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Lessons from the age of empire: the UK Internal Market Act as a rupture in the understanding of competence

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ABSTRACT

The emergence of devolution in the United Kingdom (UK) has led to the emergence of a significant body of jurisprudence to understand its place in the UK constitution, including various conceptual frameworks to explain its operation. A problem with some of this jurisprudence is the characterisation of devolution as novel or exceptional, capable of being understood only on its own terms. An examination of the history of constitutional development within the British empire, however, reveals otherwise.

Imperial history shows that the issues faced by devolved administrations in the post-Brexit UK – uncertainties about competence and the extent of dynamism and plurality, for example – have emerged before. More than that, they were dealt with by a combination of statutory text, judicial approach and political pragmatism. Some of these solutions provide a rich source from which lessons can be drawn for present-day challenges.

This article explores how legislative competence was understood across the empire and the UK before the emergence of devolution in its most recent form. It looks at the political and judicial approaches to thorny questions of legislative supremacy, legislative subordination, political paramountcy and political pragmatism.

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This article aims not only to challenge the myth of devolution's *sui generis* nature but demonstrate why the UK Internal Market Act 2020 represents a rupture in how competence was constitutionally understood. In this way, we may be better equipped to understand and resolve the problems of devolution posed by Brexit.

Keywords: legislative competence; imperial history; devolution; legislative sovereignty; disallowance; repugnancy; respection.

INTRODUCTION

In *Martin v Most*, the Supreme Court turned away from the rich history of pre-devolution legislative autonomy within the British empire when interpreting the Scotland Act 1998, stating, 'the Scotland Act provides its own dictionary'.[1] The novelty of modern devolution within the United Kingdom (UK), and the need to understand it without reference to what came before or what has developed elsewhere, is reinforced in subsequent cases such as *Imperial Tobacco* in the Inner House of the Court of Session.[2] Although these are decisions related to the Scottish Parliament, there is in principle no reason why they cannot be applied to Senedd Cymru and the Northern Ireland Assembly. I therefore consider that, like with the Scotland Act, the Supreme Court would also consider that the Government of Wales Act 2006 and the Northern Ireland Act 1998 provide their own dictionaries.

However, what came before modern devolution was not only rich, it was also varied in both nature and experience. Between dominions with the most extensive legislative autonomy, to directly ruled colonies with no legislative autonomy to speak of, there lay India – a vast collection of autonomous provinces and protectorates with a highly controlled national government – and Northern Ireland, which in some ways resembled a dominion within the UK. The operationalisation of such diverse constitutional arrangements inevitably led to conflict, whether between sub-national and national governments of self-governing territories or between these national governments and the British metropole. The lessons learned from these conflicts would reverberate not only in the comprehensive devolution models proposed in the 1970s[3] but also in the models

1 *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, [15].

2 *Imperial Tobacco v Lord Advocate* [2012] CSIH 9. See, particularly, [72]–[73] in the opinion of Lord Reed.

3 See Lord Kilbrandon, *The Royal Commission for the Constitution (1969–1973) Volume I Report* (Cmnd 5460 1973) 152–161, especially the discussions of Canada at paras 521–522. The Kilbrandon Commission report eventually led to the Scotland Act 1978 and the Wales Act 1978, neither of which was implemented due to the lack of the requisite threshold at referendums held in Scotland and Wales respectively.

which were realised in the 1990s.[4] As Donal Coffey observes, '[t]he egress of the British constitution was the constitution of the British Empire; which in turn became an ingress into British constitutional theory'.[5]

In 2020, the UK Internal Market Act (UKIMA) created a new source of conflict between central government in London and the UK's devolved administrations in Holyrood, Cardiff Bay and Stormont. Reversing the trend of increasing decentralisation which has in some ways become a hallmark of modern devolution in the UK, the UKIMA marked a major constitutional inflection point. Central to this inflection point is the concept of legislative competence – both at Westminster and its devolved counterparts – and the impact of the UKIMA on this concept. In what follows, I explore the central argument in this article: that legislative competence was historically understood as distinct from legislative sovereignty, with the former only describing the ability of a legislature to enact law regardless of that law's legal effect. I argue that the UKIMA is an unprincipled and ahistorical rupture in this understanding.

This article is divided into six main sections. The first section sets out some definitions around legislative competence relevant to this article; the second section explores legislative competence through a political lens; the third section explores the interaction between legislative competence and legislative sovereignty; the fourth section explores competence through a legal lens; the fifth section distils the main points around the historical understanding of competence; and the sixth section compares this understanding with the effect of the UKIMA and recent Supreme Court jurisprudence on legislative competence. The second, third and fourth sections explore the historical understanding, both political and legal, of legislative competence within the empire and within the British metropole. These sections are then contrasted with the way in which competence is affected by the UKIMA and the Supreme Court's recent jurisprudence. This contrast demonstrates what I argue to be a rupture in the understanding of competence from its historical (thin) conception to its more recent (increasingly thicker) conception. Both conceptions are detailed in the first section.

At this stage, I set out two necessary caveats. First, I do not claim to explore the diverse constitutional arrangements across the British

4 See eg the Explanatory Notes to s 29 of the Scotland Act 1998, which record Lord Sewel (who moved what would become the Scotland Act in the House of Lords) referring to a case arising out of Northern Ireland's pre-1998 devolution model as providing the basis for testing whether Acts of the Scottish Parliament were within its competence.

5 Donal Coffey, 'Constitutional law and empire in interwar Britain' (2020) 71(2) Northern Ireland Legal Quarterly 193, 209.

empire in their respective socio-political contexts. My aim is not to tell the stories of political and popular struggles within the empire, because such stories have been told by people with a relevant expertise and insight to which I make no claim. Rather, my concern is to foreground the concept of legislative competence in the constitutional arrangements enacted throughout the empire by the UK Parliament and the political and legal approaches which sustained them. Second, I do not explore all of the internal constitutional arrangements specific to each colony or dominion. My concern is how legislative autonomy was approached by UK authorities (political and judicial), rather than setting out a definitive account of imperial constitutional history. Instead, I recommend that those who are interested in the detail of such history might consult the works of scholars such as Peter Oliver,[6] Dean Knight,[7] Nicholas Aroney et al,[8] P N Masaldan[9] and Arthur Berriedale Keith.

A final introductory note is on the use of the words 'metropolitan' and 'imperial'. I use the former to mean the Crown's Government in the UK and the latter in relation to the empire as a whole.

THE PARAMETERS OF COMPETENCE

For the purposes of this article, I start with two concepts of legislative competence.[10] The first is grounded in legislative ability in a sense where, so long as the relevant legislature is able to enact law, irrespective of the legal effect of that law once enacted, the legislature retains its competence. This would be true, for example, of legislatures the statutes (or statutory provisions) of which were pre-empted[11] or even voided by statutes of a higher legal status.[12] This was part of the UK Government's position in the Welsh Government's challenge

6 Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press 2005).

7 Dean R Knight and Matthew Palmer, *The Constitution of New Zealand: A Contextual Analysis* (Hart 2022).

8 Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia* (Cambridge University Press 2015).

9 P N Masaldan, 'The sphere of provincial government under the Government of India Act 1935' (1947) 8(3) Indian Journal of Political Science 761.

10 The antecedents of these two concepts can be found in Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: devolution minimalism and the competence smoke screen' (*UKCLA* 4 July 2022).

11 Eg the Government of Ireland Act 1920, s 6(2).

12 See the Colonial Laws Validity Act 1865, s 2 (explored further below).

to the UKIMA[13] and is exemplified by cases such as *Rediffusion v Attorney General of Hong Kong* (I explore the case in more detail further below).[14] In this article, this is treated as the 'thin' concept of legislative competence, in which a legislature is competent in a field so long as its laws relating to that field are able to get on to the statute book (whatever happens to those laws subsequently). This has the impact of severing legislative ability from legal effect.

The second concept predicates legislative ability on legal effect, so that a law which has no legal effect *ipso facto* implies a corresponding restriction on legislative competence. In other words, a legislature only has competence in a field where it has the ability to make law which is effective and not merely appearing in the statute book. This concept is exemplified by cases such as *The Treaty Incorporation Bills Reference* (also explored further below).[15] This is the 'thick' concept of legislative competence.

The difference between the two conceptions can perhaps be most clearly illustrated by taking a hypothetical Act of the UK Parliament (X), which concerns a subject (Y), transferred to a devolved administration. X governs Y by using a particular set of standards (Z1), which the devolved administration wishes to change to a different set of standards (Z2). However, the devolved administration does not directly modify the content of X by straightforwardly supplanting Z1 with Z2. Instead (for policy reasons adopted by the devolved administration), the administration amends the legal effect of X so that Z1 is to be understood as or supplanted by Z2 over time. On a thin conception of competence, the UK Parliament retains the competence to legislate in respect of Y because, despite the modification of the *legal effect* of X, X was able to get on to the statute book. Moreover, the transfer of Y to the devolved administration did not terminate the UK Parliament's competence to legislatively intervene in Y as and when it chooses. On a thick conception of competence, the devolved administration's modification of the legal effect of X *ipso facto* deprived the UK Parliament of its competence to make law in respect of X, because the devolved administration's modifications rendered X ineffective.

The emergence of legislative autonomy in the British empire was a centuries-long and asymmetric process. The earliest examples of

13 *R (Counsel General for Wales) v Business, Energy and Industrial Strategy Secretary* [2022] EWCA Civ 118 [24].

14 *Rediffusion v Attorney General of Hong Kong* [1970] AC 1136 (Privy Council).

15 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2021 SCLR 629.

legislative autonomy included the creation of colonial legislatures mandated to make laws for the peace, welfare and good government of the relevant colony.[16] There was, however, asymmetry in one significant aspect in these early examples of legislative autonomy – some colonial legislatures were expressly forbidden from legislating contrary to the entire body of English law,[17] whereas others were not.[18] The task of checking the legislative remits of colonial legislatures in this system fell to two main bodies: the Colonial Office and the Judicial Committee of the Privy Council.[19] The former advised the Sovereign in Council whether to use its disallowance powers, by which legislation enacted by the colonies would be struck out of the statute books by royal authority. The latter, as the court of final appeal for the empire, assessed the *vires* of colonial legislation against the statutes which conferred law-making powers on colonial legislatures. Both the political control of the Colonial Office and the legal control of the courts is crucial to understanding how legislative competence operated in the empire.

AUTONOMY AND POLITICS: DISALLOWANCE, ROYAL INSTRUCTIONS AND RESERVATION

This section explores the political controls over imperial legislation exercised by and on behalf of metropolitan authorities. Its purpose is to demonstrate that although these controls intervened in law-making, they were not regarded as constituting a competence restriction on the corresponding legislature (in other words, competence was understood in its thin conception).

16 See eg the Constitutional Act 1791 (Upper and Lower Canada), s 2, and the Australian Constitutions Act 1850 (Victoria, Van Diemen's Land, South Australia and Western Australia), s 14.

17 The Australian colonies: see the Australian Constitutions Act 1850, s 14.

18 The Canadian provinces: see the Constitutional Act 1791, s 2 of which simply forbade the provincial legislatures from enacting laws repugnant to the Act itself. This was changed significantly when, by the Union Act 1840, Upper and Lower Canada were reunified into the Province of Canada, where the Legislative Council and Assembly were barred from enacting laws in breach of the Union Act, any unrepealed part of the Constitutional Act, or any current or future Act of the UK Parliament extended to the Province of Canada 'by express Enactment or by necessary Intendment': see the Union Act 1840, s 3.

19 For the rest of the article, I refer simply to the Privy Council.

Disallowance

Although the Privy Council was seen in theory as a 'vital element of control over the colonies, as a part of the heritage of the Briton overseas … and as a prerogative link of empire',[20] the reality is more nuanced. For example, Australian legal academic Sir William Harrison Moore noted that, while a significant proportion of cases decided by the Supreme Court of New South Wales between 1825 and 1862 involved questions of the applicability of English law to New South Wales, these questions were answered in the colony itself.[21] It is evident that every dispute over legislative competence would not reach the Privy Council, the more so as it considerably restricted criminal appeals which it would hear to 'very rare' instances,[22] thus implicitly restricting competence appeals involving criminal statutes from the colonies.

A highly significant role was instead played by the Colonial Office.[23] This role was the review of colonial legislation to determine whether it should be permitted or disallowed. The involvement of the executive in reviewing colonial legislation stemmed from the fact that the Crown's representatives in the colonies were authorised to legislate solely on the terms of their respective commission and instructions, both of which were also approved by the executive in London.[24] Colonial legislation so reviewed by the executive met with one of three fates: disallowance by Order in Council, confirmation by Order in Council, or 'qualified assent': where the Crown's representative would assent on the Sovereign's behalf with the understanding that the latter could revoke assent at any time.[25]

This metropolitan review of colonial legislation was not a competence review in the legal sense as it would appear under the modern devolution settlements. Sir James Stephen, for instance, who as Colonial Office legal counsel officially reviewed colonial legislation 'in point of law', noted in 1841 that characterising his work as providing 'mere legal opinions' was 'a fiction', because such opinions 'embrace or advert to every topic which … demand[s] the notice of the Secretary of State in reference to the [colonial legislation]'.[26] That the

20 See eg Vincent C Macdonald, 'The Privy Council and the Canadian Constitution' (1951) 29(10) Canadian Bar Review 1021, 1025–1026.

21 William Harrison Moore, 'A century of Victorian law' (1934) 16(4) Journal of Comparative Legislation and International Law 175, 178.

22 See eg *Attorney General of New South Wales v Bertrand* (1865–67) LR 1 PC 520, 530 per Sir John T Coleridge.

23 D B Swinfen, *Imperial Control of Colonial Legislation 1813–1865* (Clarendon Press 1970) 11.

24 Ibid 12.

25 Ibid 13.

26 Ibid 15.

political interests of the metropole were of paramount importance in this review process is clear: decisions of the Sovereign in Council relating to the disposal of colonial legislation were based on minutes of the Secretary of State expressing his views on this issue (without reference to colonial officials or inhabitants who might be affected by the legislation).[27] But colonial legislation was not reviewed in a vacuum. Colonial Office counsel candidly admitted that the review of colonial legislation, and the relationship of the metropole with its colonies, had to be mutually beneficial 'while it lasts', demonstrating that even during this early phase, there was an acknowledgment that demands for greater autonomy in the colonies were inevitable.[28]

Here, it is important to explore the character of the disallowance power. It was not an intervention prior to the enactment of a law. Rather, it was a form of post-enactment (that is, post-assent) intervention, exercisable typically[29] within two years of the date of the relevant statute's enactment.[30] Disallowance was recommended where, as previously set out, colonial legislation conflicted with some metropolitan interest in an unacceptable manner. The sweep of this power, therefore, encompassed a field much wider than law. In fact, where the colonial legislation was arguably legally repugnant to its enabling statute or some Act of the UK Parliament which expressly or otherwise extended to the relevant colony, the focus of the Colonial Office was on the practicalities underlying the impugned legislation, rather than its *vires*. As David Berridge Swinfen summarises: '[w]here the justifiable needs of the colonists conflicted with the rule of law, the latter must bend, as far as practicable'.[31] It is also telling that advising on disallowance turned Colonial Office counsel from 'being a lawyer, into a practical administrator with expert legal knowledge'.[32]

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27 Ibid 16. Stephen, as quoted by Swinfen, notes how the Secretary of State would not even be present when the Council deliberated colonial legislation, preferring instead to send minutes.

28 Ibid 31, Swinfen quoting Sir Frederic Rogers, who succeeded Stephen in the Colonial Office.

29 But not absolutely – British India was, for example, subject to disallowance powers without any time-limits. See the Government of India Act 1915, s 69.

30 See eg the New Zealand Constitution Act 1852, s 58. A significantly restricted modern version of this power can be found in the Northern Ireland Act 1998, s 15(4), in cases of royal assent given to urgent Assembly Bills to which the Northern Ireland Secretary has consented (where such Bills require the Secretary's consent under s 8).

31 Swinfen (n 23 above), 63.

32 Ibid 57. The reference is specifically to Stephen, in Swinfen's analysis of the change of Stephen's doctrinaire approach to colonial legislation, to one which was more practically minded.

Instructions

Disallowance was a power exercised in London (in relation to dominion and colonial legislation, but not provincial legislation of federal dominions),[33] by the Sovereign in Council. In the colonies and dominions, however, there was also a form of metropolitan control through formal Instructions to representatives of the Crown (such as governors or lieutenant governors). Royal Instructions constituted the parameters within which Crown representatives could act in relation to colonial legislation – by assenting to or refusing to assent to such legislation on the Crown's behalf, or by reserving legislation for the signification of the Crown's pleasure.[34] Although in theory a form of far-reaching metropolitan control, in practice the Instructions contained clauses and articles which could fairly be described as *pro-forma* between successive Crown representatives of the same colony or province and *across* different colonies and provinces.[35] Moreover, although opinion varied (including judicially) on the issue, the Colonial Office uniformly insisted that Instructions had no force of law and thus colonial legislation assented to in breach thereof could not be considered repugnant in any sense, with Stephen caustically comparing the effect of Instructions to 'a page from Robinson Crusoe'.[36]

Nevertheless, Instructions were relied upon by authorities in London when the actions of the Crown representative in relation to colonial legislation affected a metropolitan interest – whether a practical interest or one of principle. Examples of the former category include a particular interest in controlling colonial legislation which modified the local electoral franchise and likewise on provision that imposed trading restrictions in relation to goods from across the

33 Disallowance and reservation were mostly dealt with in London only in relation to Bills passed by national legislatures such as the Parliament of Canada or the Commonwealth Parliament in Australia. Bills passed by sub-national legislatures, such as those of the Canadian provinces or Australian states, were dealt with (in terms of disallowance and reservation) mostly by their respective national governments rather than London. See, for example, Arthur Berriedale Keith's discussion of London's control over these aspects in relation to dominion (Canada, Australia, New Zealand, Newfoundland, South Africa and the Irish Free State) legislation in A B Keith, *The Dominions as Sovereign States* (Macmillan 1938) 65–66. Note, however, that there were exceptions to this, eg the Colonial Office directly instructing the Lieutenant Governor of New Brunswick (a Canadian province) to veto future attempts to legislate industrial incentives: see Earl Grey, *The Colonial Policy of Lord John Russell's Administration Volume I* (Richard Bentley 1853) 279–280.

34 See eg the British North America Act 1867, s 55 (regarding Bills passed by the Parliament of Canada) and s 90 (regarding Bills passed by Provincial Legislatures in Ontario, Quebec, Nova Scotia and New Brunswick).

35 Swinfen (n 23 above) 82.

36 Ibid 79, Swinfen quoting Stephen in a letter from 1842.

empire, but especially from the metropole.[37] Examples of the latter category include matters relating to slavery. A Dominican statute was enacted to appoint a Rector, but also authorised the same Rector to solemnise marriages between slaves only on the consent of their owners. Stephen pointed to the relevant Instructions for the Governor of Dominica which forbade legislative tacking – enacting laws dealing with multiple subjects (in this case, the appointment of a Rector and marriage between slaves) – as a way of recommending the statute's disallowance. Stephen's real point, however, was that it restricted the marital rights of slaves.[38]

India marked a departure from the aforementioned practice of *pro-forma* Instructions called in aid of the metropolitan interest from time to time, but otherwise unenforced. By the time Indian people were allowed into the legislature which made laws directly for them, under the Indian Councils Act 1861, the Governor General in Council was free to legislate on any subject whatsoever dealing with India. This ability, however, was subject to a bar on affecting the 1861 Act and certain other, older UK statutes dealing with the governance of India during its rule by the East India Company, UK Acts raising revenues in the UK for India, statutes relating to mutiny and desertion, UK Acts passed after the 1861 Act which extended to Indian territories and a specific bar on legislating contrary to the sovereignty of the UK Parliament and certain parts of the 'unwritten Laws or Constitution of the United Kingdom' (on which, I expand further below).[39] The Indian Governor General, as the Crown's representative, was *not* subject to any general Instructions relating to his office under the 1861 Act, and could also make laws affecting the Crown's prerogatives[40] – laws which might have earned a swift recommendation for disallowance in relation to other territories.[41] However, this is not to suggest that Indian Governors General were free to legislate as they wished. A practice had developed by the 1870s of seeking the prior sanction of (the metropolitan) Secretaries of State for India before introducing legislation in India – a practice which was deprecated in certain quarters and led to a 'strong feeling … against [these] constructive qualifications and limitations … upon the powers

37 Ibid 88–91.
38 Ibid 87.
39 The Indian Councils Act 1861, s 22.
40 Ibid s 24.
41 See Swinfen (n 23 above) 100–101, exploring certain legislation from Tobago and Jamaica which interfered with prerogative powers to summon and dissolve legislatures as well as with the effect of such summons and dissolution.

of the Legislative Council'.[42] Exacerbating the concerns of its critics, however, the practice of seeking the metropolitan India Secretary's prior sanction would, in the Government of India Act 1915, be turned into a statutory duty whereby the Governor General was required to 'pay due obeisance to all such orders as he may receive from [the India Secretary]'.[43] Even when modest measures towards (but short of complete) responsible government in India by Indians were enacted in 1919, a commensurate relaxation of the India Secretary's control over Indian affairs was partial.[44]

An illustration of the control retained over Indian law is in the matter of Indian attempts to develop and control an Indian maritime industry in the interwar period. Systemically starved of capital, with no government support and faced with openly hostile competition from British shipping, Indian shipping had faded into insignificance by the interwar period.[45] In the period 1924–1925, almost three-quarters of India's overseas trade was carried by British tonnage.[46] Attempts to enact legislation reserving India's trade to shipping companies controlled predominantly by Indian people were met with outright hostility by British interests in India.[47] This hostility was compounded by discussion in the UK Parliament and repeated appeals to the India Secretary by business associations in India and the UK,[48] general delay and finally, an outright and *constitutional* ban on non-reciprocal discriminatory treatment between British and Indian shipping.[49]

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42 C D Field, 'The limitation of the powers of the Legislative Council in India' (1895) 11 Law Quarterly Review 278. Field claimed this deprecation 'throughout all educated classes of the community in India, Native as well as European'. The reality of Indian *community participation* in legislative business was considerably different. The 1861 Act had, by the time Field was writing, been amended to include between five and eight non-official (that is, unaffiliated to the Crown or Government of India) Additional Members to the Legislative Council, who may be European or Indian, in a Council where the maximum strength was 24 members. See ibid 279. None of these non-official members, were, moreover, elected in any capacity, but nominated by the Governor General: see the Indian Councils Act 1861 s 10, as amended by the Indian Councils Act 1892, s 1(1).

43 The Government of India Act 1915, s 33.

44 The Government of India Act 1919, s 33.

45 Frank Broeze, 'Underdevelopment and dependency: maritime India during the Raj' (1984) 18(3) Modern Asian Studies 429, 445.

46 V Ramadas Pantulu, 'Indian Mercantile Marine and the Coastal Traffic Reservation Bill' (1929) Triveni: A Journal of the Indian Renaissance.

47 Broeze (n 45 above), 448–449.

48 HC Deb 6 May 1929, vol 227, cols 1932–1933.

49 The Government of India Act 1935, s 115(1).

Reservation

The reservation of a Bill for the signification of the Crown's pleasure was an altogether different power from disallowance. Whereas disallowance was exercised in respect of an already enacted statute, reservation preceded assent, which in that event came directly from the Crown and not its colonial representative. Arthur Berriedale Keith describes the purpose of reservation powers as 'secur[ing] full discussion between the Imperial and Dominion Governments of any issue affecting Imperial relations [rather] than to dictate policy'.[50] However, this characterisation of reservation as a trigger for intergovernmental discussion is somewhat more idyllic than the nuanced reality of its exercise, especially in one specific area: non-white affairs across the empire.

Endowed with a new autonomous bicameral General Assembly in 1852, self-governing New Zealand's Governors were initially instructed to reserve Bills relating to a range of matters, including those affecting the Crown's prerogative, and those which would be enacted only for a year.[51] Delegation of powers to New Zealand's provinces by the General Assembly warranted the exercise of reservation in 1854 and 1856,[52] but matters came to a head over legislating in respect of Māori affairs. Under the New Zealand Constitution Act 1852, Māori affairs were the special responsibility only of the Crown or those to whom it delegated such responsibility (the Governor or Provincial Superintendents).[53] The General Assembly, however, had passed a Bill to allow colonists to purchase land directly from the Māori. This ability to purchase land was subject to the 'Governor in Council', meaning the Governor was bound by advice from his Executive Council (of local politicians), rather than being required to follow his Royal Instructions (from London), as the Constitution Act 1852 had set out.[54] The Governor reserved the Bill and metropolitan authorities in London vehemently objected to its provisions. London believed that the Bill would cause distrust and 'revolution' and that British military strength would be required to enforce its provisions. As a result, not only was the Bill reserved, but assent was also refused.[55]

Just as with reservation for Māori affairs in New Zealand, the Crown had special responsibilities for 'native affairs and of matters specially

50 A B Keith, *The Governments of the British Empire* (Macmillan 1935) 50.
51 John E Martin, 'Refusal of assent – a hidden element of constitutional history in New Zealand' (2010) 41 Victoria University of Wellington Law Review 51, 53.
52 Ibid 57–58.
53 See eg the New Zealand Constitution Act 1852, s 73.
54 Martin (n 51 above) 58–59.
55 Ibid 60.

or differentially affecting Asiatics throughout' South Africa.[56] South African Governors General were required, upon their Instructions, to reserve Bills abolishing the right of Black people to vote.[57] Swinfen notes that, while the metropolitan authorities pushed back against colonial and dominion attempts to dilute the political position of non-white communities within these territories, this pushback was not always successful[58] or full-throated.[59] Indeed, within a few decades of granting South Africa and New Zealand self-government, London effectively gave up its special responsibilities towards the non-white communities in both.[60]

Understanding competence through disallowance and reservation

The political powers of disallowance and reservation, as well as control over assent to legislation through Instructions and general metropolitan orders to the Crown's representatives throughout the empire, illustrate an important point for legislative competence in the empire. Although legislatures were legally permitted to make laws in wide-ranging subjects, their ability to do so was significantly controlled through the politics of metropolitan paramountcy. The operation of this paramountcy was often unpredictable and overlaid by a complex web of different priorities. In some cases, Colonial Office concerns about the interests of the politically disadvantaged inhabitants of the empire – whether slaves or former slaves, Māori, or Black communities in South Africa, appear to have motivated metropolitan control over colonial and dominion legislation. In some ways, this might be characterised as the metropole being concerned with ensuring effective 'peace, order and good government' – the stock statutory phrase which conferred law-making powers on many colonial and dominion legislatures.[61] But

56 The South Africa Act 1909, s 147.

57 Keith (n 50 above) 49.

58 See eg Australian colonies seeking to end the practice of transporting convicts to their shores by stringent laws which would increase their punishments, against which the Colonial Office, initially fervently opposed, eventually gave way: Swinfen (n 23 above) 141–143.

59 See eg ibid 144–145, Swinfen's exploration of the Australian colonies' antipathy towards Chinese immigration and consequent legislation seeking to drastically reduce and disincentivise this immigration.

60 For South Africa, see Keith (n 50 above) 49, and, more generally, Hermann Giliomee, 'The non-racial franchise and Afrikaner and Coloured identities, 1910–1994' (1995) 94 African Affairs 199, 219; for New Zealand, see Martin (n 51 above) 64.

61 See eg the Government of Ireland Act 1920, s 4(1) (legislative powers of Irish Parliaments), and the Government of India Act 1935, s 288(2) (Aden).

these concerns of welfare obscured deeper concerns of *metropolitan* government – whether the powerful shipping interests in relation to India or the unwillingness to put the Crown's armed forces at the disposal of newly self-governing New Zealanders to deal with the Māori as they saw fit.

Indeed, an exploration of the political control of colonial and dominion legislation throughout the empire reveals its polylithic quality: there was no coherent approach to the use of disallowance, reservation, Instruction, or order, or even an attempt to rationalise the circumstances in which such elements would be used.[62] If there was any convention as to when or how these elements would be used by metropolitan authorities in London, it lay in the political priorities of the UK Government and the ability of Crown servants to convince the relevant minister to exercise a power or advise the sovereign to do so.

Here lies a powerful reason for the decline of political controls in the interwar period: they were used by the UK *in the UK's interests*. In recounting the history of the Imperial Conferences – periodic gatherings of the most important dominions and colonies in the empire – historian and international affairs scholar F H Soward points to disunity being the Conferences' key feature, with Canada, South Africa and the Irish Free State able to exert pressure on the UK in their own (and collective) interests.[63] Thus for example, Canada was able to make the persuasive case for patriating the powers to advise the reservation of Bills (though by convention rather than legislative change)[64] and the UK Government in turn had to recognise the dominion governments as its equals and not its subordinates.[65] The need for the dominions to gain equality with the metropole in powers and status makes sense if the metropole acts like an overbearing parent towards dominion interests. Indeed, there was a growing weariness in Canada at the UK 'harping

62 Though note that, within federal dominions such as Canada, there were attempts to rationalise these circumstances for legislation enacted by sub-national legislatures: see eg Eugene Forsey, 'Disallowance of provincial Acts, reservation of provincial Bills, and refusal of assent by Lieutenant-Governors since 1867' (1938) 4(1) Canadian Journal of Economics and Political Science/Revue canadienne d'Economique et de Science politique 47, 48–49. But as the focus of this article is competence and autonomy as understood by the UK, I do not explore this issue in any detail.

63 F H Soward, 'The Imperial Conference of 1937' (1937) 10(4) Pacific Affairs 441, 443.

64 W P M Kennedy, 'Imperial Conferences, 1926–1930' (1932) 48(2) Law Quarterly Review 191, 196. Legally, the power of reservation was subject to no limitations or restrictions, see *Reference Concerning the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of the Lieutenant-Governor of a Province* [1938] SCR 71, 79, per Duff CJ (Supreme Court of Canada).

65 Ibid 198–199.

on' about its status relative to that dominion.[66] The most significant development in this regard lay in the Statute of Westminster 1931, by the terms of which the UK Parliament gave up its right to make laws for the dominions without their request and consent,[67] conferring on dominion legislatures the right to make laws with full extraterritorial effect[68] and the unqualified right to regulate their own shipping and coastal trade.[69]

But the exercise of political control also indicates that legislative competence was understood in its thin conception. Disallowance of a law, for example, did not preclude the relevant legislature from attempting to enact or enacting the same or similar law again because such laws would invariably reach the statute book before being disallowed (if they were disallowed). Certain colonies, for example, St Kitts (the present-day Federation of Saint Christopher and Nevis) and British Honduras (present-day Belize) were particularly noted for attempting to enact disallowed laws in different guises or revive previously disallowed laws.[70] Similarly, the reservation of an imperial Bill would not necessarily preclude it from reaching the statute book, because the Colonial Office might have recommended assent (even qualified assent) instead of disallowance (as set out at the start of this section). The nature of these political controls turned on the priority that the metropole accorded to ensuring policy coherence between itself and a relevant territory in a given field at a given time. Thus, disallowance and reservation could not by nature operate as hard constraints on legislative competence because a somewhat amended version of a previously disallowed law could reach the statute book, depending on metropolitan attitudes.[71]

Modern equivalents to disallowance and reservation

It is important to appreciate that disallowance and reservation have no exact equivalents in modern devolution. The closest powers to disallowance are those conditionally authorising UK ministers to revoke subordinate legislation made by devolved authorities.[72] Meanwhile, although reservation may seem similar to pre-assent intervention

66 Ibid 193.
67 The Statute of Westminster 1931, s 4.
68 Ibid s 3.
69 Ibid s 5, disapplying the Merchant Shipping Act 1894, ss 735–736, which restricted colonial legislatures' abilities to amend or repeal any part of that Act and regulate coastal trade.
70 Swinfen (n 23 above) 88.
71 Martin (n 51 above) 81–82.
72 See eg the Scotland Act 1998, s 58(4), the Government of Wales Act 2006, s 82(3), and the Northern Ireland Act 1998, ss 25(1) and 26(4).

powers, such as that most recently exercised in relation to the Scottish Parliament,[73] I would argue that reservation is a categorically different power for two main reasons. First, reservation was unconditional – *any* imperial Bill could be reserved for the signification of the Crown's pleasure, for *any* reason. The existence of any specific Instructions to reserve Bills dealing with certain matters did not preclude reservation of other Bills dealing with other matters. This is unlike the power under the Scotland Act, which is conditional. Second, the absolute discretion contained in the reservation power allowed it to be used as a powerful tool for policy coherence, in accordance with the policy priorities of the metropole. By contrast, the Scotland Act introduces elements of legal coherence in the exercise of the power under section 35 – incompatibility with international obligations[74] and adverse effects on the operation of the law as it applies to reserved matters.[75] This is not to say that legal coherence has no connection with policy – after all, legal coherence may itself be a policy decision – but that the reservation power contained no element of legal coherence as a *condition* of its exercise. It is difficult, given that this is the first exercise of the section 35 power, to say more by comparison to reservation, but it is clear that the two powers are different.

AUTONOMY AND PARLIAMENTARY SOVEREIGNTY

The levers of political control over colonial legislation were undergirded by the unbreachable sovereignty of the Crown in Parliament to legislate in respect of any part of the empire. This sovereignty was explicitly laid down in many statutes conferring legislative autonomy[76] and inferred in others.[77] This was categorically different from the general provisions laying down the supremacy of specific UK statutes extended to colonies by express or implied terms. The sovereignty of the Crown in Parliament simply meant that it had the right to legislate in respect of the empire and this right could not be legally curtailed at all.

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73 The Scotland Act 1998, s 35(1)(b), in relation to the Gender Recognition Reform (Scotland) Bill. See also, 'Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill'.

74 The Scotland Act 1998, s 35(1)(a).

75 Ibid s 35(1)(b).

76 See eg the Government of India Act 1915, s 65(2), and the Government of Ireland Act 1920, s 75.

77 See eg in the discussion of the right of the UK Parliament to legislate for Canada by W H P Clement, *The Law of the Canadian Constitution* (Carswell Co 1892) 56. This is despite there being no specific part of the British North America Act 1867 declaring or otherwise reserving this right.

Sovereignty as the character of legislative ability

Two characteristics of parliamentary sovereignty as judicially understood historically deserve mention here. The first characteristic is that the doctrine co-existed with legislatures which were plenary in their powers. The case of *Burah* is instructive here.[78] The issue in that case involved the Indian Governor General, by legislation enacted under the Indian Councils Act 1861, removing the Garo Hills territory from the jurisdiction of the Calcutta High Court, and instead vesting it in the office of the Chief Commissioner of Assam, subject to the direction and control of the Lieutenant Governor of the Bengal Presidency. The Lieutenant Governor in turn, using powers conferred by this legislation, extended the exclusion to the Khasi and Jaintia Hills.[79] The respondent (Burah) was tried and convicted of murder by the Deputy Commissioner of the Khasi and Jaintia Hills and sentenced to death, with this sentence later commuted to transportation for life by the Assam Chief Commissioner.[80] The issue was whether the Indian Legislature (the Governor General in Council) had the competence to enact this legislation, given that it stripped the High Court of jurisdiction conferred by an Act of the UK Parliament. Alternatively, it was contended that, if the Indian Legislature was competent to enact such a law, it was still incompetent to delegate jurisdiction-stripping to the Lieutenant Governor.[81] The Calcutta High Court, sitting *en banc* and by a bare majority, declared the law *ultra vires* on the alternative ground.[82] The Privy Council allowed the appeal and dismissed both grounds, with its reasoning shining a light on the interaction between the UK Parliament and the Indian Legislature.

On the first ground, the Indian Councils Act 1861 placed several restrictions on the competence of the Indian Legislature, as set out above. Of these, the Privy Council considered that only one could apply – the injunction against making laws contrary to certain Acts of the UK Parliament. In this case, the relevant UK statute was the Indian High Courts Act 1862, which set out, *inter alia*, the jurisdiction of the High Courts (including the Calcutta High Court).[83] That Act expressly subjected its jurisdictional clauses to laws made by the Indian Legislature, so the respondent's argument failed in this regard.[84] On the alternative ground, it was contended that, as the Indian Legislature

78 *The Queen v Burah* (1878) 3 App Cas 889 (Privy Council), judgment of Lord Selborne.
79 Ibid 890–892.
80 Ibid 889.
81 Ibid 896–897.
82 Ibid 892–893.
83 The Indian High Courts Act 1862, ss 9, 10 and 11.
84 *Burah* (n 78 above) 903.

was a delegate of the UK Parliament, it was caught by the rule against sub-delegation and could not itself delegate legislative powers (to the Lieutenant Governor to extend the exclusion of jurisdiction). The Privy Council considered that the Indian Legislature, far from being a delegate, was, when acting within the limits of its parent statute, 'intended to have, plenary powers of legislation, as large, and of the same nature, as those of [the UK] Parliament itself'.[85] Moreover, the Privy Council did not consider that the Indian law had delegated anything to the Lieutenant Governor, but merely made its application to the Khasi and Jaintia Hills (to exclude the jurisdiction of the Calcutta High Court) conditional on the Lieutenant Governor's discretion. This was permissible, the Privy Council declared, because:

> Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may ... be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient.[86]

The analogy with the UK Parliament is highly instructive, the more so because, among the competence restrictions under the 1861 Act which the Privy Council held did not apply in *Burah*, the final such restriction is worth setting out:

> ... the said Governor General in Council shall not have the Power of making any Laws or Regulations which ... may affect the Authority of Parliament, or the Constitution and Rights of the East India Company, or any Part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any Degree the Allegiance of any Person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the Crown over any Part of the said Territories.[87]

The respondent in *Burah* argued that the power to legislate in respect of the Calcutta High Court was retained by the UK Parliament to the exclusion of the Indian Legislature. This was because the 1861 Act conferred no power on the Indian Legislature to make laws in respect of courts specifically, whereas a previous UK Act did so. By implication of the UK Parliament enacting the High Courts Act, it was argued that it had reserved the power to legislate for courts.[88] If correct, the Indian law in question would constitute an attack on the authority of the UK Parliament to legislate for India, in a breach of the 1861 Act. But the

85 Ibid 904.
86 Ibid 906.
87 The Indian Councils Act 1861, s 22.
88 *Burah* (n 78 above) 896–897.

Privy Council drew a key analogy between the *legislative abilities* of the Indian Legislature and the UK Parliament.[89] The only difference between the two bodies was that the former could only legislate within defined boundaries and the latter had no such boundaries – the *character* of their legislative abilities, however, was the same. Thus, the sovereignty of the UK Parliament did not act as a further, implied limitation on the law-making abilities of legislatures with plenary powers. This was despite the existence of provisions in some UK Acts preserving the power of the UK Parliament to legislate for imperial possessions with autonomous legislatures.[90] *Burah* was subsequently applied in relation to other legislatures such as in Queensland.[91]

Sovereignty as a subsisting attribute

The second characteristic of parliamentary sovereignty was that, as the dominions became sovereign entities themselves, the doctrine came to characterise multiple legislatures across the new Commonwealth. In thus evolving, the doctrine of legislative sovereignty came to be legally understood as capable of withstanding manner and form restrictions, as in *Ranasinghe*.[92] The impugned legislation in that case had been a statute of the Parliament of Ceylon authorising executive appointment of members to Bribery Tribunals.[93] There were two issues with this statute. First, the tribunal members were appointed by the Ceylon Governor General on executive advice, rather than via the independent Judicial Service Commission as mandated under the Ceylon (Constitution) Order in Council 1946 (the 1946 Order).[94] Second, although the Ceylonese Parliament was permitted to amend any aspect of the 1946 Order, a Bill to do so could only be validly assented to if it was passed by at least two-thirds of the total membership of the Parliament's lower House, and certified as such.[95] The impugned statute was instead passed by a simple majority.

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89 Ibid 904.

90 See eg the Government of India Act 1935, s 110(a). A B Keith described this provision as 'definitely connected with sovereignty' and characterised it as a reassertion of parliamentary sovereignty 'in accordance with precedent' rather than acting as an implied, substantive restriction on legislative competence: see A B Keith, *A Constitutional History of India 1600–1935* (Methuen & Co 1936) 376.

91 *Cobb v Kropp* [1967] 1 AC 141 (Privy Council) 154E, judgment of Lord Morris of Borth-y-Gest.

92 *Bribery Commissioner v Ranasinghe* [1965] AC 172 (Privy Council), judgment of Lord Pearce.

93 Ibid 191G–192C.

94 The Ceylon (Constitution) Order in Council 1946, s 55(1).

95 Ibid s 29(4).

The Privy Council decided that the statute was *ultra vires* on both grounds.[96] In response to the appellant's argument that the Ceylonese Parliament was sovereign, with this sovereignty precluding any restrictions on its legislative powers and any judicial scrutiny into whether any of its enactments complied with the manner and form restrictions contained in the 1946 Order, Lord Pearce's analysis of legislative sovereignty is worth setting out in full:

> No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.[97]

Lord Pearce did not arrive at this position by deeming the Ceylonese Parliament as legally inferior to the UK Parliament. Instead, the distinction he drew related to the foundational parameters of each legislature. In neither case was the legislature able to escape its respective foundational parameters – it was just that the UK Parliament did not have any such parameters which *prescribed* its powers.[98] A similar point was made by Centlivres CJ in the South African case of *Harris*,[99] though the manner and form restriction in that case required a joint sitting of both Houses of the South African Parliament and a

96 *Ranasinghe* (n 92 above) 193D and 194D–E.

97 Ibid 200B–C.

98 Ibid 195B. It is curious that the Board was not referred to *MacCormick v Lord Advocate* (1953) SC 396, a decision of the Inner House of the Court of Session which may have given Lord Pearce pause before arriving at this conclusion, as the Lord President in *MacCormick* had made *obiter* comments to the effect that the UK Parliament was at least arguably prescribed by the Treaty of Union 1707, see *MacCormick*, 411–412. This view was also relevant to the Acts of Union 1800, by which the modern UK Parliament was constituted, in relation to Northern Ireland: see Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens & Sons 1968) 18–20. This view of the 1800 Acts resurfaced in *Allister and Peeples' Applications for Judicial Review* [2023] UKSC 5, [2023] 2 WLR 457, but the Supreme Court did not dispositively answer this matter, instead referring to this view as 'academic': see *Allister and Peeples* [66].

99 *Harris v Minister for the Interior* 1952 (2) SA 428, (Appellate Division) 464E.

two-thirds majority vote in such a sitting.[100] *Harris* was cited with approval in *Ranasinghe*.[101]

When applied to the legislatures of the empire, therefore, the doctrine of parliamentary sovereignty emerged from its cocoon of Diceyan absolutism and developed considerable nuance. It accommodated and co-existed with an increasing level of legislative autonomy throughout the empire, until the UK Parliament, in tandem with the political status of the UK, came to be seen as having relinquished its ability to superintend, far less control, the legislatures it had once enacted (or authorised) into existence, or having enabled these legislatures to significantly reduce or sever their relations with the UK.[102] Certainly, in his final years, Dicey himself would accept the limits of his purist vision of the doctrine – ironically, in trying to reconcile manner and form qualifications which the UK Parliament had enacted upon itself.[103] In many ways, this was inevitable: the Statute of Westminster marked one of the most consequential dominoes to fall in a cascade which ended with the UK Parliament enacting a complete severance of ties when granting independence.[104]

AUTONOMY AND LAW: REPUGNANCY AND RESPECTION

If metropolitan political controls over imperial legislation demonstrated the thinness of competence, so too did the legal limits of the law-making abilities of the empire's legislatures. As explored below, the evolutions of these abilities were not understood as legally *depriving* the UK Parliament of its competence to enact law regardless of such evolution. In fact, the development in the judicial understanding of these legal limits emphatically underscores the thinness of legislative competence of both the empire's legislatures and the UK Parliament.

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100 The South Africa Act 1909, s 152.

101 *Ranasinghe* (n 92 above), 199F.

102 See eg *Moore v Attorney General for the Irish Free State* [1935] AC 484 (Privy Council), which concerned the validity of the Oireachtas of the Irish Free State having amended its 1922 Constitution to remove appeals to the Privy Council: see the judgment of Viscount Sankey LC at 498–499. See also *Whittaker v Durban Corporation* [1921] 90 LJPC 119 (Privy Council) 120, per Lord Haldane, observing that the general intention of s 106 of the South Africa Act 1909 was to 'get rid of appeals to [the Privy Council]' through law enacted by the South African Parliament.

103 The Parliament Act 1911. See Coffey's discussion of Dicey's views in Coffey (n 5 above) 205–208.

104 See eg the Burma Independence Act 1947, s 1(1). See also the Federation of Malaya Independence Act 1957, s 1(2)(b).

Repugnancy

Repugnancy as a concept was derived from the language of the statutes which conferred law-making powers on colonial legislatures. As set out earlier, there were, by and large, two types of statutory language which reflected the concept. First, a colonial legislature was barred from enacting law repugnant to the 'law of England'. Second, a colonial legislature was barred from enacting law repugnant to Acts of the UK Parliament specifically or by necessary implication extended to the corresponding colony. While the sweep of repugnancy was reasonably clear in regard to the second category, so that a colonial legislature had only to be aware of specific UK statutes extended to the corresponding colony, the first category gave rise to difficulties.

A significant difficulty arose in defining the extent of the 'law of England' with reference to whether a colony had been 'settled' or 'ceded' (or conquered). The distinction here was consequential, as 'ceded' or conquered colonies in law retained all their pre-existing laws until or unless modified by prerogative or the UK Parliament.[105] By contrast, 'settled' colonies, seen by the law as being practically uninhabited (or without a 'settled law') at the time of colonisation, were subject to the entire body of English law which could then subsequently be modified by prerogative or statute, whether metropolitan or colonial.[106]

Theoretically, the enforceability of the repugnancy doctrine was not simply the domain of the courts. Nothing prevented the Sovereign in Council from disallowing legislation which was presumed to be repugnant, or the Colonial Office from recommending that disallowance be exercised. But in practice, the Colonial Office's views on repugnancy were generally favourable to the colonial legislatures. Stephen, for example, remarked on the twin 'absurdity' of attempting to distil a set of fundamental constitutional principles from written and unwritten English law, as well as the idea that the UK Parliament should have intended colonial legislatures to be bound rigidly by these principles.[107] Stephen's successor Rodgers also shared this view, believing that colonial legislatures should only be bound by the terms

105 See eg *Campbell v Hall* (1774) Lofft 655, 744, per Lord Mansfield CJ (King's Bench).

106 *Cooper v Stuart* (1889) 20 App Cas 286, 291, per Lord Watson. The terms 'settled' and 'ceded' are controversial in historical and present-day law in parts of the erstwhile empire and present-day Commonwealth such as Australia. It is not my intention to explore this controversy because I cannot do justice to it, either in this article or otherwise. But that does not mean the controversy should go unacknowledged, see eg Dani Larkin and Kate Galloway, 'Uluru statement from the heart: Australian public law pluralism' (2021) 29(2) Australian Law Librarian 151.

107 Swinfen (n 23 above) 57, quoting Stephen in a memo on Van Dieman's Land (modern day Tasmania).

of UK statutes which intended to bind them.[108] It should be noted that, where the Colonial Office may have recommended disallowance for repugnancy with the fundamental principles of English law, those principles were (at the relevant time) so entrenched that their abolition was generally unthinkable.[109]

However, the pragmatism of the Colonial Office over repugnancy did not extinguish a growing crisis in South Australia. The second puisne judge of the South Australian Supreme Court, Benjamin Boothby, had interpreted the repugnancy doctrine somewhat too aggressively for the liking of South Australia. The judge had invalidated legislation for having been assented to in breach of the relevant Royal Instructions and for fundamental breaches of English common law, going as far as suggesting in one case that the South Australian Parliament had 'no authority' to override the common law.[110] Boothby was pilloried in the South Australian press.[111] The metropolitan response was to entrench the Colonial Office's pragmatism into statute. The result – the Colonial Laws Validity Act 1865 – marked a major reform in the doctrine of repugnancy. Colonial legislatures[112] were now bound only by the terms of their enabling legislation and specific UK statutes which were extended to the corresponding colonies (including any subordinate legislation made thereunder),[113] in line with the Canadian position set out above. These statutes would operate in the relevant colony to the exclusion only of any inconsistent colonial legislation (which would be rendered void due to this inconsistency).[114] Moreover, colonial legislation assented to in breach of Instructions would no longer be void thereby (unless the Instructions were contained in Letters Patent or the Governor's Commission).[115] By the interwar period, however, this reform in repugnancy had outlived its initial emancipatory character,

108 Ibid 59.

109 Examples include the sovereignty of the Crown in Parliament, the prohibition of slavery, the dominance of Christianity and the prohibition of punishment without trial: see ibid 59, fn 17.

110 Ibid 170–171.

111 See *The South Australian Register* (Adelaide 19 June 1861) 2, and 'The Parliament and the Supreme Court' *The South Australian Register* (Adelaide 25 July 1861) 3.

112 As defined, 'colony' excluded the UK, the Channel Islands, the Isle of Man and Indian territories: see Colonial Laws Validity Act 1865, s 1.

113 The Colonial Laws Validity Act 1865, ss 2–3.

114 A version of these provisions was enacted in the Government of Ireland Act 1920, s 6(1).

115 The Colonial Laws Validity Act 1865, s 4.

and was viewed as too restrictive,[116] leading eventually to the Statute of Westminster 1931.

The operation of the Colonial Laws Validity Act entrenched the practice of the Colonial Office into law (despite its misgivings and opposition to such a move)[117] by implicitly distinguishing between local matters in which the metropole either did not wish to, or did not have the capacity to interfere, and those matters which the metropole determined were of empire-wide importance. This entrenchment not only rectified the errors of a rogue colonial judge, but it also addressed a bitter complaint from South Australia: that the metropole was happy to plod along without even acknowledging, far less addressing, the difficulties faced by the colonial Government.[118] The South Australian crisis served as a powerful reminder, already understood by the Colonial Office (as above), that metropolitan–colonial relations had to be *mutually* beneficial.

It is arguable, however, that repugnancy relating to fundamental aspects of the common law subsisted notwithstanding the Colonial Laws Validity Act, in some measure, to invalidate laws which were extreme in their breach of such fundamental aspects. For example, in *Sprigg v Sigcau*, the Privy Council ruled that the proclamation of a Governor of the Cape Colony authorising the arrest of a former tribal chief in Pondoland was unlawful under the corresponding statute of the Cape Colony Parliament,[119] while also noting that such a proclamation, effectively an act of attainder,[120] 'would be little calculated to enhance the repute of British justice'.[121]

Respection

Respection[122] is a doctrine which tests whether colonial or dominion legislation falls within the prescribed subject matters over which the corresponding legislature has competence. Variously expressed by the phrases 'pith and substance' and 'true nature and

116 K C Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press 1953) 127–131.

117 Swinfen (n 23 above) 180.

118 Ibid 180–181.

119 *Sprigg v Sigcau* [1897] AC 238 (Privy Council) 248.

120 Ibid 241, remarks of Lord Halsbury LC.

121 Ibid 247.

122 The word 'respection' appears in *Martin v Most* (n 1 above) [11], and in Calvert (n 98 above) 178–180.

character',[123] respection is distinct from repugnancy in an important respect: where repugnancy marks the binary threshold (an impugned law is either repugnant or it is not), respection is the method by which the court determines whether an impugned law is repugnant or not. At its core, respection asks the purpose of a given law, in order to determine whether it impermissibly breaches a competence restriction of its enacting legislature. However, querying statutory purpose does not make respection synonymous with purposive construction, especially when the latter canon of statutory construction is applied to Acts of the UK Parliament. This is because respection asks for statutory purpose *relating to* the prescribed parameters of legislative competence in the statute which establishes the relevant legislature. No such query is possible with Acts of the UK Parliament, given that the UK Parliament has no prescribed limits to its own competence. Thus, in determining whether a law was repugnant by respection, the courts had to ask not only the purpose of the law, but also the extent of the corresponding legislatures' competence in a given field. The latter question raised its own problems, given that subjects within a legislature's competence were merely listed in statutes which established these legislatures, with no statutory guidance as to how widely such subjects should be interpreted by the courts. It is beyond the scope of this article to exhaustively explore the relevant caselaw, but the following examples show a trend of widely construing sub-national competences and strictly construing national competences.

So, for example, the Privy Council decided that, as treaty implementation *per se* was unlisted under dominion and provincial competences in the British North America Act 1867, treaty implementation in the domestic Canadian legal order would have to be split between the dominion and provincial legislatures, according to the subject matter with which a given treaty dealt.[124] This had the impact of invalidating dominion legislation implementing, *inter alia*, international treaties concerning labour law and, moreover, emphasised provincial competences at the expense of dominion authority. For this and related judgments, the Privy Council's legitimacy was called into

123 See eg *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna* (1947) 74 LR Ind App 23 (Privy Council) 42–43, in particular Lord Porter (for the Board) approving a passage from the Federal Court of India's judgment in *Subhramanyan Chettiar v Muttuswani Goundan* (1940) FCR 188, 201, per Sir Maurice Gwyer CJ: 'the impugned statute is examined to ascertain its pith and substance or its true nature and character'. *Prafulla Kumar Mukherjee* was cited as illustrative of respection in *Martin v Most* (n 1 above) [12].

124 See eg *Attorney General for Canada v Attorney General for Ontario and Others* [1937] AC 326 (Privy Council) 351, per Lord Atkin (for the Board).

question.[125] Half a world away, India's newly established Federal Court was busy 'emasculating' its central government by invalidating wartime detention regulations and setting thousands of detainees free.[126] This was a consequence of strictly construing the Government of India's rule-making powers under the Defence of India Act 1939, which authorised rules to detain those 'reasonably suspected' of being or acting hostile,[127] whereas the rules so made contained no reference to reasonable suspicion, only to the relevant government's satisfaction.[128] At the same time, the Federal Court gave the Indian provinces considerable latitude to dismantle the vast estates gifted by the Crown to the Indian upper classes, by dismissing the argument that provincial legislative competence could not touch prerogative grants.[129] Contemporaneously, Northern Ireland's young Parliament was also given a fairly wide latitude to regulate the sale of milk within the jurisdiction for public health, even though the impugned law negatively impacted trade between Northern Ireland and the Irish Free State, which was forbidden to the Stormont Parliament.[130] Similarly, when Stormont legislated to establish a work-permit system to take up employment in Northern Ireland, such legislation was not held to be in respect of the forbidden field of 'alienage ... or aliens as such', even though the statute undoubtedly impacted foreigners.[131]

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125 See eg F R Scott, 'The Consequences of the Privy Council Decisions' (1937) 15 Canadian Bar Review 485.

126 See Rohit De, 'Emasculating the executive: the Federal Court and civil liberties in late colonial India: 1942–1944' in Terence C Halliday, Lucien Karpik and Malcolm M Feeney (eds), *Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press 2012) 59–90. In particular, De cites the case of *Keshav Talpade v King Emperor* 30 AIR 1943 FC 1, by which r 26 under the Defence of India Rules 1939, which included wide powers of expulsion and detention, was invalidated. This had the effect of calling into question up to 8000 detentions: see De, 64.

127 The Defence of India Act 1939, s 2(2)(x) (Central Indian Legislature).

128 The Defence of India Rules 1939, r 26(1)(b).

129 *Thakur Jagannath Baksh Singh v United Provinces* AIR 1943 FC 29, 87, affirmed on appeal in [1946] AC 327 (Privy Council), judgment of Lord Wright (for the Board).

130 *Gallagher v Lynn* [1937] AC 863 (HL), 870, per Lord Atkin. The relevant competence restriction on the Northern Ireland Parliament is in the Government of Ireland Act 1920, s 4(1)(7).

131 *Duffy v Ministry of Labour and National Insurance* [1962] NI 6 (NICA), 14 per Lord MacDermott CJ.

LESSONS FOR COMPETENCE TODAY

If legislative competence is conceptualised as the ability of a legislature to make laws, then we can draw three important lessons from imperial history.

First, legislative competence in its thin form speaks purely to explicit statutory limits or restrictions on the *effect* of laws made by a relevant legislature. This is true whether the relevant control on colonial and dominion legislation was political or legal. As set out earlier, for example, disallowance of a law did not prevent subsequent versions of the same law from being enacted. The laws in question would reach the statute book, possibly take effect, and then be removed by disallowance. The underlying competence to enact such laws remained intact. Similarly, a law which would almost certainly be repugnant if enacted was nevertheless allowed to be introduced, debated and enacted.[132] Again, while repugnancy would deprive the law in question of legal effect, the relevant legislature retained the ability to enact it.

Second, imperial history did not conceive of legislative competence in its thick form. Attempts by purist colonial judges to absolutely enforce the legal effects of Acts of the UK Parliament in the colonies were eroded by further such Acts, until the Privy Council itself moved in lockstep with the evolution of relations between the metropole and the colonies and dominions. Not once during this evolution was the UK Parliament *deprived* of its ability to make law in respect of the empire more generally. It is true that, under successive statues, the UK Parliament enacted clear intentions to restrict and ultimately stop such law-making, but these statutes did not place any hard restrictions on its own law-making ability. For example, barely two years after enacting the Statute of Westminster 1931, the UK Parliament authorised the UK Government to take over the administration of Newfoundland, then a dominion on the brink of financial collapse.[133] Although this metropolitan takeover of Newfoundland came as a consequence of the latter's request to this effect,[134] the requirement in the Statute of Westminster for the UK Parliament to legislate for the dominions only with their consent was effectively a manner and form restriction that the UK Parliament could legally override at will.[135] Similarly, in *Madzimbamuto v Lardner-Burke*, the Privy Council decided that

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132 *Rediffusion* (n 14 above) 1161B–F, per Lord Diplock.

133 The Newfoundland Act 1933, s 1(1). For more detail, see Declan Cullen, 'Race, debt and empire: racialising the Newfoundland financial crisis of 1933' (2018) 43(4) Transactions of the Institute of British Geographers 689–702.

134 The Newfoundland Act 1933, sch 1.

135 *British Coal Corporation v The King* [1935] AC 500, 520 per Viscount Sankey LC.

Southern Rhodesia's unilateral declaration of independence did not override Parliament's authority to statutorily intervene in the colony's affairs, notwithstanding the convention that Parliament would not thus intervene without consent.[136]

Both the Newfoundland and Southern Rhodesian examples demonstrate that the UK Parliament acted as a sovereign legislature within an unlimited competence, as compared to colonial and dominion legislatures which acted within *limited* competences. Here lay the key difference between the UK Parliament and colonial and dominion legislatures. Endowed with plenary powers within an unlimited competence, statutes of the UK Parliament were enforceable against any inconsistent legislation enacted by legislatures with limited competences. There was thus no need for a further competence restriction to ensure that the will of the UK Parliament was enforced. Equally, however, any enactment of the UK Parliament which prescribed the manner of enforcing its statutes (in other words, their legal effect) overrode any inconsistent colonial or dominion law. Seen in this light, neither the Colonial Laws Validity Act nor the Statute of Westminster deprived the UK Parliament of any of its competences – they merely instructed the courts of the empire as to the legal effect of its laws *in light* of both Acts.

Third, legislative competence was distinct from legislative sovereignty. The former concept described the fields in which a legislature had the ability to make laws, while the latter concept described the character of such ability (and its consequent breadth). This is apparent from cases such as *Ranasinghe* and *Rediffusion*. In the first of these cases, the Ceylonese Parliament was sovereign but did not have the competence to make valid law in breach of the manner and form requirements of its foundational law. In the second case, the Hong Kong Legislative Council was not sovereign, but was nevertheless competent to make repugnant legislation. These observations would apply *a fortiori* to a sovereign legislature with unlimited competence (the UK Parliament). In fact, legislative sovereignty positively *reinforces* the thinness of legislative competence. Consider that, classically, manner and form restrictions or qualifications which the UK Parliament might impose on itself can be legally undone merely with a further statute which repeals or otherwise modifies these restrictions or qualifications, expressly or by necessary implication, without having to effect repeal or modification consistently with those same restrictions or qualifications. This position subsisted by distinguishing cases such as *Harris* and *Trethowan* (in light of the

136 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (Privy Council) 723A, per Lord Reid.

respective legislatures' competence in those cases),[137] and no judicial authority has since suggested otherwise. If the UK Parliament is legally competent to impliedly repeal or impliedly modify the effect of previous enactments which condition the exercise of its own powers, such that one Parliament is incapable of binding its successors, then the corollary is that a future Parliament does not, by implied repeal or modification of the effect of a predecessor's statute, *deprive* the same of the competence of having enacted that statute. On the contrary, the repeal of any implied repeal or modification may bring back into full effect the impliedly repealed (or modified) statute.[138]

The distinction between competence and sovereignty also accounts for the normative equivalence drawn between statutes of the UK Parliament and statutes of the legislatures it created or authorised. This equivalence was entrenched into the provisions of the Colonial Laws Validity Act – the restriction of repugnancy to only *specific* Acts of the UK Parliament extended to the colonies and dominions implied that those which were not so extended could be modified or repealed with impunity, provided the relevant legislature was competent to legislate in the field occupied by the relevant UK Act. The normative character of enacted law, in other words, depended on legislative competence rather than legislative sovereignty. This notion was also enacted in at least one other statute – the Northern Ireland Constitution Act 1973 – which provided for the establishment of a new Assembly after the collapse of devolution at Stormont in 1972. This envisioned that the Assembly would enact 'Measures' which had, subject to a bar relating to religious or political discrimination, 'the same force and effect as an Act of the Parliament of the United Kingdom',[139] even though, self-evidently, the Assembly would not be a sovereign legislature.

The thin form of competence thus ultimately led to a form of reciprocity in the relationship between the UK Parliament and the other legislatures – each enacting law of the same normative character, none impinging on the competence of any other, save that the UK Parliament alone possessed unlimited competence and could, by that fact alone, amend the conditions of the exercise of law-making ability for all other legislatures. This reciprocity explains why arguments seeking to distinguish the *character* of the competence of individual

137 *Attorney General for New South Wales v Trethowan* [1932] AC 526 (Privy Council). See H W R Wade, 'The basis of legal sovereignty' (1955) 13(2) Cambridge Law Journal 172.

138 *Allister and Peeples* (n 98 above) [65]–[67]. Without going into detail, the complex and convoluted discussion by all three courts involved in the *Allister and Peeples* litigation demonstrates the under-theorisation of implied repeal or implied modification of statutory effect by a subsequent statute.

139 The Northern Ireland Constitution Act 1973, s 4(3).

legislatures (with plenary powers) across the empire were rejected by the Privy Council.[140]

This discussion demonstrates the need to frame appropriate questions when conceptualising legislative competence. If competence is conceptualised only in its thin form, such that legislative ability is divorceable (and indeed divorced) from legal effect, then is the legislature really making *law* when enacting legislation with no legal effect? If instead, competence is conceptualised only in its thick form, so that legislative ability means that the relevant legislature must be able to enact *effective* law, how then can such a legislature be described as 'plenary' when its laws, in fields where it has explicit competence may, *ceteris paribus*, be rendered ineffective? The apparent rhetoricity of these questions raises deeper questions of the modern devolution settlements and their judicial interpretation, especially in relation to the relationship of the UK Parliament to its devolved counterparts.

THE RUPTURE(S)

The framework of the UKIMA represents a specific but extensive rupture in the imperial understanding of competence. It is unnecessary to set out its provisions in detail[141] as the reason for the rupture is in the manner that the UKIMA's provisions interact with its normative character. The UKIMA automatically disapplies statutory provisions which directly or indirectly discriminate against incoming goods,[142] but because the Act itself is entrenched within the devolution settlements,[143] the only legislature with the ability to modify any of the UKIMA's provisions is the UK Parliament. This means that, through the UKIMA, the UK Parliament has protected only the conditions of its own competence. The result is that the UK Parliament may enact legislation which modifies or even sets aside the automatic disapplication requirements in the UKIMA, but the devolved legislatures may not. This has consequences for the normative character of the statutes enacted by the UK Parliament when compared to those enacted by the devolved legislatures. Although there has been academic debate over the normative characteristics of Westminster

140 *Prafulla Kumar Mukherjee* (n 123 above) 42.

141 On which, however, see Nicholas Kilford (in this Special Issue), 'The market access principles and the subordination of devolved competence' 75(1) Northern Ireland Legal Quarterly 77–105.

142 The UK Internal Market Act 2020, s 5(3).

143 Ibid s 54.

legislation when compared to devolved legislation,[144] the UKIMA effectively answers this question by dramatically differentiating their respective impacts by its entrenchment in the devolution settlements. Entrenching the UKIMA leaves the UK Parliament as the *only* body capable of making law which escapes the prescriptions contained in the UKIMA (the market access principles which apply to legislation whatever its provenance).[145] This marks a complete break from the reciprocity of competence which had come to characterise the imperial experience.

But the UKIMA is not the only rupture in the understanding of competence. The Scottish Parliament (and by analogy, Senedd Cymru and the Northern Ireland Assembly) was described as 'plenary' by the Supreme Court, by which the Court meant that the Parliament was not subject to any implied limits to its law-making ability beyond those explicit in the Scotland Act 1998.[146] The Scotland Act (in common with the Government of Wales Act 2006[147] and the Northern Ireland Act 1998)[148] allows the Scottish Parliament to modify the laws effective in Scotland, subject to explicit restrictions on its ability to do so.[149] On the thin conception of competence, the Scottish Parliament and its counterparts retain these abilities regardless of the legal effect of the laws they make. But, by the *Treaty Incorporation Bills Reference*, the same cannot now be said of the UK Parliament, the laws of which must be effective in Scotland in order for its power to make laws for Scotland to remain unaffected.[150]

The Supreme Court's reasoning here turns imperial experience on its head. As previously set out, imperial experience conceptualised competence as thin, but did so across *all* legislatures within the empire. Devolution jurisprudence relating to Northern Ireland's historic devolution model (under the Government of Ireland Act 1920) is also consistent with this conceptualisation, meaning competence

144 See eg N W Barber and Alison Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' (2003) Public Law 112; Aileen McHarg, 'What is delegated legislation?' (2006) Public Law 539; and Anurag Deb, 'Devolved primary legislation and the gaze of the common law: a view from Northern Ireland' (2021) Public Law 565.

145 The UK Internal Market Act 2020, s 6.

146 *AXA v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, [147] per Lord Reed JSC.

147 The Government of Wales Act 2006, s 108A.

148 The Northern Ireland Act 1998, ss 5–7 generally, and specifically s 5(6).

149 The Scotland Act 1998, s 29 generally, but the implication specifically in s 29(4) is that the Scottish Parliament is permitted to make modifications of Scots private or criminal law as it applies to reserved matters if it does so consistently to reserved and transferred matters: see *Martin v Most* (n 1 above) [19].

150 *Treaty Incorporation Bills Reference* (n 15 above) [42], per Lord Reed PSC.

was understood in its thin form within the empire *and* within the metropole. In *McCann*, for example,[151] an arguably void statute enacted by the Northern Ireland Parliament was held to have been curable (and cured) in respect of its repugnancy by a later statute. Lord Denning, joining with the majority of the Appellate Committee in that case, further reasoned that 'the duty of the Court is to uphold the legislative power [of the Northern Ireland Parliament] when it is fairly and reasonably exercised and only strike it down when it is abused'.[152] In *McCann*, the restriction was an absolute bar on expropriation of property without compensation,[153] with any such legislation void as a result.[154] The effect of the Appellate Committee's decision in *McCann* was that the absolute prohibition did not void a repugnant law where it was subsequently cured of its repugnancy by the same legislature which had enacted the repugnant law in the first place. One could interpret the judgment as stating that the impugned statute was voidable rather than void *per se*, although the Appellate Committee did not infer this, and such a conclusion would in any event conflict with the clear language of the Government of Ireland Act 1920. So, either the Appellate Committee committed an error, or the UK Parliament's competence was understood as being thin – the less-than-absolute legal effect of a *prima facie* absolute prohibition not affecting the competence to have enacted such a prohibition.

It may be justifiable to distinguish the UKIMA's effect on legislative competence from the imperial experience by reference to the statute's underlying purpose: regulation of the UK internal market. By contrast, the empire was never a consolidated single market free of tariffs and equivalent measures.[155] But in order to utilise the UK internal market to justify the UKIMA, let us squarely acknowledge the justification as political rather than principled. There is no legal reason why the UKIMA effectively terminates the reciprocity in thin competence with which both caselaw and statute law understood legislative ability within the metropole and across the empire for at least a century and a half (since the enactment of the Colonial Laws Validity Act 1865). Indeed, the predominance of thin competence in this period was itself a response to, *inter alia*, stridently criticised attempts to enforce thick competence in South Australia. Perhaps the enforcement of thick competence over the entire empire would have stretched metropolitan

151 *McCann v Attorney General for Northern Ireland* [1961] NI 102 (HL).

152 Ibid 133.

153 The Government of Ireland Act 1920, s 5(1).

154 Ibid s 5(2).

155 See eg Steven E Lobell, 'Second image reversed politics: Britain's choice of freer trade or imperial preferences, 1903–1906, 1917–1923, 1930–1932' (1999) 43 International Studies Quarterly 671.

resources in a way that enforcement within the UK would not. But that is just as political a justification as is the internal market.

The jurisprudence of the UK Supreme Court, however, is more difficult to explain. The Supreme Court focused on the power of the UK Parliament to legislate for Scotland, though there is no principled reason why the word 'power', when applied *only* to the UK Parliament's legislative ability with respect to the devolved legislatures, should demand its competence be conceptually thick rather than thin. It may be, as Aileen McHarg has noted:

> ... an extended notion of Parliamentary sovereignty which not only preserves the *residual* power of the UK Parliament to legislate for Scotland, but also limits the *way in which* the Scottish Parliament is able to legislate in devolved areas.[156]

If this is indeed the case, the parallels with the South Australian crisis in the 1860s are not difficult to see. It also reveals an unprincipled element in this emerging line of jurisprudence – the UK Parliament's competence is thick in relation to devolved legislatures only, but not in relation (so far) to *itself*. No reason for imbuing the word 'power' in the Scotland Act with the ability to create such a distinction can be discerned from the Supreme Court's reasoning in this context. It is ironic, however, that the jurisprudence in this regard may have come full circle in asserting a thick conception of competence in respect of the very legislature (the UK Parliament) which intervened in 1865 to prevent this trend.

CONCLUSION

This article is a (necessarily) whistle-stop tour through two or so centuries of legal and political tools employed in service of governance in the empire. In its exploration of legislative competence during this time, it looks at how courts and Crown officials understood the ability of legislatures in different parts of the empire, with different competences, to enact law. Initially controlled highly prescriptively, over time legislative competence came to be accepted as a thin concept, separate from the effect of enacted laws. As the empire waned and its constituent parts began to dismantle their connections with the metropole, the concept of competence remained thin, so that this

156 Emphasis in the original. Aileen McHarg, 'Devolution: a view from Scotland' (*Constitutional Law Matters* 23 May 2022). McHarg looks at the notion of a substantive dimension to parliamentary sovereignty in more detail in her chapter 'Giving substance to sovereignty' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 203–222.

dismantlement was not seen as an attack on the competence of the UK Parliament.

In 2020, the UK Parliament enacted a statute which marked a significant rupture in thin competence. By the UKIMA, Parliament has underscored its ability to make *effective* law, while denying the same ability to its devolved counterparts. Legally, the statutory assertion of such an ability is both unprincipled and ahistorical. Politically, it may mark a moment in Westminster-devolved relations as significant as the Statute of Westminster had marked in metropolitan–dominion relations. But I leave the political implications to others with greater insight on the topic.