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Factortame-like Judicial Statute Disapplication and Dicey's Constitutional Orthodoxy: A Case for their Mutual Compatibility

Vincent LaFortune*

Abstract

In the second *Factortame* case, the Appellate Committee of the House of Lords disapplied part of an Act of Parliament that infringed Community law. In 1996, HWR Wade famously argued that that decision had engendered a revolution in the traditional doctrine of Parliamentary sovereignty: such judicial intervention, according to the constitutional scholar, was incompatible with the orthodox constitutional arrangement of the United Kingdom as authoritatively captured by AV Dicey. In this article, I argue that if Wade's analysis of the case still holds such sway today, it is because it has not been met with the rebuttal it, in fact, deserves. This article contends that, with all the necessary ingredients, *Factortame*-like judicial statute disapplication in virtue of an earlier statute is well within the boundaries of an orthodox Diceyan conception of Parliamentary Sovereignty. In other words, that provided all the necessary conditions are met, a court, in disapplying an Act of Parliament or part thereof, does not commit either of the two offences that immediately spring to the reader's mind when reading the *Factortame (No. 2)* decision, namely (i) that of subverting Parliament's legislative sovereignty by force of common law encroachment or (ii) that of allowing an earlier Parliament to bind its successor through manner-and-form hurdles. To achieve this objective, I formulate

* LLB candidate (University College London). My heartfelt gratitude goes to Professor Ronan McCrea (University College London) for his precious guidance in the writing of this article, and to Professor Philip Schofield for his constructive comments on early drafts. Insightful comments from anonymous reviewers were also instrumental in strengthening the piece, for which I am grateful. vincent.lafortune.19@ucl.ac.uk.

a new definition of "constitutional statute" and argue for a reconceptualization of Parliament's temporality. These two arguments, which I respectively label the *technical* and *constitutional* arguments, fuse together to show that a pristine Diceyan conception of Parliamentary sovereignty enjoys more expansive bounds than previously thought, so as to even encompass judicial disapplication of an Act of Parliament or part thereof in virtue of an earlier statute, when a particular set of conditions obtain.

Keywords: Factortame, statute disapplication, constitutional statute, constitutional orthodoxy, parliamentary sovereignty

I. Introduction

In his 1996 article "Sovereignty: Revolution or Evolution?",[1] HWR Wade characterized the *Factortame (No. 2)*[2] decision as a revolution in the "traditional [Diceyan] doctrine of Parliamentary sovereignty" because, by disapplying a provision in the Merchant Shipping Act 1988 in virtue of a provision in the earlier European Communities Act 1972, "the House of Lords elected to allow the Parliament of 1972 to fetter the Parliament of 1988".[3] Wade's claim is a bold but sensible one because judicial disapplication of an Act of Parliament seems *prima facie* anathema to the constitutional framework of the United Kingdom as authoritatively captured by Dicey.[4] It is also an appealing claim, not least because it has not yet been met with the rebuttal it in fact deserves. Indeed, all attempts to rationalize the decision systematically cede, however unwittingly, the most crucial terrain to Wade, namely the decision's incompatibility with Dicey's idea of the workings of Parliamentary Sovereignty in this jurisdiction.

This article contends that with all the necessary ingredients, *Factortame*-like judicial statute disapplication in virtue of an earlier statute is well within the boundaries of an orthodox Diceyan conception of Parliamentary Sovereignty. In other words, that provided all the necessary conditions are met, a court, in disapplying an Act of Parliament or part thereof, *does not* commit either of the two offences that immediately spring to the reader's mind when reading the *Factortame (No. 2)*[5] decision, namely (i) that of subverting Parliament's legislative sovereignty by force of common law encroachment or (ii) that of allowing an earlier Parliament

1 HWR Wade, 'Sovereignty: evolution or revolution?' (1996) 112 LQR 568.

2 *R. v Secretary of State for Transport Ex p. Factortame Ltd (No. 2)* [1990] UKHL 7, [1991] 1 AC 603.

3 Wade (n 1) 574.

4 AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Macmillan 1915), 3-4.

5 *Factortame* (n 2).

to bind its successor through manner-and-form hurdles. If these contentions are accepted, hitherto controversial case law such as the decision in *Factortame (No. 2)*,[6] can be safely reframed as perfectly Dicey-compliant. Moreover, incidental conclusions of almost equal importance will be arrived at on the way to this main one. A *technical argument* and a *constitutional argument* fuse together to support this thesis.

The *technical argument* puts forth a brand-new definition of the key ingredient for judicial statute disapplication to obtain, namely a constitutional statute. Necessary therefore, in the first place, is a review of the many different accounts currently existing on the nature of these somewhat perplexing special statutes. Secondly, in rejecting all currently available rationalizations of constitutional statutes, my definition signals a clear break from the current paradigm where constitutional statutes are said to be shielded from implied repeal *because* they boast some especial normative worth entitling them to constitutional status. I show why this irremediably puts the cart before the horse and argue that, instead, some statutes are of a constitutional nature *because* they are linguistically shielded from implied repeal. This enables me to show, *contra* prior explanations, that there is nothing controversial, from a Diceyan perspective, in a constitutional statute investing the courts with disapplication powers. With this redefinition of constitutional statutes, I am equipped to deflect contentions that *Factortame (No. 2)*[7] marked a fundamental shift in constitutional orthodoxy, something which other attempted counters to Wade's revolution thesis have failed to accomplish.

Next, the *constitutional argument* erects fortifications around the *technical argument* in anticipation of jurisprudential siege. It argues for a radical departure from the *idée reçue* that "a Parliament" is one unique sovereign unit established at every general election (in following the conventional characterisation, it is assumed here that when the composition of the House of Commons changes, a new Parliament is formed). Rather, I argue that Parliament, as the supreme and untrammelled legislator under a Diceyan conception of sovereignty, is *one temporally continuous entity*, and has been so since its inception. This argument acts as a prophylactic against the most obvious attack to which the *technical argument* exposes itself, namely a "constitutional-orthodoxy-flavoured" rebuke of the premises upon which it (the *technical argument*) stands. Furthermore, the *constitutional argument*'s importance is signified by the light it shines on a core aspect of the United Kingdom's constitution, namely the foundational principle of the separation of powers between the legislature and the executive.

Thus, the *technical* and *constitutional* arguments come together to show that a pristine Diceyan conception of Parliamentary sovereignty enjoys more expansive

[6] ibid.

[7] ibid.

bounds than previously thought, so as to even encompass judicial disapplication of an Act of Parliament or part thereof in virtue of an earlier statute, when a particular set of conditions obtain.

An important caveat must be borne in mind throughout this article: my thesis is not to be read as an attempt to salvage, or make the apologia of, Diceyan orthodoxy. It might well be the case that Parliamentary Sovereignty cannot today realistically be captured by Dicey's characterisation. Be that as it may, the aim here is to show that, however true it is that Diceyan orthodoxy is nowadays untenable in light of the constitutional landscape of the 21st century,[8] cases like *Factortame (No. 2)*[9] ought not to be taken as having contributed to this constitutional paradigm shift, for what occurred in that case is well within Diceyan comfort zone. A full-fledged defence of Diceyan orthodoxy and of its suitability to modern constitutional realities is a matter for much more voluminous endeavours. This is why this article assumes, from the get-go, that Diceyan orthodoxy is the undisputed norm.

The inaugural section of this paper does not set out to demonstrate anything new and yet it is important because it sets the scene for what comes next. It asserts a trite Diceyan proposition, namely that Parliament's sovereignty also entails its only weakness: that it may not, whatever linguistic brio is conjured up by the parliamentary draftswoman, bind "successive Parliaments" (or as I will prefer later under the *constitutional argument*: "bind itself"). It is this fundamental corollary of a pristine Diceyan conception of sovereignty that critiques of *Factortame (No. 2)*[10] would ultimately (that is, even if they accepted the *technical argument*) contend the case flouted and it is those contentions that the *constitutional argument* will meet. Once that "unfetterability" principle has been reiterated, and the Diceyan bedrock of this paper thus settled, I then proceed with the *technical argument*, which rebuts contentions of common law encroachment. The article concludes with the *constitutional argument*, whose function is to shield the *technical argument* from contentions that it flouts the unfetterability principle.

A final word of recapitulation. It will hopefully be apparent to the reader that I am embarking on two distinct albeit interconnected missions. The first mission is simply to rescue constitutional statutes from the brink. They currently sit in both a precarious and a contentious position because they are not rationalised as products of Parliament but as spawn of the common law, thus exposing their flanks to two charges. The first charge is that constitutional statutes are the result

[8] See, for example, Lord Steyn in *Jackson and Other v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262, at [102]: "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom".

[9] *Factortame* (n 2).

[10] ibid.

of courts imbuing some statutes with a superior status according to the judge's own normative inclinations. This in turn makes the judiciary prone to all sort of criticisms, such as that of usurping the legislative function of Parliament. The second charge is that it follows from the common law source of constitutional statutes (that is, under the current rationale) that judges with different sympathies towards the notion of constitutional statutes could do away with them to "restore" orthodox Parliamentary Sovereignty. By repositioning constitutional statutes within the traditional Diceyan framework, I prophylactically address these critical dangers facing constitutional statutes. Indeed, constitutional statutes can be salvaged and rebranded as Parliament's own doing. The second mission is to shield those freshly rationalized constitutional statutes, especially those which grant disapplication power to the courts, from the contention that they fall foul of the rule, which flows from the traditional Diceyan notion of Parliamentary sovereignty, that Parliament cannot legislatively shackle itself. At the end, I hope the reader will accept *Factortame (No. 2)*[11] as a Dicey-compliant decision and that she will adopt the various incidental conclusions arrived at on the way there.

II. Why Is This Important?

At this point, the reader might query about the relevance of the extensive discussion that unfolds below. The decision of the House of Lords in *Factortame (No. 2)*, one might argue, belongs to truly bygone political and legal epochs. Nevertheless, let me make the case for the relevance of fostering the discussion to which this article seeks to contribute. Firstly, a remote, yet not totally irrelevant, reason to have this discussion might be that re-joining the EU in the (however distant) future is not so outlandish a prospect that the constitutional implication of such a choice should simply be relegated to oblivion. Secondly, and of more tangible import, there is no denying that the United Kingdom's constitution is to some extent an elusive concept which benefits greatly from spirited debate. The following discussion strikes at the heart of this debate by proposing new ideas about the nature of the entity that is Parliament as well as reconsidering and reframing the flexibility that it enjoys in its enactments. Thirdly, this article delves at length on constitutional statutes, a topic of great importance whose relevance is undeniably contemporary. Fourthly, and finally, there are important conclusions to be drawn

[11] ibid.

from this discussion on the fundamental principle of the separation of powers between the legislative and the executive.

III. Parliament's 'Unfetterability'

As mentioned in Section I above, before embarking on my main task I must briefly look at some corollaries a Diceyan understanding of Parliamentary sovereignty entails. At the risk of repeating myself, the derivatives established below simply reflect the commitment of this paper to Diceyan orthodoxy: they are taken for the sake of argumentation, for as mentioned above, I do not commit to such constitutional view, but simply strive to show that Diceyan orthodoxy is not threatened by occurrences of judicial statute disapplication of which the *Factortame (No. 2)*[12] case is the most poignant example.

As is well-known, the core proposition under Dicey is that Parliament is sovereign and, the case being, its intentions, communicated in writing via Acts of Parliament, are necessarily beyond dispute. Necessarily then, this paper adheres to the view that "Parliament […] has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[13] From that proposition, many sub-propositions may be derived. Germane to my discussion is the sub-proposition that emerges from considering the merits of the claim that "the legislative authority of an existing Parliament may be limited by enactments of its predecessors."[14]

The proposition that Parliament may bind its "successors" and that consequently the sovereignty of future Parliaments is "qualified and precarious" clearly stands at odds with "all available English authority".[15] In his *Introduction*, Dicey provides two examples of the futility of attempting to bind "future Parliaments": The Union with Scotland Act 1706 and the Union with Ireland Act 1800.[16] Without going into too much detail, it is impossible for Parliament's intention, in 1706 and in 1800, to have been clearer: the conditions upon which the unification of the nations depended were to be entrenched and shielded from any future repeal. Nevertheless, each respective Act saw some of their sacrosanct provisions repealed in the years following their enactment.[17] These two examples alone, being clear yet unsuccessful attempts to shackle "future Parliaments", provide compelling grounds to assert that however forcefully and unequivocally

[12] ibid.
[13] Dicey (n 4) 3-4.
[14] ibid 21.
[15] Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) CLJ 172, 185.
[16] Dicey (n 4) 65.
[17] ibid.

Parliament may convey its desire to lock a piece of legislation in an impenetrable vault and discard the key in the depths of the Great Blue Hole, the fact remains that this very key, through the mystical connivances of *Lady Sovereignty*, always remains at Parliament's disposal.

Yet, analogical reasoning is not entirely satisfactory, and Dicey was aware of this (although I wonder why he restricted himself to providing the logical necessity of the unfetterability of Parliament in the form of a footnote). Indeed, inductively derived conclusions leave us in want of the more reasoned and logical explanation which we would get via the deductive route, that is, an explanation which would readily discard any postulate to the effect that linguistic brio from clever draftswomen could eventually be successful at binding "future Parliaments". Fortunately, such logical explanation is available, and here is Dicey's version of the substantive rationale underpinning the unfetterability principle:

> "The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. An Act, whatever its terms, passed by Parliament might be repealed in a subsequent, or indeed in the same, session, and there would be nothing to make the authority of the repealing Parliament less than the authority of the Parliament by which the statute, intended to be immutable, was enacted. 'Limited Sovereignty', in short, is in the case of a Parliament as of every other sovereign, a contradiction in terms".[18]

These are wise, true, and sufficient words indeed, but let us elaborate ever so slightly. Dicey is right in saying that as long as a sovereign is sovereign, she cannot restrict her own powers. This is not a normative proposition or a statement of what the sovereign should not do, but a corollary of what we mean by the noun substantive "sovereign". "Sovereignty" is, to borrow Jeremy Bentham's terminology, a "fictitious entity".[19] A fictitious entity is a noun substantive which, although grammatically talked as if existing in the real world ("sovereignty" is often talked of as "something" one "possesses") does not. Nonetheless, although "sovereignty" does not evoke any material image in the mind, it may be *paraphrased* in so many terms rooted in physicality which themselves elucidate the meaning of the noun. Thus, something or someone is talked of as being invested with sovereignty when that thing or person(s) enjoy omnipotence in a given sphere of activity. For example, Man is sovereign over his own decisions and may not

[18] Dicey (n 4) 24.

[19] Jeremy Bentham, *The Works of Jeremy Bentham, 11 Vols.* (J. Bowring (ed.), OLL 1838–43) viii 3.

"conclude himself":[20] if at this very moment I promise to myself that I will go out and purchase Zola's *Germinal* tomorrow morning, and further utter to myself that I cannot on any pretext come back on my promise, my legs do not automatically start walking towards the bookshop the next morning even though I have since changed my mind. Similarly, to say that Parliament is the legislative sovereign is to say that Parliament enjoys an absolute power to enact whatever law it so desires. If it today stipulates that henceforward apple-picking shall be forbidden on Tuesdays, and that this law shall be entrenched and immutable, and if tomorrow it feels awful about its enactment and admits of its absurdity by providing for its repeal, then by the terms of its sovereign status, it is the most recent will that prevails over the earlier one, however formidable in its formulation the latter is. To suggest the possibility of a "legislatively limited legislative sovereign" is therefore to trade in oxymorons since this phrase is, to recycle Dicey's words, a "contradiction in terms".[21] Such terms are mutually exclusive and cannot co-exist, and so either someone (or something) is sovereign or, however slight the limitation is, is not so.[22] Therefore, as long as Parliament "retain[s] its sovereign character", it must be free to legislate as it wishes. Notice that this leaves open the extremely stimulating question of whether Parliament *should* be able to abandon its sovereignty if it so desired, but this inquiry is moot to our present quest: we simply need to show that the Parliament of the day in 1988 was sovereign and remained sovereign even though it saw one of its enactments disapplied by the House of Lords in 1990. If I succeed in showing this, claims that *Factortame (No. 2)*[23] was a revolution, and more generally that statute disapplication under any circumstances is a violation of Parliament's sovereignty, are deflected. With the hope that my commitment to a full-fledged Diceyan orthodoxy is clear, I now proceed with the *technical argument.*

IV. The Technical Argument: Redefining Constitutional Statutes

This section surveys the prevailing definitions of, and subsequently formulates a new definition for, the main ingredient required for statute disapplication to obtain, namely a constitutional statute.

The term "constitutional statute" may at first introduce unease in someone who has always been taught that in the United Kingdom, Parliament is sovereign and free to legislate as it wishes. Indeed, that term instantly directs the mind to legal systems where written constitutions exist and are supreme, in stark contrast with the way things work in this jurisdiction. But the force of the adjective "constitutional"

[20] Dicey (n 4) 64.
[21] Dicey (n 18).
[22] Dicey (n 4) 68.
[23] *Factortame* (n 2).

here used is, in truth, much tamer. Indeed, constitutional statutes have this sole, but important, distinguishing characteristic that they are immune from implied repeal. To be sure, constitutional statutes are not *enshrined* or *entrenched* or *anchored* like the provisions in the Constitution of the United States are. Constitutional statutes are said to be immune from the operation of repeal by implication but may always be repealed by an express provision from Parliament through the ordinary Parliamentary process.

Considering the foregoing, it is easy to see that since judicial statute disapplication in virtue of an earlier statute necessarily entails a conflict between two statutes, the only way such an event can possibly take place is if the earlier statute has constitutional status. Indeed, were it not for the constitutional status of the earlier statute, the latter would be repealed by implication instead of not only surviving but also disapplying the later statute.

Constitutional statutes were first coined by Laws LJ in *Thoburn*,[24] and since then a substantial amount of ink has been spilt in the quest to uncover the rationale underpinning their special treatment. I begin this section by conducting a survey of the most authoritative explanations of constitutional statutes to date, focusing particularly on the important work of Ahmed and Perry on the topic.[25] After surveying the current landscape, I attempt to show that if any of the currently available theses tendered as providing the best rationalization of constitutional statutes is accepted, then whatever justification within that array of choice one ends up subscribing to, one is forced to drop one's commitment to Diceyan orthodoxy. Indeed, as I shall show, the special status enjoyed by constitutional statutes is currently owed to the constitutional worth of their subject matter i.e., a statute will be shielded from implied repeal if it has some special constitutional or normative weight. It is within the confines of those premises that judges and commentators have attempted to explain why some statutes ought to be immune from implied repeal and they have focused their efforts on establishing the minimum content that a statute should have to enjoy constitutional status. As we will see, at the heart of those explanatory endeavours are value judgments exercised by the courts which are fundamentally at odds with a pristine conception of Diceyan orthodoxy. Thus, if any of the current rationales is adopted, we inevitably concede that the common law has designated a special class of statutes which it shields from

[24] *Thoburn v Sunderland City Council* [2002] EWHC 195, [2002] 3 WLR 247.

[25] See, for example, Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73 The Cambridge Law Journal 514; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 OJLS 461.

Parliament's intentions, a clear disruption of the constitutional hierarchy and an acknowledgment of the soundness of Wade's revolutionary thesis.

If this article is to prove that Diceyan constitutional orthodoxy is not endangered by judicial statute disapplication, the first step is to deny that constitutional statutes are granted their immunity because they are of some distinctive normative importance. In other words, I must challenge the fundamental premise currently shared by all justificatory arguments. I do so by encouraging a shift away from the current view that "because it is a constitutional statute it may not be impliedly repealed" to "because it may not be impliedly repealed it is a constitutional statute". I occasion this shift by challenging the common conception of the "doctrine of implied repeal" and by showing why it is that constitutional statutes are instead statutes worded in a particular way which immunises them from implied repeal, thereby unquestionably making them products of Parliament rather than of the common law. This is the *technical argument*.

A. Constitutional statutes: the traditional views

(i) Traditional Definitions of Constitutional Statutes

There is extensive literature devoted to coining a definition of constitutional statutes. I shall briefly assess such literature, guided by the precious work of Ahmed and Perry, before considering how the gap is traditionally bridged between the content of a constitutional statute and its distinctive property of being protected from implied repeal.

The only definition given in a judicial context is found in Laws LJ's *Thoburn*[26] judgment: "in [his] opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights".[27] "Ordinary statutes may be impliedly repealed […] constitutional statutes may not".[28] Laws LJ goes on to say that this "special status of constitutional statutes follows the special status of constitutional rights",[29] and that just like fundamental constitutional rights, constitutional statutes are a development of the common law.[30] Since this is the only judicial definition to date, I must give it due consideration and will do so by

[26] *Thoburn* (n 24).
[27] ibid 62.
[28] ibid.
[29] ibid.
[30] ibid 64.

following attentively the incisive work on the subject-matter conducted by Ahmed and Perry.

Ahmed and Perry, authors of the most recent comprehensive academic paper on constitutional statutes, [31] have identified a first flaw with Laws LJ's definition. They argue that it is underinclusive.[32] To illustrate their point, it is a sound practice to consider particular statutes which have come to be recognised as having constitutional status and see whether they fit easily under Laws LJ's definition. It is in conducting such matching exercise that Laws LJ's definition seems to fall short. For example, if the Parliament Acts of 1911 and 1949 are to be deemed statutes of constitutional status, as they usually are, then we must conclude that not all constitutional statutes are about conditioning the relationship between citizen and state, or are concerned with the codification of constitutional rights: sometimes, constitutional statutes shape the relationship between state institutions themselves.[33] From a descriptive point of view, Laws LJ's definition therefore inaccurately captures the breadth of constitutional statutes, which are more varied in nature than what his definition admits.

Since these "counterexamples […] cannot be easily smoothed over",[34] Ahmed and Perry take on the task of tweaking the definition so that it captures the full range of constitutional statutes. Their endeavour begins with an analysis and half-endorsement of David Feldman's proposed definition. The "institutional approach"[35] to the identification of constitutional statutes, according to Feldman, is preferable because it captures statutes that are in line with what is generally understood as the normal meaning and function of a "constitution" : that it should "constitute the state and its institutions and confer functions, powers and duties on them". [36] This definition clearly embraces the Parliament Acts of 1911 and 1949 and thereby seemingly solves the under-inclusiveness of Laws LJ's definition. It seems fair to assert, as Ahmed and Perry do, that Feldman is of the view that it *suffices*[37] for a statute to confer functions, powers, and duties on organs of the state to acquire a higher status and ultimately immunity from implied repeal. At the very least, Feldman does not qualify further the type of functions, power and duties which would be required to render the statute constitutional.

Ahmed and Perry accept that Feldman's definition solves Laws LJ's underinclusiveness problem, but they contend that it is guilty of the opposite effect. By showing how Feldman's institutional approach would achieve the weird

31 F. Ahmed and A. Perry, 'Constitutional Statutes' (2017) 37 OJLS 461.
32 ibid 466.
33 ibid.
34 ibid.
35 David Feldman, 'The Nature and Significance of Constitutional Legislation' (2013) Jul. LQR 129.
36 ibid 350.
37 Ahmed and Perry (n 31) 467.

result of including statutes such as the Coroners and Justice Act 2009 and Crown Prosecution Service Inspectorate Act 2000 ('CPSIA 2000') to the corpus of constitutional statutes, they argue that Feldman's definition is, unfortunately, over-inclusive. Although Ahmed and Perry "agree […] that all constitutional statutes create or regulate state institutions",[38] they qualify this subject matter common to all constitutional statutes as a necessary *but not sufficient* ingredient. This is the insight upon which they build to find the missing ingredient lacking in Feldman's definition.[39]

As anticipated, this missing ingredient is a certain *normative importance* which the statute must possess for it to qualify as a constitutional statute.[40] Be that as it may, "normativity" being the nebulous concept that it is, simply asserting that a constitutional statute is equal to Feldman's definition plus a certain normative weight is rather unhelpful. Ahmed and Perry suggest that the right question to ask in determining whether a statute passes the "normative notoriety" threshold is what would be the effect of that statute's repeal on the state's governing *abilities* or *disabilities*: "A statute might be of great direct influence because it confers wide-ranging powers, for example, or because it makes unlawful large swathes of state action".[41] Their definition of a constitutional statute thus runs as follows:

> "A constitutional statute is a statute at least a part of which (1) creates or regulates a state institution and (2) is among the most important elements of our government arrangements, in terms of (a) the influence it has on what state institutions can and may do, given our other governing norms, and (b) the influence it has on what state institutions can and may do through the difference it makes to our other norms".[42]

Although this definition shares similarities with Feldman's institutional approach, it additionally requires the statute to boast normative importance as defined in 2(a) and (b). With this latter criterion, Ahmed and Perry are able to suggest that statutes which condition the relationship between state institutions or that create such institutions, but that are not inherently of "great importance" like the CPSIA 2000 will not risk being included in the select category of implied-repeal-shielded constitutional statutes.[43] In that sense, they avoid Feldman's over-

[38] ibid.

[39] ibid.

[40] In that sense, Ahmed and Perry approve of Paul Craig's insight on the matter in Paul Craig, 'Constitutionalising Constitutional Law: *HS2*' (2014) PL 373.

[41] Ahmed and Perry (n 31) 469.

[42] Ahmed and Perry (n 31) 471.

[43] ibid 472.

inclusiveness problem. Importantly, this normative criterion is not grounded on some fundamental common law principle that the statute in question seeks to promote, but rather is determined through the analysis of the statute's "direct and indirect importance" regarding its influence on "governing norms".[44] That way, Ahmed and Perry's definition avoids Laws LJ's under-inclusiveness problem.

In as far as Ahmed and Perry's objective was to provide a definition that captured all currently recognized constitutional statutes – whether judicially, academically, or what may come to the same, intuitively identified[45] – they seem, at first glance, to have coined a working definition which best does justice to the variety of constitutional statutes routinely recognised. Nevertheless, one burning question remains: what is it exactly, in the broader context of the doctrine of Parliamentary sovereignty and the corollaries which flow from it, that justifies the higher status ascribed to these statutes? How do we get from the insightful but otherwise benign observation that some statutes boast superior normative qualities to justifying their special treatment with regards to implied repeal?

(ii) The Traditional Justifications for The Privileged Treatment of Constitutional Statutes

Coming up with a definition which aims at capturing all recognized constitutional statutes is one thing, but it is quite another to justify the immunity to repeal by implication granted to those statutes falling under said definition. As will be shown, because their justification arguably initiates a paradigm shift *away* from the orthodox legal justifications for the special treatment of constitutional statutes, it is at the stage of justifying the special treatment enjoyed by constitutional statutes that Ahmed and Perry's analysis is most compelling. Indeed, as Ahmed and Perry themselves state towards the end of the section concerned with formulating their definition of constitutional statutes (with which we were concerned in Section IV.A.(i)): "Perhaps most importantly, our definition accounts for how constitutional statutes ought to be treated for the purposes of implied repeal […]".[46] Although this seems to augur well for Diceyan orthodoxy, because Parliament has a central place in their justification, it will be submitted that, despite being more nuanced, their approach still boasts the same fundamental flaw inherent in all other commentators' works and is, if accepted, fatal to Diceyan orthodoxy. But first, let's

[44] Which distinguishes their approach to normative importance from that of David Jenkins: David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 International Journal of Constitutional Law 183-201.

[45] Ahmed and Perry (n 31) 466: "The Parliament Acts 1911 and 1949, for example, *strike us (and others) as obvious examples of constitutional statutes* (emphasis added)".

[46] ibid 473.

briefly survey the traditional justifications for granting some statutes, once their "constitutional" worth identified, an immunity to implied repeal.

It is remembered that for Laws LJ, constitutional statutes are those that codify fundamental common law rights. Said rights are greatly valued by the common law and, necessarily, by common law judges whose task it is to protect them. Somewhat fortuitously, Laws LJ also deems the common law to be the originator of the rule of implied repeal (this view will be disputed in Section IV.B.(i) below). It follows that the courts are not only justified in, but entrusted with, tweaking this rule (i.e., shielding some statutes from an otherwise clear case of implied repeal) in their quest to protect and uphold common law constitutional rights as far as possible. While for Feldman constitutional statutes are not limited to those codifying common law constitutional rights, his justification for their special treatment by the courts is akin to that of Laws LJ's. Along with other reasons that are not central to our discussion, Feldman attributes the impossibility of impliedly repealing constitutional statutes to, inter alia, "the risk of such an important law being amended or repealed without proper consideration in Parliament".[47] Thus, in both Laws's and Feldman's justifications there is an appeal to the statute's importance to justify its immunity from the operation of implied repeal. To be sure, the courts, after having identified a particular statute under either Laws's or Feldman's definition, should shield them from implied repeal because those definitions identify, in their own ways, statutes of great importance.

Ahmed and Perry voice two powerful criticisms of these legal justifications for granting immunity to constitutional statutes from the operation of implied repeal. The first is that, as seen previously, "not all constitutional statutes have one of [the] two subject matters" to which Laws LJ refers in his definition.[48] Thus, what justification are we to give to current constitutional statutes outside of the scope of Laws's definition such as the Parliament Acts? Indeed, on Laws LJ's account, the common law should not be preoccupied with shielding the Parliament Acts and other statutes which regulate institutional matters. Ahmed and Perry thus contend that his Lordship's definition does not do justice to the breadth of constitutional statutes that are today recognized with the result that his justification for the common law's intervention in tweaking the rules of implied repeal only captures those that do conform to his definition. This is unsatisfactory for, surely, we need a uniform justification that applies to all constitutional statutes.

In my view though, it is the second flaw with Laws's justification as identified by Ahmed and Perry that truly highlights its unsatisfactoriness. And although Ahmed and Perry think it a "less obvious objection", I submit that this is in fact an

[47] Feldman (n 35) 352.

[48] Ahmed and Perry (n 31) 474.

obviously fatal objection which is of peculiar importance. The following passage has my full endorsement, and it is worth quoting it at length:

> "[…] there is no plausible understanding of parliamentary sovereignty that would allow judges to unilaterally impose new limits on Parliament's powers, or to assign a meaning to a statute at odds with the one Parliament intended. Laws LJ's argument that judges should modify the doctrine of implied repeal requires them to do both: it requires them to limit Parliament's power to make legal change by implication and to assign a meaning to statutes based partly on the desirability of preserving fundamental rights, rather than honouring parliamentary intent".[49]

Although Ahmed and Perry do not address it, the same could be said of Feldman's justification: it requires judges to limit Parliament's power to repeal by implication based on the reticence of impliedly repealing statutes that, due to their conferring powers and imposing duties on state institutions, are of some especial normative worth.

This criticism from Ahmed and Perry seems to be hinting at an incoming vindication of Diceyan orthodoxy. Indeed, it suggests that within the confines of the United Kingdom's orthodox constitutional framework as sketched by Dicey, there is simply no justification for courts to decide whether to give effect to a clear case of implied repeal on the basis of the statute's promotion of fundamental common law constitutional rights as Laws LJ would have it or, as a matter of fact, on any other ground which purports to distinguish the treatment of statutes according to their content. Such judicial behaviour could arguably be criticized as usurpative of Parliament's legislative sovereignty and is unacceptable if Diceyan orthodoxy is at the core of the United Kingdom's constitutional framework. But, again, I must stress that whether Diceyan orthodoxy still is at the core of the United Kingdom's constitutional framework is not the concern of this paper. What can be asserted, however, is that Laws LJ's justificatory argument does require an abandonment of Diceyan orthodoxy, as Ahmed and Perry also point out.

Having rejected Laws's justification as unsatisfactory, Ahmed and Perry propose a rationale which at first glance avoids the constitutional discomfort produced by those hitherto tendered. Their justification for the special status accorded to constitutional statutes relies on the presumption of consistency according to which, in times of political normality, Parliament may be presumed to legislate consistently with its prior enactments.[50] What is more, the "greater the

[49] ibid.

[50] ibid 475.

weight Parliament can be expected to accord a statute, and the greater the potential disruption of that statute's repeal, the stronger the presumption of consistency will be".[51] A constitutional statute, as it has been defined by Ahmed and Perry, is one to which Parliament may be presumed to have given considerable weight and also one whose "repeal […] would be highly disruptive", especially in times of political normality.[52] It follows that "stronger evidence should be required to show that a later ordinary statute and an earlier constitutional statute are inconsistent than that two ordinary statutes are inconsistent".[53] Were this stronger evidence to be lacking, it is presumed that the later ordinary statute should have its ambit narrowed so as to not impede on the earlier constitutional statute's jurisdiction.

Although a move in the right direction, it is submitted that Ahmed and Perry's justificatory argument for the special treatment of constitutional statutes boasts both different and similar shortcomings as those of Laws LJ and others. Thus, if their justification is adopted, Diceyan orthodoxy would have to be abandoned.

B. Where the traditional rationales all falter

(i) Problems specific to Ahmed and Perry's rationalisation

Firstly, it is unclear what kind of stronger evidence would do to rebut the presumption of consistency and thus to warrant implied repeal of a constitutional statute or part thereof. What is clear, however, is that such evidence must be sourced elsewhere than in the statutes themselves since we are already working under the assumption that there is clear linguistical incompatibility between two statutes. It is possible that what Ahmed and Perry have in mind is for the courts to rely on *Pepper v Hart*[54] to gather the necessary evidence. But *Pepper* allows reliance on Parliamentary material only where "legislation is ambiguous or obscure or leads to an absurdity".[55] Repeal of a constitutional statute is not "absurd" – would we say that the express repeal of a constitutional statute is "absurd"? – and would in any case only occur impliedly if the implication is unequivocal and clear, not "ambiguous or obscure". Thus, it is doubtful whether *Pepper* could at all be relied upon in a case where a constitutional statute is faced with the threat of implied repeal.

Be that as it may, let's be blind to the above criticism and assume that the statute should automatically be deemed "obscure" and "ambiguous" if it threatens

[51] ibid 476.
[52] ibid 477.
[53] ibid.
[54] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, [1993] AC 593.
[55] ibid 640.

a constitutional statute in "times of normality". Arguably, the courts would be looking for some mention of the constitutional statute in question and for some words conveying the intention for its repeal. Then, since we are dealing with evidence, what evidential threshold should be set: "balance of probabilities" or "beyond reasonable doubt"? Ahmed and Perry would most likely argue for the latter, given the status they ascribe to constitutional statutes in times of political normality. Now let's further assume that there is clear and express intention in Hansard that the later normal statute should revoke the earlier constitutional statute. In light of this analysis of Hansard, reasonable doubt seems to dissipate and implied repeal to be justified. This is how I interpret the nature of the evidence that Ahmed and Perry are suggesting would be required for implied repeal to take effect.

But the pressing question is why, if it was discussed and apparently decided, did Parliament not provide explicitly for the repeal of the earlier constitutional statute in the later statute itself? The discrepancy between Hansard and the enacted statute introduces doubt as to whether Parliament's intention was indeed to repeal the constitutional statute after all deliberations were concluded. That being the case, the burden of proof, which requires the absence of any reasonable doubt, is not satisfied. The corollary of this observation is that Ahmed and Perry's approach, on my understanding of it, means that constitutional statutes as identified against their definition may only be repealed expressly, something they earnestly deny. [56] It must be emphasised how important it is for Ahmed and Perry to allow for the possibility of constitutional statutes being impliedly repealed:

> "to say that a statute can only be repealed expressly is thus to say that a statute cannot be repealed despite Parliament's clear intention to do so. That amounts to a limit on Parliament's sovereignty – something which, we have said, judges cannot unilaterally impose".[57]

And yet, in my submission, their methodology leads to the very outcome they were at pains to disavow: it will never be possible for Parliament to repeal a constitutional statute other than expressly because the extra-statutory evidence which must contain express statements to the effect that the constitutional statute with which the new statute conflicts should be repealed, does not make its way into the final wording of the statute itself.

To conclude the above discussion, it is worth pondering some *obiter dictum* by Laws LJ in *Thoburn*. Maybe my gripe with Ahmed and Perry's evidential approach

[56] Ahmed and Perry (n 31) 477.
[57] ibid.

is the same Laws LJ had in mind when he stated that "in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper v Hart*".[58]

(ii) The Overarching Flaw

But there is one overarching, fundamental flaw endemic in all the aforementioned rationales. I shall expose that flaw by showing how it manifests itself in Ahmed and Perry's justificatory argument because that argument poses the strongest resistance to my rebuttal and if it goes, so do all other justifications.

The gist of the fundamental problem is that the justifications studied so far appeal to concepts which do not flow from an orthodox conception of Parliamentary Sovereignty and thus are necessarily fatal to Diceyan orthodoxy. For just like Laws, Feldman and others, Ahmed and Perry rely on a *qualitative appreciation* of the statute's content to justify the bolstered presumption of consistency and to shield it as far as possible from implied repeal. In other words, the courts should use their (Ahmed and Perry's) definition to identify statutes which have an especial normative worth (defined as the statute's direct and indirect influence on governing norms) entitling them to constitutional status, which in turns shield said statutes from an otherwise clear case of implied repeal bar some extra-statutory evidence to suggest that it was indeed Parliament's intention to effectuate the repeal (the problems with this approach are highlighted in Section IV.B.(i) above). In doing so, they inevitably condone judicial questioning of the quality of Parliament's intentions, something which is alien to the very idea of sovereignty where there must be no justification for, nor qualitative assessment of, the legislative sovereign's volition as it is communicated through Acts of Parliament.

It must however be acknowledged that Ahmed and Perry's justificatory argument is, in a very important way, much subtler than the others. Indeed, *contra* Laws LJ, under Ahmed and Perry's view judges do not tweak the doctrine of implied repeal to preserve norms which are sacrosanct to the common law. Rather, the courts intervene on the purported grounds of giving effect to Parliament's intentions: this attempts to shift the rationale from self-interested to almost altruistic judicial intervention. Nevertheless, let's recall Ahmed and Perry's fundamental criticism of Laws LJ's justificatory argument: "[…] there is no plausible understanding of parliamentary sovereignty that would allow judges to *unilaterally* impose new limits on Parliament's powers, or to assign a meaning to a statute at odds with the one Parliament intended (emphasis added)". Does it follow from this that if Laws LJ's justificatory argument would have been to the tune that the common law tweaks

[58] *Thoburn* (n 24) 63.

the doctrine of implied repeal because Parliament "is likely to have appreciated the significance of, and deliberated particularly carefully about, constitutional statutes, because they"[59] give statutory effect to common law fundamental principles, then the only flaw in his Lordship's position would be its rather less fatal under-inclusiveness? Indeed, on that latter entirely plausible reformulation of the common law argument for preserving constitutional statutes from implied repeal, it seems that judges would not anymore be "unilaterally" imposing new limits on Parliament's powers, but rather doing so pursuant to the intentions they ascribe to Parliament itself and, as such, not fall foul of Ahmed and Perry's fundamental criticism. By allowing for such an easy counter, something seems to be amiss with Ahmed and Perry's argument. Indeed, a legal system premised on Parliamentary Sovereignty where the legal interpreters may potentially cloak their normative inclinations under the pretence of giving effect to the sovereign legislator's will is a recipe for trouble. To be sure, judges must of course often "fill in the gaps" in legislation and exercise their discretion as they best see fit when the rules alone fall short of providing the answer. That is indeed a consequence of the "irreducibly open-textured" natural language used by the legislator in shaping the laws.[60] It must however be recalled that we are working under the hypothesis of a clear case of repeal by implication where there is irresistible linguistic incompatibility between two statutes: there is no "penumbra of uncertainty"[61] as far as the operation under scrutiny is concerned and this makes judicial tergiversation unacceptable.

The thought that Parliament did not accord the same weight to an ordinary statute as it did to a constitutional statute however defined may be factually right. That it "appreciated the significance of, and deliberated particularly carefully about, constitutional statutes"[62] more so than other statutes, may or may not be true. But the essential privilege of a legislative sovereign is that the rationale behind its decisions is not to be questioned and that its most up-to-date intentions as gathered from Acts of Parliament are the law. To be sure, in shifting the focus to Parliament's intentions, Ahmed and Perry do contribute substantially towards the emancipation of constitutional statutes from the contentious and frankly controversial view that they are products "of the common law, for the common law", as Laws LJ would have it. Nevertheless, their approach still requires judicial

[59] Ahmed and Perry (n 31) 477.
[60] HLA Hart, *The Concept of Law* (first published 1961, Clarendon 2012) 128.
[61] ibid 134.
[62] Ahmed and Perry (n 31) 477.

interference and involvement of a degree which is at odds with what a Diceyan conceptualization of Parliamentary Sovereignty would be comfortable.

(iii) Recapitulation

In this subsection, I have assessed the most authoritative attempts at coining a definition and providing a justification for constitutional statutes, in particular through the important work conducted by Ahmed and Perry on the matter. The key takeaway from this survey is that, as things stand, constitutional statutes are granted immunity from implied repeal because judges and commentators imbue them with a certain normative worth. The main debate between the different views pertains to what definition best captures constitutional statutes, and how to best rationalize the special treatment they receive.

Yet, the jump from a statute having normative importance to it being shielded from implied repeal is simply unreconcilable with an orthodox Diceyan understanding of Parliamentary sovereignty. Despite attempted tweaks and modified appearances, the stance which had been initially developed by Laws LJ never fundamentally changed. In all the definitions explored above, the fact remains that some statutes are shielded from implied repeal *because* they are constitutional (a term which, as seen, attracts many definitions) and that it would, for various reasons, be harmful to allow implied repeal. In my view, Ahmed and Perry have kickstarted a paradigm shift in the narrative that had until then prevailed regarding constitutional statutes, but I believe that their own justification does not go far enough as it still demands that the courts form their own appreciation of what kind of statute Parliament must have intended to give some special weight to.

As Ahmed and Perry put it, with the rejection of all the above justificatory arguments "comes a choice": either we conclude that "the line of cases" which has systematically recognised new constitutional statutes is misguided "insofar as it suggests there is something special about constitutional statutes with respect to implied repeal", either, less drastically, we conclude that the problem lies with the current justifications, and we try to salvage constitutional statutes with our own.[63] We will of course opt for the latter option, but it is worth considering how precarious the state of affairs is as things currently stand.

First, claims that constitutional statutes currently undermine our traditional understanding of Parliamentary sovereignty are not ludicrous. Although when Wade wrote his critique[64] of *Factortame (No. 2)*,[65] the *Thoburn*[66] judgment (containing Laws LJ's definition of constitutional statutes) had yet to

[63] Ahmed and Perry (n 31) 474.
[64] Wade (n 1).
[65] *Factortame* (n 2).
[66] *Thoburn* (n 24).

be pronounced, it is clear that had he had the chance to respond, he would have pointed to the incompatibility of Laws LJ's rationalisation of constitutional statutes with an orthodox understanding of Parliamentary sovereignty, and he would have been right in doing so. Second, judges more recalcitrant to common law involvement in qualifying Parliamentary sovereignty could potentially abolish the special treatment enjoyed by constitutional statutes if the justificatory conundrum is not properly addressed.

Time has now come to propose my own definition and justification for the existence of constitutional statutes. It will be my mission, in the following paragraphs, to show that implied-repeal-shielded statutes are entirely explainable within the strict boundaries of orthodox Parliamentary sovereignty, and that reliance on extra-statutory considerations is not required to identify a class of statutes shielded from implied repeal.

C. Salvaging constitutional statutes

(i) On implied repeal

Let me for a moment return to the basics. The sole distinguishing property of a constitutional statute is that it is immune to implied repeal. Implied repeal, per Laws LJ, is the rule "that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later. The importance of the rule is, on the traditional view, that if it were otherwise, the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty".[67] This definition clearly highlights the nexus between implied repeal and Parliamentary sovereignty. Hence, it comes (to me at least) as a surprise to read later on in the same judgment that His Lordship deems the doctrine of implied repeal to be a creature of the common law.[68] It is my submission that the doctrine of implied repeal is no such creature. In fact, implied repeal is not a "doctrine" at all: it is simply, and uncontroversially, a corollary of the doctrine of parliamentary sovereignty itself. Repeal occurs impliedly when a later statute is inconsistent with an earlier statute i.e., when one or more provisions in each statute is or are mutually exclusive. That is so because Parliament's volition is, logically, always assessed from the latest Act, in a way that were we to take a snapshot of the whole body of Acts of Parliament after the latest enactment, any irreconcilably inconsistent temporally antecedent provision would naturally be automatically discarded. In other words, it would not be representing Parliament's most up to date volition if repeal of the earlier provision did not take place. It is hardly conceivable that this is a doctrine

[67] ibid 37.

[68] ibid 60.

of the common law: it is not as if the courts had a choice to give effect or not to Parliament's wishes. The implied repeal of a statute simply is the result of the courts doing their job under the orthodox constitutional framework, nothing more.

But this is not merely a semantic argument. Indeed, it shows that *nothing in the rule about implied repeal stipulates that every statute shall be impliedly repealable*. Following from the very essence of implied repeal, *it not being a doctrine of its own, but rather a derivative of the doctrine of Parliamentary sovereignty, and therefore not amenable to being interpreted from a scope which favours one's normative ideals*, whether a statute is impliedly repealable or not is entirely and solely dependent upon the wording that is used to convey Parliament's intention.

(ii) My definition

To be clear, this paper's aim is not to discredit the importance attributed to statutes hitherto labelled as "constitutional" by judges and commentators. Rather, it seeks to find a new way to justify their immunity to implied repeal which fits within a traditional Diceyan understanding of Parliamentary sovereignty.

In light of the above discussion, it will hopefully have become clear to the reader that I am not going to tender a definition which attempts to capture statutes currently recognized as constitutional. It is not the business of the judiciary to confer preferential treatment to a statute in the face of implied repeal in virtue of a certain normative importance it boasts in the eyes of the judge. Rather, the better view is to leave it to the statute itself to tell us how it should be handled.

I wish to suggest that some statutes are immune from implied repeal not *because* they boast normative importance (although they often do), but *because* such immunity is linguistically provided for in the statute itself. In other words, some statutes are constitutional *because* they are immune from implied repeal as opposed to them being shielded from implied repeal *because* they fit under one definition of "constitutional statute". The latter view puts the cart before the horse. This draws directly from the abovementioned proposition that there is nothing in the principle of implied repeal to say that every statute ought to be impliedly repealable. My definition thus reads as follows:

"A constitutional statute is a statute which *expressly conditions* the substance of past and future laws by tasking the courts to *supervise* the content of the entire body of statutes and, *when provided for*, remedy enactments that fall short of the *standard* required by the statute. "Constitutional statute" here takes the meaning of a statute which, although always vulnerable to express repeal, for the time being shapes (to

varying degrees) the constitution of (as in the composition of) the entire body of laws of the United Kingdom".

Since this definition relies exclusively on the language of the constitutional statute, it avoids the need to undertake a normative analysis of the statute under scrutiny the result of which is amenable to vary according to the judge or the state of the common law at any point in time. But perhaps most importantly, it means that constitutional statutes are not only completely immune from implied repeal but are also immune from claims that they should not be. Linguistically speaking, and Parliament's intentions are only assessable from language, it is impossible to contemplate the repeal by implication of statutes that fit within the above definition. Indeed, the express intention for a statute to supervise the content of other statutes logically exempts that supervising statute from the application of implied repeal. Finally, since constitutional statutes are now solely products of Parliament's intentions, (almost)[69] nothing seems to be in the way of such statutes investing the courts with disapplication powers.

(iii) HRA 1998 and ECA 1972

To illustrate the above proposition, let's discuss two statutes widely accepted as constitutional even under the currently prevailing narratives: The Human Rights Act 1998 (HRA 1998) and the European Communities Act 1972 (ECA 1972) the latter of which, for the purposes of this discussion, will be assumed to still be in force.

Let us start with the HRA 1998. Section 3(1) of the HRA 1998 requires the courts to, "so far as it is possible to do so", read "primary legislation and subordinate legislation […] in a way which is compatible with the Convention rights".[70] The supervisory function of this provision is clear: all past and future legislation, whether primary or secondary, given two competing but equally eligible interpretations attributable to the statute, where one of which is in conflict with Convention rights, should be given the construction which aligns the piece of legislation with Convention rights, notwithstanding that the interpretation chosen is somewhat less eligible than the other from a conventional interpretative approach. In other words, because a later Act of Parliament could be interpreted in a way which infringed Convention rights does not mean that it impliedly repeals the earlier HRA 1998 or that it is shielded against it. That is so because the HRA expressly conditions the law so far as interpretatively possible. But the HRA goes further in its role as a constitutional statute. It also tasks the courts, in case of an interpretive impasse (i.e., where an interpretation compatible with the ECHR would be plainly *contra legem*), with notifying Parliament that its enactment is

[69] See Section V below.

[70] Human Rights Act 1998, section 3(1).

incompatible with the ECHR. Such is the function of section 4 and its "declaration of incompatibility" which allows the incompatibility between the HRA and a later statute to subsist without repeal taking place.[71] In that sense, the constitutional reach of the HRA is whole : either the law under scrutiny is already interpretively compatible with Convention rights and passes the checkpoint, either it is able to bear two meanings (and maybe one interpretation is to be preferred to the other on a literal approach) in which case the meaning compatible with Convention rights is selected, either it is irresistibly incompatible and Parliament is notified and a special procedure becomes available should the Government wish to comply with the court's findings.[72] The HRA is not shielded from implied repeal because it is of normative import (although it undeniably is). Nor because Parliament must have given the HRA some especial considerations (although it surely did). The statute and its provisions are shielded from implied repeal because Parliament has linguistically tasked the courts to supervise its own enactments and to interpret them as far as possible with ECHR rights, or, if that is impossible, sound the alarm while providing for the mutual incompatibility to stand.

Let's turn now to the ECA 1972, another Act of Parliament widely reputed to enjoy the status of constitutional statute.[73] Section 2(4) of the ECA 1972 provides that "any enactment passed or to be passed […] shall be construed and *have effect subject to the foregoing provisions of this section*" (emphasis provided).[74] The supervisory nature of this section is clear: the words "have effect subject to" conveys as much. What is more, section 2(4) is an *active supervisory provision*, as distinct from the *passive supervisory* nature of the HRA 1998. In addition to being a constitutional statute of the kind the HRA 1998 is, the ECA 1972 tasks the courts to remedy any provision in other statutes which run contrary to Community law: United Kingdom laws may only stand ("have effect") if they comply with EU law. That the ECA 1972 was a statute of constitutional magnitude in conventional terms is not in question here: the contention that it could not be impliedly repealed because of its normative importance is. Not only does this reasoning depart from Diceyan orthodoxy, but as shown, it is not even necessary to go to such contentious lengths. Indeed, the answer is found within the statute itself. It is Parliament's wish that its doings be supervised by the courts and kept in line with EU law so long as the ECA 1972 is not expressly repealed, or a statute expressly shielded from the bite of section

[71] ibid section 4(6).
[72] ibid section 10.
[73] See, for example, *Thoburn* (n 24) at 62 and Ahmed and Perry (n 31) 462.
[74] European Communities Act 1972, section 2(4).

2(4). It is Parliament which precludes, by its own wording, the operation of implied repeal.

(iv) Anticipating objections

The view I am proposing in this paper is a drastic departure from the current rationales underpinning constitutional statutes. I should therefore attempt to meet some possible counters.

The first obvious objection to this view is that it entails that Parliament can literally make any law constitutional by inserting a section equivalent to section 2(4) of the ECA 1972. This indeed follows from the view I have proposed above, and I accept this ramification. Nonetheless, there are two things to keep in mind which, I hope, abates the concern. The first, which should never be forgotten, is that however much a statute shields itself from implied repeal, that is as far as it can go to safeguard its perennity. A later statute which directly addresses the repeal of the earlier constitutional statute proceeds untrammelled in its deed, however strongly worded the constitutional clause in the earlier statute may be. It would therefore seem that an appeal to the perhaps disconcerting consequence which our view entails (that Parliament can make *any* statute constitutional) would seem to rely too heavily on a meaning of "constitutional" that constitutional statutes in our jurisdiction simply do not share with their counterparts elsewhere. The second point in answer to such criticism would be that the chances that a constitutional clause would be attached to a trivial statute are slim. Indeed, it is not inconsistent at all with our view that most statute which will be shielded from implied repeal and thus be constitutional under our definition will also meet the criteria of the definitions tendered by Ahmed and Perry.[75] This will indeed stem from the normative importance that those statutes will usually carry which will have made it apposite for the legislature to have annexed the supervisory constitutional clause. Correlation, though, is not causation.

An example of a constitutional statute captured by my definition which might take readers by surprise is the statute that was in question in *Ellen Street Estates Ltd v Minister of Health*.[76] Section 7(1) of the Acquisition of Land (Assessment of Compensation) Act 1919 provided that "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, *have effect subject to this Act*, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect." This is a paradigmatic case of constitutional statute under the newly coined definition: the statute tasked the courts to supervise past and future enactments. It was also an *active supervisory statute*. But in the *Ellen Street Estates* case,

[75] See above.

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

Section 7(1) was repealed. It may seem from reading the judgment that Scrutton LJ thought he was giving effect to repeal by implication: "Parliament can alter an Act previously passed […] by enacting a provision which is clearly inconsistent with the previous Act".[77] But if Section 7(1) rendered the Act a constitutional one, on our definition even a clearly incompatible later provision would not entail its repeal. Have I got it all wrong? I do not, for clearly the better view is that Section 46(2) of the Housing Act 1925 (which contained provisions, in s46(1), which were at odds with the 1919 Act) provided for the express shielding of that statute from the bite of s7(1), the supervisory clause. Section 46(2) provided as follows: "Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act 1919." The effect of this sub-section is blatantly clear: by providing the words "subject as aforesaid", Parliament expressly shields section 46(1) of the 1925 Act from the operation of the 1919 active constitutional provision. If it had not said as much, Parliament's will would have had to be construed by the courts as wishing for the disapplication of section 46(1), but section 46(2) demands that the supervisory jurisdiction of the courts, as empowered by section 7(1), not apply to section 46(1).

A final criticism which it is incumbent on me to address is that I have simply cherry-picked currently recognized constitutional statutes that do contain the all-important constitutional provision. This is, indeed, a critique to which I am legitimately exposed but to which answers exist. Firstly, the statutes I have so far discussed are the only statutes whose constitutional status have had actual practical judicial effect. Other statutes have been recurrently labelled as constitutional by the courts,[78] but this has not yet been followed by any concrete application. At the very least, what my analysis strove to demonstrate is that where repeal by implication has been refused and where the court's active supervision was exercised as in *Factortame (No. 2)*, there was no need for judges to rely on anything but the statute itself to refuse the operation of implied repeal.

D. Conclusion

It is to be hoped that the benefits of this *technical argument* and of this new definition of constitutional statutes are apparent if we are to parry claims of constitutional upheaval pursuant to the *Factortame (No. 2)* judgment. The starting point to my justification was that implied repeal is not in fact a doctrine properly so-called. Rather, implied repeal derives from the need to give effect to Parliament's most recent intentions: if such intentions clash with chronologically earlier ones,

[77] ibid 595.

[78] *R (on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents)* [2014] UKSC 3, [2014] 1 WLR 324, 207.

they take precedence. But by wording a statute so as to confer it supervisory functions, Parliament pre-emptively tells the courts that implied repeal does not apply to that statute. Since this justification for immunity to implied repeal is now sourced from Parliament's own, express volition, there is no dichotomy between Parliament's intentions and the rationale for the impossibility of implied repeal: the impossibility is provided by the statute itself. Gone is the need to ascribe higher-order status based on certain qualitative criteria. Furthermore, now that a way has been provided for implied-repeal-shielded statutes to be understood solely as products of Parliament's intention, there is no risk that their legitimacy be questioned. And what is more, if a constitutional statute grants strike down powers to the courts, then to do so, if the circumstances arise, is simply to give effect to Parliament's intentions, as the House of Lords duly did in *Factortame (No. 2)*.

V. The Constitutional Argument: Parliament's 'Atemporality'

The *technical argument* sought to demonstrate that there is no disconnect between Parliament's intentions and the immunity to implied repeal enjoyed by constitutional statutes. This new definition meets and deflects claims that constitutional statutes are in fact instruments of the common law designed to stymie Parliament's sovereignty in favour of some normative ideals by putting hurdles in the normally necessarily free legislative path a sovereign entity properly so-called ought to enjoy. Yet, it would be rash to assume the matter settled. Indeed, there is a more subtle yet entirely tangible conceptual hurdle that needs to be addressed: the idea that Parliaments succeed one another. If the widespread assumption that at every general election a "new" Parliament comes into existence is not overcome, then my defence of constitutional statutes and of the outcome of cases such as *Factortame (No. 2)* as being entirely Dicey-compliant fails, and Wade's revolution thesis prevails.

The problem is best illustrated by the very probable retort with which the *technical argument* is prone to be met: 'it is all very well that it is Parliament's express intention that some statutes be shielded from implied repeal and that some of these statutes empower courts to disapply incompatible legislation, but this fails to distinguish between what are intentions from an *old and obsolete* Parliament (e.g., Parliament of 1972), and those from the *newly empowered* Parliament (e.g., Parliament of 1988) whose intentions are, naturally, supreme. In enacting a statute, the later sovereign Parliament clearly does not *intend* for it to be disapplied by a provision found in a statute enacted by a previous Parliament, even though that provision, under the *technical argument*, seemingly requires courts to quash the new Parliament's statute unless expressly shielded. To require such express provision instead of allowing it to take place by implication is to foray into the territory of

manner-and-form requirements which is foreign to an orthodox understanding of Parliamentary sovereignty. Therefore, the *technical argument* is flawed, because it asserts that an earlier Parliament may sneakily bind a later one. In short, an Act of Parliament should never be under threat from a temporally antecedent one'.

This is essentially the rebuttal Wade had in mind when, commenting on Lord Bridge's construction approach to the effect that section 2(4) of the ECA 1972 applied to Part II of the MSA 1988, he said that his (Lord Bridge's) "hypothetical section would take effect by authority of the Parliament of 1988, not the Parliament of 1972."[79] A few lines later, Wade further submits that "to hold that its terms are putatively incorporated in the Act of 1988 is merely another way of saying that the Parliament has imposed a restriction upon the Parliament of 1988."[80] If this argument stands, my *technical argument* is rendered worthless because I will have violated the necessary derivative of Parliamentary sovereignty discussed in Section III above, namely that Parliament may never be legislatively restricted whatsoever, including by manner-and-form hurdles.

With my *constitutional argument*, I make good my commitment to Diceyan orthodoxy and show that the *technical argument* is concordant with the fundamental principle of absolute legislative freedom.

A. When semantics distort the conceptual

(i) "Parliament and its successors […]"

The phrases "Parliament and its successors", "Successive Parliaments", "Future Parliaments", "The Parliament *of* [insert any date]" are all widely used across the legal literature. In HWR Wade's piece, I count ten occurrences where the author makes use of phrases conveying that Parliaments succeed one another.[81] In *Thoburn*, the fact that "Parliament cannot bind its successors" is repeated multiple times.[82] It is ubiquitous terminology.

Surely, this terminology can be useful. It allows commentators and readers to situate themselves in time. For example, referring to "the Parliament of 2020" will be an easy way to rapidly put the ensuing commentary in the context of the coronavirus crisis. As a contextualisation tool, then, it is harmless. Perhaps some commentators also employ this phraseology as a linguistic shortcut to emphasize

[79] Wade (n 1) 570.
[80] ibid.
[81] Wade (n 1).
[82] *Thoburn* (n 24) 51, 58–59.

the fact that from time-to-time Parliament has tried, and inevitably failed, to handcuff its future *self*.

Unfortunately, it is not just some innocuous linguistic shortcut or mere contextualizing device. It is not, in other words, only about semantics. When we commonly talk of past and successive Parliaments, we mean it. Indeed, under this view, Parliaments succeed one another e.g., the Parliament *of* 1988 is distinct from the Parliament *of* 1972: they are both completely independent sovereign entities. To talk of "successors" is to necessarily imply that every time there is a general election and hence a newly composed House of Commons, there is a new sovereign Parliament. For example, the "Parliament of 1972" became sovereign in 1970 until the following general election in 1974 which saw it lose its sovereignty in favour of the Parliament of 1974, so on and so forth.

The implications of such a view must be carefully scrutinised. Assuming that this is how we should understand the nature of Parliament, key features of our constitutional framework seem unexplainable. It is striking, for example, that despite the steady stream of new sovereigns since 1689, some "Acts of Obsolete Parliaments" carry on without *any word of acquiescence having been uttered by the legitimate, current Parliament*. For example, under this understanding of Parliamentary sovereignty, all new sovereign Parliaments since the end of the 1861 Parliament have had the Offences Against the Person Act 1861 imposed upon them at the outset of their new sovereignty. This surely flouts any sound definition of sovereignty: the investiture of a new sovereign demands, by force of logical necessity, *tabula rasa*.

Yet, if we take a quick glance at our current constitutional arrangement, statutes enacted by earlier legislative assemblies are not commonly deemed to be forcibly imposed upon "later" Parliaments. Acts of Parliament seamlessly ride the turbulent waves of general elections and progress unscathed through the passage of time unless they are repealed. This simple observation points to a different conceptual understanding of Parliament and casts serious doubts on the "successive Parliaments" hypothesis.

I should stress once again that my contention is not merely semantic in nature. It would be semantic if I was simply displeased with the way the concept of Parliamentary sovereignty, with which I otherwise agreed, was formulated. Thus, to come back to what was said above, if the idea that Parliaments succeed one another was merely a linguistic shortcut or a stylistic device, I would have no gripe with it, or perhaps only the one that it fuels the obfuscation of the true picture of the constitutional framework. But this is not what is happening here. Rather, what I am forced to conclude is that the *semantics inform the conceptual* so much so that, in

my submission, the true and sound conception of Parliamentary sovereignty has been blurred irredeemably.

(ii) Parliament is one continuous entity

It is submitted that there is only, and has ever only been, one Parliament. Since its inception in 1689,[83] Parliament has never been stripped of its sovereignty nor replaced by a new Parliament after each general election. Parliament is a temporally continuous entity: this is the *constitutional argument*.

The source of the misapprehension that Parliaments succeed one another lies in a failure to make the distinction between the legal and the political: between, that is, Parliament and Parliamentarians. The former is the entity into which legislative supremacy is vested by the rule of recognition of this jurisdiction.[84] Parliamentarians, on the other hand, are politicians devoid of any legislative powers as such. Parliament, the legal entity, is completely independent from all the political processes that run in the foreground of the political sphere to legitimise the supremacy of its enactments. The most flagrant example of such political processes are general elections which serve as the ultimate accountability mechanism for Parliament and Government. General elections see Parliamentarians succeed one another and yet Parliament, *qua* the lawgiver, is unaffected by these internal changes.

Proof of this is readily available. The exclusive conduit through which the supreme legislator communicates its volition, and the only instrument with legal weight, is the Act of Parliament. Not Acts of "Conservative" Parliament; not Acts of "Labour" Parliament. The political leanings and manifestos which Parliamentarians carry in and out of the House of Commons have no legal impact whatsoever on the source of laws. Although political promises and manifestos do eventually expire and are succeeded by new ones, Acts of Parliament are always contemporary, continuous; and so is Parliament.

Once again, this is not an account of how things should be, but how things actually are. If one accepts that the validity of Acts of Parliament is unchanged despite the multiple general elections that fill the political landscape in the years following the enactment of an Act of Parliament – and a general election is the event which, according to the "successive Parliaments" thesis, discriminates between an earlier and a later Parliament – then one must also accept that the constitutional picture is otherwise than one where the legislative sovereign is whatever body of

[83] This date was also taken by Mark Elliott in: Mark Elliott, 'The United Kingdom's Constitution and Brexit: A "Constitutional Moment?"' (2020) Horitsu Jiho 15-22, University of Cambridge Faculty of Law Research Paper No. 22/2020.

[84] Hart (n 60) 149.

Parliamentarians sit at one point in time and therefore that as soon as there is a change in the composition of such body, there is a new sovereign Parliament.

The rule of recognition of the United Kingdom is that whatever Parliament duly enacts is added, or *superimposed*, to the conversation it is continually having with *itself*, and it is the sum of all the additions *and* subtractions which take place within that internal monologue that give us the law of the jurisdiction. The courts, in grappling with this complex soliloquy, ought to remain loyal to the letter of Parliament's textually communicated volition and refrain from interpreting legislation and the relationship between different legislative texts according to the nature of the political body who enacted the respective statutes.

B. The implications of the constitutional argument

(i) A new relationship between legislature and judiciary

The implications of this reconceptualization of Parliament as a temporally continuous entity are momentous for this article's thesis. Again, an Act of Parliament must be deemed to be always speaking and always wished for by Parliament unless Parliament conveys, impliedly or expressly, that it does not intend the Act to have further effect. This flows from the idea of a temporally continuous sovereign legislator which, since 1689, has had but one omnipotent voice. If an Act of Parliament is disapplied by the courts as a result of its not conforming to boundaries set by an earlier supervisory constitutional statute as defined in Section IV.C above, the correct interpretation to give to the disapplication is that Parliament is *perfectly happy and has intended for* the statute to be disapplied because it has expressly tasked the courts, and has not expressly revoked such task, to be wary of and make right any incompatibility in previous legislation and, what is more, remedy any oversight in all future Acts of Parliament.

The opposite approach, informed by the view that "Parliaments" literally, conceptually, succeed one another, would be to assume, in light of intentions imputed to Parliamentarians belonging to the majority party, be it through what is said by the minister spearheading the Bill or by inference from the party's political inclinations, that the later Act was clearly intended to override the earlier one. Since the "successive Parliaments" thesis is predicated on the premise that general elections entail a "new" Parliament, there creeps inevitably in such reasoning notions which are anathema to sound constitutional reasoning, namely judicial assumptions of a statute's effect based on the political composition and leaning of the House of Commons. To approach statutory construction in such a way is to dangerously blur the fine line between the legal and political realms. Yet, it is what the "successive Parliaments" approach invites one to do, consciously or not.

It is absolutely vital, if the separation of powers stands as a core principle of the United Kingdom's constitution, as it clearly and necessarily does, that Parliament is characterized, in the legal constitutional context, as the atemporal, apolitical body that it is whose laws should not be interpreted with any political gloss.

(ii) In practice: Shielding Factortame (No. 2) from Wade's critique

In 1990, the House of Lords disapplied a provision of the Merchant Shipping Act 1988 (MSA 1988) by virtue of section 2(4) of the ECA 1972 which provided in essence that "European Community law was to prevail over Acts of Parliament 'passed or to be passed'".[85]

HWR Wade was categoric in his critique of the judgment: "the Parliament of 1972 has imposed a restriction upon the Parliament of 1988",[86] something which obviously is at odds with the fact that Parliament cannot bind itself and, accordingly, with the principle of Parliamentary sovereignty. Thus, for Wade, when "the House of Lords elected to allow the Parliament of 1972 to fetter the Parliament of 1988 in order that Community law might be given the primacy"[87] by tweaking the rule "that an Act of Parliament in proper form had absolutely overriding effect, except that it could not fetter the corresponding power of future Parliaments",[88] it amounted to a "technical revolution",[89] but a revolution no less.

Naturally, Wade's criticism was not left unanswered. And swiftly did the response come in the form of *Thoburn*.[90] As seen previously, Laws LJ's judicial definition of constitutional statutes seemed at first to quell Wade's concerns: it is not that the House of Lords tweaked the well-established rule of recognition, it is that the ECA 1972 is a constitutional statute in the eyes of the common law and "[the ordinary rule of implied repeal] has no application to constitutional statutes".[91] It is to be hoped that the section of this paper concerned with the *technical argument* demonstrated why this is a precarious justification. Although it certainly aimed to refine *Factortame*, *Thoburn*'s own rationale for constitutional statutes and their interaction with implied repeal had gaping holes. While the outcome it leads to is right, the justification afforded by *Thoburn* is unsatisfactory and precarious as it does not stand on solid constitutional ground.

Yet, Laws LJ was right: the ECA 1972 may not be impliedly repealed and is a supervisory constitutional statute which empowers the courts to disapply incompatible statutes. It is so because on its proper construction and nothing

[85] Wade (n 1) 568.
[86] ibid 570.
[87] ibid 574.
[88] ibid.
[89] ibid.
[90] *Thoburn* (n 24).
[91] ibid 63.

more (*technical argument*), it provides for every past and future Acts of Parliament to be supervised by and subjected to EU law. In 1972, Parliament, in accordance with the political conditions of the UK's accession to the European Community, decided to empower the courts to disapply Acts of Parliament at odds with EU law.

In 1988, at the time of the passing of the Merchant Shipping Act 1988, Parliament maintained such wish since nothing in the 1988 Act expressly disavowed s2(4) of the ECA 1972. It follows that Parliament in 1988 was *happy* for the MSA 1988 to be regulated by s2(4) of the ECA 1972 and repealed in its name. Buttressed by the fact that Parliament is one temporally continuous sovereign entity which can add layer of supervision to its own enactments (*constitutional argument*), it is easy to see how, far from having successfully been permitted to bind itself, Parliament in fact had its intentions afforded the respect they should.

C. Conclusion and broader implications of the above view

The importance of avoiding the language of "successive Parliaments" is twofold. First, it enables us to give new dimensions to an orthodox understanding of Parliamentary sovereignty. Under this reconceptualization, there is nothing contentious in the idea of a dialogue between Parliament and the courts where the former asks the latter to supervise and make good any oversight in its legislative functions. Such a dialogue can only be adequately understood when the idea that multiple Parliaments continuously succeed one another is jettisoned. Again, this is not mere semantics, as the way we conceptualize Parliament has important ramifications on the constitutional validity of judicial actions under orthodox principles.

Second, it avoids the dissemination of distorted constitutional narratives. Indeed, in the *Factortame (No. 2)*[92] case, it could have been tempting for the courts to make the leap of taking the minister's wish (of the Act being intended to supersede the ECA 1972) for Parliament's (which was, at that time, composed of a majority of MPs from the minister's Conservative party). But the separation of powers at the heart of the United Kingdom's constitution will not allow such callous shortcut. Whatever its majority in the House of Commons, the Government is not Parliament. It was always possible for Parliament to expressly shield the MSA 1988 from the bite of section 2(4), but without express provision to that effect,

[92] *Factortame* (n 2).

Parliament's intentions (albeit surely not the Government's) were for section 2(4) to disapply the infringing provision in the Merchant Shipping Act 1998.

VI. Conclusion

The aim of this paper was to show that *Factortame*-like judicial statute disapplication is not abhorrent to an unqualified Diceyan doctrine of Parliamentary sovereignty. To achieve this objective, this paper challenged two prevailing ideas in modern constitutional discourse.

Firstly, the *technical argument* submitted that constitutional statutes are not shielded from implied repeal *because* they are of especial normative worth (although they often are), but because it is Parliament's express intention that they supervise past and future legislation, with the result that implied repeal is simply unavailable. The fact that implied repeal is not a doctrine of its own but a corollary of the doctrine of parliamentary sovereignty itself paved the way for this purely construction-based approach. This hopefully avoids the precarious position which resulted from a normative-quality-inspired rationale for constitutional statutes' immunity to implied repeal. Moreover, once a statute is vested with a supervisory function, it may further provide on what should happen with past and future statutes that infringe its provisions. When the constitutional statute provides that they should be disapplied, then the proper move from a court is to do precisely just that, unless expressly told otherwise.

Secondly, the *constitutional argument* showed that Parliament must be viewed as a continuous entity whose apolitical legislative identity is not influenced by its political composition. This was a crucial step to properly attach the *technical argument* to the orthodoxy train. Indeed, the "successive sovereigns" view would have legitimized claims that this seemingly construction-based approach was simply manner-and-form hiding in plain sight.

Statute disapplication, when all ingredients obtain, is therefore not the transgression of Parliament's sovereignty under an orthodox Diceyan understanding, nor even its qualification: it is its full, unqualified expression.