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THE SECOND CHAMBER DEBATE IN THE UK REVISITED: LIFE, AFTERLIFE AND REBIRTH?**

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Introduction

The House of Lords continues to function as part of the contemporary UK Parliament despite its unique origins, unplanned development and often archaic practices.[1] The discussion below employs the metaphor of the stages of life, after life, and finally rebirth, to help amplify the unfolding constitutional dynamics surrounding the House of Lords. The advantage of adopting a historical trajectory is that it assists in demonstrating the connection between the institutional roots of the upper house on the one hand, and its present role as a revising chamber, on the other. Part I highlights important episodes in its early life as a prelude to analysing in Part II the clash in its maturity between the House of Commons and the House of Lords. Particular attention is devoted to its resistance to the Great Reform Act of 1832 as the initial stage in nineteenth century electoral reform, and then just as intensely to the radical budget proposed in 1909 by the Liberal government. Walter Bagehot had insisted in his famous study that as a 'dignified' part of the constitution which enjoyed deference and

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[1] The State opening of Parliament during which the Queen delivers a policy speech written by the Prime Minister from the throne in the House of Lords exemplifies the residue of traditional pageantry.

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respect the House of Lords would never be reformed. [2] Of course, this was a serious misjudgement, the 1911 and 1949 Parliament Acts not only curtailed its powers but also anticipated its replacement. Pending abolition, Part III peers into the notional 'afterlife' by assessing the extent of its role during this seemingly indefinite moratorium. Finally, what of the future? For more than a century it appeared that the principle unresolved question was to reach agreement on a revised composition. However, it is argued in this essay that given the extent of constitutional reform an entirely new regionally based Senate is required in order to rebalance the constitution.

Part I Youth: The House of Lords and the Path to Democracy

It is axiomatic that the House of Lords evolved in tandem with the uncodified traditional British constitution. The trend towards formalising consultation and participation predates representative democracy based on the notion of the universal franchise. From the 11th century prior to the Norman conquest the Saxon Parliament, including religious leaders, land owners and ministers was consulted by kings. By the late fourteenth century the medieval Parliaments of Edward III had merged as a combination of a high court of justice and a body charged with taxing and representation.[3] It acted not in opposition but as an instrument of Royal government. From this period onwards the Parliamentary model of representation already consisted of two distinct houses, with the hereditary Lords Temporal and Spiritual forming the House of Lords[4], while the Commons comprised the lesser barons and knights together with the representatives of the towns. Rather than participating actively in the affairs of state early Parliaments consented to decisions as it evolved from a high court of justice into a legislature. Some acknowledgment of placing limitations on the monarchy was observed by Erasmus when visiting London in the early sixteenth century: 'Henry VIII recognized this as his own existing system. King, Lords and Commons were the three elements of government: the Commons subordinate to the Lords, the Lords subordinate to the King, but each modifying the others and neutralizing the dangers inherent in their purest forms.'[5] The Parliament of 1529 (great Reformation Parliament) sat for 7 years but it attempted to eliminate medieval liberties to allow easier exercise of the authority of the sovereign. It is significant also that the clergy comprised more than half the membership of the House of Lords until the dissolution of the monasteries by Henry VIII in 1539.

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[2] W Bagehot *The English Constitution* (Glasgow, Fontana, 1963), 149.

[3] M Russell *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford, Oxford University Press, 2013).

[4] The importance of the church is reflected in the fact that until the mid fourteenth century the Lords Spiritual outnumbered the Lords Temporal. The present figure of 26 Archbishops and Bishops has remained the same since the death of Elizabeth I in 1603.

[5] J Wells *The House of Lords : From Saxon Wargods to a Modern Senate*, (London, Sceptre, 1997), 97.

The seventeenth century has been labelled as the century of revolution in England and it witnessed a civil war between the King and Parliament which broke out in 1642.[6] The absolute rule of the monarchy was successfully challenged. After the Civil War (1649) and the execution of Charles I the House of Lords was abolished altogether but it was re-instated with the restoration of Charles II in 1660. A high proportion of the 158 seats were given to members who had already served in the House of Commons and were also the younger sons of aristocrats.[7] Looking forward to the crisis in 1909 the predominance of the House of Commons over the raising and spending of revenue was re-asserted in 1671: 'in all aids given the King by the Commons the tax rate ought not to be altered by the Lords'.[8] The succession of William and Mary was confirmed following a Parliamentary convention dominated by the Commons and the Bill of Rights of 1689 required regular meetings of Parliament. Following the glorious revolution appointments to the House of Lords were regularly made to boost the King's support in Parliament.

Part II Maturity: The Rivalry of the two Houses

From the end of the eighteenth century it might be said that 'Some form of English-style parliamentary government – Edmund Burke's "third option" between the "despotism of the monarch" and the "despotism of the multitude' was gradually accepted as the sensible replacement for absolute monarchy and way to forestall revolution.'[9] Britain had emerged victorious from the Napoleonic wars which ended in 1815. It was experiencing rapid industrialization. The economic, social and political condition of the nation were being rapidly transformed but it faced widespread agitation and lacked a sustainable form of representative democracy.[10] The French Revolution was relatively fresh in many memories. The prospect of widespread violent unrest was viewed with apprehension, especially by those with property, and thus who had a lot to lose. The traditional constitution was regarded by some commentators as having important virtues. For example, the hereditary House of Lords offered a paradigm for Edmund Burke and his followers 'Our civilization, like the Upper House, depended on unbroken tradition, respect for the past combined with respect for the future.'[11]

The Conservative government of the Duke of Wellington foundered in 1830 as a result of the failure of the Tory party to respond to what had become a popular mood for change. Notwithstanding the corruption and inequality of representation identified by others the Duke had no doubt of the virtues of Parliament in its current form. He claimed that: 'it has as a member every man noted in the country for his fortune, his talents, his science, his in-

[6] C Hill *The Century of Revolution* 2nd edn (London, Routledge, 1980).
[7] Russell, 2013, 18.
[8] House of Commons Journal Volume 9: 13 April 1671.
[9] R Tombs, *The English and Their History* (London, Allen Lane, 2014), 414.
[10] E Thompson, *The Making of the English Working Class*, (Harmondsworth, Penguin, 1968).
[11] Wells, 1997, 159.

dustry or his influence; the first men of all professions, in all branches of trade and manufacture connected with our colonies abroad; and representing, as it does, all the states of the United Kingdom'.[12] Further, Wellington maintained that 'To conduct the government will be impossible, if by reform the House of Commons should be brought to a greater degree under popular influence'.[13] This was, in part, a defence of a natural right to rule, but it was also meant to be a practical claim relating to the competence and experience of establishment figures in the art of government. In the words of Wellington again: 'I am certain that the country would be injured by depriving men of great property of political power: besides the injury done to it by exposing the House of Commons to a degree of popular influence'.[14] Given the relatively limited ambitions of the reform bills presented in Parliament it was perhaps going a bit too far to claim that Parliamentary reform would be: 'a revolution that will overturn all the natural influence of rank and property'.[15] Nevertheless, scare tactics which conjured up what reform might bring in its wake were bound to have some resonance with the established propertied classes.

The return of the Whigs to power in 1830 with Lord Grey as PM on a platform of reform meant that reform of some kind was regarded as inevitable, except that is by the Tory opposition in the Lords led by Wellington himself. Although in one sense the struggle to get this Act passed can be regarded as a clash between the established landed classes and the new industrial interests, notably still viewed with suspicion by Bagehot 30 years later. By the time the Reform Bill (1832) was introduced the representatives in Parliament of a substantial proportion of the traditional ruling class were already convinced of the case for a reform of some kind. Indeed, it was of particular significance that the will to reform had spread to the emerging industrial elite. Change had now become inevitable.

In the House of Commons the Tories typically repeated the view that 'a stake in the country was an essential title to political power'. Unleashing the process of reform would lead to the eventual destruction of Parliament. At the same time there was resistance to the proposed shift in the distribution of seats from country squirarchy to industrial towns. It was also pointed out with some justification that the reform proposals fell short of being a rational scheme for a comprehensive redistribution of seats. The first bill needed the support from Irish members to scrape a majority. It narrowly passed its second reading in the Commons by 302 votes to 301 but it was then defeated in committee on the 19 April 1831. The King called an election on the issue of the bill which the Whigs and pro-reformers supporting the government of Lord Grey won resoundingly. It seemed that the tide was turning inexorably towards reform. The second bill following the election was largely similar to the first (£50 ten-

[12] E. Smith *Reform or Revolution? A Diary of Reform in England, 1830-32*, (Stroud, Alan Sutton, 1992), 61.
[13] ibid
[14] Smith, 1992, 62.
[15] A Briggs *The Age of Improvement* (London, Longman, 1959) 242.

ants at will in the counties were also to be given the vote). This time it gained a substantial majority of 136 votes in the Commons on second reading and 109 votes on its third reading and seemed to be set fair for the statute book. There was a famous impassioned speech lasting more than three hours in the House of Lords in which Lord Chancellor Brougham used eloquence and invective to undermine the repeated objections to the bill. Given the widespread clamour for reform in the country Lord Brougham implored his fellow peers not to reject the bill, fearing dire consequences (rioting and insurrection). However, Wellington continued the rear guard action in the upper house. The bill was again defeated by 199 votes to 158 on the 8 October 1831. This was largely thanks to the intervention of the bishops in the House of Lords against the bill.[16]

The impact of this rejection was immediate. Never has the nation been closer to revolution than in the autumn of 1831. Many feared outbreaks of violence on an unprecedented scale. Riots were triggered in many parts of the country and the authorities were barely equipped to contain the unrest. Now the question was how the log jam caused by the intransigence of peers could be overcome. It occurred to the Whig leadership, just as we shall see it did to Asquith and Lloyd George 80 years later when the Parliament Bill was rejected, that the solution could be in the hands of the King. Essentially, they recognised that the bill's passage could be ensured if William IV could be persuaded to create sufficient peers to ensure a majority in the upper house. This break caused by the defeat of the Second Bill was also an opportunity for negotiation to get Tory waverers to change their minds by offering limited concessions. A Third Reform Bill was introduced on the 12 December 1831. The main changes were that this version reduced the list of condemned seats from 69 to 49 but second seats were granted to some northern industrial towns. It sailed through the House of Commons in two days and was passed on second reading by 324 votes to 162. Grey was reluctant to flood the House of Lords with new peers which he felt set a dangerous precedent. Nevertheless, William IV was approached with this in mind as there was no alternative. Initially, he was reluctant to commit himself but in January agreed to appoint sufficient new peers to ensure a majority in the House of Lords. In April 1832 with this threat looming the Bill passed its second reading in the House of Lords by 9 votes. A further crisis erupted when the bill was defeated on 7 May, this time in its committee stage in the House of Lords. The King accepted the government's resignation rather than accede to the request to create 50 new peers. This sparked another round of nationwide mass demonstrations. In the meantime there was deadlock as Wellington was unable to form an alternative government. Finally, the King had very little alternative but to invite Grey to form a government with an assurance that sufficient peers would be created to guarantee the bill's passage. At this point the Conservative opposition in the Lords caved in and the bill passed its third reading by 106 votes to 22. It has been claimed with some justification that the most revolutionary aspect of the reform cri-

[16] E Pearce *Reform: The Fight for the 1832 Reform Act* (London, Jonathan Cape, 2003), 192.

sis of 1831-2 was not the Reform Bill itself, but the coercion of the House of Lords.[17] Equally the undercurrents of class struggle were everywhere apparent. For example, in the mid Victorian era the unreformed House was stoutly defended as: ' … its dignified capacity – is very great. … Nobility is the symbol of mind. It has the marks from which the mass of men always used to infer mind, and often still infer it'. [18] Moreover, for Bagehot the landed gentry still had a crucial role to play. Only they could hold the line and resist the rule of wealth epitomised by the emerging dominance of new money and commercial interests that now tended to prevail in the House of Commons.

The "Peoples Budget" and the Parliament Acts 1911 and 1949

The fate of the House of Lords was not seriously questioned again until the constitutional crisis of equal or perhaps even greater magnitude was prompted in 1909 when the upper house rejected the budget of the elected Liberal government. 'Politically the reforms [in the budget] were explosive. In order to pay the costs both of old-age pensions and expensive new battleships due to the naval arms race with Germany Lloyd George introduced a "People's Budget" in 1909, with a range of new or increased taxes, including a "super tax" on incomes over £5000, increased death duties and a new land tax, popular among Liberals and Labour, and of course particularly unwelcome to landowners.'[19] In other words it constituted an assault on traditional property interests represented in the upper house. By this time more than half of adult males had the right to vote and the actions of the House of Lords in rejecting the programme of the government was not only an attempt to frustrate the will of the House of Commons but it also breached the key constitutional convention which recognised the predominance of the House of Commons on financial matters. Once established most conventions are irreversible and there is an expectation that a constitutional convention will be respected. Indeed, any failure to do so is likely to have drastic consequences. The refusal of the House of Lords to pass the budget in 1909 serves as an outstanding example. This intervention was a step too far[20] and the failure to pass a Finance Bill prompted a very serious political crisis. This was for the obvious reason that a government without a budget to pay officials and the armed forces, and so on, could not govern. From the moment of the budget's rejection there was a stalemate between the elected House of Commons and hereditary peers in the House of Lords, most of whom supported the Conservative Party, and opposed the government. After protracted negotiations, King George V agreed to create sufficient peers to secure the passage of a Parliament Bill, curbing the powers of the Upper

[17] S Lang *Parliamentary Reform 1785-1928*, (London, Routledge, 2007), 37. The 1832 Reform Act redistributed seats from unrepresentative pocket and rotten boroughs mainly to the growing cities and towns which were previously unrepresented. The franchise was fixed at a £10 a year property qualification which almost doubled the number of males eligible to vote from 497,000 to 811,000. This was about 18% of adult males.

[18] W Bagehot *The English Constitution* (Glasgow, Fontana, 1963), 121.

[19] R Tombs *The English and Their History* (London, Allen Lane, 2014), 528.

[20] R Walters 'The House of Lords' in V Bogdanor (ed) *The British Constitution in the Twentieth Century* (Oxford, Oxford University Press, 2003), 193.

House, but only if there was a mandate from the electorate for the reform. The general election in December 1910 returned a Liberal-dominated coalition, committed to permanently clipping the wings of the Lords. At this point the Conservative peers in the House of Lords backed down and passed the Bill.

The Parliament Act 1911 was and remains a pivotal piece of constitutional legislation because it qualified the powers of the House of Lords and thereby formally restricted the influence of the hereditary peers, with their overwhelming support for the Conservative Party. Firstly, the Act generally removed the absolute veto over legislation. It provided that money bills could be delayed by up to a month, and other legislation for a maximum of two years. Secondly, as a safeguard to prevent a government from remaining in power indefinitely, the absolute veto was retained but only for any bill having the effect of extending the maximum life of a Parliament and thus threatening the democratic process. Thirdly, the Act reduced the maximum time between elections from seven years to five years (this limit still applies to general elections). Fourthly, the House of Lords retained its veto over subordinate legislation. This power is particularly relevant to its function as a revising chamber, and as we will see in the next section has recently arisen as a matter of controversy. [21] As mentioned above, the Act was regarded as an interim measure pending further change and it did nothing to address the question of composition. This was despite the fact that with the prospect of universal adult suffrage on the horizon the hereditary principle clearly conflicted with the expectations of a constitutional system based on democracy.[22]

As no agreement had been reached on the composition of a reformed body the follow up reform proposals were abandoned in 1918 and the frequency with which the delaying powers would be exercised arose as a matter of obvious concern. The House of Lords still had sufficient powers to disrupt the programme of an elected government, especially in the last two years of a five year Parliament. This problem was partly resolved by the Salisbury Convention which came to be tacitly accepted. The Convention worked on the basis that the House of Lords would not impede the passage of government legislation provided it had been included in the election manifesto of the party winning the general election. This convention served to minimise conflict between the two houses when the Labour Party was in power. But the basis for it may be called into question since it implies that the electorate issue instructions for particular policies by voting for the winning party after having read its manifesto.[23] Incidentally, the same Convention might be used to suggest that the House of Lords is entitled to routinely delay/wreck other measures not included in the democratically elected government's legislative programme. The Parliament Act 1949 reduced the delaying

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[21] R Brazier *Constitutional Practice: The Foundations of British Government* 3rd edn (Oxford: Oxford University Press, 1999), 256.

[22] The Suffragette movement was at its height in the years immediately prior to World War 1. See eg F Meeres *Suffragettes: How Britain's Women Fought and Died for the Right to Vote*, (Stroud, Amberly, 2014)

[23] A King *The British Constitution* (Oxford, Oxford University Press, 2007), 299.

power effectively from two to one year, and it was introduced by Post War Labour government (1945-51). From 1945 until 1950 Labour enjoyed a substantial overall majority in the House of Commons. The 1949 Act was introduced by the government in anticipation of disruption from the House of Lords which still could muster overwhelming support for the Conservative Party in opposition. The Labour government had a strong mandate for a radical economic and social reform package, including a national social security scheme and the National Health Service while also proposals to nationalised key industries such as electricity, gas, water, railways, coal and iron and steel. The 1949 Parliament Act prevented the House of Lords from using its two year delaying power to fundamentally undermine what remained of this legislative programme.[24] By approving the Parliament Acts 1911 and 1949 Parliament, in effect, redefined itself. Under these statutes legislation can in certain circumstances be enacted without the consent of the House of Lords. The delaying power has only been used on a handful of occasions since 1949 but, as we will see in the next section, the House of Lords as a revising chamber has continued to make a significant contribution to the final form of legislation.

Part III Afterlife: Evaluating the Evolving Role of the House of Lords

In common with the unreformed Italian Senate under its 1948 constitution the House of Lords duplicates many of the functions of the House of Commons. All government legislation and private members bills must go through the same stages in the House of Commons as in the House of Lords. In terms of procedure, the main difference is that in the House of Lords the committee stage is taken by a committee of the whole house.[25] Indeed, as a revising chamber the House of Lords has certain advantages over the Commons. Although the tribalism of party politics still plays some part in the way members vote, no party is in overall control and members do not have to look towards getting re-elected which also means that the party whips have less influence in canvassing support for the official party line. Legislation is therefore much more likely to be judged on its merits. Further, within its ranks the Lords may be able to draw upon technical expertise and practical experience. Individuals rewarded with peerages for their service to the community in the form of a reservoir of former politicians, civil servants, lawyers, scientists, academics, and others. In addition, it has more time to devote to the detailed consideration of bills.

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[24] A Sked and C Cook *Post-War Britain: A Political History* (London, Penguin,1979), 31ff.

[25] Legislation in the form of public (government) bills can be introduced in either house. First reading is the formal announcement and scheduling of the bill, the second reading is followed by a debate and a vote, assuming the vote approves the bill it will then be considered clause by clause by a committee. The report stage details the amendments to the bill. When the bill is referred back at third reading stage the bill is approved in its amended form. The bill is then considered by the other house where it goes through the same stages. If there is a discrepancy in the final form of the bill between the two houses, the negotiation is referred to as 'ping pong'. The delaying power of the House of Lords would only come into play if no final agreement is reached between the two houses.

A trend towards what Lord Hailsham termed 'elective dictatorship' has been widely recognized as a characteristic of the Westminster system. Once elected with a majority the government has often been able to use the party machine by deploying the whips in the House of Commons to reach its legislative goals, and this tendency to executive dominance has not only side-lined Parliament but also exposed its weakness as a legislator.[26] Some commentators have gone even further and argued that: 'It is largely a myth that Parliament *is* a legislator. It does not make law. Almost all legislation is made within and by the executive of the day.'[27] This statement seriously underestimates the contribution of Parliament, and of the House of Lords in particular. In an important recent study Professor Meg Russell shows that the House of Lords has emerged following the House of Lords Act in 1999 as capable of imposing changes to legislation. Even though the veto is rarely used the Lords will often be prepared to propose amendments (even wrecking amendments) to bills. For example, there were 506 defeats between 1999-2012 compared to 7 in the Commons. Adopting a case study approach Professor Meg Russell shows that a combination of defeats on legislation and interventions in debate to secure concessions from the government in the form of negotiated outcomes. The quantitative analysis is striking as it reveals that 1,806 amendments were agreed out 6,330 proposed.[28] Her study '… suggests that the Lords is now increasingly influential on policy. A key reason is the chamber's "no overall control" character, where neither government nor opposition has a majority, and policy must be carefully negotiated with non-government peers. This change has brought a significant degree of consensus politics to the heart of Westminster itself, which has thus far been largely overlooked.'[29] Notwithstanding the shortcomings relating to composition and legitimacy which will be considered later below, this evidence suggests that the House of Lords makes a very significant contribution to the legislative process.

The controversy associated with the position of the House of Lords as a revising chamber was brought to public attention once again in October 2015. The unelected upper house had threatened to use its veto over delegated legislation to defeat a highly controversial policy of the recently elected Conservative government on tax credits.[30] The planned cuts would have impacted on many families dependent on benefits and this policy was not subject to the Salisbury Convention as it had not been included the party election manifesto. Nevertheless, the Conservative government maintained that voting down these delegated measures had prompted a constitutional crisis as it was argued that such an intervention not only undermined the democratic legitimacy of the government, but also, conjuring memories of 1909, that it was in breach of a convention which recognized the primacy of the Commons

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[26] Lord Hailsham 'Elective Dictatorship' *The Listener* 496-450, 21 October 1976.

[27] A Tomkins 'What is Parliament for? in N Bamforth and P Leyland *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing, 2003), 76.

[28] M Russell *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford, Oxford University Press, 2013), 168.

[29] Russell, 2013, 7.

[30] Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015.

over financial matters. Closer analysis suggests that in this case this assertion is open to question since the Tax Credits Act 2002 under which these powers were exercised had specifically given the House of Lords a veto of these orders relating to tax credits. The wider political backdrop is the Conservative government crying foul following repeated defeats at the hands of the House of Lords.[31] Rather than accepting the outcome the Cameron government reacted by publishing proposals based on a report by Lord Strathclyde to use its majority in the Commons to generally deprive the House of Lords of its veto powers over subordinate legislation.[32] In November 2016 following the change of administration the plan was dropped by PM Theresa May.[33] The volte face has been welcomed by influential parliamentary committees as such a change would have undoubtedly weakened the capacity of Parliament to check the government. This role could prove of crucial importance with the prospect of a Great Repeal Bill and Brexit on the horizon.[34]

In terms of the relationship with the executive branch of government the shift in the relative importance of the two houses by the beginning of the twentieth century is well illustrated with the emergence of a convention which requires the Prime Minister and most other senior ministers to be members of the House of Commons and thereby accountable to the elected chamber.[35] During the nineteenth century it was still routine for the Prime Minister (First Lord of the Treasury) and other senior ministers to be appointed from the House of Lords, but the Chancellor of the Exchequer, responsible for taxation, was always a member of the House of Commons. A further example of this trend is that by the time PM Thatcher selected Lord Carrington to be Foreign Secretary in 1979 she felt it necessary to appoint Sir Ian Gilmour as a Cabinet rank counterpart answerable to the House of Commons.

Although ministers appointed as peers face questions in the House of Lords it does not perform precisely the same kind of oversight function as the Commons. There is no equivalent select committee system shadowing each major department. In the case of the House of Lords the expertise of its members is channelled onto specialist select committees related to more specific policy areas.[36] In their specialist focus these committees are largely complementary to those of the House of Commons. In this regard it is worth noting the valuable contribution of the House of Lords Select Committee on the European Communities

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[31] M Russell 'The Lords, Politics and Finance' *UK Const L Blog*, (2nd Nov 2015).

[32] 'Strathclyde Review: Secondary legislation and the primacy of the House of Commons', Cm 9177, December 2015. See p 5, to re-assert the position of the Commons the preferred option would be 'to create a new procedure – set out in statute – allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy.'

[33] Statement by Leader of the House, Baroness Evans, 17 November 2016.

[34] 'Brexit: parliamentary scrutiny' European Union Committee, House of Lords, 4th Report of Session 2016-17, 20 October 2016, HL Paper 50.

[35] One of the main reasons for the selection of Winston Churchill as PM in 1940 in preference to the other leading candidate Lord Halifax was the need to have a PM as an MP, directly accountable to the House of Commons.

[36] See e.g. Communications Committee, Constitution Committee, Digital Skills Committee, Economic Affairs Committee, Science and Technology.

(now Union).[37] This committee was set up in 1972 coincidentally with UK membership (which began on the first of January 1973) and it has a wide remit allowing it to consider policy and draft legislation.[38] The 18 member committee and attendant sub-committees holds the government to account for its actions at EU level[39] and the scrutiny process begins with the Government depositing EU documents in Parliament with an explanatory memorandum.[40] Outcomes vary from clearing a proposal for European legislation to a full scale inquiry. Sub-committees follow up with reports. 'The House of Lords with a greater degree of autonomy from the government is to be congratulated on acting well before the House of Commons. … The expert reports on a wide range of subjects [have] gained respect , and its reports are widely circulated in Brussels'.[41]

In a different area, the House of Lords Constitution Committee, formed in 2001, represents a recent paradigm which combines the task of pre-legislative scrutiny with that of undertaking in depth inquiries into policy areas with obvious constitutional implications. The expert membership of the committee comprising peers with political, judicial and academic expertise has managed to produce a series of widely respected reports which have informed debate and have been fed into the legislative process.[42] Against the backdrop of far reaching constitutional reform the committee has also developed as a recognised forum for dialogue between parliamentarians and the judiciary.[43]

As part of its modernisation the House of Lords has recently been relieved of its residual judicial functions. From 1876 the judicial committee of the House of Lords had served as the highest domestic appellate court, and the Lord Chancellor who also presided over the court and made judicial appointments as head of the Lord Chancellor's department, acted as the Speaker of the House.[44] Cases were considered by 5, 7 or 9 judges from a panel of 12 Law Lords. As a special type of life peer the acting and retired law lords (still eligible) constituted the judicial committee. It is remarkable that the Lord Chancellor himself was able to sit as a judge at the beginning of the present century.[45] After the enactment of the Human

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[37] See: The European Scrutiny System: The House of Commons, No 3, October 2012.

[38] P Hardy 'European Scrutiny' in A Horne and A Le Sueur (eds) *Parliament: Legislation and Accountability* (Oxford, Hart Publishing, 2016), 99ff.

[39] House of Commons European Scrutiny Committee which was set up later has a different brief.

[40] The European Union Committee is assisted by sub-committees on Economic and Financial Affairs, Internal Market, Infrastructure and Employment, External Affairs, Agriculture, Fisheries, Environment and Energy, Justice, Institutions and Consumer Protection, Home Affairs Health and Education.

[41] C Harlow *Accountability in the European Union*, (Oxford, Oxford University Press, 2003), 91.

[42] In relation to legislative scrutiny see e.g. 'Scotland Bill' 6th Report of Session 2015-16, 23 November 2015, HL Paper 59, European Union Referendum Bill, 5th Report of Session 2015-16, 19 October 2015, HL Paper 40. In regard to wider constitutional issues see 'Inter-governmental relations in the United Kingdom, 11th Report of Session 2014-15, 27 March 2015, HL Paper 146.

[43] A Le Sueur and J Simson Caird 'The House of Lords Select Committee on the Constitution' in A Horne, G Drewry and D Oliver *Parliament and the Law* (Oxford, Hart Publishing, 2013), 282.

[44] D Woodhouse *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001), chapter 5.

[45] On his appointment as Lord Chancellor in 2003 Lord Falconer disqualified himself from sitting as a judge. This is now prohibited by section 17 of the Constitutional Reform Act 2005.

Rights Act 1998 this practice ended. The change was inevitable as Article 6 of the ECHR was now incorporated as part of domestic law. The Constitutional Reform Act 2005 recognised separation of powers and established a UK Supreme Court outside Parliament which has been operative since 2009.[46] Previously, the serving Law Lords were able to participate in parliamentary debates and vote on legislation but by convention avoided intervening on issues of political controversy. Supreme Court judges retain the title 'Lord' but no longer have the right when appointed to participate as members of the House.

Revisions to the Composition of the House of Lords

At the beginning of the twentieth century with the inevitability of the extension of democracy the House of Lords was already perceived as anachronistic, representing as it did a narrow class interest. The failure to address the issue of membership in 1911 meant that the House of Lords was not regarded as a constitutional asset, but as an indefensible bastion of wealth and privilege. The unremitting clamour for reform, or in some quarters, for outright abolition, can be linked to the unusual composition of the House of Lords as a second chamber which, in turn, is attributable to its historical antecedents discussed in the first part of this essay.[47] As a body which grew up in the thirteenth and fourteenth centuries it represented two great estates: the established church and the landed aristocracy. The Lords Spiritual comprising the Archbishops of Canterbury and York together with 24 other bishops, representing the Church of England, were granted a traditional right to sit in the House of Lords and participate in the affairs of Parliament. Although the leaders of other denominations may be given life peerages, there is no right of equivalent representation.[48] Turning to the hereditary peers, by the beginning of twenty first century there were still families capable of tracing their aristocratic ancestry back to the medieval period. These peers had been elevated to the nobility by the King personally, but by the nineteenth century the power to appoint peers was effectively in the hands of the Prime Minister.[49] The PM's nominees were simply approved by the reigning monarch. It is also relevant to note that the Acts of Union with Scotland 1707 and Ireland 1800 allowed some Scottish and Irish Peers to be elected as representatives to sit in the House of Lords. It has been pointed out that because of limited representation in the House of Lords: 'For decades, Scotland and Wales have been deliberately over-represented in [the House of Commons], on the grounds of their distance from London and the scarcity of their populations … These asymmetries in representation are the unitary system's mimicking of the asymmetries which are build into many federal systems – most notably by the equal

[46] See A Le Sueur (ed) *Building the UK's New Supreme Court* (Oxford, Oxford University Press, 2004).
[47] I McLean *What's Wrong with the British Constitution* (Oxford, Oxford University Press, 2010), 233.
[48] The Royal Commission sought to address this anomaly by suggesting that all the major religions should be represented in a reformed second chamber.
[49] P Hennessey *The Prime Minister: The Office and Its Holders Since 1945*, (London, Penguin, 2000), 76. More recently some nominees are selected by an appointments commission.

representation in some chamber of parliament, usually the upper chamber, of states of grossly unequal size.'[50]

It has been stressed on several occasions already that by the time the Parliament Act 1911 abbreviated the powers of the House of Lords, it was already evident to many that birth right was not a legitimate qualification for service in a modern legislature. Moreover, it was blatantly iniquitous to have only hereditary peers. They mostly supported the Conservatives and the party was able to assemble a majority by summoning its supporters to vote. It could rely on these 'backwoodsmen' peers who never otherwise attended the House.

It has been pointed out that the House retained sufficient powers to at least disrupt the legislative programme of a government. The built-in Conservative majority presented a particular obstacle for Liberal and later for Labour governments. Nevertheless, it was the Conservative government under PM Harold Macmillan that first attempted to tackle the issue of composition with what seemed to be a relatively modest reform. At this point apart from bishops and law lords the House of Lords comprised solely of hereditary peers of varying ranks.[51] The Life Peerage Act 1958 allowed peers to be appointed for their life time only. The titles were not passed down to their children. By the mid 1960's only life peers were being created, [52] both as political appointees and for exceptional service to the community.[53] A convention came to be accepted allowing party leaders to nominate partisan life peers in approximate proportion to the strength of their party in the Commons. At the same time, the availability of life peerages enabled the gender balance to be addressed for the first time, as a substantial proportion of those appointed have been women. At the beginning of 2017 209 women were eligible to sit in the House of Lords.

The Labour Party were committed in their 1997 election manifesto to abolish the hereditary element and to completing the reform of the House of Lords. Although the House of Lords Act 1999 was introduced to completely remove the hereditary element, it was agreed that 92 of the hereditary peers would be allowed to keep their seats. This concession was enacted to preserve continuity and because some of the hereditary peers were still making an important contribution to the work of the House. The Act provided that the 758 hereditary peers were permitted to elect 92. The elected rump were allowed to serve as active mem-

[50] F Mount *The British Constitution Now* (London, Mandarin, 1992), 200.

[51] These included in order of seniority: royal dukes, dukes, marquesses, earls, viscounts and barons.

[52] Exceptionally, a handful of hereditary peerages were conferred during Margaret Thatcher's term as Prime Minister.

[53] A substantial proportion of these political appointments consists of politicians with experience in the House of Commons or at European, devolved, or local level. The second category of nominees comprises those appointed in recognition of exceptional contributions to the wider community. Included under this head are captains of industry, retired leaders of trade unions, distinguished academics, former senior civil servants, retired generals, admirals, and air marshals, leading figures from the professions, arts, and sciences, and so on.

bers of the House for their lifetime.[54] The reform dramatically changed the political complexion of the House of Lords. It not only meant that no single party had a majority but it also led to an increasing number of peers describing themselves as cross benchers, with no clear party affiliation.[55] As mentioned earlier, the study by Professor Meg Russell suggests that the modified composition, detaching its allegiance from the Conservative party, has allowed the Lords to flex its muscles much more effectively than before as a revising chamber.[56]

Part IV Rebirth: What Next?

With the notable exception of the Parliament Acts of 1911 and 1949 there was remarkably little constitutional reform during the course of the twentieth century until in 1997 the Labour government of Prime Minister Tony Blair launched a raft of measures, including devolution, the incorporation of the ECHR through the Human Rights Act 1998, A Freedom of Information Act and, of course, the changes to the composition of the House of Lords discussed above. It is significant that the changes were not made as part of a coherent package of related reforms. This is because, taken together, it has become increasingly apparent subsequently that the entire constitution has been transformed and that these changes have generated momentum for further, often related, change.[57] For instance, we have already noted that incorporation of the ECHR impacted on the role of the Lord Chancellor and the House of Lords as an appellate court by prompting the introduction of the UK Supreme Court as a replacement for the appellate committee.

Turning to the House of Lords, a glaring problem in urgent need of attention concerns the burgeoning size of the upper house. The number of life peers eligible to sit has steadily increased and it has now reached 809 members. Whether they are elected or selected, there needs to be an expectation that individuals with the opportunity to serve as legislators actually do so. By international standards this number is extremely large. For example, the Senates in Canada and Australia, both with federal constitutions based on the Westminster model, have 105 and 76 members respectively.[58] Despite these numbers, in practice, the House of Lords is relatively cheap to run since peers receive expenses on daily basis if they turn up rather than salaries. Only a limited proportion attend regularly. The fact that members can

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[54] When a serving hereditary peer dies they are no longer succeeded by their heir as members of the Lords. Elections are held among the serving hereditary peers to chose a successor bringing the figure back to 92.

[55] For example, in January 2017 membership comprised: The Archbishops of Canterbury and York and 24 other bishops are entitled to Conservative 255, Labour 204, Liberal Democrat 103, Crossbench 179, non-affiliated including law lords and ex-law lords 28, Bishops 26.

[56] See Russell, 2013.

[57] 'The Process of Constitutional Change', Select Committee on the Constitution, House of Lords, 15th Report of Session 2010-12, 18 July 2011, HL Paper 177, para 27. See also 'The Government's Constitutional Reform Programme, 5th Report of House of Lords Select Committee on the Constitution, 9 November 2010, HL, Paper 43.

[58] See J Webber *The Constitution of Canada: A Contextual Analysis* (Oxford, Hart Publishing, 2015), 65ff; C Saunders *The Constitution of Australia: A Contextual Analysis* (Oxford, Hart Publishing, 2011), 115ff.

chose whether it suits them to participate harks back to the aristocratic roots of the institution and contributes to an amateurish ethos. At least the House of Lords Act of 2014 opens up the opportunity for members to retire early or be compulsorily removed for criminal convictions or other forms of misconduct.[59]

In considering the question of reform the starting point in recent years has been cross party acceptance (since 1989) of the need to retain a form of two chamber parliament. The obvious difficulty in introducing further reform is to maintain or enhance the effectiveness of the upper house by giving the reformed chamber greater legitimacy, but this objective needs to be achieved without making it a competitor to the House of Commons.[60] The problem with reaching sufficient agreement has not only been a party political one, but a clash between the two houses over the type of replacement for the House of Lords. Across the major parties members of the House of Commons have consistently expressed a preference for a wholly or predominantly elected house. On the other hand, the collective view of the House of Lords has favoured a mainly appointed house.

Before legislating to abolish the hereditary element in 1999 the Labour government as a prelude to stage two of the planned reform set up a Royal Commission on the House of Lords presided over by the Conservative peer Lord Wakeham. The Commission reported in 2000 recommending that the majority of peers should be appointed by an independent appointment body with the remainder elected directly using an open-list system of PR.[61] This proposal was a half hearted compromise and there was virtually no political support for a mainly appointed replacement. The trend was moving in the other direction, towards a predominantly elected body, but despite having a comfortable majority in the House of Commons between 1997-2010 Labour were unable to find sufficient consensus in Parliament for further reform.[62] The draft bill published in May 2011 by the Conservative/Liberal coalition government is the most recent of the many attempts to reform the Lords.[63] If this bill had been enacted the house would have retained its current powers, but it would have been reduced in size from 800 + members to 300-400 members. 80% of members would have been elected by a single transferable vote system of proportional representation. 20% of the membership would have been appointed by an appointments commission. It was envisaged that this group would sit as cross-benchers, not as representatives of political parties. In proposing this version it was regarded as crucial to avoid having elections that coincided with elections to the House of Commons. However, one of the most controversial and unsatisfactory

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[59] House of Lords Act 2014 sections 1, 2, and 3.

[60] M Finn and A Seldon 'Constitutional Reform Since 1997: The Historians Perspective' in M Qvortrup (ed) *The British Constitution: Continuity and Change* (Oxford, Hart Publishing, 2013), 29.

[61] See *Report of the Royal Commission on Reform of the House of Lords*, Cm 4534

[62] See eg Cross party report 'Reforming the House of Lords: Breaking the Deadlock' (2005) and White Paper *The House of Lords: Reform*, Cm 7027, 2007.

[63] P Norton 'Parliament: A New Assertiveness' in J Jowell, D Oliver, C O'Cinneide (eds) *The Changing Constitution* 8th edn (Oxford, Oxford University Press, 2015), 190.

aspects of this bill was the non renewable 15 year term to be served by elected members. In effect, representatives destined for such a long term as serving members, once elected, would not have been democratically accountable at all. In the face of co-ordinated opposition in the House of Commons the Bill was eventually dropped. In some ways the failure of this bill is not surprising as these reforms take virtually no account of the impact of the pressing constitutional context.

Without doubt the most persuasive motivation for House of Lords reform or replacement is to address the effects of the asymmetrical form of devolution introduced in the United Kingdom that has impacted strongly on Parliament.[64] The impact is particularly apparent as England has no equivalent level of government to Scotland, Wales and Northern Ireland which each has its own law-making Parliament or Assembly and executive responsible for many devolved functions. Since the Scottish referendum in 2014 the trend towards devolving powers, including tax raising powers, has been re-enforced.[65] From a constitutional standpoint the problem was that since the launch of devolution in 1999 no changes were made to the procedures at Westminster to allow for devolution. [66] In consequence, Scottish, Welsh and Northern Irish MPs elected to the Westminster Parliament were able to vote on English legislation, while English MPs, no longer enjoyed the same right to vote for most policy areas concerning Scotland, Wales and Northern Ireland which now fall within the remit the Scottish Parliament and the assemblies in Wales and Northern Ireland. The huge discrepancy in population size between England at over 55 million, compared to Scotland 5 million, Wales 3.5 million, and Northern Ireland 1.9 million would make it difficult to establish an English Parliament which did not have overwhelming authority. At the same time the Westminster Parliament might be side-lined by the introduction of an English Parliament.[67]

A partial strategy to overcome this problem has recently been implemented by the Conservative Party following the 2015 election, and it is referred to as English Votes for English Laws (EVEL). This change to legislative procedure in the House of Commons restricts the voting rights of Westminster MPs who represent constituencies in Scotland, Wales and Northern Ireland. Bills certified by the Speaker as English bills at the committee stage are now to be referred to a committee comprised exclusively of MPs from English constituencies, and the committee has a veto over such legislation. In the short term this change consolidates the power of the Conservative party as the whips will be able to guarantee support for English legislation coming before the committee. However, apart from raising technical issues in defining what amounts to an English bill, the real objection at a time of resurgent nationalism is that such a change tends to undermine the perception of the Westminster Par-

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[64] A Blick *Beyond Magna Carta: A Constitution for the United Kingdom*, (Oxford, Hart Publishing, 2015), 141.

[65] See The Smith Commission Report and The Scotland Act 2016.

[66] V Bogdanor 'The West Lothian Question' *Parliamentary Affairs*, Vol 63, No 1, 2010, 156-172.

[67] There is very little political support in England for an English Parliament.

liament as a Parliament representing the whole of the United Kingdom.[68] While it is too early to judge the full impact of EVEL there are remaining concerns over MPs from the devolved nations having sufficient input on legislation which will have a significant spill over effect as a result of the impact of the Barnett formula or policy decisions which relate to the devolved nations.[69] As the second chamber the House of Lords continues to represent the United Kingdom as a whole.

Instead of the EVEL reform of parliamentary procedure a preferable strategy for re-balancing the constitution would be to fundamentally transform Parliament by replacing the House of Lords with a Senate for the nations and regions. It has been stressed that 'the commonest form of representation in upper chambers – in both federal and unitary states – is territorial. 'In such systems members generally represent areas contiguous with subnational levels of government, provinces, regions or states.'[70] Indeed, it is worth emphasizing that the proposed reforms to the Italian Senate in 2016 would have dispensed with the current 315 directly elected members which mirrors the Chamber of Deputies in order to create a 'Senate of local autonomies' consisting of 95 members with up to 5 additional senators nominated by the President.[71] A controversial feature of this particular reform was the proposed move from direct to indirect elections[72] as members would have been elected by the leaders of regional administrations. Although a revised draft of the proposals gave electors the right to express a preference indicating which regional councillors should be eligible to serve as senators, arguably the reform would have undermined the democratic legitimacy of the revamped body. On the positive side it would have introduced an increased element of regional representation into the Italian Parliament but without sharing the characteristics of the Bundesrat which represents the Länder directly. Furthermore, the revised Senate was intended to have a narrower and more specialized remit and modified powers over the passage of legislation. [73]

The recent Italian blueprint for reform, despite failing to gain the necessary approval, reminds us that there may be a compelling argument for a regional Senate in the United Kingdom. In 2005 the Liberal Democrats published a proposal for a 100 member Senate directly elected by PR, with Scotland, Wales, Northern Ireland each electing a specified number of Senators who would serve a four year term.[74] After the collapse of the coalition's pro-

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[68] P Leyland *The Constitution of the United Kingdom: A Contextual Analysis*, 3rd edn (Oxford, Hart Publishing, 2016), 107ff and 277.

[69] 'English votes for English laws' *House of Lords, Select Committee on the Constitution*, 6th Report of Session 2016-17, 2 November 2016, HL Paper 61, 36.

[70] M Russell 'What are second chambers for?*'* 54 *Parliamentary Affairs* (2001), 442-458 at 444.

[71] The 'no' vote to the constitutional reform in the referendum held on 4 December 2016 means that reform will not be adopted and led to the fall of Renzi government. See T Jones 'After Renzi' London Review of Books, 5 December, 2016.

[72] C Fusaro 'A new bicameral parliament for Italy?', *The Constitution Unit*, April 16, 2015.

[73] R Damiani 'Reforming the Italian Senate' *The Constitution Unit*, November 17, 2015.

[74] R Brazier *Constitutional Reform: Reshaping the British Political System* (Oxford, Oxford University Press, 2008), 71.

posals for reform in 2012, in a similar vein, the Labour Party at the 2015 General Election were intending to abolish the House of Lords and introduce an entirely new Senate for the regions.[75] The point to emphasize about this proposal is that the new Senate while having approximately the same powers as the current House of Lords would be designed to provide territorial representation on a regional basis. In the light of the wider constitutional picture a regional Senate would certainly appear to be by far the best option to pursue. Clearly, the vague outline requires a lot of further work, as Labour's original plan was to introduce an overly large body of 400 members. It was not clear whether the Senate would be "indirectly elected" by the regions, as in the case of the unsuccessful proposal for a reformed Italian Senate, or directly elected by a form of proportional representation thereby providing a contrast with the House of Commons. In considering how to fill in the details further, it would make sense to stagger elections with Senators serving a 6 or 7 year term. A smaller body of between 75 to 150 members would probably need to have a modified remit as such a small membership would be unable to sustain the same workload as the current House of Lords. At the same time, changes to the scrutiny procedures in the House of Commons would almost certainly be required, as the challenge in designing an alternative would be to achieve wider territorial representation by way of a more compact elected replacement, without entirely sacrificing the virtues of the present House of Lords as a revising chamber with considerable expertise and experience.

Conclusion

This essay has provided an explanation of how the House of Lords evolved over time as in its previous carnation it presented a formidable barrier in the wider struggle to achieve a genuine form of representative democracy. The concept of 'after life' conveys the idea that even following the extension of the franchise, and the limiting of its veto powers, a number of its residual characteristics managed to survive. Indeed, viewed from a positive standpoint, we have observed that notwithstanding its unique composition and varied set of powers, the House of Lords still manages to make a significant contribution to the legislative process, as well as performing a specialist executive oversight function. Influential constitutional commentators have pointed out correctly that an elected replacement body will be difficult to achieve, and it might be added that an ideal solution is unlikely to be reached. All constitutional systems in designing legislatures and other institutions seek to reconcile many conflicting elements. Nevertheless, it would be a mistake to conclude that moderate change on the fringes, characterized in this paper as part of the almost perpetual post 1911 'after life' are sufficient to fulfil the task of reform adequately.[76] The 1999 Act removed the bulk of the hereditary peers, and, in doing so produced sufficient tension between the two houses to force

[75] http://press.labour.org.uk/post/101667859054/labour-announces-plans-to-give-regions-and-nations

[76] R Brazier *Constitutional Reform: Reshaping the British Political System* (Oxford, Oxford University Press, 2008), 73.

the government in power to modify, or even drop, their projected legislative changes on numerous occasions. However, it is argued that there are two main reasons why a comprehensive re-birth, not just minor tinkering, is now essential. First, it has become apparent that the consolidation of devolution is radically impacting on the overall constitutional framework. It follows that an elected Senate for the regions of some kind has become necessary to rebalance the constitution. Second, the government has sought to reset the legislative rules of the game in its own favour. The introduction of English Votes for English Laws potentially reduces the capacity of Parliament to revise legislation effectively. The Labour party lost the 2015 election and the opportunity to hold a constitutional convention has slipped away. In the immediate future there is no prospect of radical reform of the House of Lords being adopted by the government of Prime Minister May. However, with the possibility of further momentous constitutional change on the immediate horizon, prompted by the process of disengagement from Europe as part of Brexit and a phase of more intense devolution, the case for rebirth in the form of a Senate for the regions might yet become irresistible.