The British Constitution: From Revolution to Devolution

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Although the British Constitution, from a strictly legal viewpoint, does not appear to have undergone significant change during the past 200 years,¹ the government now functions in a far more democratic manner. This Article will survey the trend of democratization under the British Constitution by examining separately each of the elements of the constitutional system. These elements first will be considered in the context of the United Kingdom and its trend toward devolution of power. Finally, the same elements of British constitutional government will be considered in the context of the British Commonwealth and its gradual decentralization of power as new political relationships are developed with the states and territories that formerly constituted the British Empire.

THE UNITED KINGDOM

The Monarchy

No clearly defined watershed can be discerned in the distribution of power between the sovereign and the royal ministers. After the loss of the American colonies and the fall of Lord North’s ministry in 1782, the personal role of the monarch in British government steadily decreased, but the process was gradual and the product both of the inadequacies of reigning monarchs and of the growth of other sectors of the government. On the one hand were the illness of George III, at first spasmodic and later more or less continuous,² the profligate character of George IV,

¹Notable exceptions are statutes such as Representation of the People Acts and the Parliament Acts, with regard to the United Kingdom and, with regard to the Commonwealth, the Colonial Laws Validity Act 1865, 28 & 29 Vict., c. 63, and the Statute of Westminster 1931, 22 & 23 Geo. 5, c. 4. It should be noted that there are no particular documents embodying British constitutional law, but there are laws and conventions establishing the functions, composition, and interrelations of the elements of government, as well as the rights and duties of the governed.

²Medical opinion now is that George III was not insane but suffered from an acute intermittent form of porphyria, a rare metabolic disorder.
the irresolute personality of William IV, and the immaturity of Victoria when she came to the throne; on the other hand were the outstanding qualities of such Prime Ministers as the younger Pitt, Melbourne, and Peel, the growing cohesion of the Cabinet, the reform of the central departments and of the civil list, and the general ethos of the times. By the middle of the 19th century the power of the monarch was confined, in Bagehot's well-known words, to "the right to be consulted, the right to encourage, the right to warn." Yet the influence of a sovereign who has been on the throne for some years is far from negligible, for his experience will be wider and more continuous than that of most ministers. Victoria's interventions cannot be taken as a model for the 20th century, but George V's reign shows a number of examples of the influence that can be exerted by the throne. For example, the King brought the parties together in negotiating the Anglo-Irish Treaty of 1921, though he left the conduct of the negotiations entirely to the Prime Minister, Lloyd George, and refrained from any comment or intervention while the conference lasted.

The post of Private Secretary to the monarch has become a very important link with the Prime Minister and Cabinet, and also with Governors-General and Commonwealth Prime Ministers. In theory, the Home Secretary was the sovereign's personal secretary, but in 1805, when he was almost blind and could no longer write his letters, George III appointed Sir Herbert Taylor to be his personal secretary, and since the death of the Prince Consort in 1861 that office has been institutionalized. The sovereign's Private Secretary, who now is sworn of the Privy Council, informally seeks information and advice from various sources—ministers, Opposition leaders, elder statesmen, and senior officials—and then briefs the sovereign. Occasions such as the abdication of Edward VIII in 1936, and the choice of Baldwin rather than Lord Curzon as Prime Minister in 1923, demanded from the King's Private Secretary the utmost tact and delicacy of judgment.

The Cabinet

George III, during the earlier part of his reign, still could hold a personal ascendancy by trading on the lack of political unity among his

6. For discussions and documents relating to the Cabinet, see R. Crossman, Inside View
ministers, by manipulating the two Houses, and by making use of "honorary" members of the Cabinet. During his reign, however, the Cabinet established the right to consider matters without reference from the King. The normal course had been for departmental matters to go from the minister concerned, to the King, and then to the Cabinet only if the King so willed. It came to be recognized, however, that even if the King did not have a duty to consult the Cabinet, he nevertheless generally was expected to do so. The King consulted the ministers individually in the closet, but they could agree beforehand in the anteroom upon what they would say. When the members of Cabinet were all of one party, they sometimes met as party leaders rather than as the King's advisers; this paved the way for the Cabinet to become the general initiator of policy. The absence of the King from meetings of the Cabinet, which had become usual after the accession of George I, was a significant factor in the development of Cabinet government.

Cabinet unity, one aspect of the collective responsibility of ministers, grew with the development of political parties and party discipline in the House of Commons. Nonetheless, a Cabinet sometimes has left a question undecided, so that ministers were not committed to a particular policy. This happened, for example, with Catholic emancipation under Lord Liverpool's ministry, with the introduction of voting by ballot, with the extension of the franchise in 1873, and with women's suffrage. The "agreement to differ" in 1932 was remarkable because four Liberals in a predominantly Conservative coalition government were left free to disagree publicly on the vital financial policy of the government, but the experiment was unsuccessful and the four Liberals resigned after a few months. Remarkable, too, was the arrangement announced by Mr. Wilson in the House of Commons early in 1975 that, though the considered policy of the government was that the United Kingdom should remain in the European Community on the "renegotiated" terms and that this should be supported in the forthcoming referendum, dissenting ministers (including about one-third of the Cabinet) should be free to speak and vote outside the House against membership in the European Economic Community.

At the time of American independence, though ministers could not stay long in office if the Commons disapproved, they were chosen by

the King. Not until Victoria's reign did the Commons have the effective power to veto the appointment of a minister. The last dismissal of a minister by the sovereign was in 1834 when Melbourne was forced to resign,7 and the last occasion on which a sovereign successfully opposed appointment to office was in 1892 when Victoria, on personal grounds, refused to accept either Sir Charles Dilke or Henry Labouchere.

All ministers are required by convention to sit in one or the other house so that their activities may be subject to parliamentary supervision. Because the House of Commons Disqualification Act 1975 limits the number of ministers who may sit in the Commons,8 some must be in the Lords, and the government in any event will want to be represented in the upper house. A modern ministry is represented in the upper house at least by the Lord Chancellor who presides but lacks the power of the Speaker of the Commons to control debate, by another senior minister as Leader of the House, and usually by a few junior ministers.

Perhaps the most interesting change in the Cabinet is the development of the committee system, which has improved the efficiency of the Cabinet and thus allowed an increase in its workload. Committees of the Cabinet were set up ad hoc in the 19th century to expedite government business, as was done during the Crimean War. The first standing committee was the Committee of Imperial Defense set up by Balfour in 1903. During World War I, Asquith and Lloyd George established a large number of committees, and, during World War II, Churchill did so more systematically. Between the wars, committees came and went, with an average of 20 ad hoc committees existing at any one time. Attlee was the first Prime Minister to have a permanent committee structure in peacetime, and the pattern of ad hoc committees existing alongside standing committees has continued since. Some committees are chaired by the Prime Minister, and some by other ministers, but the membership and terms of reference of all these bodies are at the discretion of the Prime Minister. To preserve the principle of Cabinet unity and collective responsibility, details usually are not made public during the lifetime of a government.9

7. Melbourne, however, returned to office for 6 years more after a dissolution granted to Peel.
9. Sometimes the term "Inner Cabinet" is applied to meetings of small informal groups of the Prime Minister and his Cabinet confidants, but such meetings are probably too amorphous to be regarded as forming a body as definite as an Inner Cabinet.
The desultory practice, under the Hanoverians, of keeping Cabinet minutes lapsed until World War I. Throughout the 19th century the sovereign was kept informed of Cabinet conclusions in a confidential letter written in the Prime Minister's own hand, while the other ministers were expected to remember what was decided and to carry out those decisions in their departments. Lloyd George introduced a Cabinet Secretariat in 1916, and since then, minutes of Cabinet meetings have been sent to the Sovereign and circulated to Cabinet members. The Secretary to the Cabinet, who is sworn of the Privy Council, acts as Principal Private Secretary to the Prime Minister.

The Prime Minister

The appointment of the younger Pitt as First Lord of the Treasury in 1783 may be said to mark the emergence of the modern Prime Minister. Pitt, who held the chief office for the next 17 years and again from 1804 to 1806, expressed the opinion that it was absolutely necessary that there should be an avowed and real minister having the major influence in the council and the principal place in the confidence of the King. That power, he said, must rest in the person generally called the First Minister, and that minister ought to be the person at the head of the finances. The position was brought about by a combination of factors: possession of the King's confidence, preeminent personality, patronage as First Lord of the Treasury, and above all, control of the Commons, which, with the development of the party system, usually involved leadership of the largest party. The authority of the Prime Minister was established firmly by the late 19th century through the outstanding personalities of Disraeli and Gladstone.

The Prime Minister now invariably takes the office of First Lord of the Treasury, which places him technically at the head of the most important department of state, yet he has only nominal departmental duties because the working head of the Treasury is the Chancellor of the Exchequer. In the 18th and early 19th centuries, before the reform of

10. For discussions of the office of Prime Minister, see The British Prime Minister (A. King ed. 1969); B. Carter, The Office of Prime Minister (1956); W. Ivor Jennings, supra note 6; J. Mackintosh, supra note 6; P. Gordon Walker, supra note 6.

11. E. Neville Williams, supra note 6, at 132.

12. The Ministerial and other Salaries Act 1975, c. 27, fixes a salary for the person who is Prime Minister and First Lord of the Treasury.
the civil service and the parliamentary franchise, the First Lord of the Treasury exercised a very extensive patronage and consequently could control departmental appointments; this helped him to obtain a majority in the Commons for his party. The Prime Minister now is head of the Civil Service Department and must approve the most senior civil service appointments.

The chief functions of a modern Prime Minister are to form a ministry and to choose and preside over the Cabinet. He is the main channel of communication between the Cabinet and the sovereign. He is the leader of his party and is primarily responsible for the organization of House of Commons business, even though this work is delegated to another minister as Leader of the House. Communicating directly with the other Commonwealth Prime Ministers, he presides over their London meetings. The Cabinet Secretariat is under his control, and not only is he briefed by the Secretary to the Cabinet, but he also can require briefings from the Permanent Secretaries of the various departments.

Although in the present century the sovereign on several occasions has been faced with a personal, though limited, choice of Prime Minister, in each instance the Prime Minister was resigning for reasons of health rather than for political reasons, and there was no question of a change of the party in power. With the development of the party system, the sovereign’s choice of Prime Minister has become a mere formality in the typical case. Thus in 1855 Victoria, who preferred Lord Derby, was constrained to appoint Lord Palmerston, and in 1880 she reluctantly appointed Gladstone, to whom she was antipathetic, when she would have preferred Hartington. If the government is defeated at a general election, the Prime Minister and the other ministers resign immediately,

13. The Civil Service Commission was established in 1855, following the Trevelyan-Northcote report on conditions in the civil service, which advocated open competition in place of nepotism and patronage. In 1870 the principle of open competition by written examination was applied to all entrants to the home civil service. The Commission makes regulations, subject to ministry approval, concerning the qualifications for appointment to civil service posts.

14. For example, George V and Baldwin in 1923, and the present Queen and Harold MacMillan in 1957.

15. Harold Wilson’s notice to the Queen in March, 1976, that he intended to retire on personal grounds, and the public arrangements made for the governing parliamentary Labor party to elect a new leader who would presumably be appointed Prime Minister, marked an entirely new departure.

16. Palmerston was a nonrepresentative Irish peer who sat in the Commons.

17. Later 8th Duke of Devonshire.
and the sovereign, on the advice of the outgoing Prime Minister, sends for the Leader of the Opposition. In the last century, the Prime Minister sometimes waited until he met Parliament before resigning, and in 1873, Disraeli, the Opposition leader, declined to accept office when given the opportunity because he thought Gladstone's position would be further damaged if he remained in office a little longer.

It has been suggested that since World War II, if not before, Britain has had a system of "prime ministerial government" rather than of "cabinet government," due to the predominance of the Prime Minister over his Cabinet. The Prime Minister chooses the other ministers, decides which of them shall be in the Cabinet, and can require their resignations. Policy is initiated and many decisions are made by the Prime Minister outside the Cabinet. He is the political master of the most influential civil servants, personifies the government in the eyes of the public, plays a special role in foreign and Commonwealth affairs, and above all, has the power of advising a dissolution of Parliament. On the other hand his choices of people and measures are limited by the exigencies of party politics. He is limited also because all important matters, including those requiring legislation, must be approved by the Cabinet. Furthermore, much depends on the respective personalities of the Prime Minister and his colleagues. The correct conclusion is that even if the Prime Minister is more powerful than most combinations of ministers, he usually is less powerful than the Cabinet collectively. Mr. Wilson, for example, saw his role as that of an executive chairman; according to him, power still lies in the Cabinet in Parliament.

Government and Parliament¹⁸

Because of the gradual growth of constitutional usages, the trend toward greater democracy has been apparent in the relationship between the ministers and Parliament. Most important among these conventions are the collective responsibility of the Cabinet, the individual responsibility of ministers, and the power of the Prime Minister to advise the sovereign to dissolve Parliament.

The collective responsibility of the government to the House of Commons now means that the whole ministry resigns with the Prime Minister if the government party loses its majority of seats at a general election.

¹⁸. For discussions of government and parliament, see H. HANSHAM, supra note 6; W. IVOR JENNINGS, supra note 6.
If the government is defeated in the Commons on a major matter of policy or on any motion that the Prime Minister regards as a question of confidence, an event that because of party discipline is very rare when the government has a party majority in the House, it either resigns or, more likely, asks for a dissolution. Gladstone's government was defeated on the budget in 1885 and resigned; the following year it was defeated on an Irish Home Rule bill\(^\text{19}\) and asked for a dissolution. The last occasion on which a government was constrained to resign after a defeat in the House of Commons was in 1895, when Lord Rosebery's ministry was censured for the inadequate supply of cordite to the army. Mr. Wilson's government was defeated by one vote in 1970 on a clause of a bill to give power to the Commercial Court to sit in private, but there was no question of resignation or dissolution; between January and March, 1976, his government, with a party majority of four, was defeated three times in the Commons.\(^\text{20}\) Two general elections, however, had been held in 1974, and because party funds were depleted, no one wanted another general election. A minority government, one whose party does not have an overall majority in the House of Commons, will not feel compelled to resign or dissolve unless defeated on a major issue.\(^\text{21}\)

Collective responsibility requires that if a minister disagrees with the policy of the Cabinet he must either resign,\(^\text{22}\) or if the matter is not fundamental or does not affect his department, make no public disclosure of his disagreement. The principle is not applied rigorously to ministers not in the Cabinet, for they often are not consulted on matters extraneous to their department; their responsibility is passive rather than active.

Individual responsibility means that a minister is accountable to the House of Commons for the conduct of his department, not only for his own acts and omissions, but also for his civil servants' misdeeds of which he knew or should have known. If he is censured by the House he must

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20. On March 10, 1976, the government was defeated in the House (owing to Labor abstentions) on a major matter of financial policy, but Wilson, instead of resigning, successfully moved a vote of confidence the next day.

21. For example, in 1924 Ramsay MacDonald's minority Labor government was defeated twice in 8 months, and between March and October 1974, Wilson's government was defeated on a number of occasions, yet both governments survived for a time.

22. Thus Anthony Eden resigned as Foreign Secretary in 1938 over Neville Chamberlain's policy of appeasing the dictators, Aneurin Bevan resigned as Minister of Health in 1951 over the imposition of National Health charges, and Frank Cousins resigned as Minister of Science and Technology in 1966 on prices and incomes policy.
resign. How effective resignation is as a sanction in such cases has been disputed, because the resigning minister may be appointed to another post or may be saved by a timely reshuffle of ministerial posts.

By the end of the 18th century, the Opposition had become recognized as having the potential to provide alternative ministers upon resignation or dissolution. Charles James Fox is regarded as having become the first Leader of the Opposition on the appointment of the younger Pitt as Prime Minister in 1783, though George Tierney from 1817 to 1821 was the first holder of this position in the modern sense. House of Commons business is arranged between the Leader of the House and the Leader of the Opposition. As Tierney said, the Opposition has the duty to oppose, but its opposition must be responsible, for not only are national interests paramount, but the Opposition must be prepared to take over the government. The shadow cabinet of the Opposition existed in an inchoate form in the 1860’s. The idea emerged that the Opposition should organize itself on parallel lines to the government, and it is said to have become a convention that there should be a shadow cabinet to constitute an alternative team from which the prospective Prime Minister can choose his senior colleagues. This system has been formalized in this century by making the Opposition leadership of each House a salaried position.23

The sovereign in the 18th century was identified so closely with government policy that the defeat of a government was a rebuff to him, but the Reform Act of 183224 had the effect of separating the sovereign from party politics, and there has been no pretext since for refusing to dissolve Parliament on advice. Conversely, there has been no instance since the 17th century of a sovereign attempting to dissolve Parliament without the favorable advice of the ministry. The general conventions, then, are well established: the sovereign should dissolve Parliament when so advised and should not dissolve Parliament unless so advised. From 1841 to 1910 the timing of a dissolution, within the maximum statutory term, was a matter for the Cabinet as a whole, even though the advice

23. The Ministers of the Crown Act 1937, 1 Edw. 8 & 1 Geo. 6, c. 38, § 5, gave a salary to the Leader of the Opposition in the House of Commons. The Ministerial Salaries and Members’ Pensions Act 1965, c. 11, § 2, provided salaries for the Leader of the Opposition in the House of Lords and the Chief Opposition Whip in both Houses. These enactments are consolidated in the Ministerial and other Salaries Act 1975, c. 27.

24. Representation of the People Act 1832, 2 Will. 4, c. 45 (repealed).
was conveyed to the monarch by the Prime Minister. In 1918, however, party leaders of a coalition, Lloyd George and Bonar Law, alone, made the decision to dissolve; the lapse of time since the last general election in 1910 had caused ministers to forget the former practice. Since then, rather than being treated as a formal Cabinet matter, the decision to dissolve has been made by the Prime Minister after consulting such colleagues as he chooses; this development probably is undesirable, because granting the Prime Minister the ability to time a general election gives him too much power.

The House of Commons

The democratic trend in the House of Commons can be seen in a number of areas: qualifications for membership, independence of the Speaker, the evolution of national parties, and the development of the modern electoral system and House procedure. Disqualifications for membership gradually have been eroded during the last two centuries. Since 1774, it has been unnecessary for a candidate for Parliament to have any residential connection with his constituency, so that, for example, a domiciled Englishman can be elected for a Scottish constituency. Civil disabilities against Protestant dissenters were removed in 1828, and Catholics were admitted to Parliament by the Roman Catholic Relief Act 1829. The parliamentary oath was made acceptable to Jews in 1858; Quakers, atheists and others who objected to taking any kind of oath later were allowed to make an affirmation. Women became eligible for the House of Commons in 1918.

The Act of Settlement 1700 was an attempt to solve the problem of "placemen" in the House of Commons. "Placemen" are holders of offices or positions of profit from or under the Crown and pensions at the pleasure of the Crown, and their presence in the House of Commons continued to pose a problem for 150 years after the Act. At one time there may have been as many as 200 placemen, consisting of officers

25. Annual acts of Parliament prolonged the life of the Parliament elected in 1910 because it was impracticable to hold elections in war time.
26. 10 Geo. 4, c. 7, § 2.
29. Parliament (Qualification of Women) Act 1918, 8 & 9 Geo. 5, c. 47.
30. 12 & 13 Will. 3, c. 2, as amended, Succession to the Crown Act 1707, 6 Anne, c. 41 (taking into account the Union with Scotland).
of the court, civil servants (some of whom changed with the government), members sitting for boroughs controlled by the Crown, and government contractors. During the 19th century there was a reduction of the government patronage that gave rise to this problem, but the statutory law on this subject was very confusing. The House of Commons Disqualification Act 1957 at last reformed and consolidated the law. Exhaustive schedules of disqualifying offices now are set out; a limit is fixed to the number of holders of ministerial offices who may sit at any one time in the Commons, and holders of government contracts no longer are disqualified.\textsuperscript{81}

Since 1790, the Speaker has been disqualified from holding an office of profit under the Crown. The impartiality of the Speaker, however, was not established until after 1835, during the speakership of Shaw-Leffevre. The election of a new Speaker by the Commons was opposed exceptionally, though unsuccessfully, in the case of Mr. Selwyn-Lloyd in 1971, and this incident, really a demonstration by backbenchers who thought they ought to be consulted, led to a change in the procedure for election of the Speaker. The reelection of a Speaker by the Commons was not opposed after a change of party in 1841, and since then the Speaker of the previous Parliament generally has been elected unanimously if still a member and willing to stand. A Speaker takes no active part in a parliamentary campaign, and it was at one time thought to have become a convention that he should not be opposed in his constituency at a general election. Sir Harry Hilton-Foster, however, was opposed by both Labor and Liberal candidates in 1964 but was reelected as an independent. One of the Speaker’s most important modern functions is the certification of “money bills” for the purpose of the Parliament Act 1911.\textsuperscript{82}

In the 18th century there were no national parties advocating particular policies and enjoying the adherence of the great majority of members of Parliament. Names like “Whig” and “Tory” were bandied about, but the party system in the modern sense was not yet known. Political leaders “managed” fewer than half the members of Parliament, for inde-

\textsuperscript{81} 5 & 6 Eliz. 2, c. 20, replaced by the House of Commons Disqualification Act 1975, c. 24. Members of the House of Commons have been paid a salary since 1911, following the decision of the House of Lords in Amalgamated Soc’y of R.R. Servants v. Osborne, [1910] A.C. 87 (1909), that a “political levy” by trade unions on their members to finance parliamentary candidates was illegal under the law of that time.

\textsuperscript{82} 1 & 2 Geo. 5, c. 13, § 1.
Independent candidates could gain election to Parliament by purchasing borough seats despite having no family connection or local interest. When the Parliamentary Elections Act 1868 transferred jurisdiction to determine disputed elections from the Commons to the courts, however, the function of keeping a government in office was assumed by the parties rather than by the independent members. The Conservative and Liberal parties developed during the 19th century under such leaders as Disraeli and Gladstone; the Liberals were largely displaced by the Labor party after World War I.

The most striking democratic trend in the House of Commons concerned the electorate. The election of members in the 18th century was conducted on local and personal, rather than national, lines. Electors did not vote for governments, because general elections did not at that time coincide with changes of ministry. The cohesion of the Commons necessary to keep the government in power was brought about partly by government patronage, and partly by powerful landowners influencing elections. The agitation for parliamentary reform that followed American independence and that was given a new impetus by the French Revolution was directed against bribery and corruption, especially in connection with "rotten boroughs," and in favor of fairer representation of the people by a widening of the franchise. The modern history of the parliamentary franchise begins with the Reform Act of 1832, eventually passed by the Lords and assented to by William IV on the threat of the creation of a sufficient number of peers to ensure its passage. This Act not only abolished the rotten boroughs, but extended the franchise by means of property qualifications that roughly added the middle classes to the landed gentry and borough caucuses. Although the proportion of the electorate to the population was raised only from 3 percent to 4 percent, the indirect consequences of the Reform Act were immense. The Act heralded a succession of Representation of the People Acts that have continued for more than 100 years, their combined effect making the Commons the predominant element in the government of the country, detaching the monarchy from politics and forcing governments to recognize that they depend upon the suffrage of the electorate. Many urban workers received the franchise in 1867, many agricultural workers

33. 31 & 32 Vict., c. 125, reenacted, Representation of the People Act 1949, 12, 13 & 14 Geo. 6, c. 68, pt. III.
34. Representation of the People Act 1832, 2 Will. 4, c. 45 (repealed).
35. Representation of the People Act 1867, 30 & 31 Vict., c. 102.
in 1884, all males aged 21 and women aged 30 in 1918, and all women aged 21 in 1928. In 1969, the minimum age for voting, though not for being elected, was reduced to 18. Meanwhile, property qualifications for the franchise gradually have been abolished, ordinary residence in the constituency on the qualifying date being required.

The modern parliamentary electoral system provides for single-member constituencies. Independent statutory Boundary Commissions review the representation in the House of Commons in the four areas of the United Kingdom and report periodically to the Home Secretary, who is required to submit the reports to Parliament together with draft orders in Council giving effect to their recommendations. The conduct of elections is controlled in detail by the Representation of the People Acts of 1949 and 1969, which set strict limits on the expenses that may be incurred by or on behalf of a candidate and on the purposes for which such expenses may be incurred. Election to Parliament in 1970 cost a successful candidate an average of £2,212, two-thirds of which was for printing and stationery. Legislation against corrupt and illegal election practices began with Curwen’s Act of 1809. The Corrupt and Illegal Practices Prevention Act 1883 strengthened the law against bribery and corrupt practices, but lavish expenditure by candidates was a greater problem than actual corruption. The aim of the Act was to fix maximum expenditures, beyond which the election would be void. Precise accounts were to be rendered to, and published by, the returning officer, and unauthorized expenditure by others was made an illegal practice. Corrupt practices also disqualify one from voting in any parliamentary election for 5 years, and illegal practices disqualify

37. Representation of the People Act 1918, 7 & 8 Geo. 5, c. 64, §§ 1, 2, 4 (repealed in part in 1928).
38. Representation of the People (Equal Franchise) Act 1928, 18 & 19 Geo. 5, c. 12, § 1.
41. 12, 13 & 14 Geo. 6, c. 68.
42. C. 15.
43. Id. § 8.
44. Parliamentary Elections Act 1809, 49 Geo. 3, c. 118.
45. 46 & 47 Vict., c. 51.
46. Id. §§ 4, 8.
47. Id. § 38.
48. Id. § 13.
one for the same period in his constituency.\textsuperscript{49} A vitally important innovation was made by the Ballot Act 1872, which substituted a secret ballot for the traditional open election at the “hustings.”\textsuperscript{50} Strict precautions ensure the continued secrecy of the ballot; disputed elections now are heard by two high court judges,\textsuperscript{51} and the sealed ballot boxes may be opened only on the authority of a high court judge.

The British electoral system admittedly does not produce representation of the various parties in close proportion to the number of votes they receive in a general election. Not only does the leading party tend to get too many seats in proportion to the second party, but in most general elections since World War II a party returned to power has received less than half the votes cast. The Liberal party has long been underrepresented in the Commons, and naturally has advocated some system of proportional representation. In this it has been joined by the Scottish and Welsh Nationalists. Hitherto, both the Conservative and Labor parties in turn profited sufficiently from the existing system not to want it changed, but more recently it has become less advantageous for the Conservatives, and they are beginning to consider whether some kind of proportional representation might not help their party to return to office, at least at the head of an antsocialist coalition.

Procedure in the House of Commons down to the Reform Act of 1832\textsuperscript{52} depended mainly on ancient usage and later parliamentary practice, and though present procedure still is based partly on the old sources, much more use has been made since 1832 of standing orders. Questions to ministers began in a desultory way in the House of Lords early in the 18th century, but it was after 1832 that the practice really developed, especially in the Commons, forming a significant part of parliamentary government from the 1850’s. Speakers’ rulings require that a question addressed to a minister relate either to public affairs with which he is “officially connected,” proceedings pending in Parliament, or matters of administration that come within the work of his department

\textsuperscript{49} Representation of the People Act 1949, 12, 13 & 14 Geo. 6, c. 68, §§ 140(3)-(4), 151.
\textsuperscript{50} 35 & 36 Vict., c. 33, § 2, repealed, Representation of the People Act 1949, 12, 13 & 14 Geo. 6, c. 68. Secret ballot provisions are now in Representation of the People Act 1949, 12, 13 & 14 Geo. 6, c. 68, §§ 12, 23, sched. 2, Parliamentary Election Rules § 20(2), Local Election Rules § 16(2).
\textsuperscript{51} Representation of the People Act 1949, 12, 13 & 14 Geo. 6, c. 68, § 110, repealing Parliamentary Elections Act of 1868, 31 & 32 Vict., c. 125, § 11.
\textsuperscript{52} Representation of the People Act 1832, 2 & 3 Will. 4, c. 45 (repealed).
or his official duties or powers. A minister may decline to answer a question on public policy grounds, especially if it involves matters of diplomacy or national security. The Prime Minister, with no separate department of his own except the civil service, has special responsibility for general government policy and is the residuary target for questions that seem to be inappropriate for other ministers. Those members on either side of the Commons who hold no office have no special access to government information nor any special facilities for research other than the library of the Commons and the resources any journalist may have, so the Opposition is at a disadvantage in criticizing government policy or conduct or in proposing alternative policies.

The object of many standing orders is to enable more business to be done by expediting debate. In accord with this, the Closure, or the "Gag," was adopted in 1887, prompted by the systematic obstruction of Parliament in the 1880's by Irish Nationalist members who were reelected with the express purpose of attempting to wreck the proceedings until home rule was granted. The Closure is a procedure that enables the Speaker to accept a motion supported by a sufficient number of members "that the question be now put."

Standing committees of the House for the consideration of certain stages of public bills were regularized in 1907, and now the general rule is that when a public bill has passed the second reading, the House having approved its general principles, it goes to a standing committee for the discussion of details and proposed amendments. Standing committees consist of no more than 50 members selected in proportion to the strength of the parties in the House and with regard to the qualification of members. Thus, a government, unless it has an appreciable overall party majority in the Commons, may be defeated in committee from time to time on particular amendments, though this may be reversed when the bill is reported to the House. Financial matters always have required special procedures; the importance and complexity of these procedures have exercised the ingenuity of the Commons. Gladstone, when Chancellor of the Exchequer in 1861, had the House set up a Select Committee of Public Accounts to examine all appropriation accounts and such other accounts laid before Parliament—now including the accounts of certain public corporations and the universities—as it sees fit. The Committee, usually chaired by a member of the Opposition, cross-examines the chief accounting officer and other senior officers of the departments
or corporations. The Committee exercises little practical control over expenditures, partly because it deals with the accounts of the previous financial year, and partly because the House of Commons seldom has the time or the inclination to debate its reports. Nevertheless, its mere existence tends to prohibit departmental proposals for extravagant expenditures. Emphasis recently has shifted from mere accounting to the elimination of waste and better estimating and contracting.

The Exchequer and Audits Department Act 186658 created the combined post of Comptroller and Auditor-General as an independent officer who, like the judges, holds office during good behavior, is removable by the Crown only on an address from both Houses, and whose salary, like that of the judges, is charged on the consolidated fund instead of being voted annually. As Comptroller he ensures that no public money is withdrawn from the consolidated fund without statutory authority, and that money so withdrawn is properly applied; as Auditor he audits the accounts of the government departments and makes an annual report to the Public Accounts Committee. Because the estimates became too complex for the House and the Public Accounts Committee, an Estimates Committee was established in 1912 to examine the departmental estimates presented to the House and to suggest how the policy implicit in them might be carried out more economically. Although looking at past estimates, the Committee was concerned with the future, and after 1945 became more interested in policy. It was replaced in 1970 by the Expenditure Committee, whose functions are more extensive than those of the former Estimates Committee and are more compatible with new methods of presenting detailed information about public expenditure to the Commons.54 In addition to Select Committees of about 15 members, such as those just mentioned, a number of “specialist” select committees of the Commons have been set up since World War II to scrutinize the efficiency of various fields of administration, including the nationalized industries, the Parliamentary Commissioner (“Ombudsman”), science and technology, race relations and immigration, Scottish affairs, and European Community secondary legislation. Practical limits are set to the creation of select committees by the requirements of staff and accommodations as well as the availability of members.55

53. 29 & 30 Vict., c. 39.
55. For a detailed comparison between the British parliamentary system and the congressional system, see K. BRADSHAW & D. PRING, PARLIAMENT AND CONGRESS (1972).
Parliamentary privilege, that special branch of English law administered by each House through its officers and recognized by the courts, originally was developed as a protection against the Tudor and Stuart monarchs and later was used to guard the boundaries between the powers of the two Houses. It sometimes has been used, however, against the liberties of the citizen. The right to restrain publication of debates was regarded as a corollary of the privilege of freedom of speech in Parliament. After the case of John Miller in 1771\(^{56}\) the Commons ceased to enforce the orders against publication of reports of debates, but, for some time after this, reporters could not get seats or take notes, and objection often was taken to the presence of "strangers." Reporters' galleries were provided in 1834, parliamentary reports and debates first were published and sold inexpensively in 1835, and the following year publication of division lists was permitted. The series of reports known after the original reporter as "Hansard" began unofficially in 1803 and later was subsidized by a parliamentary grant. Official publication of debates did not begin until 1909.

The last confrontation between the Commons and the courts on the subject of privilege took place in prolonged litigation in which one Stockdale sued the parliamentary printers for libel, culminating in *Stockdale v. Hansard*,\(^{57}\) tried in 1839 by the Queen's Bench. Immunity from judicial proceedings no doubt attached to defamatory matter circulated only among members of Parliament, but in *Stockdale*, the Commons, through Hansard, argued that such immunity extended to any papers printed by order of either House and put on sale to the public. The Queen's Bench rejected this view and held for Stockdale, adopting the principle that though the members of the Commons were sole judges as to whether and how they would enforce a privilege, the court had jurisdiction to decide whether an alleged privilege existed. This decision never was accepted openly by the Commons, who have kept the resolutions of that time on their journals, but since then they have been sensible enough to avoid direct challenge to the courts. On the other hand, because Parliament is unlimited by any constitution, it can make the law what it wants the law to be, and this it did by the Parliamentary Papers Act 1840\(^{58}\); yet the fact that an act of Parliament was passed vindicates

\(^{56}\) See 2 T. Erskine May, Constitutional History 43-49 (1860).


\(^{58}\) 3 & 4 Vict., c. 9.
WILLIAM AND MARY LAW REVIEW

the court's decision that the Commons could not change the law by resolution. The distinction between what transpires within the House and what transpires outside the House also was present in Bradlaugh v. Gossett,\textsuperscript{59} in which the high court decided in favor of the Sergeant-at-Arms in an action brought by the atheist, Charles Bradlaugh. The petitioner claimed that he had been elected a member for Northampton and that the Sergeant-at-Arms acted unlawfully by enforcing the House order excluding him. The Commons, in exercising its privilege to regulate its internal proceedings, could put its own interpretation on the Parliamentary Oaths Act 1866,\textsuperscript{60} but the matter would have been different if the Commons had allowed Bradlaugh to sit and then had purported by resolution to protect him against the statutory penalties that a common informer might at that time have claimed against him in the courts.

It is unsatisfactory that the courts and the Houses of Parliament\textsuperscript{61} should claim competing jurisdictions in matters that may affect the liberty of a citizen. This anomaly could be removed if the Commons would allow an act to be passed, as they did with the Parliamentary Elections Act 1868,\textsuperscript{62} transferring to the courts exclusive jurisdiction to punish persons, or at least members of the public, charged with breach of privilege or with contempt of Parliament. In this way the issue would be tried by an impartial tribunal, counsel and witness would be heard, the facts could be found by a jury, and there could be a right of appeal. A select committee of the Commons set up in 1966 reviewed the law and practice in relation to parliamentary privilege; its report\textsuperscript{63} recommended extensive changes in the parliamentary procedure relating to matters of privilege and contempt, some of which have been implemented. Although these changes would minimize conflicts between the House and the courts, the report did not deal with the more fundamental question of competing jurisdictions.

\textit{The House of Lords}

Most ministers sat in the House of Lords in the 18th century, as did the naval, military, and ecclesiastical leaders of the country. The Lords

\begin{footnotes}
\item[59.] [1884] 12 Q.B.D. 271.
\item[60.] 29 & 30 Vict., c. 19.
\item[61.] The privileges of the House of Lords have not been controversial in recent times. \textit{But see} Stourton v. Stourton, [1963] P. 302 (1962) (parliamentary privilege protects husband from attachment by separated wife seeking to have her property returned).
\item[62.] 31 & 32 Vict., c. 125.
\item[63.] \textit{Report from the Select Committee on Parliamentary Privilege} (1967) H.C. 34.
\end{footnotes}
had a negative power, in that their consent was necessary to legislation, but they never had the positive power of the Commons, for the latter was representative of the electors and had the exclusive privilege of introducing financial measures. Peers traditionally had a right of individual access to the sovereign, but this now is confined in practice to ministers who are Privy Councilors. Before the Reform Act of 1832,\textsuperscript{64} most of the great landowners who controlled parliamentary constituencies were peers, but the creation of peerages lay with the executive. Until the middle of the present century, the composition of the House of Lords, except for the bishops, was based entirely on the hereditary principle, modified after the Unions by the presence of representative Scottish and Irish peers,\textsuperscript{65} and after the Appellate Jurisdiction Act 1876\textsuperscript{66} by the presence of the Law Lords.\textsuperscript{67}

William IV's short reign was marked by the passing of the Reform Act of 1832,\textsuperscript{68} governing the relationship between the Houses of Parliament. Although the Lords could not constitutionally amend money bills, they had the legal power to reject them, though this power was exercised rarely. In 1860 the Lords rejected a bill to repeal the paper duty, so the next year Gladstone, Chancellor of the Exchequer, tacked this provision to a general financial measure for the services of the year, and this the Lords shrank from rejecting. Other differences between the two Houses arose over the Irish Church Disestablishment Bill of 1869,\textsuperscript{69} the abolition of the purchase of army commissions in 1872, the Representation of the People Bill in 1884,\textsuperscript{70} and Gladstone's Irish Home Rule Bill in 1886.\textsuperscript{71}

The crisis came after the Liberals were returned to power with an over-

\begin{itemize}
\item \textsuperscript{64} Representation of the People Act 1832, 2 & 3 Will. 4, c. 45 (repealed).
\item \textsuperscript{65} The Peerage Act 1963, c. 48, § 4, repealed the relevant provisions of the Union with Scotland Act 1706, 6 Anne, c. 11, and allowed all holders of Scottish peerages to sit and vote. The relevant provisions of the Union with Ireland Act 1800, 39 & 40 Geo. 3, c. 67, which were obsolete since the establishment of the Irish Free State in 1922, were repealed by the Statute Law (Repeals) Act 1971, c. 52.
\item \textsuperscript{66} 39 & 40 Vict., c. 59.
\item \textsuperscript{67} Cf. Wensleydale Peerage, 10 Eng. Rep. 1181 (H.L. 1856) (Lords' Committee of Privileges).
\item \textsuperscript{68} Representation of the People Act 1832, 2 & 3 Will. 4, c. 45 (repealed). The King, much against his inclination, supported the bill by threatening to use his prerogative of creating sufficient peers to carry the measure in the upper House. Adequate abstentions, however, made this unnecessary.
\item \textsuperscript{69} Bill No. 27 (1868/69), 3 Brit. Sess. Papers 85.
\item \textsuperscript{70} Bill No. 119 (1884/85), 6 Brit. Sess. Papers 429.
\item \textsuperscript{71} Bill No. 181 Sess. 1, (1886), 2 Brit. Sess. Papers 461.
\end{itemize}
whelming majority in the Commons in the 1905 election, and the Lords rejected or drastically amended a number of the principal measures introduced by the government, culminating in the rejection of Lloyd George's budget in 1909 on the ground that it contained matter inappropriate to a budget. After a general election and the death of Edward VII in 1910, George V acceded to Asquith's request that, if necessary, a sufficient number of peers to pass a Parliament bill should be created, though this was not made public at the time. Another general election made little difference to the position of the parties, the King's promise to create additional peers was published, and the Parliament bill was passed, as the Reform Act had been in 1832, by virtue of a large number of abstentions. The Parliament Act 1911 in effect limited the Lords' power to delay a money bill, as strictly defined in the Act, to 1 month, and limited their power to delay other public bills to 2 years. Because of the self-preserving forbearance of the Lords in seldom directly opposing a government bill and in knowing when to compromise on their proposed amendments, only three acts have been passed without the formal consent of the second chamber, the most important of which was the Parliament Act 1949. This Act was passed under Attlee's Labor administration when the government, having secured the enactment of a series of nationalization acts foreshadowed in their election manifesto, feared that their bill, not included in that manifesto, to nationalize the iron and steel industry would be held up by the Lords until the expiration of that Parliament. The effect of the Parliament Act 1949 was to reduce the power of the Lords to delay a nonmoney bill from 2 years to 1 year. It was part of the compromise in 1911 that the maximum life of Parliament should be reduced from 7 years to 5 years, and a vitally important provision of the Parliament Acts is that the Lords cannot be overridden on a bill to extend the life of Parliament.

New economic and social conditions after World War II meant that the second chamber was functioning on the regular attendance of perhaps 80 peers, while hundreds of "backwoodsmen," who were entitled

72. 1 & 2 Geo. 5, c. 13, §§ 1, 2, as amended, Parliament Act 1949, 12, 13 & 14 Geo. 6, c. 103. For discussions of the rationale and effect of the Act of 1911, see H. Hanham, supra note 6, at 194-99; W. Ivor Jennings, Parliament 414-34 (2d ed. 1969); H. Nicolson, supra note 5, at 102-04, 125-39, 148-58.
73. 12 & 13 & 14 Geo. 6, c. 103.
74. Id. § 1.
75. Fixed by the Septennial Act 1715, 1 Geo. 1, Stat. 2, c. 38.
76. Parliament Act 1911, 1 & 2 Geo. 5, c. 13, § 2.
to sit and vote and who possibly might do so in an emergency, were absenting themselves in order to earn a living. There is no salary for peers attending, though since 1957 a daily attendance allowance has been paid. Efforts to abolish totally the House of Lords have not attracted more than a small minority since the Restoration. To increase the number of persons who could be expected in the circumstances of the day to attend and take part regularly in debates, especially those who are not Conservatives, the Life Peerages Act 1958 was passed to enable the Prime Minister to advise the creation of an unlimited number of life peers and life peeresses entitled to sit and vote. It was intended that the Prime Minister consult the Leader of the Opposition and accept his suggested nominees, an apparently quixotic measure for a Conservative government to pass, but based upon a recognition that the British parliamentary system depends on the existence of an effective Opposition, that the Labor party, not rich in hereditary peers, was now one of the two main parties in the country, and that a minimum number of Labor peers in the House of Lords was desirable. The Peerage Act 1963 allowed holders of hereditary peerages to disclaim their peerage for life and become eligible for election to the House of Commons. In recent years the work of the House of Lords has been carried on by about 200 regular attenders, and since 1964, no new hereditary peerages have been created.

The functions of the House of Lords in modern times include debating on motions, taking part in the legislative process subject to the Parliament Acts, proposing amendments to bills sent up by the Commons, relieving the Commons of much committee work, especially in relation to delegated legislation and private (mostly local) bills, and playing a part in scrutiny of the administration. The upper House acts as a

77. 6 & 7 Eliz. 2, c. 21. This Act made possible the first admission of women to the House of Lords, id., § 1(3), but did not grant this right to hereditary peeresses. See Viscountes Rhondda's Claim, [1922] 2 A.C. 339 (Lords' Committee for Privileges). Hereditary peeresses, who are few in number, became admissible under the Peerage Act 1963, c. 48, § 6.

78. C. 48, §§ 1, 2. Several prominent politicians have taken advantage of this provision: Mr. Wedgwood Benn, 2nd Viscount Stansgate, see In re Parliamentary Election for Bristol South East, [1964] 2 Q.B. 257 (1961); Sir Alec Douglas-Home, 15th Earl of Home; and Lord Hailsham. Lord Hailsham, 2nd Viscount Hailsham, son of the 1st Viscount Hailsham who was twice Lord Chancellor, renounced his hereditary peerage in 1963 to become Quintin Hogg, Member of Parliament. In 1970 he himself was appointed Lord Chancellor and was granted a life peerage as Lord Hailsham of St. Marylebone.
brake on important constitutional innovations, and remains the chief safeguard against an extension of the life of Parliament at the will of the elected House alone.

Among the proposals made over the years for further reforming the composition and powers of the House of Lords are the Bryce Conference in 1917 and the Conferences of Party Leaders on the Parliament Bills of 1949 and 1968. The Labor Government in 1968 and 1969 attempted to devise a reformed second chamber that would preserve as far as possible the historical continuity of the House of Lords without interfering with hereditary titles, but also without making the new second chamber so efficient and powerful as to rival the House of Commons. The solution adopted was a two-tiered scheme of voting and nonvoting members. Voting members would be life peers and first holders of hereditary peerages who wished to take advantage of this qualification with its attendant duties. Nonvoting members would be those peers by succession who already had received or applied for a writ of summons before the legislation had been adopted. Provision would be made to ensure that the government of the day would have a small majority of the party membership, but not an overall majority of the entire membership, including crossbenchers. Although independent peers in theory would hold the balance of power, they supposedly would not be organized as a group. The bill also would have reduced the power of the Lords to delay a nonmoney bill from 1 year to 6 months. Although such a reduction in the delaying power of the Lords may be considered too drastic, it is unfortunate that a reform in the composition of the second chamber that was substantially agreed to by the leaders of each side in both Houses should not have been enacted. The bill, however, was dropped because the more extreme backbenchers on both sides of the Commons revolted on the ground that the government would have too much patronage and the Prime Minister too much discretion in the creation of voting peers, who would be paid full salaries.

Ireland and the Union

The constitutional status of Ireland before 1800 is uncertain; for centuries Ireland had been a kingdom belonging to the English Crown, but whether it was subject to the English Parliament was a different question.

After much vacillation, in 1783 the British Parliament declared that Ireland was bound only by laws enacted by its own parliament, and that no appeals would lie from Irish to British courts. Seventeen years later the British Parliament passed the Union with Ireland Act 1800, and the Irish Parliament reluctantly passed a corresponding statute, uniting the two kingdoms into the United Kingdom of Great Britain and Ireland on similar terms to the Union of 1707 except that there was no separate system of Irish private law. The first breach in the "fundamental" terms of the Union came with the disestablishment of the Church of Ireland in 1869, to which Queen Victoria was induced to give her assent by being reminded that her duty as a constitutional monarch was to act on the advice of her ministers. The Union proved unpopular in Southern Ireland, and after long agitation for "home rule" the Government of Ireland Act 1914 was passed providing for an Irish Parliament with limited legislative powers in matters exclusively relating to Ireland and subject to the overriding authority of the Parliament at Westminster. The outbreak of World War I forced postponement of the implementation of the Act. As a result of the Easter, 1916, uprising in Dublin, followed by "the troubles," and of the unwillingness of the Protestant majority in the North to throw in their lot with the Catholic South, the scheme had to be recast. After the war, therefore, the Government of Ireland Act 1920 provided for two subordinate Parliaments for Northern and Southern Ireland, with a government in each area responsible to its parliament, the Lord Lieutenant representing the Crown, and a Council of Ireland forming a bond of union for the purpose of the eventual end of partition. This Act was not implemented effectively in Southern Ireland, and following the Anglo-Irish "Treaty" of 1921, Ireland was accorded Dominion status similar to that of Canada by the Irish Free State (Agreement) Act 1922.

82. 23 Geo. 3, c. 28 (1783).
83. 39 & 40 Geo. 3, c. 67.
84. Irish Church Act 1869, 32 & 33 Vict., c. 42.
85. 4 & 5 Geo. 5, c. 90, §§ 1, 2, repealed, Government of Ireland Act 1920, 10 & 11 Geo. 5, c. 67, § 76(2).
86. The Protestant majority is the effect of the Plantation in James I's reign, consisting largely of Scottish Presbyterians.
87. 10 & 11 Geo. 5, c. 67, §§ 1, 2.
89. 12 & 13 Geo. 5, c. 4.
Northern Ireland, comprising six of the eight counties of Ulster, however, exercised its option to remain in the United Kingdom under the terms of the Government of Ireland Act 1920. That Act, as amended, remained the basis of the constitution of Northern Ireland for the next 50 years. Under it, Northern Ireland had a subordinate parliament at Stormont with a large measure of legislative and administrative devolution, though the Governor represented the Crown and appeals in civil and criminal cases lay to the House of Lords. When, after World War II, the Irish Free State (Eire) was recognized by the British Parliament as the independent Republic of Ireland by the Ireland Act 1949, the Act declared that Northern Ireland remained part of His Majesty's dominions and part of the United Kingdom, and affirmed that in no event would any part of Northern Ireland cease to be part of the United Kingdom "without the consent of the Parliament of Northern Ireland." When, however, sectarian strife on a serious scale broke out in 1969, especially in the suburbs of Belfast, its continuance necessitated the use of statutory emergency powers and the employment of troops to maintain order. The Northern Ireland Parliament was suspended and direct government from Whitehall was imposed by the Northern Ireland (Temporary Provisions) Act 1972, which confirmed the declaration contained in the Ireland Act 1949. A referendum held in Northern Ireland in March, 1973, resulted in an overwhelming majority in favor of the province remaining in the United Kingdom. The Northern Ireland Constitution Act 1973 abolished the Stormont Parliament, replaced it by an assembly to be elected by a kind of proportional representation, and declared in section 1 that the status of Northern Ireland would not be changed "without the consent of the majority of the people of Northern Ireland voting in a poll." The principle of executive "power sharing" between the different parties did not work, and the assembly, in

91. 10 & 11 Geo. 5, c. 67.
93. 12 & 13 Geo. 6, c. 41. Section 5 of the Act provides that citizens of the Republic of Ireland should not be regarded as aliens. They therefore may vote in parliamentary and local elections in the United Kingdom if ordinarily resident there.
94. Id. § 1(2).
95. C. 22, § 1. See note 94 supra & accompanying text.
96. C. 36, § 31.
97. Id. § 28.
98. Id. § 1.
its turn, was abolished by the Northern Ireland Act 1974, which provided for the holding of a constitutional convention, and confirmed the declaration contained in section 1 of the Act of 1973.

It is unclear whether the United Kingdom Parliament is bound by the declaration of the Act of 1974. The history of both the Scottish and the Irish Unions shows that "fundamental" provisions have not been regarded as binding, and the orthodox doctrine of the legislative supremacy of Parliament concedes the inability of Parliament to limit its own powers. Further, despite obiter dicta in the Scottish case of MacCormick v. Lord Advocate indicating that certain fundamental terms of the union with Scotland may represent a higher law binding on Parliament, it appears that no court in the United Kingdom has jurisdiction to declare an act of Parliament void.

**Britain and the European Community**

Mr. Edward Heath, then a minister in Mr. Harold Macmillan's Conservative government, began strenuous, though unsuccessful, negotiations in 1962 for the entry of the United Kingdom into the European Economic Community. Mr. Wilson's Labor government, from 1968 to 1970, resumed the negotiations as an important aspect of its policy, but was overtaken by the general election of 1970, which brought Mr. Heath into office as Prime Minister. In an about-face, the Labor party announced its opposition to membership in the Community. Mr. Heath's government resumed the negotiations and in January, 1972, signed the accession treaty at Brussels, which Parliament implemented by the European Communities Act 1972. The Commonwealth countries most concerned, notably Australia and New Zealand, intimated that they favored Britain entering the Common Market, and a substantial majority in the House of Commons, on a free vote, favored the principle of entry. After the Act was passed the Labor Opposition declared its intention, if returned to power, to "renegotiate the terms of entry," which actually would have required renegotiation of the terms of continued membership. At the general election of February, 1974, which

99. C. 28, § 2. The constitutional convention has since been dissolved.
100. Id. § 2(7). See note 98 supra & accompanying text.
103. C. 68.
Labor won, Mr. Wilson confirmed this policy, stating that if the renegotiation were unsuccessful, the existing treaty obligations would not be regarded as binding. International lawyers generally, and Community lawyers in particular, no doubt would take the view that withdrawal without good cause and without the agreement of all the member states would be a serious breach of treaty obligations. Although under British constitutional law Parliament doubtless could repeal the European Communities Act and unscramble a considerable part of the commercial, industrial, and agricultural law of the country, that would be inconsistent with the convention that a government succeeds to the international obligations of its predecessors.

A referendum on the Community membership issue was a possibility, but the holding of a referendum traditionally has been regarded as "un-English" and inconsistent with the principle that members are elected to Parliament to exercise their informed judgment on behalf of their constituents. There is also the suspicion that the result may be affected by the way the question is put, which is necessarily oversimplified anyway. The Labor party, and even ministers inside and outside the Cabinet, were seriously divided over the issue of membership. Mr. Wilson, who initially opposed the holding of a referendum, therefore found it expedient to announce at the general election of October, 1974, that if the government were satisfied with the result of renegotiation, the issue would be put to the people either in a referendum or at another general election. Labor returned to office in October, 1974, and renegotiated in Brussels to the satisfaction of the government. A referendum, unique for the United Kingdom, was held under the Referendum Act 1975 in June, 1975, after a short campaign in which hardly anything was said about the actual results of renegotiation. An overall majority of more than two-thirds voted in favor of continued membership, with smaller favorable majorities in Scotland and Wales.

Both Houses of Parliament have set up select committees to cope with the intricate problems of European secondary legislation. This legislation imposes self-executing regulations, which take effect directly within the United Kingdom as a member state and take precedence over local law

104. During the discussions on the Parliament bill in 1910, however, Lord Lansdowne, leader of the Conservative peers, proposed that when a bill sent up by the Commons had been rejected three times by the Lords, the matter should be decided by referendum. A referendum was held in Northern Ireland in March, 1973, on whether Northern Ireland should remain part of the United Kingdom.

105. C. 33.
in certain fields. The select committees also deal with delegated legislation passed under statutory authority to give effect to Community directives. Ministers remain responsible to Parliament for Community affairs as they affect the United Kingdom, but those attending the Community Council cannot be bound closely in advance of decisions being negotiated, and may not be entirely free to inform Parliament of the factors leading to such decisions. The unanimity principle, however, is applied at present by the Council in important matters, and could not be abrogated without the agreement of the United Kingdom. Consequently, as ministers depend on the support of Parliament, they would not agree to anything that Parliament was unlikely to favor.

Devolution Within Great Britain

Although outwardly the United Kingdom has followed the recent trend in favor of supranational organizations by joining a wider European Community, inwardly Scottish and Welsh nationalism is calling for smaller, rather than larger, governmental units. Thus the gradual transformation of Empire into Commonwealth may be followed by a more sudden disintegration of the United Kingdom itself. This movement to which the Kilbrandon Report has given impetus is not so novel as may be thought. Legislative devolution for Scotland and Wales, as well as for Ireland, has been discussed since 1885 when the Scottish Office was established. Before World War I the Liberal government seriously considered devolution as an item of policy. Winston Churchill, while Home Secretary in 1911, submitted to the Cabinet an outline plan as a basis for discussion, in which elected legislative and administrative bodies would be set up for Ireland, Scotland, Wales, and seven areas of England, though he saw that an English parliament alongside the Imperial Parliament was impracticable. Likewise, Prime Minister Asquith, in a 1912 House of Commons speech on the Government of Ireland Bill, said that provisions similar to those in the Government of Ireland Bill then under consideration were needed for England, Scotland, and Wales, to free the Imperial


107. See note 111 infra & accompanying text.
Parliament from local concerns and burdens.\textsuperscript{108} After World War I, the Commons approved a broad scheme for subordinate legislatures for England, Scotland, and Wales, leaving open the question of subdividing England, but nothing came of it at the time.

Nationalism in Scotland and Wales first became a serious electoral issue at the general election of 1966, when the Nationalist parties received the votes of 20 percent of the electorate in those countries. Neither the Conservative nor the Labor party strongly favored devolution, but with the politician's desire for votes these parties at least had to appear to take nationalist aspirations seriously. Mr. Heath, Conservative opposition leader, in a speech to Scottish Conservatives in May, 1968, put forward the idea of a Scottish assembly, and in August of that year he appointed an independent committee under the chairmanship of Sir Alec Douglas-Home to work out proposals. The committee recommended establishing a Scottish assembly in Edinburgh to undertake certain stages of Scottish bills passing through Parliament,\textsuperscript{109} but it is doubtful whether this would have made much difference, because a body acting in effect as a legislative committee of Parliament would have to conform to the general parliamentary procedure.\textsuperscript{110}

In 1969, the Labor government, holding more seats in Scotland and Wales than any other party, appointed a Royal Commission on the Constitution under the chairmanship of Lord Crowther and then, on his death, of Lord Kilbrandon, a distinguished Scottish judge. The scope of inquiry of the Commission, though fairly wide, was taken as being limited to the question of devolution. The Royal Commission Report,\textsuperscript{111} popularly known as the Kilbrandon Report, appeared in 1973. After returning to power in June, 1974, the Labor government issued a consultative document,\textsuperscript{112} which was followed

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\textsuperscript{108} H. Hanham, supra note 6, at 133.
\textsuperscript{110} Bradley, Devolution of Government in Britain—Some Scottish Aspects, in Devolution 100-01 (H. Calvert ed. 1975) [hereinafter cited as Devolution].
\textsuperscript{112} Devolution Within the United Kingdom: Some Alternatives for Discussion (1974).
in September, 1974, by a white paper\textsuperscript{113} outlining the decision of the government on some of the main questions presented by the Kilbrandon Report. The government agreed with the Royal Commission in rejecting separatism and federalism, and in regarding the maintenance of the political and economic unity of the United Kingdom as a vital and fundamental principle; they noted that there already had been a substantial amount of administrative devolution from London to Scotland, Wales, and the English regions. A number of important questions still remained to be resolved with regard to such matters as finance and economic management, trade, industry and employment, local government, the Secretaries of State for Scotland and Wales, and representation in the United Kingdom Parliament, but the government accepted the broad conclusion of the Kilbrandon Commission that a further substantial measure of devolution was desirable, and that it best could be achieved by the establishment of directly elected assemblies in both Scotland and Wales. Because Scotland has a separate judicial system and its own private and administrative law, the government proposed that the Scottish assembly have legislative powers within fields in which separate Scottish legislation already exists, such as housing, health, and education. A Welsh assembly also would be created that would parallel the Scottish counterpart in assuming certain powers of the Secretary of State regarding delegated legislation, and that would be given responsibility for many of the executive functions at present carried out by nominated bodies within Wales and by the Secretary of State himself.

A second white paper was published by the Labor government in November, 1975,\textsuperscript{114} and it was expected that a bill embodying its proposals, subject to revision after consultation with opposition party members, would be introduced in Parliament within a year and put into effect by 1978.\textsuperscript{115} Scotland, it was proposed, would be given a lawmaking assembly in Edinburgh with a cabinet-type government and a chief executive. By proposing a Welsh assembly limited to executive functions, the

\textsuperscript{113} Democracy and Devolution: Proposals for Scotland and Wales, Cmnd. No. 5653 (1974).

\textsuperscript{114} Our Changing Democracy: Devolution to Scotland and Wales, Cmnd. No. 6348 (1975). The white paper is reprinted in part in The Times (London), Nov. 28, 1975, at 4, col. 1. For commentary on the proposals, see \textit{id.}, Nov. 28, 1975, at 2, col. 4; \textit{id.}, Nov. 28, 1975, at 1, col. 1; \textit{id.}, Nov. 28, 1975, at 1, col. 1; \textit{id.}, Nov. 28, 1975, at 1, col. 1; \textit{id.}, Nov. 28, 1975, at 2, col. 4.

\textsuperscript{115} The Times (London), Nov. 28, 1975, at 1, col. 1.
white paper resolved a division among the members of the earlier Royal Commission in favor of a more limited form of devolution for Wales. The assemblies would have power over local government, health, personal social services, schools, housing, roads, environment, and many aspects of physical planning. The system of election would not be proportional, and the Scottish and Welsh assemblies would consist of 142 and 72 members respectively, 2 members to be elected from each constituency for 4-year terms. Laws passed by the assemblies would be funded by block grants from Parliament and from surcharges on local taxes; the government would retain the power to intervene if the assemblies exceeded their power. In accord with what was considered an "essential" provision of the earlier white paper, Scotland and Wales would retain their existing number of seats in Parliament. This is puzzling because Scotland and Wales already are overrepresented in Parliament in terms of population, and there would be nothing to prevent Scottish and Welsh members from voting on purely English affairs. The proposals were condemned strongly by the opposition parties; Conservatives felt it went too far, and Liberals, joined by some extreme devolutionists on the Labor back benches, believed it had not gone far enough. In light of the poor reception of the proposals and the announcement that they were amendable after consultation, it is impossible to predict what form devolution ultimately will take, but an assembly with some legislative powers for Scotland is almost a foregone conclusion.  

Scotland is unique in the United Kingdom in having separate judicial and administrative systems but no separate legislature. During the Kilbrandon deliberations Scottish nationalism was quiescent, but it revived with the discovery of North Sea oil. Although the oil reserves are located somewhat nearer to Scotland than to England, requiring land installations to be predominantly in Scotland, control of the oil will be vested by Parliament in a United Kingdom corporation. North Sea oil is not included in the list of matters for the Scottish assembly, the official view being that British economic and industrial development should not be devolved. There have been many changes in the law since the Scottish Union, notably the numerous statutory regulations controlling areas of private life and local administration; Lord Kilbrandon recently expressed the opinion that the matters proposed for legislation by the Scottish assembly would have been expected by Scotland and agreed

116. For a summary of the proposals and reactions to them, see id.
REVOLUTION TO DEVOLUTION

It is unfortunate, however, that shortly before the publication of the Kilbrandon Report, major schemes of local government reorganization were introduced on both sides of the border. Apart from the unsettling effect of devolution on a new system of local government, it is questionable whether there is room for another tier between national and local government. This is particularly true of Scotland, where one new local authority, Strathclyde, contains 40 percent of the population of that country. Further, it may be asked whether there is sufficient evidence that a widespread sense of lack of participation and communication, and concomitant grievance and frustration, necessarily are confined to the boundaries of Scotland and Wales, and whether these beliefs differ significantly from those in the various English regions. Even if they do, devolution may not be the appropriate solution. The crux of the problem may involve the provision of sufficient control over the national administration to prevent the abuse of power. Even if some form of devolution is desirable to check discontent, it is unlikely that schemes of devolution motivated by party political advantage will cure the real ills. With regard to Wales, the major issue has been whether its assembly should have legislative powers or only executive functions. Not only has Wales no separate legal system, but it has been integrated politically with England for centuries; it therefore may be argued that selective legislative devolution for Wales hardly would work satisfactorily unless similar arrangements were made for the English regions.

Divisions in England coincide more with socioeconomic groups represented by the political parties than with regional boundaries, making it questionable whether a genuine regional consciousness exists in England. A number of alternative schemes of devolution for England, or for the English regions, have been suggested and shelved; devolution does not appear particularly to interest the English people.

The British Empire and Commonwealth

The American Declaration of Independence brought the first British Empire to an end, but the ubiquitous activities of British explorers, fol-

117. Address by Lord Kilbrandon, A Background to Constitutional Reform, Holdsworth Club, Faculty of Law, University of Birmingham, England, 1975, 18-20.
118. See Devolution, supra note 110, chs. 1, 2, 4 (H. Calvert ed. 1975).
119. Williams, Wales and Legislative Devolution, in Devolution, supra note 110, at
lowed by missionaries, traders, and then antislave traders, obliged Britain to try to establish ordered government in all quarters of the globe. The continued growth of the Empire was a historical accident, arising either from settlement in newly discovered lands or from the first continuous contacts between Europeans and underdeveloped peoples. The politico-economic concept of the Empire was not conceived until Joseph Chamberlain became Colonial Secretary at the turn of the present century, and the retention of the Empire was never first on the list of British priorities. The period from the loss of the 13 North American colonies to the development of colonial self-government in the middle of the 19th century has been called the "second British Empire." The main common law principles relating to colonial government were established by the middle of the 18th century, notably in the case of Campbell v. Hall. Later constitutional changes were effected mainly by the development of usages, though there were a few important statutes, including the Colonial Laws Validity Act 1865 and the British Settlements Act 1887. The term "third British Empire" has been used to describe the period of the development of self-government in certain colonies, including Canada, Australia, and New Zealand, from the middle of the 19th century until the formal recognition of "dominion status" by the Statute of Westminster 1931. From that time, as the association between the United Kingdom and the other territories over which the Crown exercised some degree of control has become less and less formal and hierarchical, it has come to be known as the British Commonwealth of Nations, the British Commonwealth, or simply the Commonwealth. The overseas territories of the Empire or Commonwealth fall into various legal categories. Apart from colonies, strictly defined,

121. 28 & 29 Vict., c. 63.
122. 50 & 51 Vict., c. 54.
123. 22 & 23 Geo. 5, c. 4.
124. This expression is intended to cover protectorates, protected states, and trust territories.
125. Lord Rosebery in 1884 in a speech in Australia said: "the Empire is a Commonwealth of Nations"; Lionel Curtis, a journalist, coined the expression "British Commonwealth of Nations."
126. General Smuts, the South African statesman, popularized the expressions "the British Commonwealth" and "the Commonwealth."
and the Dominions as defined in the Statute of Westminster 1931, there were protectorates, protected states, trust territories, and British India, earlier called the Indian Empire, now represented by India, Pakistan, and Bangladesh.

The Queen and the Commonwealth

The Queen, as Head of the Commonwealth, is the symbol of Commonwealth association. The convention recited in the preamble to the Statute of Westminster requires that an alteration by the United Kingdom Parliament in the law touching the succession to the throne should have the assent of the parliaments of all the Dominions or realms owing allegiance to the Crown. These bodies also presumably would need to pass their own legislation to make such an alteration effective in their own countries. On the accession of Queen Elizabeth II in 1952, proclamations were issued in the independent countries of the Commonwealth, which, except for that of New Zealand, differed from that issued in the United Kingdom in that they referred to Her Majesty specifically as Queen of their respective countries.

The common law doctrine was that the Crown was one and indivisible throughout the King’s dominions. Although there is only one Queen with various national titles, and one Head of the Commonwealth, there are in one sense as many “Crowns” as there are independent governments in the nonrepublican parts of the Commonwealth. Within nonrepublican federations, however, the Crown is regarded as indivisible for certain purposes. In international law the Crown is divisible; it is possible for the Crown to be at war with respect to some Commonwealth countries and at peace with respect to others. In World War II, for example, some Commonwealth countries made separate declarations of war against Germany and Japan, while Eire, now the Republic of Ireland, but then a dominion, remained neutral throughout. Since the war, members of the Commonwealth have not been able to agree on a common foreign policy, differing over the Suez Canal intervention in 1956 and over the recognition of the People’s Republic of China.

127. 22 & 23 Geo. 5, c. 4, § 1.
128. The convention recited in the preamble to the Statute of Westminster would seem to extend to more recently independent members of the Commonwealth, unless they are republics.
Colonial Law down to the Colonial Laws Validity Act 1865

There is a tendency to think of the British Empire or Commonwealth over the years as consisting wholly or mainly of "colonies," and to speak of British policy in relation to overseas territories as being a "colonial" policy. Since American independence, however, this has been inaccurate; the colonization of Canada, Australia, and New Zealand by development of settlements must be contrasted to the acquisition by cession or annexation of the Indian Empire with its enormous population during the 18th and 19th centuries, and to the vast areas covered by the protectorates declared in Africa in the latter part of the past century.

A British colony may be defined as any part of the royal dominions, excluding the British Isles. Protectorates, protected states, and trust territories, however, were never part of the dominions of the Crown. British India was excluded by statute from the definition of colony, though limitations on its legislature were similar to those imposed upon colonial legislatures; later statutes have excluded from the definition independent members of the Commonwealth, their provinces or states, and states associated with the United Kingdom. Persons born in a British colony were at common law natural born British subjects, and are now citizens of the United Kingdom and Colonies. The basis of the legal system of a colony was determined by whether the colony was acquired by set-

130. The Crown shared governmental powers in India after statutes of 1773 with the East India Company, originally incorporated by royal charter in 1600. After the Indian Mutiny the East India Company was abolished in 1858, and its territories passed under the exclusive sovereignty of the Crown acting through the Governor-General or Viceroy in Council, and responsible to the Imperial Parliament through the Secretary of State for India. Queen Victoria, in effect, succeeded to the position of the Mogul Emperors, receiving the title of Empress on Disraeli's initiative, and exercising suzerainty over hundreds of Indian ruling princes.

131. The British Islands include the Channel Islands and the Isle of Man, Interpretation Act 1889, 52 & 53 Vict., c. 63, § 18(1).

132. Id. § 18(3).

133. Statute of Westminster 1931, 22 Geo. 5, c. 4, §§ 1, 11 (excluding Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland from the definition); West Indies Act 1967, c. 4.


135. Whicker v. Hume, 11 Eng. Rep. 50 (H.L. 1858) (English mortmain statute does not apply to New South Wales); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774) (English law of trespass and false imprisonment applied to a governor of Minorca for injury to a Minorquin committed in Minorca); Blankard v. Galdy, 91 Eng. Rep. 356 (K.B. 1693) (establishing the principle that when an uninhabited country is settled by English subjects, all English laws are in force there, but when a colony is conquered,
tlement,\textsuperscript{136} by conquest,\textsuperscript{137} or by cession,\textsuperscript{138} though in some cases the historical facts were confused and uncertain and the legal system of a colony might be changed from time to time by legislation.\textsuperscript{139} Since American independence, legislation by the United Kingdom Parliament concerning colonies usually has been confined to constitutional changes affecting more than one colony or creating or dissolving a federation,\textsuperscript{140} or to matters of general concern such as admiralty jurisdiction, merchant shipping, currency, nationality, citizenship, and extradition of fugitive offenders within the Commonwealth. A convention established in the middle of the 19th century, that Parliament would not legislate concerning Canada, Australia, or New Zealand without their consent, was extended in the present century to more recently self-governing colonies, such as Southern Rhodesia, Malta, and the Gold Coast. In other cases in which parliamentary legislation concerning colonies is considered necessary or desirable, it is accomplished by means of statutory orders in council.

Because the Crown at common law had no direct lawmaking power over settled colonies, it was found expedient to pass the British Settlements Act 1887\textsuperscript{141} to authorize the Crown to make laws by order in council for sparsely populated settlements that had not been granted representative institutions, such as the Falkland Islands and certain settlements on the west coast of Africa. This power later was used to legislate for the Straits Settlements (Singapore, Penang, and Malacca). For conquered or ceded colonies, on the other hand, the Crown has a prerogative to legislate by order in council, proclamation, or letters patent, including the power to establish any kind of constitution. Lord Mansfield held in \textit{Campbell v. Hall,}\textsuperscript{142} however, that when an elected assembly has been granted to a colony, the prerogative to make laws cannot be exercised while such a grant is in force, as that would be repugnant to the grant. On the other hand, it was held more recently by the Privy

\textsuperscript{136} Such as the North American colonies, except Quebec, and the Australian colonies.

\textsuperscript{137} For example, Aden and Ashanti.

\textsuperscript{138} Including Quebec, Malta, and Fiji.

\textsuperscript{139} Thus, for example, Roman-Dutch law was adopted in Southern Rhodesia.

\textsuperscript{140} Such as statutes relating to Canada, Australia, and the British West Indies.

\textsuperscript{141} 50 & 51 Vict., c. 54.

\textsuperscript{142} 98 Eng. Rep. 1045 (K.B. 1774) (concerning the imposition of a duty on the export of sugar from Grenada).
Council, in *Sammut v. Strickland*,\(^{148}\) that if representative institutions are revoked validly, the prerogative to legislate for the colony revives even though no power of resumption has been reserved expressly. Otherwise, the Privy Council held, the colony would be left without lawmaking authority unless and until the Imperial Parliament intervened.

Colonial legislatures are subordinate lawmaking bodies, whose powers depend on the act of Parliament, order in council, or letters patent conferring them. Although the scope of power of a colonial legislature is restricted, within those bounds the legislature is unrestricted and does not act as an agent or delegate.\(^{144}\) The earlier common law rule was the rather vague one that a colonial act was invalid if repugnant to English law. In the 1860's, a controversy arose in South Australia when Judge Boothby held invalid certain acts passed by the legislature of South Australia, some on the ground that they were contrary to English law and others because the Governor had not followed his instructions by reserving them for the royal pleasure, that is, the assent of the Secretary of State. Following addresses from the two houses of the South Australian Parliament asking for the judge's removal, the Secretary of State consulted with the English Law Officers, and Parliament passed the Colonial Laws Validity Act 1865,\(^{145}\) which was intended to be declaratory and not restrictive. The Act still is in force in relation to colonies and, for historical reasons, the Australian states. Section 2 provides that a colonial law repugnant to any act of Parliament or to any order or regulation made thereunder, extending to the colony concerned or to colonies generally, shall to the extent of the repugnancy be void; section 3, however, makes clear that a colonial law is not void on the ground that it is contrary to English common law or to a British statute not applying to colonies.\(^ {146}\) Failure by a Governor to observe instructions to reserve certain classes of bills for the royal pleasure does not invalidate his assent to a bill, unless these instructions actually are embodied in the constitution of the colony.\(^{148}\) The power of a colonial legislature to establish

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\(^{143}\) [1938] A.C. 678 (P.C.) (concerning the imposition of import duties in Malta after Parliament had provided for the revocation of the self-governing constitution of Malta).


\(^{145}\) 28 & 29 Vict., c. 63.

\(^{146}\) Id. § 2.

\(^{147}\) Id. § 3.

\(^{148}\) Id. § 4.
courts of justice is confirmed by section 5, which declares that every "representative" colonial legislature has power to make laws respecting the constitution, powers, and procedure of such legislature, provided that such laws are passed in such "manner and form" as may from time to time be required by any law in force in the colony. 149

**Development of Dominion Status** 150

The development of responsible government in the colonies originated in 1839 in the report sent from North America by Lord Durham to the British government. Upper and lower Canada already had representative assemblies; the thrust of Lord Durham's report was that, as a necessary consequence of the grant of representative institutions, the Governor should entrust the administration to such men as could command a majority. In other words, responsible government should be introduced, and this could be effected simply by a change in the Governor's instructions. Responsible government accordingly was introduced into the united colonies of Ontario and Quebec. Sir Charles Bagot as Governor, in 1842 to 1845, added French-Canadians and Radicals to moderates in the council, and in 1848, Lord Elgin as Governor-General accepted party lines as the basis for a Canadian ministry. Nova Scotia, Prince Edward Island, New Brunswick, and Newfoundland followed along similar lines. Full autonomy in internal affairs gradually was supplemented by a degree of autonomy in external affairs. Implicit in the British North America Act 1867 was the existence of responsible government in the new federal Dominion of Canada. 151 After 1850, the same principles were extended to New South Wales, Tasmania, South Australia, Victoria, Queensland, 152 and New Zealand, 153 to the South African colonies during the latter part of the 19th century, to the new federal Commonwealth of Australia in 1900, 154 to the new Union of South Africa in 1909, 155 and

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149. *Id.* § 5. A representative legislature is one in which at least half the members are elected by inhabitants of the colony. *Id.* § 1.

150. For discussions and documents concerning the development of dominion status, see A. Keith, Speeches and Documents on the British Dominions 1918-1931 (1935); K. Wheare, The Statute of Westminster and Dominion Status (1932).

151. 30 & 31 Vict., c. 3.


154. Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict., c. 12. The federation includes New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania.

to the Irish Free State when granted "dominion status" in 1922.\textsuperscript{156} The autonomy of these dominions received further impetus by their recognition as separate members of the League of Nations after World War I.

The Balfour Declaration of 1926\textsuperscript{157} described the position and mutual relations of the United Kingdom and the dominions at that time as: "autonomous communities within the British Empire, equal in status, in no way subordinate one to 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 of Nations."\textsuperscript{158} The mutual relations between the autonomous members of what had become known as the British Commonwealth were regarded as governed, not by international law, but largely by usages whose character was something between international law and constitutional law. These conventions included both legislative autonomy and executive autonomy, which involved the Governor-General's acting on the advice of the dominion government, the principle that a dominion could not be bound by a treaty entered into by the Crown without its consent, and the choice of Governor-General by the dominion government. Largely at the instigation of South Africa and the Irish Free State, it was agreed that the United Kingdom Parliament should pass an act to reconcile the law relating to legislative powers with the conventional status of the dominions.\textsuperscript{159} After careful study by legal representatives of the various countries concerned in a Conference on the Operation of Dominion Legislation in 1929,\textsuperscript{160} and following resolutions adopted by the Imperial Conference of 1930,\textsuperscript{161} the Statute of Westminster 1931\textsuperscript{162} was passed. Some of the more important conventions, as well as the request and consent of all the dominions to the passing of the Statute, were recited in the preamble. Section 2 of the Statute repealed the Colonial Laws Validity Act 1865\textsuperscript{163} in relation to future dominion legislation, and provided, out

\begin{itemize}
  \item \textsuperscript{156} Irish Free State Constitution Act 1922, 13 Geo. 5, c. 1.
  \item \textsuperscript{157} REPORT OF IMPERIAL CONFERENCE, CMD. NO. 2768 (1926).
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Then encompassing Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland.
  \item \textsuperscript{160} CMD. NO. 3479 (1929-30).
  \item \textsuperscript{161} CMD. NO. 3717 (1930-31).
  \item \textsuperscript{162} 22 & 23 Geo. 5, c. 4. The title of the Statute was suggested by Sir Maurice Gwyer, then Solicitor-General and a member of the Conference on the Operation of Dominion Legislation, and later Chief Justice of India. The Statute never came into operation in Newfoundland, which became a province of Canada.
  \item \textsuperscript{163} 26 & 27 Vict., c. 76.
\end{itemize}
of an abundance of caution, that no future dominion legislation would be void on the ground of repugnancy either to English common law or to existing or future acts of the United Kingdom Parliament. Section 3 "declared and enacted" that dominion parliaments have full power to make laws having extraterritorial operation.\textsuperscript{164} The celebrated section 4 provides that no act of the United Kingdom Parliament passed after the Statute shall extend, or be deemed to extend, to a dominion, as part of the law of that dominion, unless it expressly is declared in the act that the dominion has requested and consented to its enactment. This section applies only to subsequent acts, for otherwise the basis of the constitution of a dominion and much of the rest of its law would have ceased to have effect; a dominion wishing to repeal a previous act of the United Kingdom Parliament applying to it, however, can do so by virtue of section 2 of the Statute.

Because Australia did not strongly favor the Statute of Westminster, and because New Zealand probably preferred that it not be enacted, sections 2 through 6\textsuperscript{165} were made adoptive in respect to those two dominions. Australia adopted the sections on the entry of Japan into the war in 1942,\textsuperscript{166} and New Zealand did so in 1947.\textsuperscript{167} The absence of power on the part of the Canadian Parliament to amend the Canadian Constitution was preserved\textsuperscript{168} unless and until the federation and the provinces could agree on how the distribution of powers among them should be made internally amendable.\textsuperscript{169} The existing restrictions on the power of the Australian Parliament to amend the Australia Constitution

\textsuperscript{164} It has been held that such power already existed under the British North America Act 1867, 30 & 31 Vict., c. 3, § 91. Croft v. Dunphy, [1933] A.C. 156 (P.C. 1932) (upholding Canadian statute providing for seizure of vessels hovering within 12 miles of the Canadian coast with dutiable goods aboard). \textit{But see} Macleod v. Attty-Gen. for New South Wales, [1891] A.C. 455, 458 (P.C.) (dicta stating that a bigamy law applicable to marriages outside of New South Wales would be beyond the jurisdiction of the colony).

\textsuperscript{165} Section 5 dealt with merchant shipping and section 6 with admiralty courts.

\textsuperscript{166} Statute of Westminster Adoption Act 1942, 5 & 6 Geo. 6, No. 56 (Australia).

\textsuperscript{167} Statute of Westminster Adoption Act 1947, 10 & 11 Geo. 6, No. 38 (New Zealand).

\textsuperscript{168} 22 & 23 Geo. 5, c. 4, § 7.

\textsuperscript{169} The British North America (No. 2) Act 1949, 12, 13 & 14 Geo. 6, c. 81, \textit{amending} the British North America Act 1867, 30 & 31 Vict., c. 3, § 91(1), passed at the request and with the consent of Canada, conferred on the Canadian Parliament the power of constitutional amendment by means of ordinary legislation, with certain exceptions relating to provincial rights and the meeting and duration of parliament.
Act, as well as the existing rights of the Australian states, also were preserved, as were the limits, if any, on the power of constitutional amendment in New Zealand. When New Zealand adopted sections 2 through 6 of the Statute of Westminster in 1947, it asked for and obtained an act of Parliament giving it complete constituent powers.

Colonial Development Since World War II

The stated central purpose of British colonial policy at the end of World War II was to guide the colonial territories to responsible self-government within the Commonwealth under conditions that would ensure the people of both a fair standard of living and freedom from oppression from any quarter. This statement of policy was reiterated in subsequent years by successive Secretaries of State regardless of party; in 1960 Prime Minister Macmillan gave dramatic recognition to African national consciousness by his "wind of change" speech delivered in Cape Town. A minimum size first was stipulated as a prerequisite of independence, but since the grant of independence to Cyprus in 1960 smallness in itself no longer has been considered an objection to independence.

There have been almost as many varieties of colonial legislatures as colonies, and over the years their constitutions have been subject to frequent change. Typical postwar tendencies have been to confer legislative councils on colonies that had no legislative body; to turn majorities of official members into majorities of unofficial members, elected minorities into elected majorities, and assemblies with elected majorities into assemblies wholly elected; to substitute universal adult suffrage, with racial quotas in mixed populations, for property or educational franchise qualifications; and to confer an increasing degree of self-government, especially regarding internal affairs, on colonies with elected assemblies.

In the executive sphere there have been parallel developments. Executive councils commonly consisted at first of officials serving ex officio or

170. The Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict., c. 12, §§ 1-8, provides for an indissoluble federation under the Crown of the United Kingdom, and makes no provision for amendment by the Australian Parliament. The alteration of the constitution, id., § 9, requires a special kind of referendum; the distribution of powers between the federation (the Commonwealth of Australia) and the states leaves the residue of the existing powers to the states.
171. 22 & 23 Geo. 5, c. 4, § 8.
173. The Cyprus Act 1960, 8 & 9 Eliz. 2, c. 52.
nominated by the Governor. Nominated unofficial members soon were introduced, the unofficial element grew, and nomination was made on the recommendation of the legislative council. The function of an executive council in what were formerly known as “crown colonies” was advisory only. When a legislature becomes representative (that is, has an elected majority) the unofficial members of the executive council will probably be members of the legislature and leaders of opinion there, so the Governor will try to avoid acting against their unanimous advice. The introduction of the ministerial system involves the Governor’s assigning unofficial members of the executive council as ministers of departments. The Governor then is instructed to act on the advice of the executive council, and the elected ministers by convention will depend on the confidence of the legislature. The leader of the majority in the elected house then may be styled Chief Minister. Certain departments still are retained by officials, including defense and external affairs, and perhaps for a time the Attorney-General’s department and internal security. In matters concerning public order, public faith, and good government, the Governor’s reserved power to certify that a bill shall have effect though it has not been passed by the legislature is available in an emergency. The last transitional stage before independence usually is internal self-government. The United Kingdom retains control only over defense and external affairs and power to suspend the constitution in an emergency, for which the Secretary of State remains responsible to the United Kingdom Parliament. The executive council becomes the Council of Ministers or Cabinet, over which the Governor ceases to preside, and the Chief Minister is styled Prime Minister. The chief remaining limitations are the subordination of the colonial legislature to the United Kingdom Parliament, and the lack of international personality. A colonial legislature cannot enlarge its own powers; still less can it lawfully make a unilateral declaration of independence as Southern Rhodesia purported to do in 1965.174 In Madzimbamuto v. Lardner-Burke175 the Privy Council held that the nature of the sovereignty of the Queen in the United Kingdom Parliament over a British colony must be determined by the constitutional law of the United Kingdom, and that the Queen in the United Kingdom Parliament still was sovereign in Southern Rhodesia after the Unilateral Declaration of Independence. The Privy Council held that the convention under which the United Kingdom Parliament

did not legislate for Southern Rhodesia without the consent of its government had no legal effect in limiting the powers of the United Kingdom Parliament.\textsuperscript{176}

**Protectorates and Trust Territories**

The largest areas of British jurisdiction in Africa were protectorates, and most British protectorates were in Africa.\textsuperscript{177} These were under the protection of the Crown, which was responsible for their external affairs. Although they often were administered internally in a way similar to that of adjoining colonies, as by Governor Lugard in Nigeria, they were not British territory under constitutional law, and their inhabitants were not British subjects.\textsuperscript{178} According to the British view, jurisdiction in "uncivilized" countries could be exercised only over the nationals of the protecting power and of such other powers as gave their consent, but Britain eventually adopted the view of other European powers\textsuperscript{179} that lawmaking power extended over all persons in a protectorate. Protected states, mostly in the Malay Peninsula and in the Pacific\textsuperscript{180} continued to be governed by their native rulers according to their own customary systems of law, but under varying degrees of supervision by British "residents" or "advisers."\textsuperscript{181} Governmental acts by the Crown in protectorates and protected states were regarded either as acts of state or as authorized by foreign jurisdiction acts.\textsuperscript{182} Similar principles applied to mandated territories after World War I\textsuperscript{183} and to trust territories after World War II,\textsuperscript{184} except that the United Kingdom was responsible to the League of Nations for the government of the former, and to the United Nations for the government of the latter. The transition to self-government was brought about in a way similar to that employed in the colonies. All protectorates and trust territories now have been granted

\textsuperscript{176} Id. at 722-23.
\textsuperscript{177} Notably Uganda, Northern Rhodesia, and Nyasaland.
\textsuperscript{179} General Acts of the Berlin Conference, (1885) C. 4739; Brussels Conference, (1890) C. 6049.
\textsuperscript{180} Including Brunei and Tonga.
\textsuperscript{183} Including Palestine.
\textsuperscript{184} Including Tanganyika.
independence by acts of Parliament; if their inhabitants have not acquired the citizenship of an independent country, they have the status of British protected persons who are neither citizens of the United Kingdom and Colonies nor aliens.\textsuperscript{185}

\textit{Grants of Independence Since 1947}

Since 1947 a large number of formerly dependent territories have been granted independence by act of Parliament. Independence involves, first, the freedom of the country concerned from dependence on the Parliament and government of the United Kingdom, and, second, the acquisition of international personality, the availability of application for membership in the United Nations, and control over questions of state succession. By the Government of India Act 1935,\textsuperscript{188} India had acquired a considerable degree of internal self-government both centrally and in the provinces, and early in World War II it was promised dominion status when the war ended. By the end of the war, however, nothing short of independence would satisfy the peoples of the subcontinent. There were such bitter divisions between Hindus, Moslems, and other communities that the Governor-General, Lord Mountbatten, with the approval of Prime Minister Attlee, fixed a time limit for British withdrawal, leaving the political leaders to compose their differences among themselves according to their own methods. The series of postwar Independence Acts began in 1947 with those for India\textsuperscript{187} and Ceylon,\textsuperscript{188} which remained in the Commonwealth, and for Burma\textsuperscript{189} which, in spite of Attlee’s plea that membership in the Commonwealth meant “independence plus,” chose to leave that association. The Ireland Act 1949 recognized the independence of the Republic of Ireland outside the Commonwealth.\textsuperscript{190} Comparable provisions were made by the South Africa Act 1962,\textsuperscript{191} though South Africa’s withdrawal upon becoming a republic was the result of political pressure from other African members of the Commonwealth. Meanwhile Ghana\textsuperscript{192} and Nigeria\textsuperscript{193} followed

\begin{itemize}
\item \textsuperscript{185} British Nationality (No. 2) Act 1964, c. 54, § 5, amending British Nationality Act 1948, 11 & 12 Geo. 6, c. 56, § 32(1).
\item \textsuperscript{186} 26 Geo. 5 & 1 Edw. 8, c. 2.
\item \textsuperscript{187} Indian Independence Act 1947, 10 & 11 Geo. 6, c. 30.
\item \textsuperscript{188} Ceylon Independence Act 1947, 11 Geo. 6, c. 7.
\item \textsuperscript{189} Burma Independence Act 1947, 11 & 12 Geo. 6, c. 3.
\item \textsuperscript{190} 12, 13 & 14 Geo. 6, c. 41.
\item \textsuperscript{191} 10 & 11 Eliz. 2, c. 23.
\item \textsuperscript{192} Ghana Independence Act 1957, 5 & 6 Eliz. 2, c. 6.
\item \textsuperscript{193} Nigeria Independence Act 1960, 8 & 9 Eliz. 2, c. 55.
\end{itemize}
the example of Ceylon, and a number of other territories in all parts of
the world followed Ghana and Nigeria.

An independence act removes, in the general manner of sections 2,
3, and 4 of the Statute of Westminster 1931, the three legislative limi-
tations of repugnancy to British statute law, extraterritoriality, and the
lawmaking power of the United Kingdom Parliament. The contingency
that the country concerned might request and consent to Parliament
legislating for it in the future, however, generally has been omitted.
Protectorates and trust territories are not within “Her Majesty’s do-
minions” and therefore their independence acts technically have annexed
them to the Crown so that, on the withdrawal of protection, they might
be granted independence within the Commonwealth if that is desired, as
is usually the case. For trust territories, this process requires the ap-
proval of the United Nations. Provision is made that British protected
persons retain that status until they become citizens of an independent
country. Executive powers, whose exercise was thought to be covered
adequately by constitutional usages, were not dealt with by the Statute
of Westminster, which was intended to recognize dominion “autonomy”
rather than independence. The post-World War II Independence Acts,
however, expressly have provided that the United Kingdom government
should cease to be responsible for the government of the country con-
cerned. There usually is an agreement between the United Kingdom
and the territory concerned that the latter will succeed to the rights and
obligations affecting it that arise out of international agreements. Some-
times the grant of independence also is accompanied by agreement with
the United Kingdom on external affairs, defense, and public officers,
though these agreements may be of short duration.

A newly independent member of the Commonwealth, when it revises
its constitution, tends to adopt the principle of “autochthony,” the as-
sertion that its constitution is derived from its own people rather than
from a United Kingdom statute. Autochthony strictly requires a com-
plete breach in legal continuity, as it is the substitution of one basis of
the legal order for another, though in practice the process is often ac-
complished without anything like a revolution in the ordinary sense.

194. 22 & 23 Geo. 5, c. 4. See notes 149-50 supra & accompanying text.
195. E.g., Ceylon Independence Act 1947, 10 & 11 Geo. 6, c. 7, § 1(2); Ghana Inde-
pendence Act 1957, 5 & 6 Eliz. 2, c. 6, §1(6).
196. Such agreements were made upon the independence of Ceylon, Singapore, and
Malta.
The notion of autochthony is hardly applicable to Canada, Australia, or New Zealand.\(^{197}\)

**Republics and the Westminster Model**

The desire for independence is stimulated largely by British political ideas, and nationalism marks the later stages in the development of dependent territories even where, as in Africa, the territories never existed as nations. At this stage there is, in effect, only one party, whose aim is to end “colonialism”; but the British political system, the only system that the British seek to bequeath to emancipated countries, presupposes two main parties or groups, one being an effective opposition capable of providing an alternative ministry. Soon after independence, a one-party system, to traditionalists a contradiction in terms, may be introduced, especially if the country becomes a republic with a strong presidential system. Thus, the “Westminster model” soon was abandoned in Pakistan and Ghana, and since has been abandoned by most of the African members of the Commonwealth. Before World War II, republicanism was presumed to be inconsistent with membership in the Commonwealth because of common allegiance to the Crown; it was at least partly for this reason that the Republic of Ireland left the Commonwealth. Nehru, however, achieved what De Valera could not or would not. India’s wish to remain a full member of the Commonwealth after its imminent adoption of a republican constitution\(^{198}\) was considered in 1949 by a meeting of Commonwealth Prime Ministers. They agreed to the formula that India would accept the King as the symbol of the free association of the independent members of the Commonwealth of which it was a member, and, thus, as the “Head of the Commonwealth.”\(^{199}\) This modification of the Balfour Declaration of 1926\(^{200}\) marked the end of “common allegiance.” It was followed in 1955 on the eve of the first republican constitution of Pakistan,\(^{201}\) and now republics in the African and Asian countries of the Commonwealth are numerous.  

\(^{197}\) For a discussion of autochthony, see K. Wheare, *The Constitutional Structure of the Commonwealth* 89-113 (1960).

\(^{198}\) See India (Consequential Provision) Act 1949, 12, 13 & 14 Geo. 6, c. 92.

\(^{199}\) J. Wheeler-Bennett, *King George VI*, at 719-31 (1958). Sir Norman Brook, Secretary to the Cabinet, went throughout the Commonwealth negotiating acceptance of the title “Head of the Commonwealth.”

\(^{200}\) See notes 143-44 supra & accompanying text.

\(^{201}\) The Pakistan (Consequential Provision) Act 1956, 4 & 5 Eliz. 2, c. 31.
Associated States

A new kind of noncolonial status, falling short of independence, has been devised for some of the smaller islands in the Caribbean following the dissolution of the Federation of the West Indies in 1962 and the independence of the larger islands in that area. The West Indies Act 1967 provided that Antigua, Dominica, Grenada, St. Christopher-Nevis-Anguilla, St. Lucia, and St. Vincent would be states in association with the United Kingdom; the United Kingdom was to retain responsibility for defense, external affairs, and citizenship, and the Governor was to represent the Queen. The associated states would have legislative powers rather less extensive than those of the dominions under the Statute of Westminster. Apart from the compromise between colonial status and independence, an interesting feature of this arrangement is that an associated state may terminate unilaterally the association by the prescribed legislative procedure, though the power of the United Kingdom to terminate the association is subject to an assurance that it will not do so without giving reasonable notice.

Full Membership in the Commonwealth

The present-day Commonwealth is an anomalous institution. It scarcely can be said to have a constitution, and it is not an international person. Its basic rules are concerned mainly with the acquisition, continuance, and discontinuance of membership, rather than with the incidents of membership. The rules are conventions that have grown out of practice and may be modified or discarded when it is thought convenient. Although the grant of independence, whether within or outside the Commonwealth, is a matter for the United Kingdom and the territory concerned, admission to full membership in the Commonwealth is a question that, by convention, requires consultation with all existing independent members because of their equality of status. There is no unanimity rule; rather, it is a matter of consensus. Since 1947 it has been recognized that an independent member may leave the Commonwealth by voluntary secession. Such secession requires not only local legislation, which in this respect would be beyond the powers of the

202. c. 4, § 1.
203. Id. § 2.
204. Compare id. § 4, sched. 1, with Statute of Westminster 1931, 22 & 23 Geo. 5, c. 4, § 3.
Parliaments of Canada and Australia, but also an act of the United Kingdom Parliament for such purposes, amending the British laws of citizenship, visiting forces, extradition, and diplomatic immunities. Commonwealth membership manifests itself mainly in the system of consultation. Consultation, exchange of information, and cooperation take place mainly in the fields of external affairs, defense, finance and economics, and education. There also is a limited degree of mutual help, though consultation tends to emanate uniquely from the United Kingdom. The media for consultation include the Crown and the Governor-General, meetings of Prime Ministers, other ministers, and officials, the exchange of High Commissioners or Ambassadors, and regular communication between the British Foreign Office and the Departments of External Affairs in the Commonwealth countries. A number of official organs also exist for cooperation in such matters as agriculture and forestry, air transport, economics, scientific liaison, shipping, statistics, and telecommunications.

**Appeals to the Privy Council**

The earlier history of the jurisdiction of the Privy Council to hear appeals from overseas territories is bound up with that of the North American colonies. After the abolition of the wider judicial powers of the Privy Council in the 17th century, the remaining jurisdiction rested on the prerogative of the King as the fountain of justice; its exercise, however, came to be regulated by the Judicial Committee Acts of 1833 and 1844, which created a Judicial Committee of qualified judges. During the last 200 years, the Privy Council, or its Judicial Committee, has heard appeals from the Channel Islands, the Isle of Man, the colonies, and India; also, by virtue of the Foreign Jurisdiction Acts, it has heard appeals from protectorates, protected states, mandates, and trust territories. Appeals “as of right” or by right of grant, in so far as they rest not on local legislation but on an act of Parliament or a statutory order in council, cannot be limited or abolished by the legislature of a dependent territory,
because that would be contrary to the Colonial Laws Validity Act 1865210 or to the Foreign Jurisdiction Acts. Similarly, it has been held that the power of the Privy Council to grant "special leave" to appeal cannot be limited or abolished by the legislature of a dependent territory. Any such limitation would be repugnant to the Judicial Committee Acts, and could be effective only if construed as having extraterritorial operation; a colonial act, however, generally cannot have such operation.211 The Imperial Conference of 1930 did not agree on any solution to the question of appeals from the dominions to the Privy Council; it seems clear that the Statute of Westminster did not intend to affect them. British policy did not demand that the dominions would retain such appeals against their will, though it was hoped that appeals would continue in the interest of the uniformity of the common law. The Judicial Committee, in 1935, however, held that sections 2 and 3 of the Statute of Westminster212 implicitly enabled a dominion to which the Statute applied to abolish any or all appeals to the Privy Council, including appeals by special leave.213 The same consequence followed from the various independence acts since 1947. The tendency has been to abolish appeals to the Privy Council upon assumption of republican status, if not before. Appeals still lie from New Zealand, from the Australian states in matters of state law, from a dwindling number of other independent Commonwealth countries, and from the remaining colonies. A meeting of Commonwealth Law Ministers in 1966 under the chairmanship of Lord Gardiner, the Lord Chancellor, considered a proposal for a peripatetic Commonwealth appeals court, but the proposal came too late to interest many of the members.

**Conclusion**

The democratic trend in Great Britain clearly cannot be attributed to any single factor. Key developments often have been dependent upon personalities: at times upon the one on the throne, at times upon the one occupying No. 10 Downing Street, and at times upon other officials and

210. 28 & 29 Vict., c. 63.

211. Nadan v. The King, [1926] A.C. 482 (P.C.) (Canadian statute intended to prevent appeals in criminal cases invalid).

212. See notes 163-64 supra & accompanying text.

members of Parliament. Historical factors, uncontrolled by Great Britain, such as movements for independence by colonists and the two World Wars, also have hastened political change. Nonetheless, from the independence of the Prime Minister from the Crown to the independence of the colonies from the Commonwealth, the past 200 years have witnessed a continued growth of democratic institutions and conventions in Great Britain. Concurrently, there has been a gradual decentralization of power, typified both by the development of new political relationships with the states and territories that formerly had constituted the British Empire, and by the consideration of devolution within the United Kingdom.