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"RIGHTS OF ENGLISHMEN" SINCE 1776: SOME ANGLO-AMERICAN NOTES*

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In commemorating the two hundred years since English colonists in the New World concluded that they could secure their "rights as Englishmen" only by breaking free from England itself, the most meaningful perspective will derive from an appraisal of both English and American constitutional evolution since then. For central to the crisis of 1774-1783 was the fact that the colonies and the mother country proceeded from fundamentally, irreconcilably opposed understandings of the British constitution itself. The American Revolution effected fundamental changes in England and in America, launching both nations upon new courses on which they have continued to the present. It should follow, therefore, that the most practical evaluation of the one course will depend upon a comparable evaluation of the other.

I. THE CONSTITUTIONAL IMPASSE OF 1776

A. *The Sea Change of Viewpoints*

For most of the 170 years from the drafting of the first charter of the Virginia Company of London in 1606 to the third

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and final Declaration of the Continental Congress in 1776, Englishmen on both sides of the Atlantic took for granted their respective theories of the constitutional status of British America. Lord Coke, who in 1606 had a hand in drafting the first charter of the Virginia Company of London, authored the opinion in *Calvin's Case*[1] two years later, which reaffirmed the feudal doctrine of prerogative *extra regnum*.[2] During this same period Coke was beginning to orient himself with the Parliamentary party attacking the domestic prerogative,[3] a dichotomy that characterized the nascent theory of an imperial constitution.[4] In retrospect, it was rather evident that few persons in England saw in the granting of the Virginia Charter an instrument for extending domestic constitutional rights beyond the seas.[5]

The Virginia settlers, again in restrospect, consistently argued that such extension was intended in the Charter's oft-cited words—"that all and everie the parsons being our subjects . . . shall have and enjoy all liberties, franchises and immunities within anie of our other dominions to all intents and purposes as if they had been abiding and borne within this our realme of *Englande* or anie other of our saide dominions."[6] Yet, a century-and-a-half after Coke, Sir William Blackstone would restate him unhesitatingly:

> Our American plantations [were] principally . . . obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allow-

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[1] 7 Co. Rep. 1a, 77 Eng. Rep. 377 (C.P. 1608).

[2] *Id.* at 15a-16a, 18a, 23b, 25a-28a, 77 Eng. Rep. at 394-96, 398, 405-06, 407-10.

[3] *See* W. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 166-67, 172-77, 182-85, 189-90, 195 (1965).

[4] On the constitutional background and formation of the First British Empire see generally 1 CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 143-70, 175-80 (J. Rose, A. Newton & E. Benians eds. 1929); D. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 293-364 (9th ed. 1969); A. KEITH, CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE 3-58 (1930); Holdsworth, *The Conventions of the Eighteenth Century Constitution*, 17 IOWA L. REV. 161 (1932); Holdsworth, *The House of Lords, 1689-1783* (pts. 1-2), 45 L.Q.R. 307, 432 (1929); Temperly, *Inner and Outer Cabinet and Privy Council, 1679-1783*, 27 ENG. HIST. REV. 682 (1912).

[5] *But see* Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1174-91 (1976) (Coke not so much a champion of Parliamentary supremacy specifically as of limited and principled government generally).

[6] THE THREE CHARTERS OF THE VIRGINIA COMPANY OF LONDON WITH SEVEN RELATED DOCUMENTS; 1606-1621, at 9 (1957).

> ance or authority there; *they being no part of the mother-country*, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament, though . . . not bound by any acts of parliament, unless particularly named.[7]

For Coke and Blackstone alike, the constitutional principle was corroborated in domestic as well as imperial law; if the authority was not appropriately to be found in the latter, manifest authority existed in the common law, which unvaryingly recognized the paramount jurisdiction of the Crown over subordinate charters granted to local entities.[8] It was scarcely to be suggested, therefore, that an overseas province differed significantly from such subordinate agencies within England itself. No *concerted* protest arose among colonial spokesmen upon passage of the Navigation Act of 1660[9] or upon establishment of the Lords Commissioners for Trade and Plantations (Board of Trade) in 1696.[10]

The constitution of the First British Empire, indeed, developed so laconically as virtually to confirm the saying about the empire itself—that it was acquired absentmindedly. The Act of Union in 1707,[11] indeed, offered such immediate and manifest economic advantages that the most articulate Scottish nationalists were momentarily mollified. With the advent of the House of Hanover, the first and second Georges devoted their primary attention to their Germanic hereditaments, leaving the development of both the union and the colonies to native English ministers, who established overseas administrations so diverse in character that no one could argue that any consistent, uniform imperial policy attested any guarantees to colonials.

Yet the colonials in the New World, at least, saw their legal status as readily distinguishable from the mercantilistic East India Company or Crown colonies like Jamaica, Barbados, and Bermuda. The recalling of charters, they later contended, might convert a province from a proprietary to a royal jurisdiction, but

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[7] 1 W. BLACKSTONE, COMMENTARIES *109 (emphasis supplied).

[8] On the imperial constitution, see generally note 3 *supra*; de Montpensier, *The British Doctrine of Parliamentary Sovereignty: A Critical Inquiry*, 26 LA. L. REV. 753 (1966).

[9] An Act for the Encouraging of Shipping and Navigation, 12 Car. 2, c.18 (1660); *see* G. BEER, THE COMMERCIAL POLICY OF ENGLAND TOWARD THE AMERICAN COLONIES, in 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 36-42 (No. 2, 1893).

[10] CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 268-99 (1929).

[11] The Union with Scotland Act, 6 Anne, c.11 (1707).

it did not extinguish the rights of which the charters themselves were merely declaratory; in such a climate of conviction, John Locke was invited to draft the Fundamental Constitutions of Carolina in 1669.[12] Moreover, in certain instances the local governments assumed the right to incorporate English law into their own legislative structure—thus the Massachusetts Body of Liberties of 1641.[13] William Penn, a prototype of the post-Restoration dissenter in England, commended Magna Carta to the settlers of his new proprietary[14] and further urged them that "if in the constitution by charter there is anything that jars, change it";[15] while in 1736 Sir John Randolph, newly elected Speaker of the House of Burgesses, was heard to declare to the new royal governor of Virginia that it was established custom for the King's representative to confirm all liberties and franchises theretofore enjoyed.[16]

In the long period of "benign neglect" under Robert Walpole's ministry, the American colonists were able to nurture these assumptions without disposition in England to dispute them. With victory in the Seven Years' (French and Indian) War, which brought an enormous new portion of the Western Hemisphere under the British flag, came the need to reorganize the empire, and leaders on both sides of the Atlantic awakened with a shock to the fundamental difference in viewpoints that had grown up unattended in the previous generations.

B. *The View From Westminster*

If in 1765 an Englishman had been asked to characterize the constitutional gains of the previous century's revolution, he would almost certainly have pointed to the Petition of Right of

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[12] THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA, in 7 OLD SOUTH LEAFLETS 393 (No. 172, undated).

[13] *A Coppie of the Liberties of the Massachusets Collonie in New England*, 8 COLL. MASS. HIST. SOC. 216 (3d ser. 1843). *See* Gray, *Remarks on the Early Laws of Massachusetts Bay*, *id.* 191. When in 1683 New York drafted a similar document, however, the Restoration government disallowed it, the King's advisers fearing that it infringed the royal prerogative. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, in MAGNA CARTA COMMEMORATION ESSAYS 180, 195 (H. Malden ed. 1917); *see* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 327-28 (1944).

[14] W. PENN, THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND (1687).

[15] W. SWINDLER, *supra* note 3, at 214 (quoting statement by Penn to freeholders of his proprietary on his second visit to Pennsylvania in 1699-1701).

[16] JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1734, 1736-1740, at 241-42 (H. McIlwaine ed. 1910).

1627,[17] the Habeas Corpus Acts of 1640[18] and 1679,[19] the Bill of Rights of 1688[20] a decade later, and the Act of Settlement of 1701[21]—all recognized elements of the English constitution. That is to say, these were rights of Englishmen *in England*; and when Englishmen in America subsequently claimed the benefit of these constitutional gains, parliamentary pamphleteers shrewdly pointed out that if the colonists expected such entitlements, which Parliament had enacted, they could not consistently deny parliamentary jurisdiction in other matters.[22]

Parliament itself, despite 1776 and 1783, never wavered in its assumption of its jurisdiction. Indeed, the arguments of Burke, Fox, and the two Pitts, sympathetic to the American cause though they were, proceeded from the same assumption of parliamentary authority vis-à-vis the empire, contending only that the policy for administering that authority was censurable. Whig criticism of the Stamp Act,[23] the cornerstone upon which a reorganized imperial structure was to be assembled, was certainly not framed in terms of ultra vires parliamentary legislation. The Grenville proposal of spring, 1764, had, in fact, been essentially an extension of the Molasses Act of 1732,[24] which the American colonists had met not with ideological arguments but with smuggling developed to a fine art.

Parliament, in the decade after the Seven Years' War, was in no mood to indulge overseas temperamentalism; it had to deal with a succession of cantankerous issues at home. The war had ended not only the era in which a global network of settlements could be administered with little involvement of the mother country but the era of post-Restoration establishment as well.[25]

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[17] 3 Car. 1, c.1 (1627).

[18] 16 Car. 1, c.10 (1640).

[19] 31 Car. 2, c.2 (1679).

[20] 1 W. & M. sess. 2, c.2 (1688).

[21] 12 & 13 Will. 3, c.2 (1700).

[22] *See, e.g.*, W. KNOX, THE CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES REVIEWED 6-7 (1769):

> If they fhould unhappily be able to demonftrate that the Colonies are no part of the Britifh ftate; that they are the king's dómain, and not annexed to the realm; that the inhabitants are not Britifh fubjects nor within the jurifdiction of parliament; they can have no title to fuch privileges and immunities as the people of England derive under acts of parliament, nor to any other of thofe rights which are peculiar to Britifh fubjects within the realm.

[23] 5 Geo. 3, c.12 (1765).

[24] 6 Geo. 2, c.13 (1732).

[25] *Cf.* D. KEIR, *supra* note 4, at 298-99; T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 502-29,

The winter of 1763-1764 had been the time of the John Wilkes furor and the famous Issue No. 45 of the *North Briton*;[26] from 1769 to 1782 a running debate over the Middlesex elections[27] would preoccupy both houses far more than the war in America. And in 1771 the Lord Mayor of London was arrested for contempt of Commons, with Chief Justice De Grey refusing to issue a prerogative writ of habeas corpus.[28] A legislative body that had been the dominant force in government for more than a century was in need of modernization—and once the American war was over, the movement for parliamentary reform began. Independence, like empire, was in some degree a product of absent-mindedness or diverted attention.

In any case, Westminster consistently viewed the imperial constitution in terms of overseas settlements' being responsible for their internal affairs while Parliament retained total power over matters in any way affecting the interests of the empire as a whole. The annoying business of the Stamp Act of 1765[29] was admittedly an impolitic use of parliamentary authority; but in repealing the act the following year,[30] the established view of the imperial constitution was strongly reaffirmed in the Declaratory Act:

> *WHEREAS several of the houses of representatives in his Majesty's colonies and plantations in America, have of late, against law, claimed to themselves, or to the general assemblies of the same, the sole and exclusive right of imposing duties and taxes upon his Majesty's subjects in the said colonies and plantations*, . . . be it declared . . . , That the said colonies and plantations in *America* have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of *Great Britain* . . . .[31]

585-665 (10th ed. 1943). *See also* J. CANNON, PARLIAMENTARY REFORM: 1640-1832, at 47-52 (1973).

[26] Wilkes was a rabble-rousing reformer who flouted tradition by directly attacking the Crown in his newspaper, the *North Briton*. Although he successfully pleaded Parliamentary privilege against a prosecution for criminal libel, The Case of John Wilkes esq. on a Habeas Corpus, 19 STATE TRIALS 981 (T. Howell ed. 1813), a majority of both Houses voted that privilege did not extend to libel and expelled him. *See* E. WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815, DOCUMENTS AND COMMENTARY 232-38 (1960).

[27] *Id.* 239-44.

[28] *Id.* 245-48.

[29] 5 Geo. 3, c.12 (1765).

[30] 6 Geo. 3, c.11 (1766).

[31] 6 Geo. 3, c.12 (1766).

Some saw the need for a reasonable accommodation. Thomas Pownall, who had studied the colonial mind closely during his tenure as war governor in the sixties, stressed that Britain's essential requirement from its empire was economic rather than political, that parliamentary taxation should be exclusively for imperial needs (a suggestion the next ministry sought to apply, but in vain), and that a single, unified ministry be given responsibility for colonial administration and resolution of disputes between the colonies and between the colonies and the mother country.[32] Time was to run out, however, before accommodation of any sort could have a fair chance.

C. *The View From the Colonies*

The Resolutions of the Stamp Act Congress of 1765 articulated the now classic assumptions of the American settlers —"That his Majesty's Liege Subjects in these Colonies, are intitled to all the inherent Rights and Liberties of his Natural born Subjects, within the Kingdom of *Great-Britain*" and "That it is inseparably essential to the Freedom of a People, and the undoubted Right of Englishmen, that no Taxes be imposed on them, but with their own Consent, given personally, or by their Representatives."[33] For the next ten years, this unilateral exposition of English constitutional law (which was also substantially inaccurate[34]) would be repeated and belabored by the colonists. In 1768 the Massachusetts General Court remonstrated in a letter to the Earl of Sherburne that "the constitution of Great Britain is the common right of all British subjects,"[35] a position asserted three years earlier in Patrick Henry's Stamp Act Resolutions before the Virginia House of Burgesses.[36]

By the time of the First Continental Congress in 1774, therefore, it required little clairvoyance to perceive that the par-

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[32] T. POWNALL, THE ADMINISTRATION OF THE COLONIES 10-40 (4th ed. 1768).

[33] *The Declarations of the Stamp Act Congress* (1765), in SOURCES AND DOCUMENTS OF THE STAMP ACT CONGRESS 1764-1766, at 62-63 (E. Morgan ed. 1959).

[34] *Cf.* D. KEIR, *supra* note 4, at 352-54, 357-58; T. TASWELL-LANGMEAD, *supra* note 25, at 784-85. *See generally* MAN VERSUS SOCIETY IN EIGHTEENTH CENTURY BRITAIN: SIX POINTS OF VIEW (J. Clifford ed. 1968). *But see* Black, *supra* note 5, at 1158-74 (colonists may well have been wrong in construing their rights under royal charters and British common law but presented a strong case in terms of the evolutionary development of the British constitution toward dominion relationship with Great Britain).

[35] MASSACHUSETTS STATE PAPERS 137 (A. Bradford ed. 1818).

[36] JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 1761-1765, at lxiv-iv, 360 (J. Kennedy ed. 1907).

liamentary position in the Declaratory Act was irreconcilable with the Declaration and Resolves of that Congress. The latter instrument repeated much of what had been said by the Stamp Act Congress, and enlarged upon it: The first settlers came to the New World "entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England"; by emigration they did not divest themselves, nor could they be divested, of these rights; fundamental among these rights was representation in their own legislative assembly; and by the *ipse dixit* of such an assembly the colonists were "entitled to all the immunities and privileges granted & confirmed to them by royal charters, or secured by their several codes of provincial laws."[37]

When the Second Continental Congress received the North ministry's rebuff—predictable enough, given the constitutional viewpoint of Westminster—the Declaration of 1775, on the Causes and Necessity of Taking up Arms,[38] became the transition from 1774 to the final Declaration—that of Independence in 1776. The bill of particulars set out in the Declaration of 1776 was the final statement of the American view of the British constitution; how totally it failed to persuade the English public in general may be seen in the point-by-point refutation written that same year by a London barrister.

"He has refused his Assent to Laws," said the Declaration; the answer to this first charge was largely technical—assent per se is unnecessary, but the Crown might disallow colonial enactments contrary to imperial interests.[39] "He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained"; to which it was replied that suspension is essential to guard against the said conflicts.[40] "He has called together legislative bodies at places unusual, etc."; something, according to the writer, done only when circumstances threatened the orderly conduct of business in the customary site.[41] "He has made Judges dependent on his will alone"; a practice similar to this

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[37] 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 68-69 (W. Ford ed. 1904).

[38] 2 *Id.* 140-57 (1905).

[39] J. LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 13-15 (5th ed. 1776).

[40] *Id.* 16-22.

[41] *Id.* 29-31.

obtains in England, it was said.[42] "He has erected a multitude of New Offices"—a necessity for the enormous North American possessions that had fallen to the empire with the victory over France.[43] For the same reason, standing armies to protect the Indian-infested region were justified; quartering of troops in North America was less common than in Ireland; and the great issue of taxation without consent was rejected on the basis of precedents from the Long Parliament and the reigns of Charles II, William III, Anne and George I and II.[44]

With such a complete conflict of viewpoints, each side could only follow the course to which its own assumptions had committed it. The First British Empire (which would not survive the American Revolution) either had to prevail over the American viewpoint or to cut off the American possessions from its jurisdiction. The American colonists, if they persisted in their concept of the rights of Englishmen, could validate the concept only by becoming free to write those principles into their own fundamental law.

II. THE EMERGING COMMONWEALTHS

A. *American Constitutionalism of the 19th Century*

Two developments in particular attest to the determination of the Revolutionary era Americans to make good the claims to the legal heritage they had insisted upon in the pre-independence declarations. Both were initially and dramatically demonstrated in legislative actions in Virginia—in George Mason's Declaration of Rights, adopted in June, 1776, before the adoption of the new state constitution itself,[45] and in the statute noting the "reception" of the English common law, passed by the new state assembly in 1776.[46] The "reception" statute was

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[42] *Id.* 45-47; *cf.* Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1105-10 (1976).

[43] J. LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 48-50 (5th ed. 1776).

[44] *Id.* 51-54, 58-59, 64-70. In reply to the charge that the Crown had fomented "domestic insurrections" in the colonies (i.e., fomented slave rebellions), Lind asked, "Is it for *them* to fay, that it is tyranny to bid a flave be free? to bid him take courage, to rife and affift in reducing his tyrants to a due obedience to *law*?" *Id.* 107.

[45] 1 THE PAPERS OF GEORGE MASON: 1725-1792, at 274-91 (R. Rutland ed. 1970).

[46] Act of May, 1776, c. V, § 6, in 9 [Va.] Stat. at Large 127 (W. Hening ed. 1821). *See also* Smith, *supra* note 42, at 1110-11; Johnson, *John Jay: Lawyer in a Time of Transition*, 1764-1775, 124 U. PA. L. REV. 1260, 1264-65 (1976).

accompanied by another, continuing in force certain acts of Parliament that the "committee of revisors"—George Wythe, Thomas Jefferson, and Edmund Pendleton—had culled from the statutes of the realm.[47] Thus, in Virginia and a number of other states that drafted new constitutions and organized new legislatures, the common law and statutory benefits (which Parliament had consistently denied extended to the colonies in course) now became the basic frame of reference for the new governments.[48]

In several respects, this process of "reception" was to create problems for the new nation. To "receive" the common law as of a given date (for example, "the sixth year of the reign of James I") was to incorporate into the rules of decision of the jurisdiction many obsolescences such as the Rule in Shelley's Case.[49] It would require more than three-quarters of a century to excise this particular archaism, and the excision had to be made by legislative action.[50] This was only one of many elements of ancient property law that had to be dealt with in similar fashion in the course of the nineteenth century.[51]

The second major problem of "reception" was that it cut off American law from the benefits of the succession of parliamentary reforms of the English common law that took place half a century after independence, in the development of the Second British Empire.[52] The long, often contrived, rationale that American jurists had to develop to take advantage of the modernization of tort law in Lord Campbell's Act of 1846,[53] only belatedly ratified by some American legislatures,[54] demonstrates the problem.

On the other hand, constitutional development among the American states in the course of the nineteenth century seemed to vindicate the Jeffersonian axiom that each generation was

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[47] Act of October, 1776, c. ix, in 9 [Va.] Stat. at Large 175, 177 (W. Hening ed. 1821). The actual report was never formally accepted but was adopted piecemeal under the sponsorship of James Monroe. *See* 2 THE PAPERS OF THOMAS JEFFERSON 305-665 (J. Boyd ed. 1950).

[48] E. BROWN, BRITISH STATUTES IN AMERICAN LAW: 1776-1836, at 23-26 (1964).

[49] Shelley's case, 1 Co. Rep. 88b, 76 Eng. Rep. 199 (K.B. 1581).

[50] *See, e.g.*, [1849] VA. CODE tit. 33, c.116, § 11.

[51] *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-27 (1973). *See generally id.* 228-47.

[52] *Cf. id.* 96-98.

[53] The Fatal Accidents Act, 9 & 10 Vict., c.93 (1846).

[54] *See generally* L. FRIEDMAN, *supra* note 51, at 421-22.

entitled to its own revolution. The Northwest Ordinance of 1787,[55] that *beau geste* of the expiring Continental Congress, directed that prospective states in the territories take as their model the constitution and codes of one or another of the existing states. This not only perpetuated the problems of the "reception" statutes, but encouraged a tendency toward sameness among state constitutions. But the readiness of most states to scrap existing constitutions and draft new ones—even though the basic provisions remained essentially the same—did make possible the enlargement of such instruments (in itself a mixed blessing) to provide basic controls over new aspects of the growing political economy.

Thus, a wave of new constitution writing swept across many of the older, Atlantic seaboard states at the end of the first quarter of the nineteenth century. This wave emanated from several political epicenters—the effort in some states to broaden the franchise,[56] and the concern with the depredations of wildcat banking enterprises encouraged by visionary or predatory legislatures in others.[57] Some of the new constitutional articles reflected the western enthusiasm for the self-consciously styled "American system" of Henry Clay, and fastened upon some states a burden that the grandchildren of the convention delegates would still be struggling to discharge.[58] The mid-century saw new waves of constitution-making, stimulated by railroad-building and the rate-fixing that accompanied it.[59] The corruption of state and local government in the post-Civil War generation led to inclusion of vast amounts of restrictive language in the legislative and executive articles of many documents,[60] while the new states of the Far West introduced new ideas of riparian

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[55] An Ordinance for the government of the territory of the United States North West of the River Ohio, 1 Stat. 51 n.(a), in 32 JOURNALS OF THE CONTINENTAL CONGRESS 334-43 (R. Hill ed. 1936).

[56] *See, e.g.*, 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 327-28 (1974).

[57] ALA. CONST. art. 6, *Establishment of Banks* (1819), in 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 45-46 (W. Swindler ed. 1973).

[58] *See generally* Westin, *The Supreme Court, the Populist Movement, and the Campaign of 1896*, 15 J. POL. 3 (1953).

[59] *Cf.* ILL. CONST., *Municipal Subscriptions to Railroads or Private Corporations* (1870), in 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 307, 313 (W. Swindler ed. 1974): ("reflect[ing] the disillusionment of many Midwestern states with the high-pressure promotional tactics of railroad agents of the time").

[60] *Cf.* 1 *id.* 34-37, 85-88, 108-13 (legislative articles of the Alabama constitutions of 1819, 1867, and 1875, grew from 29 to 37 to 56 detailed sections).

rights,[61] women's suffrage,[62] and that panacea of the early Progressive Movement, the triad of initiative, referendum, and recall.[63]

The most fundamental of constitutional changes, however, was in the federal Constitution—the adoption of the fourteenth amendment in 1868. With the shifting of emphasis in judicial construction away from the conceded original purpose of the amendment (the guaranteeing of civil rights to the newly freed blacks[64]) to the jurisprudence of *laissez-faire* so congenial to the burgeoning free enterprise, interstate economy of the last half of the century,[65] American constitutional history was set on a course that did not waver until the depression of the 1930's.[66]

When, in the constitutional crisis of 1937,[67] doctrine shifted from *laissez-faire* to a broad concept of legislative power, the ultimate impact of the theory embodied in the fourteenth amendment became manifest. This was the unequivocal definition of dual citizenship[68] in each American citizen, which now awaited only the intellectual ingenuity of an activist Court, a quarter of a century later, to extend constitutional jurisdiction over the interests of national citizens through incorporation of most provisions of the Bill of Rights into the due process clause of the amendment.[69] By the end of the Warren Court, a unitary constitutionalism had been established in the United States on the eve of the bicentennial.

B. *British Constitutionalism in the 19th Century*

The reforms that began in Parliament after American independence—products of the end-of-the-century Enlightenment rather than of the late Revolution—were characterized by

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[61] CALIF. CONST. art. XIV (1879), in 1 *id.* 500-01.

[62] COLO. CONST. art. VII, § 2 (1876), in 2 *id.* 78, 94 (convention "evaded the issue . . . and passed it to the legislature").

[63] Arizona was not admitted to statehood until it agreed to guarantee judges against recall. 1 *id.* 298-99, 301-10.

[64] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67-72 (1873) (Miller, J.).

[65] *See generally* W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932, at 18-38 (1969).

[66] *See generally id.* 206-20, 223-51, 283-303.

[67] *See generally* W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968, at 3-116 (1970).

[68] *See generally* W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: A MODERN INTERPRETATION 233 (1974).

[69] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (White, J.).

alternating bold advances and withdrawals dictated by second thoughts. Fox's Libel Act of 1792[70] was counterbalanced by the Seditious Meetings and Assemblies Act of 1795;[71] and the far greater shock of the French Revolution hampered liberalizing movements in England for almost a generation. Yet the reactions to the Reign of Terror and the Napoleonic age that followed delayed rather than dissipated the inexorable pressure for democratization that culminated in the Reform Act of 1832.[72] With this legislation, half a century after the post-Restoration constitution had manifested itself bankrupt, the way was opened, in Dicey's classic analysis, for an accelerating control over government by a majority (middle class) of English society.[73]

Domestically, this was a prelude to successive statutory reforms in contract, property, and tort law in the 1840's and 1850's.[74] As for the imperial constitution, these changes in Great Britain created a parliamentary viewpoint more responsive to the agitation for the American theory of a right to self-government that had proved the fatal issue of 1776. Ironically enough, the reform of the imperial structure began in Canada as a result of the great exodus of Loyalists from the United States during and immediately after the Revolution. One constitutional historian has shrewdly described the situation:

> The Loyalists, while honourably distinguished by their fidelity to the Crown, were the heirs of the colonial tradition in which they had been nurtured, nor was it reasonable to expect them to accept an inferior constitutional status because their fidelity had led them into exile. . . . In 1784 these settlers petitioned for the establishment of representative institutions in Canada. In 1791 an Act was passed separating Upper Canada, with its mainly English population, from the mainly French Lower Canada, and setting up representative institutions in each . . . . Thus the British North American colonies all came to possess constitutions generally simi-

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[70] 32 Geo. 3, c.60 (1792).

[71] 36 Geo. 3, c.8 (1795).

[72] 2 Will. 4, c.45 (1832). *See generally* 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 155-308 (A. Goodhart & H. Hanbury eds. 1952).

[73] *See generally* A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 62-301 (1905).

[74] 9 & 10 Vict. c.93 (1846). *See generally* 15 W. HOLDSWORTH, *supra* note 72, at 220-21.

lar to those existing during the earlier stages of colonial history.[75]

The British North America Act of 1867,[76] initiating the transformation of the Second Empire into the Third, introduced the dominion concept of imperial organization.[77] It is tempting, if not entirely accurate, to compare the Durham Report,[78] which led to the North America Act, with the Northwest Ordinance, which set the pattern for territorial administration and state-making across major portions of the United States. Although a special commission on Australian federation was appointed in 1870, clearly inspired by the Canadian experience, a Commonwealth Act was not agreed upon until 1900,[79] and this document followed the American constitutional pattern more closely than the 1867 act.[80] New Zealand's modern constitutional status was established in 1875, in the form of a unitary rather than a federal constitution,[81] and South Africa followed this example in the Union Act of 1909.[82]

A comparative analysis of American and British constitutional development in the century-and-a-half after independence shows a number of contrasts and similarities, both causes and effects of American expansion across a continent and of British administration around the world. One of the fundamental "rights of Englishmen" claimed from the seventeenth century revolution was legislative supremacy. In a unitary government, or even a United Kingdom, this doctrine was relatively simple for Parliament to maintain;[83] in a federal system, at least in the first half of the nineteenth century, the state constitutional practice of dividing or decentralizing the executive function achieved

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[75] D. KEIR, *supra* note 4, at 442-43.

[76] 30 & 31 Vict., c.3 (1867).

[77] *See* 14 W. HOLDSWORTH, *supra* note 72, at 266-69, 295-302. *See generally* O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 609-34 (5th ed. 1973).

[78] For an excellent discussion of the substance and background of Lord Durham's report and his tenure as Governor General of Canada, see 14 W. HOLDSWORTH, *supra* note 72, at 278-87.

[79] *See* D. KIER, *supra* note 4, at 550-51.

[80] *Cf.* Durack & Wilson, *Do We Need a New Constitution for the Commonwealth?* 41 AUST. L.J. 231 (1967); Moffat, *Philosophical Foundations of the Australian Constitutional Tradition*, 5 SYDNEY L. REV. 59, 77-83 (1965).

[81] New Zealand was governed by a "quasi-federal" constitution until, in 1875, the provinces were abolished pursuant to enabling legislation enacted seven years earlier. 14 W. HOLDSWORTH, *supra* note 72, at 316-18.

[82] D. KEIR, *supra* note 4, at 551.

[83] *See* Black, *supra* note 5, at 1168-74.

somewhat the same result.[84] The basic feature of parliamentary government has been the accountability of the executive branch to the legislative.[85] The American constitutional system, committed from the outset to a separation of powers, has not been able to assert accountability in the same degree or manner.[86] Congressional government, despite Woodrow Wilson's sanguine commentary,[87] has not produced a reassuring record of accomplishment, either in the Reconstruction Era or in the post-Watergate years. Indeed, it may be argued plausibly that a steadily strengthened presidential form of government, despite the divisive effect of the Nixon debacle, has provided the vital element of stability in twentieth century United States affairs.[88]

The duality of parliamentary functions in domestic and imperial affairs was uniquely effective in the nineteenth century world. The Imperial Conferences that began in 1894 enabled Britain to mobilize global efforts for the First World War with maximum efficiency;[89] and the major post-war conference in 1926 laid the blueprint for the Dominion organization of the Commonwealth of Nations which was certified in 1931 in the Statute of Westminster.[90] With the 1926 Imperial Conference, indeed, the rights of local government that Americans had insisted upon 150 years earlier became the general rule. Since 1931, and particularly since World War II, the course of constitutionalism in the British sphere has been toward decentralization, while the course in the United States, since the Great Depression, has been toward centralization.

III. RETROSPECTIVE AND PROSPECTIVE

A. *"E Pluribus Unum" and "Ex Uno Plures"?*

After two centuries of change, the issues that separated Englishmen in the New World from Englishmen at home have

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[84] *Cf.* Swindler, *The Executive Power in State and Federal Constitutions,* 1 HASTINGS CONST. L.Q. 21, 22 (1974).

[85] *See generally* O. HOOD PHILLIPS, *supra* note 77, at 261-83.

[86] *See* Swindler, *Accountability: The Constitutional Goal,* 43 GEO. WASH. L. REV. 459 (1975).

[87] W. WILSON, CONGRESSIONAL GOVERNMENT 197 (1973): "Congress is fast becoming the governing body of the nation . . . ."

[88] *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1948, at 321-37, 353-64 (3d ed. 1948); T. SORENSEN, DECISION-MAKING IN THE WHITE HOUSE: THE OLIVE BRANCH OR THE ARROWS (1963).

[89] *See* D. KEIR, *supra* note 4, at 557-58.

[90] 22 & 23 Geo. 5, c.4 (1931); *See* D. KEIR, *supra* note 4, at 559-60.

undergone changes of their own. The Empire, despite Winston Churchill's fervent wartime rhetoric, did not last a thousand years—but men will indeed remember its finest hours. The "land of the free," for whose rebirth of freedom Abraham Lincoln called in the course of the American Civil War, began to fulfill that dream only a century later. In the twentieth century the United States has moved with inexorable logic toward a centralized political economy. The British Commonwealth, and the United Kingdom, have moved and continue to move toward "devolution."

The present American and British constitutional systems both must function in a world society that has moved from the individualism of the "bills of rights" of 1689 and 1791 to the collectivism of "human rights" (*Menschenrechte*) in the international law of 1976.[92] Because, in Locke's phrase, preservation of individual rights is the ultimate purpose for which governments are instituted,[93] the extent of their preservation in our day may be taken as the test of the surviving validity of the English and American constitutions; and, in the twentieth century these rights will best be preserved through preservation of collective human rights.

In both the English and American systems individualism to a degree has given way, as it has on the world scene, to collective security—in labor relations,[94] in social welfare,[95] in guaranteed opportunities for all citizens or subjects.[96] This transition has been characterized in American life by a shift toward "unitary federalism."[97] The results of British decentralization, when and as these may be carried to logical extremes, remain to be seen, influenced as they are by Scottish and Welsh nationalism.[98] American political acceptance of centralization under the New Deal compelled a judicial reorientation;[99] and a quarter of a

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[91] *See* 1 ROYAL COMMISSION ON THE CONSTITUTION: 1969-1973, at 165-66 (1973). *See generally id.* 165-363.

[92] *See* Swindler, *The Rights of Man: A Bicentennial Perspective*, in THE EVOLUTION OF ISSUES AND IDEAS IN AMERICA: 1776-1976 (B. Taylor ed. 1976) (forthcoming).

[93] J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT §§ 123-31 (1690), in J. LOCKE, TWO TREATISES OF GOVERNMENT 184-86 (T.Cook ed. 1947).

[94] *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970).

[95] *See, e.g.*, Social Security Act, 42 U.S.C. § 301 *et seq.* (1970).

[96] *See, e.g.*, Economic Opportunity Act of 1964, 42 U.S.C. § 2701 *et seq.* (1970).

[97] Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

[98] *See generally* 1 ROYAL COMMISSION ON THE CONSTITUTION: 1969-1973, at 21-45, 133-51 (1973); 2 *id.* 84-108 (dissenting proposal).

[99] *See generally* W. SWINDLER, *supra* note 67, at 3-116.

century later the Supreme Court showed every sign of being substantially ahead of the politicians in the drive toward centralization.[100] British political acceptance of the idea of decentralization—to the degree it is accepted—has been compelled by a realistic appraisal of the shifts in power, domestically and internationally, since the Second World War.

The American constitutional revolution that began in the New Deal era and climaxed in the years of the Warren Court[101] has been consolidated rather than repudiated by the Burger Court[102] and thus seems to have fixed the character of American life for the immediate future. The changes in British constitutional posture may presage another revolution, although its outcome is not yet predictable. In its approach to the matter of devolution, the Royal Commission on the Constitution took care to develop its recommendations within the historic framework of the Union and the Commonwealth:

> We have seen that one of the main causes of discontent with government is the centralisation—or overcentralisation as many see it—of power in London. One of our principal tasks is to consider the desirability and possible means of transferring the exercise of government power away from London and nearer to the people whose lives it affects. This transfer could take many different forms, depending upon the number and size of the geographical areas over which the transferred powers were to be exercised, the extent of those powers, the constitution of the bodies to which they were transferred and the relationship of those bodies to Parliament and the central government.[103]

At a time when the Nixon administration was making much of the idea of returning power to the states,[104] the United Kingdom was launched upon a national debate on a similar issue, dramatized in Scotland by the North Sea oil development and in

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[100] *See* Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970).

[101] *See generally* W. SWINDLER, *supra* note 67, at 215-353.

[102] *See* Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974).

[103] 1 ROYAL COMMISSION ON THE CONSTITUTION: 1969-1973, at 165 (1973). *See generally id.* 86-93; 2 *id.* 10-36 (dissenting views).

[104] *See, e.g.*, State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 *et seq.* (Supp. III, 1973).

Northern Ireland by the exacerbating hostilities between the Protestant and Roman Catholic populations. The Royal Commission had considered and rejected a complete return of sovereignty to the constituent parts of the United Kingdom (separatism), and had further determined that a federal system was not feasible.[105] It then proceeded to recommend specific aspects of legislative, executive, and administrative devolution that Parliament in some cases has taken under study and in other cases apparently has tabled.[106]

One of the major intellectual obstacles to such a fundamental shift in British constitutionalism is the reasonable concern over what, in the United Kingdom and elsewhere, is referred to as "entrenchment"—a crystallizing of law as distinguished from the flexibility of "conventions":[107] such "entrenchment" would require judicial review, which the British courts might be unable or unwilling to engage in, and which would, in any case, jeopardize the supremacy of Parliament and thus reduce the experimental flexibility that is the hallmark of the British system of "conventions."[108]

If these questions seem to Americans to suggest ready answers, one must be cautioned that the trend of British judicial doctrine for the past two centuries has been in the diametrically opposed direction. For one of the leading British students of constitutionalism, the solution would have to be an American-style "higher law" document:

> The solution is to bring into being a 'New' Parliament which would owe its existence to a Constitution *not enacted by itself*, from which it would derive both its powers and its limitations. . . . A Constitution limiting the powers of the 'New' Parliament . . . would be adopted by the 'Old' Parliament, and then submitted for adoption by the people in a referendum. The Old (unlimited) Parliament would be abolished, and it would be superseded by the New (limited) Parliament.[109]

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[105] *See* 1 ROYAL COMMISSION ON THE CONSTITUTION: 1969-1973, at 133-61 (1973).

[106] *See id.* 225-326.

[107] *See generally* O. HOOD PHILLIPS, *supra* note 77, at 77-91.

[108] *Cf.* Durack & Wilson, *supra* note 80.

[109] O. HOOD PHILLIPS, REFORM OF THE CONSTITUTION 156-57 (1970). For a Canadian debate on the same subject, see Tarnopolsky & Schmeiser, *Entrenchment of a Bill of Rights*, 33 SASK. L. REV. 247 (1968).

Before such a step is taken, if it ever is, the American experience with judicial review will merit careful study by the constitution-makers of the United Kingdom in the last quarter of the twentieth century. The striking fact, at the time of the bicentennial, is that American and British constitutional thought should evince such a serious interest in shifting poles.

B. *"L'Esprit des Constitutions"*

Such thinking is manifestly a response to the changing worldwide frames of reference, and for Britain has taken on added urgency in the past decade of agitation over relationships with, and currently involvement in, the European Economic Community.[110] Over the longer term, this change in worldwide frames of reference can be traced to the implications either of a world community or of a worldwide system of communities dating from the organization of the United Nations in 1945, itself the culmination of a search for collective security of nations and individuals which dated at least from the Treaty of Paris in 1856.[111] Essentially, the international quest has posed anomalies and conflicts for the traditions of both British and American constitutionalism.

The humanitarian objectives behind the First and Second Hague Conferences of 1899 and 1907, the abortive effort at international organization in the Covenant of the League of Nations in 1919, and the worldwide sense of outrage at the Nazi atrocities in World War II which led both to the United Nations Charter and to the Universal Declaration of Human Rights, presented British and American constitutional law with hard choices. Both countries faced the prospect of having to harmonize the traditional rationale of individualism with developing notions of internationalism. In the United States this took the form of agitation for the so-called Bricker Amendment of the post-war decade.[112] In the British Commonwealth, it led to the agonizing disputes over the European Economic Community and the European Commission on Human Rights.[113]

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[110] *See generally* D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 226-29 (1973).

[111] For a text of the Treaty of Paris, see 114 THE CONSOLIDATED TREATY SERIES 410-20 (C. Parry ed. 1969).

[112] *See* N. DOWLING & G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 386-87 (7th ed. 1965) and authorities cited therein.

[113] *See generally* D. LASOK & J. BRIDGE, *supra* note 110, at 226-29.

For a quarter of a century after World War II, the pressure for international commitments mounted. In 1952 the United Nations drafted the Convention on the Political Rights of Women.[114] In 1960 came the Declaration on the Granting of Independence to Colonial Countries and Peoples;[115] in 1963, the Declaration on the Elimination of All Forms of Racial Discrimination;[116] and in 1966, the International Covenant on Economic, Social and Cultural Rights.[117] Because almost all of these documents purportedly articulated the ideals of liberal political and constitutional thought everywhere, the pressure upon individualistic traditions to conform was applied by what one writer calls the "external constituency," adding,

> It happens to be the case that the status quo powers, not being able to identify sufficiently with the victims . . . , are also not willing to make the kind of commitment that is needed to make those claims effectively realized, and therefore, it means acquiescing in the suppression of these rights in those countries.[118]

Thus confronted with internal pressures for localizing the power of domestic government and external pressures in favor of collective security *and liability* for individual and institutional rights, Anglo-American constitutional practice faces a frame of reference substantially different from what it has known in the past two centuries. The cold war between liberalism and totalitarianism, complicated by the emergence of a powerful "third world" with objectives of its own, has little to offer or learn from guidelines of this past. The values that seemed self-evident in 1689, 1776, and 1787 must be restated, if not accommodated with broader demands of world society in the last quarter of the twentieth century.

Such an accommodation or restatement requires considering whether the fundamental assumptions of the English and

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[114] *See* UNITED NATIONS, OFFICE OF PUBLIC INFORMATION, EVERYMAN'S UNITED NATIONS 365 (8th ed. 1968). *See generally id.* 364-69.

[115] *See id.* 397. *See generally id.* 396-426.

[116] *See id.* 359. *See generally id.* 358-59.

[117] *See id.* 138-39 (8th ed. supp. 1971).

[118] INTERNATIONAL PROTECTION OF HUMAN RIGHTS: BACKGROUND PAPERS AND PROCEEDINGS OF THE TWELFTH HAMMARSKJÖLD FORUM 46 (J. Carey ed. 1968) (statement of Professor Richard A. Falk).

American constitutions are logically and essentially relevant to the proliferating demands for human, economic, social, and cultural rights in the triangulated world power structure of 1976. A good case can be made that they are; if it could not, the developments of the past two hundred years might well have been in vain.