57] 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.[58] Plausibly, because constitutional statutes are *very* important, there is a *very* strong presumption that Parliament did not intend to legislate inconsistently with them.[59] With this very strong presumption at their disposal, could courts *always* find a way to interpret later statutes to be consistent with constitutional statutes?[60]

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 Act[61]). And there can

[55] Bennion, *Bennion on Statutory Interpretation*, p. 880.

[56] 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 para. [44]).

[57] *Henry Boot Construction (U.K.) Ltd v Malmaison Hotel (Manchester) Ltd.* [2001] 1 All E.R. 257, 273, [2001] Q.B. 388; cited by Lord Hope in *H* [2012] UKSC 24, [2013] 1 A.C. 413, at para. [30].

[58] Bennion, *Bennion on Statutory Interpretation*, p. 305.

[59] Young, *Parliamentary Sovereignty and the Human Rights Act*, 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) L.R. 4, C.P., 374, 392; *Nairn v University of St. Andrews* [1909] A.C. 47, 61 (H.L.).

[60] *Factortame* can be understood in similar terms: Craig, "United Kingdom Sovereignty after *Factortame*", p. 251.

[61] Conor Gearty warned in "Reconciling Parliamentary Democracy and Human Rights" (2002) 118 L.Q.R. 248 that using interpretation to make legislation compatible with Convention rights in every case would

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 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.[62] 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".[63] 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".[64]

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 conduct, in other

mean "a type of entrenchment against implied repeal would have been smuggled into UK law". See also Kavanagh, *Constitutional Review under the Human Rights Act*, p. 318.

[62] Goldsworthy, "Implications in Language, Law, and the Constitution", pp. 157–61; P. Emerton, "Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unintended Legal Consequences" (2010) 38 Fed.L.Rev. 169.

[63] J. Goldsworthy, "Constitutional Implications Revisited", p. 13. The example is originally John Searle's: see his *Expression and Meaning* (Cambridge 1979), 127.

[64] R. Ekins, *The Nature of Legislative Intent* (Oxford 2012), 260.

words.[65] But normally the law cannot guide our conduct to the extent it is inconsistent.[66] 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 L.J. did not justify his decision on interpretive grounds (as we shall explain shortly). Our point is simply that he could have.[67] We shall return to this aspect of *Thoburn* in the final section of this paper.

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?

[65] Ibid., at pp. 125–27, 136–37.

[66] See e.g. L.L. Fuller, *The Morality of Law* (New Haven 1969), 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 E.L.J. 306. For our purposes, all that is necessary is that inconsistency inhibits guidance in the normal case.

[67] Alison Young argued that this is, in fact, the best way to interpret *Thoburn*: Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 41–45. But see Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 313, and Laws, "Constitutional Guarantees", pp. 8–9.

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.[68] 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.[69] 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.[70] We know 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.[71] 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 L.J. and Lord Hope appear to favour this kind of common law constitutionalism. Laws L.J., for example, said in *Thoburn* that, although Parliament cannot impose manner and form requirements on

[68] See *Ellen Street Estates Ltd. v Minister of Health* [1934] 1 K.B. 590.

[69] Goldsworthy, *Parliamentary Sovereignty*, pp. 290, 298; Craig, "United Kingdom Sovereignty after *Factortame*", pp. 221–53; 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, 658–59, and Bamforth, "Courts in a Multi-Layered Constitution", p. 280. Cf. N. Barber, "The Afterlife of Parliamentary Sovereignty" [2011] 9 Int.J. Constitutional Law 144.

[70] There are other kinds of implications, but not ones relevant here. See Goldsworthy, "Implications in Language, Law, and the Constitution", p. 152, and Kirk, "Constitutional Implications (I)", pp. 660–61.

[71] J. Leslie, "Vindicating Common Law Constitutionalism" (2010) 30 L.S. 301, and T. Poole, "Questioning Common Law Constitutionalism" (2005) 25 L.S. 142. See generally Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, ch. 2.

itself, judges can impose equivalent requirements.[72] 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".[73] He recently expanded on his remarks extrajudicially:

> [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.[74]

Lord Hope also said that judges are able to change the principle of parliamentary sovereignty by themselves.[75]

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.[76]

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. These principles include (Allan says) liberty and democracy and, although they may change over

[72] *Thoburn* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at para. [59]–[60]. Unsurprisingly, then, Laws L.J. would disagree with the interpretation of the ECA at text to note 69 above (see *Thoburn* at para. [59]).

[73] *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262 at [126]. Lord Steyn similarly said that the principle of parliamentary sovereignty "is a construct of the common law. The judges created this principle" (at para. [102]). See also Lady Hale's judgment. For an alternative reading of Lord Steyn's remarks, see A. Young, "Sovereignty" [2011] 9 I.J.C.L. 163. Cf. Lord Hope's remarks in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 A.C. 868 at [51].

[74] D. Hope, "Sovereignty in Question" (W.G. Hart Legal Workshop, 28 June 2011), <www.supremecourt.gov.uk/docs/speech_110628.pdf>.

[75] 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", ibid., at p. 13. Lord Hope is not alone in these views. See Tomkins, *Public Law*, p. 103, and J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Cambridge 2001), 239–40.

[76] Goldsworthy, *The Sovereignty of Parliament*, pp. 239–42; Young, "Sovereignty", p. 165.

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 support[77]) 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.[78] 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.[79] Also, while an exemption would help ensure that Parliament accepts the "political cost"[80] of interfering with fundamental statutes, an exemption from implied repeal would run counter to the weighty democratic principle that favours giving effect to the clear "will of an elected assembly".[81]

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"[82] and what H.L.A. Hart termed an "ultimate rule of recognition". 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

[77] Allan shows discomfort with the creation of the category of "constitutional statutes" and their protection from implied repeal: T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford 2013), 148–49.

[78] See text to notes 87–91 on *Thoburn* and *Factortame*. Allan cautions against assuming that any limit on sovereignty imposed by *Factortame* can be extended to other contexts: T.R.S. Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 L.Q.R. 443; Adam Tomkins's 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. 116–18. See also Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 287.

[79] If it were necessary, Allan may think it justified. Allan, *The Sovereignty of Law*, p. 167.

[80] The justification for the principle of legality given by Lord Hoffman in *Simms* [1999] UKHL 33, [2000] 2 A.C. 115, at p. 131.

[81] Allan, *The Sovereignty of Law*, p. 141; see also Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution", p. 445.

[82] H.W.R. Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 L.Q.R. 568.

"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.[83]

From this second point, it follows that the Supreme Court, and even judges as a whole, cannot unilaterally alter the rule of recognition.[84] 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. (Lord Hope seems to accept that legal authority is based on an ultimate rule of recognition.[85] That is hard to square with his belief that legal authority is also based on the common law.[86] Perhaps Lord Hope believes that the rule of recognition *is* a common law rule. That would clearly be a mistake if, as Lord Hope seems to think, the common law is capable of being changed by judges alone, because, as we have now explained, an ultimate rule of recognition cannot be changed by judges alone.)

But did the Court *need* to change that rule? Perhaps, before *H* was decided, the ultimate rule of recognition *already* recognised the quasi-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*,[87] to the effect that certain "Articles" of the Acts of Union 1706 and 1707 could not be repealed.[88] 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

[83] On the kind of "acceptance" that underlies an ultimate rule of recognition: A. Perry, "The Internal Aspect of Social Rules", forthcoming in the Oxford Journal of Legal Studies (doi: 10.1093/ojls/gqu017).

[84] Goldsworthy, *The Sovereignty of Parliament*, pp. 240–42; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 54; Young, "Sovereignty", p. 168. Nor for that matter can Parliament, acting alone, change the rule of recognition: see N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford 1999), 89.

[85] *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262 at [126], per Lord Hope; D. Hope, "Sovereignty in Question", p. 13.

[86] Others share our puzzlement, e.g. Turpin and Tomkins, *British Government and the Constitution*, pp. 93–94.

[87] 1953 S.C. 396, C.S. The Articles in question are those concerned with the Court of Session and Scots private law.

[88] See also *Gibson v Lord Advocate* 1975 S.L.T. 134, 144 (Court of Session). 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*, H.L. 108-I of 1998–99.

widely adopted. Indeed, traditionally, almost all judges presented the doctrine of implied repeal as applicable to all statutes.[89]

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 (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. For example, Article XX, regarding heritable jurisdictions, was never expressly repealed, but heritable jurisdictions were abolished by the Heritable Jurisdictions (Scotland) Act 1746.[90]

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.[91] In *Thoburn*, Laws L.J. 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.

V. Constitutional Change and Judicial Disobedience

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

[89] Bennion, *Bennion on Statutory Interpretation*, pp. 254–55.
[90] 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*, H.L. Annex 1-Part 1 of 1998–99.
[91] Particularly s. 2 of 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. *H* lacks any *legal* justification, therefore.

Could *H* still be justified on broader normative grounds? Let us outline an argument for a positive answer. The argument has two parts: (1) the quasi-entrenchment of constitutional statutes is, on the whole, desirable; and (2) *H* helps make it the case that constitutional statutes are quasi-entrenched. Starting with (1), it may be that Parliament would tend to decide whether to repeal a constitutional statute more carefully were it forced to make its decision to do so express. It may also be that Parliament would be less likely to repeal constitutional statutes, including statutes that protect basic rights, were the "political cost" of doing so higher. Now, we are unsure whether these good consequences would actually come about and, if they did, whether they would outweigh the drawbacks of quasi-entrenchment, which could be considerable. Given the quantity of legislation that might be considered "constitutional", and the difficulty of predicting conflicts between statutes in the abstract, quasi-entrenchment could make it very difficult for Parliament to reliably achieve its legislative aims. However, we shall set aside our reservations, and assume for the sake of argument that quasi-entrenchment *is* desirable.

We turn now to (2). If our analysis in the previous two sections is correct, then judges have no legal authority to make constitutional statutes quasi-entrenched. Quasi-entrenchment requires a change in the ultimate rule of recognition, and judges cannot change that rule by themselves. However, judges can influence that rule's development. The ultimate rule of recognition is, after all, a consensus among law-applying officials as to the content of that rule. One way to shift that consensus is to foster the impression that it has *already* shifted. To make quasi-entrenchment a reality, judges might declare that constitutional statutes are quasi-entrenched, and generally treat the issue as settled and obvious. If they did so over a long enough period of time (in a series of obiter remarks, say), then other law-applying officials might come to take it for granted that constitutional statutes are quasi-entrenched – at which point, they actually would be. The constitution would have been changed, and a decision like *H* could have played a part.[92] (To be clear, we do not think that the

[92] For examples of judicial subterfuge in Britain, see J. Goldsworthy, "The Limits of Judicial Fidelity to the Law" (2011) 24 Canadian Journal of Law & Jurisprudence 305.

Supreme Court was insincere in this way in *H*. We are merely suggesting a possible justification for *H*.)

So, quasi-entrenchment may be desirable, and *H* could help to make quasi-entrenchment a reality. There may be something to be said for *H*, therefore. *H* would still not be justified in an overall or all-things-considered sense, however, because there are powerful objections to the strategy outlined in the last paragraph. For one thing, it is risky. As Goldsworthy says, any attempt by judges to deliberately change the content of the ultimate rule of recognition is "fraught with danger".[93] Other officials might be "persuaded, inveigled, bamboozled, or bluffed into acquiescing in the change".[94] But they might, instead, "resent and resist the judicial attempt to change the rules that had previously been accepted, and take strong action to defeat it, possibly including the impeachment of 'over-mighty judges'".[95] Judges are poorly equipped to win this kind of power struggle, and quasi-entrenchment is not important enough to warrant the risk of losing.

Moreover, if judges were to refuse to hold that a constitutional statute is repealed absent express words, they would be refusing to apply the law. That ought to trouble us on principle. Judges are legally obligated to apply the law, of course, so their refusal would amount to disobedience. But judges are also under a *moral* obligation to apply the law, except when it would cause injustice.[96] The reasons for this moral obligation are familiar.[97] Judicial fidelity to the law preserves the coherence of the legal system, encourages the resolution of disputes according to the law, and sets an example for citizens. Most importantly, judicial fidelity to the law upholds the rule of law itself. Quasi-entrenchment may be desirable, but that does not entitle judges to disregard the law, or to imperil the rule of law, in order to achieve it.

VI. Conclusion

Let us conclude, then, with two guidelines we think are appropriate for the implied repeal of constitutional statutes. The first is implicit in what we have already said. An ordinary statute repeals an earlier constitutional statute if, and only if, either: (1) it says expressly that the constitutional statute is repealed; (2) it would have said that expressly, had it not been for a drafting error; or (3) the two statutes are clearly inconsistent. What is the

[93] Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, p. 55.
[94] Ibid.
[95] Ibid; see also Goldsworthy, *The Sovereignty of Parliament*, pp. 267–71.
[96] In *Limits of Law: The Ethics of Lawless Judging* (Oxford 2010), Jeffrey Brand-Ballard argues that judges may refuse to apply the law to avoid moderate, as well as grave, injustice. Even if that is correct, it would not make a difference for our purposes because quasi-entrenchment does not, in general, avoid injustice of any degree.
[97] Goldsworthy, "The Limits of Judicial Fidelity to the Law", pp. 305, 321–22.

meaning of "clearly" in (3)? We gave an example 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 L.J. articulated in *Thoburn*, when he said that an "irresistible" implication could bring about the repeal of a constitutional statute.[98] This is also the standard applied to statutes that endanger common law constitutional rights and principles, as articulated in *Simms* and subsequent cases.[99] 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 statute[100]). In that case, the presumption that Parliament does not intend to legislate contrary to constitutional statutes is less obviously relevant. So, more tentatively, we propose a second guideline, namely that one constitutional statute repeals another constitutional statute if the two are (merely) inconsistent. The issue is complex, however, and deserves a longer treatment than we can provide here.

These guidelines 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.

[98] To be clear, we are agreeing with the standard set out in *Thoburn*, not with Laws L.J.'s theory of common law constitutionalism.

[99] See references at note 28 above. We caution that we are not adopting the justification for this standard proposed in *Simms*: see text at note 79 above.

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