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"Dominion status": History, framework and context

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This article attempts to explain "Dominion status" by various means. First, it notes that the word "Dominion" has had different meanings over time, even though it is most closely associated with the status acquired by Australia, Canada, Ireland, Newfoundland, New Zealand, and South Africa in the years 1926 to 1931. Second, Dominion status from 1926 to 1931 is compared to the constitutional claims made a century and a half earlier by American colonists. Third, Dominion Status as of 1931 is explained by way of comparison with what came before, paying particular attention to issues of repugnancy, extraterritoriality, reservation and disallowance. And, finally, this article observes the importance of constitutional conventions throughout.

1. Introduction

This article discusses how the most prominent model of Dominion status came to be, with particular reference to Australia, Canada, and New Zealand. The initial focus is on the history, purpose, and meaning of Dominion status. The article explores the idea, expressed by some commentators at the time, that the Dominions were effectively seeking in the 1920s that which the Americans had sought (unsuccessfully, of course) 150 years earlier. The American demands at that time were deeply rooted in local public opinion and grounded in venerable ideas of common law constitutionalism, but they ran headlong into mercantilist economic policies and, increasingly, inflexible British thinking on the sovereignty of the Westminster Parliament.[1] That inflexibility contributed to the loss of the American colonies, but the "losing" side in the British-American war of ideas won out where the rest of the Empire was concerned. In the 1920s, in a very different social, political, and economic environment, issues regarding the structure of Empire and Commonwealth were approached with much greater flexibility. Dominion status is part of that story.

The balance of this article discusses how Dominion status was achieved in constitutional (legal *and* conventional) terms. Accordingly, this account will pay careful

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[1] The term "Westminster" Parliament is used as a neutral descriptor for the "Imperial," "British," or "United Kingdom" Parliament referred to variously in this article.

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attention to the Balfour Declaration (1926) and the Statute of Westminster, 1931 and what they set out to achieve. The article notes in a number of places how orthodox understandings of the Westminster Parliament's sovereignty made the final transition from Dominion to independent nation hard to explain. This last phenomenon is one which I have studied in detail, so it will not be discussed here. It is possible to see independence as yet another encounter between traditional British thinking on parliamentary sovereignty and the social, economic, and political facts on the ground at the end of the Empire.[2]

2. What does Dominion status mean?

K. C. Wheare began his discussion of Dominion status in 1926 with the question that I propose to address, but voiced (in Wheare's version) by a former Prime Minister: "What does 'Dominion status' mean," asked Mr. Lloyd George in the House of Commons on December 14, 1921.[3] The context then was House approval of the Articles of Agreement for a Treaty between the United Kingdom and Ireland, which had been signed one week earlier. The opening words of that Treaty stated that Ireland would have the same constitutional status in the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa.[4] In the view of Lloyd George, it was "difficult and dangerous" to give a definition to this new "constitutional status," this Dominion status. According to Lloyd George, the Dominions themselves had been eager to avoid a rigid definition. They had felt that precise definitions were "not the way of the British constitution."[5] Lloyd George elaborated:

> Many of the [Dominion] Premiers delivered notable speeches in the course of the Conference, emphasizing the importance of not defining too precisely what the relations of the Dominions were with ourselves, what were their powers, and what was the limit of the power of the Crown. It is something that has never been defined by an Act of Parliament, even in this country, and yet it works perfectly.[6]

According to Wheare, what Lloyd George and the Dominion leaders were saying "was on the whole true."[7] For example, in 1901 the Royal Titles had been altered to

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[2] *See* Peter C. Oliver, The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand (2005) [hereinafter Oliver, The Constitution]. *See also* Peter C. Oliver, *Change in the Ultimate Rule of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents, and the Importance of Context*, 26 King's L.J. 367.

[3] United Kingdom, House of Commons, *Debates* (Dec. 14, 1921), vol. 149, cc 28 (https://api.parliament.uk/historic-hansard/commons/1921/dec/14/dominion-status#S5CV0149P0_19211214_HOC_43). For a roughly contemporaneous account of the history, law, and politics regarding the Dominions, *see* A. Berriedale Keith, The Governments of the British Empire (1929); A. Berriedale Keith, The Sovereignty of the British Dominions (1935) and A. Berriedale Keith, The Dominions as Sovereign States (1938). For a more recent account of the critical 1926–1931 period, *see* S. A. de Smith, The New Commonwealth and Its Constitutions ch. 1 (1964).

[4] K. C. Wheare, The Statute of Westminster and Dominion Status 2 (5th ed., 1953).

[5] *Debates, supra note* 3.

[6] *Id.*

[7] Wheare, *supra* note 4, at 22.

include the expression "the British Dominions beyond the Seas." That expression referred to British territories and possessions, whether self-governing or not. However, at the Colonial Conference of 1907, the self-governing territories argued that "self-governing Dominions" should be used to distinguish themselves from non-self-governing territories, and that phrase with that meaning appeared in UK legislation.[8] By the end of World War I, the usage had shifted for good, confirming the linkage between the word "Dominion" and the concept of self-governing status. The phrase "self-governing Dominions" began to give way to the single word "Dominions," "with the 'self-governing' understood."[9] A resolution of the Imperial War Conference in 1917 referred to "full recognition of the Dominions as autonomous nations of an Imperial Commonwealth."[10]

Without a more precise definition of the word "Dominion," politicians could simply point to *examples* of nations that had acquired the status. In 1921, Lloyd George could only explain himself by saying that "whatever measure of freedom Dominion status gives to Canada, Australia, New Zealand or South Africa, that will be extended to Ireland."[11]

In one sense, then, Dominion status is something that defies definition. It can only be illustrated. That is what I propose do in this article. I will summarize the gradual acquisition of self-government in New Zealand, Canada, and Australia, the three Dominions with which I am most familiar.

In another sense, however, if one were to *insist* on having a definition, it would be possible to point to the period 1926–1931. This is as close as we can come to a fixed definition or account of Dominion status (keeping in mind that by fixing Dominion status at that moment we are thereby losing sight of earlier senses of the term).

While most Dominion leaders were content to leave Dominion status undefined in 1921, General Smuts of South Africa disagreed. He called out for a careful restatement of Dominion status. As early as 1917, he had worried about the fact that, whatever the considerable freedom experienced by Dominions in practice, "in actual theory the status of the Dominions is of a subject character."[12] Smuts had unique reasons to be concerned with the tension between practice and theory. He had fought two elections in which South Africa's secession from the British Empire had been an issue, and he had twice attempted to explain to the electorate that South Africa was "no longer in the position of a subordinate British colony as . . . before."[13] In his view, his explanations would have been greatly facilitated by a clear statement of what Dominion status meant.

[8] *Id.*

[9] *Id.*

[10] W. H. Long & S. E. Baldwin, Extracts from Minutes of Proceedings Laid Before the Conference 5 (1917).

[11] *Debates, supra* note 3.

[12] Quoted in Wheare, *supra* note 4, at 23.

[13] Quoted in Wheare, *supra* note 4, at 24. For a similar account of the reasons for Smuts's interventions, *see* N. Mansergh, The Commonwealth Experience, Vol. 1, The Durham Report to the Anglo-Irish Treaty 208–214 (1982).

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By 1926, the ground had shifted. South Africa was now represented by General Herzog, General Smuts's opponent in the earlier elections fought on the issue of secession. General Herzog arrived at the 1926 Imperial Conference set on advancing the secessionist cause. South Africa had in the meantime acquired an ally in the push for greater definitional certainty. Prime Minister W. L. M. King of Canada had recently experienced the full force of the uncertainties of British constitutional theory, having been refused a request to dissolve Parliament by the Governor-General, the sovereign's representative in Canada, Lord Byng. This incident, known as the King-Byng affair, threw up issues regarding, for instance, which ministers, UK or Canadian, should advise the Sovereign (or his/her representative).[14] Prime Minister King had fought and won an election on the issue of Canada's constitutional autonomy. He was now ready to join South Africa in a call to firm up Dominion status. Finally, in 1926, the Irish Free State was now a member of the class of Dominions. As we have seen, Ireland's status was linked in general terms to the other Dominions, and in particular to Canada's evolving relations to the Crown. That which concerned Canada concerned Ireland as well.[15]

We will return at a later point to 1926, but first I would like to take a few steps back in time in order to provide the necessary context for the Balfour Declaration and the Statute of Westminster, 1931. In the view of some constitutional commentators,[16] the status that the Dominions were seeking to achieve at that moment was connected to a status that American colonists had tried unsuccessfully to acquire 150 years earlier. It may be relevant, therefore, to have a look at those American constitutional demands.

The Dominions' position in 1926–1931 can only be understood relative to where they were before that moment. We have already seen that, according to one view, Dominion status was an evolving idea, based on the level of self-government or autonomy that the Dominions had achieved at any moment in time. According to that perspective, it is as important to understand the state of Dominion-Imperial relations in 1850, 1875, 1900, and 1925 as it is to know what was happening between 1926 and 1931. But even if one is of the view that Dominion status is quintessentially a matter of what was achieved in 1926–1931, then one needs to understand the *status quo ante*. Accordingly, that is where we will proceed, after looking at the American precedents.

3. The history and purpose of Dominion status

3.1. An American prelude

Although we are well aware of a shared Anglo-American common law heritage, regarding the law of contract for instance, we tend to think of the constitutional systems

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[14] *See* Wheare, *supra* note 4, at 25. *See also* W. J. Hudson & M. P. Sharp, Australian Independence: Colony to Reluctant Kingdom 89 (1988). On the King-Byng affair and its aftermath, *see* H. Blair Neatby, William Lyon Mackenzie King: 1924–1932: The Lonely Heights (1963).

[15] Wheare, *supra* note 4, at 26. *See also* United Kingdom, Inter-Imperial Relations Committee, *Imperial Conference 1926: Report, Proceedings and Memoranda, available at* https://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf [hereinafter *Imperial Conference 1926*].

[16] *See* W. P. M. Kennedy, Some Aspects of the Theories and Workings of Constitutional Law 59 (1932) discussed in text accompanying *infra* note 27.

in the British and American traditions as fairly distinct. The first is still based in the relative flexibility of sovereignty of Parliament and exceptional judicial review of legislation, whereas the second is the global model for a supreme, entrenched constitutional law and expansive judicial review. And yet, at one time these two constitutional systems were of course part of a single British Empire. In fact, the American colonies of the eighteenth century were at the heart of debates about the constitutional structure of the British Empire that would persist and re-emerge in new forms in the early twentieth century.

Where sovereignty of Parliament is concerned, we tend to think in terms set by Professor A. V. Dicey and others in the nineteenth century, whereby the sovereignty of the Parliament at Westminster was understood to be *unlimited* and *illimitable*. However the first of these descriptors—"unlimited"—was forcefully contested by the Americans in the eighteenth century, as we shall see in a moment. The second—"illimitable"—would be placed profoundly in doubt in the twentieth century, as Dominions and other former British colonies moved toward full independence. This is the subject of Sections 4 and 5 of this article.

In *The Constitutional Origins of the American Revolution*,[17] Jack P. Greene describes how the constitutional ideas regarding the British Empire were still very much in flux during the eighteenth century. Ideas of the pre-eminence of the sovereignty of the Imperial Parliament at Westminster were beginning to take shape in the wake of the seventeenth-century victories for parliamentary over Crown constitutional control, but they were in no way fixed. Accordingly, as the Westminster Parliament began in the middle of the eighteenth century to assert its authority over its American colonies (after years of virtual neglect),[18] its assertions of constitutional power were met by resistance in many forms, including innumerable political tracts which rejected the one-dimensional, hierarchical view favored in metropolitan Britain. Greene has studied these closely. The story that emerges is that in this Empire-wide context of constitutional ideas in flux, American ideas also evolved. It is possible to see at least three phases in those American colonial ideas, each building on and taking further the earlier phase. Before looking at the phases of intellectual resistance, it may be helpful to remind ourselves of the nature of the provocation on the British side of the war of ideas.

At the heart of this war of ideas was American resentment regarding interference by Britain in local affairs. British authorities initially took the view that American governors and other political institutions could have no more power than those given

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[17] J. P. Greene, The Constitutional Origins of the American Revolution (2011). For a more in-depth version of Greene's views, *see* J. P. Greene, Peripheries and Center: Constitutional Developments in the Extended Polities of the British Empire and the United States, 1607–1788 (1986).

[18] As W. P. M. Kennedy, *The Conception of the British Commonwealth*, [1924, April] Edinburgh Rev. 227, 229, explains, economic and military factors contributed to this greater British assertiveness toward its colonies. First, a mercantilist policy viewed colonies as resources which were available to feed the British economic machine. And second, with the end of the Seven Years' War, the British treasury was depleted and colonists were going to be asked to share the financial burdens that military success had produced. *See also* Kennedy, *supra* note 16, at 44.

to them by the Crown.[19] The colonies were, after all, British possessions in their view, and British instructions should therefore prevail. Americans, on the other hand, viewed their government as rooted in American soil and subject to no built-in limitation by British executive authority.

Consistent with the constitutional theory of the Glorious Revolution, British Crown (or executive) constitutional claims gave way to British *parliamentary* claims regarding the American colonies, including most notably the parliamentary claim to be able to tax the colonies. Americans were acutely aware that these parliamentary claims (as normal as they might seem to those of us convinced by later dogmas regarding Westminster parliamentary sovereignty) were highly unusual, practically speaking, because of many past years of parliamentary neglect of America, and constitutionally speaking, because they were devoid of any claim of right, especially in the case of taxation, which violated the ancient British idea of no taxation without representation.

Essentially what was going on was a clash of two equally coherent but entirely incompatible views of parliamentary sovereignty. The Americans took the view that the Crown, and later the Crown-in-Parliament, was subject to the common law and the many rights protected therein.[20] The British increasingly asserted that Parliament was supreme and omnicompetent, or, as Blackstone would state the matter in 1763, "what parliament doth no authority on earth can undo."[21] As the Canadian constitutional writer W. P. M. Kennedy rightly pointed out, whereas the British had a good claim as to the *legal* validity of their arguments, given the evolving constitutional jurisprudence in the latter part of the eighteenth century, the Americans had a strong claim in terms of *social* validity or legitimacy.[22] And the British were about to find out how far one can go when one is right in law but wrong regarding the views on the ground.

What then were the phases of the mid-eighteenth-century American response referred to earlier, and how might these be of interest in this study of Dominion status?

The first phase of the American response was to admit that American legislatures were subordinate to the Westminster Parliament but to insist that Parliament's powers stopped short of internal or domestic affairs such as taxation.[23]

19 Greene, *supra* note17, at 18, 27. At 29–30: "The [British] assumption . . . was, as one official phrased it early in the eighteenth century, that legislative authority in the colonies operated 'within the limits of the Governor's commission and Her Majesty's instructions.' In metropolitan theory, the constitutions of the royal colonies derived from the Crown's commissions to his governors. . . ." *See Opinion of William Rawlin*, *in* Opinions of Eminent Lawyers 376 (George Chalmers ed., 1972).

20 *See* Kennedy, *supra* note 16, at 38.

21 William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, Vol. I, 156 (1979).

22 Kennedy, *supra* note 16, at 45.

23 Greene, *supra* note 17, at 82. On the reasons for increased taxation (related to the expense of the Seven Years' War), *see* A. E. R. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 139 (1968). Taxation of course fell into a larger category which could be classified as "internal affairs." *See* B. Bailyn, The Ideological Origins of the American Revolution 213 (1967). Regarding taxation, *see, e.g.*, R. Bland, *Colonel Dismounted: Or the Rector Vindicated, in a Letter . . . Containing a Dissertation upon the Constitution of a Colony*, *in* Pamphlets of the American Revolution, 1750–1776, Vol. I, 320 (B. Bailyn & J. N. Garrett eds., 1965), as interpreted by Greene, *supra* note 17, at 82.

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The second phase was to deny any power of the Westminster Parliament to legislate for America, that is, to characterize American (and other) legislatures in the Empire as equal to the Westminster Parliament and united under the Crown,[24] leaving only external affairs to British control.

The final mid-eighteenth-century American phase was to retain the idea of co-ordinate legislatures (including the Westminster Parliament) under the Crown but to assert that local legislatures were even independent of Westminster laws regarding external affairs.[25] Allegiance to the Crown was a constant until 1776.[26] The difference of opinion arose as to the position, subordinate or equal, of colonial legislatures in relation to the British Parliament.

3.2. The relevance of this American prelude to later Imperial developments

The last two of these American phases are of particular interest as they articulated in eighteenth-century form the sort of vision that would be behind the formalization of Dominion status that occurred in 1926–1931. W. P. M. Kennedy was acutely aware of these similarities in the mid-1920s, and, according to his account of the matter, he made sure that the analogy was made known to those preparing for the 1926 Imperial Conference.[27] To make his point, Kennedy set out six quotations describing the relations between the various legal systems of the British Empire, waiting until the end to deliver the *coup de grace* by revealing the identities of the six speakers:

> [W]hat is this empire? I shall read you some descriptions:
>
> 1. "The colonies [are] coordinate members with each other and with Great Britain of an empire united by a common executive sovereign, but not united by a common legislative sovereign."
> 2. "The Britannic dominions constitute an imperial state consisting of many separate governments, in which no single part, though greater than any other part, is by that superiority entitled to make laws for the lesser part."

[24] *See* Greene, *supra* note 17, at 88–90, 92, and 123, for another account. The American colonies, according to this view, were constitutionally connected to "the king alone—and not to the king-in-Parliament." *Id.* at 89.

[25] *Id.* at 162–163. *See, e.g.*, J. Wilson, 'Consideration on the Nature and Extent of the Legislative Authority of the British Parliament,' *in* Collected Works of James Wilson, vol. I, 3–31 (K. L. Hall & M. D. Hall eds., 2007).

[26] As Kennedy, *supra* note 18, at 232, reminds us: "The first Continental Congress of 1774 pronounced its loyalty to the Crown, but it repudiated the claim of 'that nation' of England to possess an unqualified right to legislate for the colonies."

[27] Kennedy, *supra* note 16, at 59–60:

> I have already referred to my interest in the lawyers and theorists of the American revolution. The similarity between the political philosophy and that of the imperial conference of 1926 is not perhaps accidental. I think I am now betraying no confidence when I tell you that I was requested to prepare a memorandum a few months before the conference of 1926 assembled summing the constitutional and legal situation, and that the introduction of my memorandum proceeded along the lines of this lecture.

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3. "So many different governments perfectly independent of one another. This is the only clear idea of their real present situation. Their only bond of union is the King."
4. "All members of the British Empire are distinct states, independent of each other, but connected together under the same sovereign, in the right of the same crown."
5. "[The king is the] common sovereign, who is thereby made the central link, connecting the several parts of the empire."
6. "Autonomous communities within the British empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs though united by a common allegiance to the crown and freely associated as members of the British commonwealth."

> Here you have six statements, substantially the same, in which the theory of constitutional right—itself deduced from social facts—as against constitutional law is clearly laid down. The first five quotations are in order . . . from James Madison, Stephen Hopkins, Benjamin Franklin, James Wilson, Thomas Jefferson—the magnificent colonial ideals of 1766–76 to which I have referred as beating in vain against the iron bars of legality; the last . . . is from the imperial conference of 1926. Thus the wheel of empire has come full circle.[28]

While the British view of Empire was defeated in battle as far as the American colonies were concerned, the former view came to dominate the many remaining Imperial territories. British authorities did everything possible to root out unorthodox views which challenged the illimitable sovereignty of the Westminster Parliament. For example, in 1791, when Upper and Lower Canada were given representative institutions through the *Constitutional Act of 1791*, "the members of the legislature were for the first time in history compelled to take an oath which strengthened the power and authority of the parliament at Westminster as against royal allegiance."[29]

When in the nineteenth century colonial campaigners demanded responsible government, they were initially met with a refusal based, again, on the ruthless and rigid logic of unlimited and illimitable parliamentary sovereignty. As Kennedy described it:[30]

> [T]he monarch is advised by a cabinet in which the sovereign legislature of the empire at Westminster imposes confidence. How can another cabinet and that of a subordinate colonial legislature advise him? What if the advice differed? Sovereignty is indivisible.

28 *Id.* at 58–59. For more regarding some of these important American intellectuals and politicians, *see* The Papers of James Madison: 1751–1779 (William T. Hutchison & William M. E. Rachal eds., 1962); The Papers of Benjamin Franklin, vols. 11–14 (L. W. Labaree ed., 1967–1970); The Papers of Benjamin Franklin, vols. 15–23 (W. B. Willcox ed., 1972–1983); Collected Works of James Wilson, vol. I (K. L. Hall & M. D. Hall eds., 2007); The Papers of Thomas Jefferson: 1760–1776 (Julian P. Boyd ed., 1950).

29 Kennedy, *supra* note 16, at 51. Kennedy's point is presumably that it was the Westminster Parliament itself, through the *Constitutional Act, 1791*, that was dictating the terms on which the British subjects of Canada should relate to the British sovereign. *See* Constitutional Act, 1791, 31 Geo. III, c. 31, s. XXIX.

30 Kennedy, *supra* note 16, at 53.

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But revolution was averted at this time. Responsible government came to the colonies in spite of these objections. According to Kennedy's persuasive account, social facts won out over the orthodox legal logic. Kennedy attributed the change of heart to the passage from an economic policy of mercantilism to one of free trade and *laissez faire*.[31] Colonies were no longer so much possessions to be exploited as burdens to be "shaken off."[32]

In this sort of climate, greater autonomy was to be encouraged; however, the orthodoxy of Westminster parliamentary sovereignty was still very much in place. It became the means by which the new colonial constitutions would be enacted. And it is to that process to which we now turn.

3.3. How "self-governing" Dominion status was achieved (in constitutional terms)

New Zealand was, in 1852, the first to acquire a national constitution, although colonies in what were to become Canada and then Australia had, like their American counterparts, by this time already acquired constitutions and institutions.[33] And they were well on their way to achieving responsible government. For the purposes of this article, I will focus on the acquisition of national constitutions, though it will be important to remember that, in the case of Canada and Australia, smaller entities came together to achieve the status of nationhood with which we are now familiar.

(a) New Zealand

The process that culminated in the signing of the Treaty of Waitangi began in February 1840, initiated by the new Lieutenant Governor, William Hobson. On February 5–6, 1840, he convened an assembly of native chiefs and obtained signatures, at this stage from approximately fifty chiefs from the northern parts of New Zealand. Over the ensuing months, the signatures of other chiefs were sought and, by October 1840, when the Treaty was sent to Her Majesty Queen Victoria, over 500 chiefs had signed. The signed proclamation was then published on October 2, 1840. Hobson had in the meantime issued two proclamations, dated May 21, 1840, asserting British sovereignty over New Zealand. The first claimed sovereignty over the North Island as a result of the cession by North Island chiefs in the Treaty of Waitangi; the second claimed sovereignty over the South Island and other smaller islands by virtue of discovery and settlement.[34]

To complete the picture, in June 1840 the Legislative Council of New South Wales passed an Act extending its laws to New Zealand, and on August 7, 1840, the Imperial Parliament enacted the *New South Wales Continuance Act 1840* in which it provided for New Zealand eventually to be made a separate colony by Letters Patent. The Imperial Act also authorized the establishment of a Legislative Council in New Zealand

[31] *Id.* at 54.

[32] *Id.* at 55.

[33] This section draws on Oliver, The Constitution, *supra* note 2, ch. 2, and the sources identified there.

[34] In the *Māori Council* case in the 1980s two judges of the New Zealand Court of Appeal viewed the Hobson proclamation as definitive in establishing British sovereignty. New Zealand Māori Council v. Attorney-General [1987] 1 N.Z.L.R. 641, 671 and 690 (*per* Richardson and Somers, JJ).

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consisting of nominated members. Finally, on November 24, 1840, Hobson was, by Letters Patent, appointed *Governor* of New Zealand, and the new colony was officially proclaimed in existence as of May 3, 1841.

Had the legally recognized form of acquisition been cession, then New Zealand courts would have been obliged to recognize and apply *Māori* law, but there is scant evidence of this having occurred. In any event, it is somewhat unreal to apply standard colonial law and formal legal logic to this situation. Although British politicians in the 1830s and 1840s (the era of emancipation of slavery movements) were increasingly inclined (relatively speaking) to take note of indigenous populations, they were not as yet prepared to recognize communal or tribal customs as law, leaving the normal rules of cession free to compete against what they viewed as a legal void,[35] one which British law could conveniently fill.[36]

So either by a culturally skewed version of cession or simply by occupation and settlement, the New Zealand courts quickly confirmed that in their view English law applied from the creation of the colony. Any doubts on this score, and there could be many, were removed, at least in strict law, by enactment of the *English Laws Act 1858* (Imp.) which, as subsequently re-enacted in 1908, deemed the inheritance of English law to have dated from January 14, 1840, prior to the signing of the Treaty of Waitangi.[37]

Given the sort of executive-led constitutional beginnings that have been described, it is not surprising that New Zealanders (indigenous or settler) were not directly involved in the making of their constitutional texts. The first Constitution for New Zealand was the Letters Patent granted November 16, 1840, sometimes referred to as the Charter of 1840.[38] It was these Letters Patent that established an appointed Executive Council to advise Governor Hobson, and an appointed Legislative Assembly (of only six) rather than the representative assembly that would have been expected in a settled colony. (The Canadian colonies, for instance, had representative assemblies, and were at the time of New Zealand's birth rebelling to obtain not just representative but also *responsible* government.) A representative assembly would require new legislation from the Imperial Parliament.

Express Imperial legislative authorization came in the form of the *Constitution Act, 1846* (Imp.). The governor, Sir George Grey, was charged with bringing the new system into operation. Far from supporting the scheme, he petitioned the secretary of state in London for legislation suspending the 1846 Constitution, and this request was acceded to, with appropriate legislation following, all without a representative legislature being constituted.

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[35] *See, e.g.*, Wi Parata v. Bishop of Wellington (1877) 3 N.Z. Jur. (NS) 72, 77 (Prendergast, CJ): "On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. . . . Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition."

[36] *See further* Philip A. Joseph, Constitutional and Administrative Law in New Zealand 35–43 (3rd ed, 2007).

[37] *Id.* at 41.

[38] *Id.* at 103.

Representative government was eventually achieved with the enactment of the *New Zealand Constitution Act, 1852* (Imp.), until 1986 the key document in New Zealand's "unwritten" or "uncodified" Constitution. It created a General Assembly (later termed Parliament) whose constituent units were the governor, an appointed legislative council, and an elected House of Representatives. Initially, the 1852 Act was not open to amendment by ordinary legislative process. However, the *New Zealand Constitution Amendment Act, 1857* (Imp.) empowered the New Zealand General Assembly (or Parliament) to amend all but twenty-one of the sections of the 1852 Act. Joseph states that the 1857 amendments to the 1852 Act were in part responsible for the Constitution Act losing its special legal status.[39] From approximately that time, the New Zealand Constitution was said to be "unwritten," and similar in this respect to that of the United Kingdom.

(b) Canada

Canada was next to achieve a national constitution, in 1867, although its constituent parts had had representative institutions and constitutive documents for some time by then.[40] The official justification for the acquisition of British sovereignty, and therefore the mode of reception, differed in each case,[41] although the imposition of the ultimate sovereignty of the Imperial Parliament was the bottom line and end result in all cases.

The *British North America Act, 1867* (Imp.) (renamed the *Constitution Act, 1867* in 1982) was the product of three years of dedicated discussions involving political representatives in the British North American colonies. It created a federal country with four provinces—initially New Brunswick, Nova Scotia, Ontario, and Quebec—as its constituent federal parts. The details of these constitutional arrangements are of less interest to us here. A more pertinent question for our purposes was how the key constitutional document of this new nation came into existence, legally speaking. The Canadian people did not, in any strong sense, assent to the 1867 Act. Indigenous peoples in the (expanding) territory of Canada certainly did not consent either. What then is the official legal explanation for the validity of the Canadian Constitution and the creation of a new Canadian legal system?

The 1867 Act was enacted by the Imperial Parliament in Westminster. According to the rules of the Imperial legal system, of which the various parts of Canada had become a part, the Imperial Parliament at Westminster could legislate not just for the United Kingdom but also for the colonies. When it performed the latter function its enactments were known as Imperial statutes. The difference between Imperial statutes and received statutes may need further elaboration.

In Canada (Australia and New Zealand) there were effectively two classes of UK statutes in operation.[42] The first class was made up of statutes which had been enacted for UK purposes, but which became part of a colony's laws by way of reception, until

[39] *Id.* at 123.

[40] *See* W. P. M. Kennedy, The Constitution of Canada: An Introduction to Its Development and Law chs. V–XIX (2d ed., 1931).

[41] *See* P. W. Hogg, Constitutional Law of Canada ch. 2 (5th ed., 2007).

[42] *Id.*, ¶ 2–17.

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such time as the colonial legislature chose to repeal or amend such laws. The second class comprised statutes which had been expressly passed to deal with colonial affairs: Imperial statutes.[43] These statutes could not be amended by the colonial legislature, and the *British North America Act, 1867* was such a statute. As recently as 1865, the *Colonial Laws Validity Act*, itself an Imperial statute, had confirmed this arrangement, stating that colonial laws were void if they were repugnant to an Imperial statute (though not void if they were repugnant to a received statute or rule of the common law). We will have more to say about the *Colonial Laws Validity Act, 1865* in discussing Australian matters.

The concepts of Imperial statutes and repugnancy presented an odd picture in the context of emerging nationhood, whether in Canadian, Australian, or New Zealand circumstances. However, in the absence of the realistic capacity (New Zealand) or the political will to create a constitution in the American way (Canada) or the desire to sever the British connection (Australia), enactment of a constitution in the form of an Imperial statute was the only simple way of achieving a level of validity, supremacy, and entrenchment that was and is normally associated with constitutional texts. Therefore the *New Zealand Constitution Act, 1852*, the Canadian *Constitution Act, 1867*, and, later, the *Commonwealth of Australia Constitution Act, 1900*, as Imperial statutes, took precedence over incompatible domestic legislation.

In Canada, where no general constitutional amendment formula had been provided for in the 1867 Act, constitutional amendments had to be accomplished by resorting to the same procedure that enacted the Constitution initially, i.e. enactment of a statute by the Imperial Parliament. Whatever the true reasons for the absence of such a mechanism, it was clear that a range of legislative competence, most significantly the power to modify the 1867 Act, remained in the hands of the Imperial Parliament, subject to powerful emerging conventions regarding its use.[44] The events of 1867 did not alter the hierarchy of Imperial and colonial law that had been so recently confirmed and clarified by the *Colonial Laws Validity Act, 1865*.

(c) Australia

Australia was the last of the three countries to acquire national status and a national constitution. Presented with the examples of New Zealand and Canada, a brief introduction to Australian circumstances is fairly easily done.

As the nineteenth century wore on, each of the Australian colonies acquired bicameral legislatures along New Zealand, Canadian, and, indeed, British lines. Although these institutions were created, directly or indirectly, by the sovereign Imperial Parliament at Westminster, and were therefore hierarchically inferior to it, they came

43 *Id.*, ¶ 2-1: "They became law in the colony by their own terms, whether or not they were also in force in England (some were and some were not), and whether or not they were enacted before the date upon which the colony received English laws."

44 Oliver, The Constitution, *supra* note 2, ch. 5.

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to be seen as omnicompetent legislatures in their own right, in the image of the body that created them: "omnicompetent," that is, within the limits set out by Imperial law.

What were the limits set out by Imperial law? In the middle of the nineteenth century, a particularly single-minded judge in South Australia, Benjamin Boothby,[45] had insisted that the laws of a colonial legislature had to be consistent not only with Imperial statute law but also with English common law.[46] Relief from Boothby's reign of legal uncertainty came in the form of the *Colonial Laws Validity Act, 1865* (Imp.) which was noted in the briefest terms earlier. The 1865 Imperial Act made it clear that statutes passed by colonial legislatures could override received British statutes and common law. However, it also made it clear that such legislatures could *not* enact laws that were repugnant to (i.e. inconsistent with) Imperial statutes, defined in section 2 of the Act as those "made applicable to such Colony by . . . express Words or necessary Intendment." Examples of such Imperial statutes were the *New Zealand Constitution Act, 1852*, the Canadian *Constitution Act, 1867*, and the *Commonwealth of Australia Constitution Act, 1900*.

The hierarchical picture painted above is the formal, legal version. The way that it worked in practice became steadily more respectful of local concerns. While it remained true that the Westminster Parliament could in theory pass any sort of statute it wished, the emerging convention was that it would only legislate for the self-governing Dominions if they requested the legislation in question. It was the governments of Australian colonies, then, having produced a constitutional compromise for a new nation in Convention and having presented it to the people in these colonies for approval, that requested that the *Commonwealth of Australia Constitution Act 1900* be enacted as a statute of the Imperial Parliament, thereby granting it supreme status in Australia.

3.4 The constitutional status of Australia, Canada, and New Zealand prior to 1931

(a) Repugnancy

In order to understand Dominion status in 1926–1931, it is essential to understand what came immediately before. We have already seen that by virtue of the subordinate status, in formal legal terms, of their central constitutional texts, and given the continued force of the doctrine of repugnancy under the *Colonial Laws Validity Act, 1865*, Dominions were still clearly parts of an overarching and all-embracing Imperial legal system in which the legislative will of the Imperial Parliament would always prevail, at least as a formal legal matter.

[45] A. Castles, *The Reception and Status of English Law in Australia*, 2 Adelaide L. Rev. 1, 23 (1963), quotes Boothby's biographer, by way of partial defense of his subject, as follows: "His learning, if it was neither as deep as a well, nor as wide as a Church door, was at least as extensive as that of the average barrister who was a candidate for a colonial judgeship."

[46] Joined by his colleague Justice Gwynne, though often opposed by Chief Justice Hanson, Justice Boothby obstructed the initiatives of the South Australia Legislature off and on for a period of ten years. As quoted by Castles, *id.* at 24–25, Governor Daly of South Australia wrote despairingly to the British government in 1865 to the effect that "no one can tell under what laws he is living or what will, in any given instance, be the decision of the Supreme Court."

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It was less controversial that the rules of the Imperial legal system set out in the *Colonial Laws Validity Act, 1865* should apply to New Zealand. After all, its key constitutional texts were enacted by the Imperial Parliament *prior* to the 1865 Act. However the Canadian *Constitution Act, 1867* and the *Commonwealth of Australia Constitution Act, 1900* were both *subsequent* Acts of that same Parliament, and one might therefore have expected the doctrine of implied repeal to apply to the 1865 Act, thereby eliminating the rule regarding repugnancy set out therein. In Canada's case, the reason for a continuing repugnancy rule was relatively clear. Section 129 of the *Constitution Act, 1867* provided that pre-Confederation laws that were in force in the uniting provinces remained in force, and it gave the legislature with the appropriate jurisdiction (under the new federal division of powers) the ability to repeal, abolish, or alter such laws. However, the same section protected from such repeal, abolition, or alteration such laws "as are enacted by or exist under Acts of Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland."[47] The paramountcy of Imperial statutes, and thus the doctrine of repugnancy, was thereby preserved in Canada.[48]

The matter was potentially more complicated in the case of Australia. Again, the issue arose because the enactment of the main constitutional text, the *Commonwealth of Australia Constitution Act, 1900,* was enacted subsequent to the *Colonial Laws Validity Act, 1865*. Consequently, it was possible to argue that because the 1900 Act of the Imperial Parliament could be said to have impliedly repealed the 1865 Act, the Commonwealth was unconstrained even by inconsistent Imperial statutes. In *Union Steamship Co. of New Zealand Ltd. v. Commonwealth*,[49] the High Court of Australia held that the repugnancy doctrine continued to apply to the Commonwealth.[50] The Australian delegates had apparently made assurances to this effect to the British government prior to the creation of the Commonwealth.[51]

Besides the doctrine of repugnancy, which is clearly of central importance in this article, the Dominions were subject to further limitations in the early stages of their constitutional development.

(b) Extraterritoriality

Leaving the doctrine of repugnancy first and foremost, the second was the doctrine of extraterritoriality, according to which legislation was invalid unless it had a sufficient connection to the geographical area of the legislating colony. As one Australian textbook has pointed out,[52] a more extreme version of this doctrine was that invalidity

47 Hogg, *supra* note 41, ¶ 3–4.

48 Taken literally, section 129 could have denied Canadian legislatures the power to amend, alter, or repeal *any* British statute, whether or not it was an Imperial statute. However, this interpretation was never adopted. *Id.*, ¶¶ 3-4n, 3-6n.

49 (1925) 36 C.L.R. 130.

50 This did not stop the High Court from going to considerable lengths to avoid a finding of inconsistency with Imperial law where it saw fit. *See, e.g.*, Commonwealth v. Limerick Steamship Co. Ltd. (1924) 35 C.L.R. 69, as explained by Commonwealth v. Kreglinger and Fernau Ltd. (1926) 37 C.L.R. 393. *See* T. Blackshield & G. Williams, Australian Constitutional Law and Theory 136–137 (2002).

51 *See* China Ocean Shipping Co. v. South Australia (1979) 145 C.L.R. 172, 209 (per Stephen, J).

52 *See* Blackshield & Williams, *supra* note 50, at 138.

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would arise if *any* part of the legislation in question operated outside that territory. The doctrine of extraterritoriality seemed to contradict the assumption that, as stated by the Privy Council in *Hodge v. The Queen*,[53] "within [its] limits of subjects and area the local legislature is supreme' with 'the same authority as the Imperial Parliament . . . would have had under like circumstances," i.e. "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow."[54] In British law, the "sovereignty" or "supremacy" of the British Parliament implied that its lawmaking power had no territorial limit. As far as the Australian Commonwealth Parliament was concerned, the grant of legislative power under section 51(xxix) of the Constitution seemed on its terms to require extraterritorial operation.[55] Not surprisingly, the doctrine of extraterritoriality had always been controversial.

(c) Reservation and disallowance

The third and fourth limitations on Dominions were, respectively, reservation and disallowance by the Crown under its prerogative. Provisions in all colonial constitutions provided for reservation and disallowance of legislation enacted by colonial legislatures. The governor might be instructed (or might choose), when presented with a colonial Bill, to "reserve" it for Her Majesty's pleasure. This meant that the bill in question would be referred to the British government to consider whether it should be allowed to become law. Each of the constitutions contained specific instances where powers of reservation of Bills for the Royal Assent were expressly set out.[56] In some cases reservation was obligatory (e.g. in New Zealand, sections 57, 65, 68, and 69 of the 1852 Act[57]). In all other matters, reservation of bills was discretionary. Where no Imperial interest was affected, the governor was entitled simply to take the advice of his ministers; however, in cases where such interests were concerned, reservation did occur, and bills were amended if the Imperial government voiced an objection.[58] In the case of Australia, a 1907 Imperial Act, the *Australian States Constitution Act, 1907*, set out classes of laws that were to be reserved.[59] Commonwealth conventions had in fact eliminated the practical effect of these powers of reservation before the Statute of Westminster, 1931.[60]

[53] (1883) 9 A.C. 117 (PC).

[54] Blackshield & Williams, *supra* note 50, at 132.

[55] Section 51(xxix), "external affairs," whereas other grants of power under the Australian Constitution could happily be interpreted as having only territorial application (e.g. "industrial disputes" in section 51(xxxv) not applying to disputes on Australian ships outside Australian waters).

[56] In Canada, sections 55 and 57 of the 1867 Act. Hogg, *supra* note 41, ¶ 3-2, notes that reservation occurred twenty-one times between 1867 and 1878 but never occurred subsequently (when royal instructions were changed). Of the twenty-one cases of reservation, six denials of Royal Assent followed. Section 90 of the 1867 Act provides for reservation and disallowance of provincial legislation, but the power is exercisable by the Canadian federal government, not by the UK government, so, as Hogg says, "no issue of Canadian independence is thereby raised."

[57] Joseph, supra note 36, at 111–12.

[58] *See id.* at 112.

[59] Australia, First Report of the Constitutional Commission, Vol. 1 ¶ 2.115 (1988).

[60] *E.g.*, the power of disallowance had been rendered inoperative as a result of the convention that refusal of assent to reserved Bills was conditional upon consultation with and consent by the Dominion concerned. *See* Wheare, *supra* note 4, at 123. Conventions in this spirit in relation to both disallowance and reservation were laid down at the Imperial Conference of 1926. *Id.* at 127–130.

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In addition, the Queen, i.e. the British government, could "disallow" legislation passed by colonial legislatures, usually within two years of its enactment.[61] Upon being disallowed an Act ceased to be a law. These powers of the British Crown (i.e. government) were exercised only in rare cases where Imperial or foreign interests were involved, such as laws which discriminated against the people of other countries.[62]

To summarize, then, the main indicators of the Dominions' subordinate status were the following: the doctrine of repugnancy as confirmed and clarified by the *Colonial Laws Validity Act, 1865*; the doctrine of extraterritoriality; and reservation and disallowance. New Zealand authors pre-1947 regularly added a further category, namely, certain inabilities regarding amendment of the Constitution, as set out in the *New Zealand Constitution Act, 1857*.[63] However, as R. O. McGechan has pointed out,[64] any inability regarding amendment of the Constitution was really a special case of the doctrine of repugnancy.

4. Dominion status, Balfour, and the Statute of Westminster, 1931

By the 1920s, following a world war in which Dominion armies had fought in separate units and Dominion leaders had separately signed the peace treaty at Versailles, there were increasing calls for an end to the ongoing vestiges of subordination to the Mother Country. Canada was most insistent, while New Zealand and Australia were fairly reluctant parties to this campaign to end subordination.[65] Other Dominions, such as South Africa and Ireland, were at least as keen as Canada, and so the campaign moved ahead.

Whether as protagonists or as passengers, the self-governing Dominions together sought to acquire the full attributes of nationhood. In order to deal with this issue and others, the Imperial Conference met in 1926 and agreed on what was to become known as the Balfour Declaration. The Balfour Declaration acknowledged that Great Britain and the Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[66] The understanding was that formerly "colonial" legislatures were no longer *subordinate* to the UK Parliament but rather *coordinate*. They, together with the United Kingdom, were equal under the Crown.

[61] First Report, *supra* note 59, ¶ 2.115.

[62] Hogg, *supra* note 41, ¶ 3-2, notes that in Canada's case disallowance occurred only once, in 1873.

[63] *See, e.g.*, A. E. Currie, New Zealand and the Statute of Westminster 1931, ¶ 12–5 (1944).

[64] *Status and Legislative Inability*, *in* New Zealand and the Statute of Westminster 65, 98 (J. C. Beaglehole ed., 1944).

[65] *See* Hudson & Sharp, *supra* note 14.

[66] Cmnd 2768 (1926).

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The problem with the forward-looking sentiments of the Balfour Declaration was that they were difficult to convert into legal form, and this for at least two reasons, one general, the other parochial.

Beginning with the more general reason, given the then-dominant understandings of parliamentary sovereignty, it was impossible to imagine any legal restraint on the sovereignty of the Westminster Parliament. Accordingly, the Statute of Westminster, 1931 in many ways sidestepped the issue. The preamble to the 1931 Statute set out the new position of the Dominions vis-à-vis the United Kingdom as recognized by the Balfour Declaration in 1926. The text of the Statute did not, however, terminate the ability of the United Kingdom to legislate for the Dominions; instead, it set out the newly restricted terms on which the UK Parliament could do so.[67] Section 4 of the statute provided as follows:

> 4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Subsequently, in the case of *British Coal Corporation v. The King*, Lord Sankey, by way of *obiter dictum*, interpreted this provision as if it kept alive the legal (if unlikely) possibility of unrequested and unconsented to Imperial legislation for a Dominion, insisting that "the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the *Statute*."[68]

In terms of the two most important indicia of subordination noted in a previous section—repugnancy and extraterritoriality—the 1931 Statute dealt with them in the following way: first, section 2 eliminated the doctrine of repugnancy by, in subsection (1), providing that the *Colonial Laws Validity Act, 1865* "shall no longer apply to any law made after the commencement of this Act by the Parliament of a Dominion," and in subsection (2), stating unequivocally that "no law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England." Together these provisions undid both the statutory and the common law bases for the doctrine of repugnancy.

Second, section 3 "declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation." For those countries to which the Statute of Westminster applied immediately, the doctrine ceased to have effect as of 1931. However, for countries like Australia and New Zealand which initially chose not to adopt the statute,[69] the Privy Council decision in *Croft v. Dunphy*[70] had considerable importance. This Canadian case saw Lord Macmillan state on behalf of the Board: "Once it is found that a particular topic of legislation is among those upon

[67] For analysis, *see* G. Marshall, Constitutional Conventions 188n (1984).

[68] [1935] A.C. 500, 520–522 (PC).

[69] The reasons for Australia and New Zealand not immediately adopting the Statute of Westminster are discussed in Oliver, The Constitution, *supra* note 2, at 188–191 and 216–220.

[70] [1933] A.C. 156.

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which the Dominion Parliament may competently legislate . . . their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State."[71] Despite the apparent clarity of this decision, Australian courts failed to apply it in its strongest sense, in part because the reasoning in the *Croft* case was thought to depend upon the Statute of Westminster which the Commonwealth did not adopt until 1942 (with effect from 1939), New Zealand until 1947, and which the Australian states never adopted. Aikman has noted that after New Zealand adopted the Statute of Westminster in 1947, the Court of Appeal of New Zealand took that as a cue to adopt the more generous interpretation of extraterritorial powers that had been approved by the Judicial Committee of the Privy Council in *Croft v. Dunphy*.[72]

What about the parochial reasons for the difficulty in converting the Balfour Declaration into law? It has already been noted that any inability to amend a constitution was really just a special case of the doctrine of repugnancy. However, it was, notably for Canada, a special case of a particularly intractable nature. Federal and provincial representatives had met in Canada as early as 1927 in order to devise a mutually satisfactory domestic amendment procedure, but no agreement had been reached by 1930–1931. Such an agreement was to prove highly elusive. As a result it was necessary to retain the possibility of recourse to the Parliament at Westminster in order to accomplish at any moment in the future amendments to the UK legislative texts which formed part of the Canadian Constitution. As far as Canada was concerned, the Statute of Westminster, 1931 appeared to maintain the *status quo ante*. After much discussion, a provision which eventually became section 7(1) of the 1931 Statute was approved.[73] This provision effectively left the UK Parliament at the apex of the Canadian legal system; and it would take over fifty years before Canadians could settle on a new procedure to amend the Constitution of Canada and repeal section 7(1).

Compared to Canada, South Africa, and the Irish Free State, New Zealand and Australia were, respectively, reluctant and less interested with respect to the Statute of Westminster. Both countries would probably have been content to see the new spirit of equality develop at the level of Commonwealth convention.[74] Accordingly, although they took part in the negotiations, they ensured that section 10(1) of the 1931 Statute provided that the key sections should not apply to them unless and until adopted.[75] Immediately upon enactment in 1931, however, section 8 of the Statute of Westminster applied to both Australia and New Zealand, providing that: "Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the

[71] *Id.* at 163.

[72] C. C. Aikman, *Parliament*, *in* New Zealand: The Development of Its Laws and Its Constitution 58 (2d ed., J. L. Robson ed., 1967).

[73] "7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder."'

[74] *E.g.*, we have already seen how convention brought reservation and disallowance powers under Dominion control. *See* Wheare, *supra* note 4, at 63.

[75] Section 10(2) went so far as to provide that the Parliaments of Australia and New Zealand could revoke any such adoption.

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Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.”

Australia’s federal nature was deemed to require special arrangements, if and when it adopted the 1931 Statute. Whereas section 7(2) ensured that the liberating effect of the Act extended to the Canadian Provinces, section 9 preserved the legal position which had applied to the Australian states prior to 1931. Adoption of the 1931 Statute meant adoption of section 9 which preserved this arrangement, so the Australian states’ legal position would not lose its subordinate character vis-à-vis Westminster until 1986.

New Zealand showed its complete preference for the status quo where the Statute of Westminster was concerned. Section 10 of the statute ensured that the sections 2, 3, 4, 5, and 6—the core provisions—would not have any effect in New Zealand until the New Zealand Parliament decided to adopt the Statute.

5. Conclusion

This article attempts to explain Dominion status by various means. First, it notes that the word “Dominion” has had different meanings over time, even though it is most closely associated with the status acquired by Australia, Canada, Ireland, Newfoundland, New Zealand, and South Africa in the years 1926 to 1931. Second, Dominion status in 1926–1931 is compared to the constitutional claims made a century and a half earlier by American colonists. Third, Dominion status as of 1931 is explained by way of comparison with what came before, paying particular attention to issues of repugnancy, extraterritoriality, reservation, and disallowance. And, finally, this article observes the importance of constitutional conventions throughout.

This account of Dominion status has encountered debates around the sovereignty or Parliament at a number of moments. In each case, it could be argued that competing coherent accounts of that sovereignty were at play, but only on some occasions did the resolution of the legal dispute squarely align well with contextual (or social, economic, political, and other) developments. The American colonists appealed to an older version of limited parliamentary sovereignty but were rebuffed and chose the path of revolution instead. The rest of the Empire lived under the regime of unlimited parliamentary sovereignty and the hierarchies which formed under it, but eventually the shifting social, economic, and political context asked questions of that version of sovereignty. Could it deal with responsible government in the colonies and Dominions? Could it deal with self-governing Dominions’ desire to have co-equal status with Britain under the Crown? Could it contemplate Westminster-generated independence legislation? In each case, constitutional dogmas were present, even prevalent, which might have prompted answers firmly in the negative. But, perhaps with the first, jarring American precedent in mind, in most cases parliamentary sovereignty adjusted to allow responsible government, increasing autonomy, Dominion status, and, finally, independence.

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