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Reforming the House of Lords: The Way Forward

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ABSTRACT

The House of Lords is suffering from an identity crisis. This is as much due to short sighted reform efforts as it is to issues of legitimacy. Reform needs to be seen as a priority, conceived as part of a normative vision of the role that the House of Lords could, and should play in the context of the modern British constitution. It is time to recognise that the House of Lords can make a meaningful contribution to our democracy, and defend it against the widespread criticism to which it is subject today.

This paper has sought to highlight the importance of the scrutinizing function the House of Lords performs. It has sought to demonstrate that the question of expertise cannot be separated from the nature of its composition. Before other issues can even begin to be addressed, the House needs to demonstrate it represents a diverse cross-section of society. By focusing on the central issue of composition, the proposed reforms should help to convince the public of the important contribution that the House of Lords can make to the quality of our democracy today.

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1 EXECUTIVE SUMMARY

This paper concludes the following:

- Proposals for the abolition of the House of Lords underplay the significant scrutinising role that the Upper House can, and should play in the context of the modern British constitution. Abolition would remove an important constitutional check on government power, reduce the effectiveness of legislative scrutiny and would also be impractical. For this reason, to address the problems facing the House of Lords today, a series of more moderate reforms, addressing composition and appointment, should be pursued.
- The case for an elected upper chamber is weak. Elections are not the only means through which legitimacy is achieved. The role that the House of Lords plays in the context of the British Constitution is such that its legitimacy comes from how effectively it scrutinises legislation, and the extent to which it ensures that public policy consider the interests of all the different sections of society.
- Nonetheless, if a reform initiative were to proceed to create a system for electing peers, a single transferable vote system with large district sizes and staggered ten-year terms would be most likely to deliver a functional and effective House.
- It is clear from the analysis of bicameral systems around the world that ensuring a diversity of interests is represented is crucial for the legitimacy of the upper house. The problems that have been faced in both common law and civil law systems indicate that hasty reforms can sometimes do more harm than good. The analysis shows that elections are not the only way in which to solve the "identity crisis" which upper houses around the world are facing. Nonetheless, if such a path of reform is pursued, the analysis suggests that a system of indirect elections may be a beneficial alternative to a direct system.
- If, as advised by this paper, the alternative route were to be pursued and reform to be realised though reform of the existing system of appointment, there are a number of potentially desirable paths that reform could take. These suggestions draw on international experience and the nature and history of the British constitution.

It is recommended that:

- A quota be imposed to limit the number of former politicians in the House. This would aim to reduce the proportion of the House with a political background in order that the composition better reflect the diversity of society.
- Specific selection criteria should be introduced. This ought to be incorporated into the appointment procedure of the House of Lords Appointments Commission, and referred to when vetting the candidates proposed by the Prime Minister.
- A system should be introduced that would encourage potential candidates to apply to the House of Lords Appointments Commission whenever there is an opening in their area of expertise. Potential vacancies would be advertised by the Commission on its website.
- The legitimacy and effectiveness of the House would benefit significantly if Prime Ministerial Patronage were abolished. However, a more moderate reform suggestion would be the introduction of selection criteria into the Ministerial Code. This criteria would be co-ordinated with the criteria employed by the House of Lords Appointments Commission, and would act as a guide for the Prime Minister in making suggestions for appointment.
- Minimum participation requirements should be introduced. Those falling below this threshold should be removed by the appointment commission, and the resulting vacancy re-advertised.
- In order to encourage full participation, peers should sit only for six months of the year. To minimise disruption, changeover in the House should be staggered so as not to jeopardise the smooth conduct of affairs.
- These reforms address only a selection of the most pressing issues facing the House of Lords today. Nonetheless, if any of the above reforms were to be implemented, it should be recognised that this should be done only gradually. Moreover, to address the issues of legitimacy and representativeness will take time. There are no quick and easy solutions. Nonetheless, we should avoid the easy conclusion that the best option is to abolish the House of Lords. Not only would this remove from the British Constitution a vital, important machinery for improving the quality of legislation, but it would also be extremely difficult to realise in practice. The first step will be to build the necessary political consensus over the need for reform, and to raise awareness of the importance of addressing the myriad of issues that face the House of Lords today.

2 INTRODUCTION

The House of Lords faces a number of significant problems facing the House of Lords today. The reforms proposed in this paper are aimed at addressing the most significant of them, namely that the current composition of the House of Lords is acting as a constraint on its ability to act as an effective scrutinising body. This means that there are inadequate checks in place capable of ensuring that public policy considers the diversity of interests that exist in the UK. As a result, many groups in society lack an effective voice in the political process.

The current composition of the House of Lords does not bring the variety of expertise to the legislative process that could be realised were a more diverse range of social groups represented in the House. By reason of the lack of legitimacy it enjoys amongst the British public, the House of Lords often lacks the confidence required to act as a strong check on the powers of government.

To address the severe issues facing the Lords today, which reflect a deeper identity crisis, reform needs to focus on addressing the inseparable issues relating to (1) representativeness (2) expertise and (3) legitimacy.

To this end, this paper begins by outlining in greater detail the current problems facing the House. In light of this analysis, the rest of the paper outlines a number of alternative paths to reform, explaining which of these are most practical and desirable. This is done with a view to creating a more effective and more representative upper house that is thereby capable of enjoying greater public support than it does today.

Following from the detailed examination of the problems facing the House of Lords, the section two will assess the merits of retaining a bicameral legislature in the UK and will make the case for retaining the House of Lords. The third section will assess the relative merits of elected and appointed upper chambers. The following two sections will discuss, respectively, the options available to realise an elected upper chamber, and the options available for reform of the present system of appointment. The final two substantive sections will place the House of Lords in its international context. These sections will draw upon the experience of other bicameral systems around the world to help inform the final, concluding section, which will combine the different perspectives offered in the paper so as to make a series of recommendations as to what would be the most practical, and desirable steps that reform should take.

2.1 CONTEXT

What is the wrong with the House of Lords? How should it be reformed? These questions have dominated political discourse throughout the 20th and 21st centuries.[1] The debate over the future of the House of Lords reached its zenith when, in its 1997 manifesto, the Labour Party committed itself to reform.[2] Ever since, there have been many different suggestions as to what reforms are required. Nonetheless, beyond the general consensus that hereditary peerages should be phased out, there has not been any agreement over what further reforms are required. Instead, successive governments appear to have used the issue of House of Lords reform as a platform for enhancing their own political power.

The dominant arguments for reform have consistently drawn on ideas of democracy, legitimacy and representativeness by way of justification. It seems that the Lords is perceived by these reformists to be lacking in one or more of these qualities. Nonetheless, one cannot help but notice that there is widespread confusion about what exactly these different concepts mean, and thus what exactly it means to argue for a more democratic, legitimate or representative House.

Criticisms of the House of Lords abound. These range from criticisms concerning the under-representation of the regions, of women, non-Christian religions, ethnic minorities and the non-political professions, to a belief that the composition of the House should reflect either the vote or seat share of the Commons.[3] The persuasive force of these criticisms, however, depends upon whether they can be situated within the context of a cohesive constitutional theory.[4] Any such theory must present a picture of the constitution that not only provides a convincing explanation of the salient features of British constitutional practice, but also is normatively desirable. This means engaging with the reasons for which we wish to retain a bicameral parliamentary system today.

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[1] For an overview of reform attempts since 1900, see: 'Reform And Proposals For Reform Since 1900'. Accessed 14 January 2016. http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldbrief/ldreform.htm.
[2] 'Labour Party Manifesto, General Election 1997 [Archive]'. Accessed 13 January 2016. http://www.politicsresources.net/area/uk/man/lab97.htm.
[3] See for details on this: http://www.electoral-reform.org.uk/sites/default/files/files/publication/House-of-Lords-Fact-Vs-Fiction-Report.pdf
[4] On which point, see: 1. John Parkinson, 'The House of Lords: A Deliberative Democratic Defence', *The Political Quarterly* 78, no. 3 (1 July 2007): 374–81, doi:10.1111/j.1467-923X.2007.00866.x. and 1. Alexandra Kelso, 'Reforming the House of Lords: Navigating Representation, Democracy and Legitimacy at Westminster', *Parliamentary Affairs* 59, no. 4 (10 January 2006): 563–81, doi:10.1093/pa/gsl029.

2.2 AN OUT-OF-DATE CONCEPTION OF THE UK CONSTITUTION

The intellectual roots of bicameralism go back to ideas of government coming from Ancient Greece and Rome.[5] The idea is founded upon two main principles: that of 'checks and balances,' and that of the need for wisdom in government. In the period between the Tudor monarchy and the Great Reform Act, the dominant constitutional theory underpinning the English constitution was that of 'mixed government.' In theory, such a system would combine the benefits of the three main forms of government - monarchical, aristocratic and democratic. In the UK, the House of Lords represented the autocratic element. Its expertise and independence were believed to flow naturally from their status as owners of landed estates.

From the early 19th century, with the development of a more democratic franchise, more upward mobility, less polarised income distribution, and the disappearance of an established class of blood aristocracy, European states experienced increasing pressures to move towards unicameralism.[6] Bicameralism was defended, however, in the context of the American Constitution and it was believed to be particularly important for Federal systems. Bicameralism was believed to provide double security for the people, allow breathing space in the legislative process and therefore provide for second thoughts over legislation. The system was believed to allow for different perspectives on social and political issues and thereby reduce the chance of reactionary legislation. Members of the upper house traditionally enjoyed longer terms of office so as to provide them with a degree of immunity from political motives and self-interest. It was believed that if the upper house was appointed, its members could be better insulated from popular opinion.[7]

While many European states converted to a unicameral system after the French Revolution, democratisation has not generally led to the widespread abolition of second chambers.[8] It may simply be that it is too difficult to ensure that a single chamber is organised so as to provide adequate legislative scrutiny and public accountability. However, it seems that there is a widely held belief that an upper house plays an important role in and of itself. Even the Ancient Greeks had believed that good government needed checks and balances, and that

[5] For an overview, see: 1.R. W. K. Hinton, 'English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: I. English Constitutional Theories from Sir John Fortescue to Sir John Eliot', *The English Historical Review* 75, no. 296 (1960): 410–25.
[6] 1.Donald Shell, 'The History of Bicameralism', *Journal of Legislative Studies* 7, no. 1 (2001): 5–18.
[7] See generally: 1.Donald Shell, 'The History of Bicameralism', *Journal of Legislative Studies* 7, no. 1 (2001): 5–18.
[8] 1.Donald Shell, 'The History of Bicameralism', *Journal of Legislative Studies* 7, no. 1 (2001): 5–18, 14

good legislation was the product not of power, but of wisdom and expertise. It seems that these arguments are just if not more salient today. The rise of the career politician, the greater sophistication in the style of political debates and its tendency to stifle open debates, and the increasingly various roles the first chamber has to play in modern society, strengthen the justification for having an upper House. Many have also argued that an upper chamber could play a useful role as a "constitutional long-stop." Indeed, there may be a strong case for entrusting them with such a role in a system such as ours where the constitution is highly flexible, and important constitutional statutes vulnerable to repeal.

2.3 CONSTITUTIONAL BACKGROUND

Today, the British constitution is organised around the principle of parliamentary sovereignty. But the replacement of the theory of mixed government has not weakened the case for a system of checks and balance. Nor has it altered the fact that legislation can be improved by the input of expertise and the exercise of independent judgment. Since as early as the 1832 Reform Act, the powers of the Lords have diminished and the power of the House of Commons has grown.[9] The spread of democracy has called into question the existence of an *appointed* chamber in a modern democratic society. It is generally true that those who have questioned the legitimacy of the Lords have done so on the basis of a belief that popular democracy is the pre-requisite to the legitimate exercise of public power. The problem is that legitimacy is not only about procedure. The legitimacy of government depends as much on *outcome* as it does on having its basis in a popular vote.

Liberal democratic theory is based on a conception of individual freedom that locates the legitimacy of the exercise of public power in the idea of popular consent. It is therefore unsurprising that modern conceptions of legitimacy are tightly bound up with the idea of the popular election[10], which is believed to provide the justification for the sovereignty of Parliament. Liberal theory also stresses the importance of democratic elections for enhancing accountability, upholding human dignity, according citizens respect, and helping foster a feeling of solidarity.

[9] See particularly: Parliament Acts of 1911 and 1949; the House of Lords Act 1999, and the House of Lords Reform Act 2014.
[10] For an in depth discussion of the concept legitimacy, see: 1.Alexandra Kelso, 'Reforming the House of Lords: Navigating Representation, Democracy and Legitimacy at Westminster', *Parliamentary Affairs* 59, no. 4 (10 January 2006): 563–81, doi:10.1093/pa/gsl029. Particularly 566.

The clear benefits of democracy ought not obscure the fact that popular democracy also has many shortcomings. The disjunction between the voting pattern and the ultimate composition of the House of Commons following the 2015 election highlight this particularly well.[11] It is clear that, popular democracy notwithstanding, a substantial proportion of British citizens lack any means of political representation. This has long been recognised to be a shortcoming of democratic elections, and is one of the reasons why additional bodies, such as the judiciary, are vital pillars of the constitution that provide an alternative forum for the representation of minority interests.

The government will not enjoy legitimacy if it fails to secure the wellbeing of its subjects - irrespective of whether or not it enjoys office by reason of a popular election. Public confidence in the judiciary is largely dependent upon perceptions of expertise and impartiality, and a sense that justice is being served.[12] It is therefore widely believed that elections are not necessary for the judiciary to secure its legitimacy. This illustrates that *output* legitimacy is extremely important and this depends not on the method of appointment, but on the extent to which public policies protect the interests of different groups in society. In the past, the House of Lords has proven itself willing and able to play an important part in enhancing the capacity for public policies to do this. This suggests that any reform should not simply attempt to democratise the appointment process, but to enhance the capacity of the constitution as a whole to protect the interests of society. This has to be what making the Lords "more representative" is about.

There are a number of possible definitions of representativeness. First, "representativeness" can have a purely formal definition, and relate to the particular mechanism through which representation is initiated. This would suggest that someone who is *elected* would be more representative than someone who is not. How representative this person is depends on the extent to which they act within the limits of their authorised powers, and the extent to which they can be made accountable for their behaviour. Second, "representativeness" can be symbolic, and thus depend on the extent to which those being represented "accept" the representative as someone who can stand for them. Third, "representativeness" can be a

[11] 'With 56 SNPs and Just One Ukip MP, How Can the Commons Reflect the UK's Political Will?' *Spectator Blogs*. Accessed 13 January 2016. http://blogs.spectator.co.uk/2015/05/with-56-snps-and-just-one-ukip-mp-how-can-the-commons-reflect-the-uks-political-will/.
[12] 'Court | Law'. *Encyclopedia Britannica*. Accessed 14 January 2016. http://www.britannica.com/topic/court-law. 'See also: House of Lords - Constitution - Sixth Report'. Accessed 14 January 2016. http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15106.htm. See Grossman, Joel B. 'Judicial Legitimacy and the Role of Courts: Shapiro's Courts'. Edited by Martin Shapiro. *American Bar Foundation Research Journal* 9, no. 1 (1984): 214–22, 215 for an overview of theories of judicial legitimacy.

term of description, whereby someone is representative to the extent that they have descriptive characteristics 'typical' of the group that they purport to represent. Finally, "representativeness" can have a substantive dimension, and refer to the extent to which someone can actually advance policy outcomes that are in the best interests of their representees.[13]

In the debates over House of Lords reform, it has been the (lack of) formal and descriptive representativeness that has been the subject of criticism. These have varied between those who believe that legitimacy derives from the formal representativeness of the House, dependent on it becoming an elected chamber, and those that believe that legitimacy depends on the extent to which its composition is reflective of the characteristics of the British population. Ironically, perhaps the most legitimate House would be neither elected nor 'descriptively' representative, but in possession of the expertise and experience necessary to enable it to advance policy outcomes that are in the best interests of society. In this sense, what would matter most for its legitimacy would be whether the expertise and life experience of the House as a whole was able to combine effectively so as to ensure that all major social interests were adequately represented. For this reason, diversity would be crucial, but precise targets as regards gender and ethnicity would be less important than ensuring that the backgrounds of the members provide the House with a broad variety expertise and experience so as to bring a diverse range of perspectives to bear on policy issues.

Of course, the legitimacy of the House of Lords does not depend on composition alone. The size, cost and mode of operation of the House are also matters of concern. Moreover, there is a strong case for undertaking a systematic review of the powers that it exercises and the procedures that govern the running of its day-to-day business. There is no shortage of criticisms of these aspects of the House, but they are often inconsistent and lack coherence. This appears to derive from a lack of consensus over what the proper role and function of the House of Lords should be in contemporary British society.

2.4 CURRENT ISSUES

There has been widespread criticisms of the cost and size of the Lords. The chamber is now the largest upper chamber in the world, and many feel that its size is an obstacle to the day-to-day running of business. This seems all the more problematic given the low rates of attendance and participation. In the 2010-2015 Parliament, £360,000 was claimed by peers

[13] See generally: Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967).

for sessions they didn't vote in, and in the last session of parliament alone, over £100,000 was claimed by peers who did not vote at all.[14] In 2013-14, the net operating costs were £118,000 per peer. The extra 50 peers the Prime Minister intends to appoint is likely to cost more than £1.3 million per year.[15] This expense seems disproportionate given that in the 2014-2015 session, 45% of all cross benchers participated in 10 or fewer votes, with the same being true for 8% of party political peers.[16] With no mandatory attendance requirement, and a declining rate of participation, it is increasingly difficult to justify the cost of maintaining such a large chamber.

The more political the composition, and the more similar the houses, the stronger is the argument for unicameralism. Over 25% of all appointments between 1997 and 2015 were made to former MPs, while 34% of those appointed, previously worked in politics. In total, representative politics is the main profession of 27% of the peers in the House today. Of the other professions, law, business and finance are relatively well represented, but only 1% of all peers have a background in a manual profession. This[17] not only suggests that the political independence of the House is questionable, but also that there may be nobody in Parliament capable of representing the *group* interests of many of society's professions. The statistics are all the more troubling given the widespread perception of the Lords' political independence.[18]

Not only is the Lords dominated by peers with political backgrounds, but the political balance in the Lords is highly skewed. It would take 723 new members to realign the house with the 2015 election results, which would increase the size of the chamber to 1545.[19] David Cameron has argued that the political composition of the Lords should match the Commons' seat share. This would increase the size of the chamber to 8663.[20] Alarming though these figures seem, if, as these arguments would suggest, the object of reform is to make the Lords a mirror of the Commons, we must surely question the need for a second

[14] 'Costly Cronies of the House of Lords | ERS', accessed 12 December 2015, http://www.electoral-reform.org.uk/blog/costly-cronies-house-lords.
[15] 'Costly Cronies of the House of Lords | ERS', accessed 12 December 2015, http://www.electoral-reform.org.uk/blog/costly-cronies-house-lords.
[16] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf ,9
[17] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf 8
[18] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf 12
[19] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf 10
[20] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf 10

It is clear that the method by which peers are appointed is vulnerable to abuse by the government of the day, which can use its power to alter the political balance in the Lords in its favour. Successive governments have shown themselves willing to do this: of the 596 appointments since 1997, 220 have been labour affiliated, 142 Conservative, 96 Liberal democrat and 138 either affiliated with other parties, cross bench or independent. Of the 374 appointments during the ten years of Tony Blair's government, 162 were labour affiliated. In the five years of Cameron's government, 76 of the 188 appointments were Conservative. These figures throw the independence of the House, much lauded as one of its most valuable qualities, into question. How far such a highly politicised House can meaningfully represent marginalised social interests is unclear.

During the 2014-2015 session, only 25 of the 797 members (excluding Bishops) were non-affiliated. Of Blair's appointments, 29% were former MPs, of Brown's, 12% and of Cameron's 20%. The majority of the members are over 70 years old.[21] These facts bolster the image of the Lords as no more than a retirement home for former MPs. It suggests that any particular expertise which the Lords can speak of derives from the *political* experience of the majority of the chamber. Undoubtedly such expertise plays an important role; but the dominance of former MPs may exclude individuals with different professional backgrounds from contributing their experience and expertise. Political expertise is present in the Commons, the experience of those who have worked outside of politics can therefore make a meaningful contribution if they have a significant presence in the upper chamber.

During the period for which he was leader of the Opposition, Ed Miliband[22] criticised the House on the basis that a disproportionate number of peers (44%) resided in London or the South East.[23] It is widely believed that there is a strong justification for bicameralism in federal systems such as the US and Germany and the quasi-federal nature of the United Kingdom is not dissimilar. Enhancing the representation of the interests of all the regions in the UK may be something a reform of the upper house should attempt to achieve.[24]

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[21] 'Research Briefings - Peerage Creations since 1997', accessed 12 December 2015, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05867#fullreport.
[22] 'Is a British Senate Any Closer Now? Or Will the House of Lords Still Go on and On?', *Democratic Audit UK*, accessed 8 December 2015, http://www.democraticaudit.com/?p=12931.
[23] http://electoral-reform.org.uk/sites/default/files/House-of-Lords-Fact-Vs-Fiction%20%281%29.pdf 13
[24] See particularly: Meg Russell and Constitution Unit, *Representing the Nations & Regions in a New Upper House: Lessons from Overseas* (Constitution Unit, 1999), http://www.ceelbas.ac.uk/spp/publications/unit-publications/50.pdf.

The gender balance in the Lords has also long been a cause of concern. Of the appointments since 1997, only 27% were women.[25] Since 2010, the percentage has risen to 34%, but the fact that women remain severely under-represented has remained a cause of concern.[26] The gender imbalance may, however, be a further problem associated with the high numbers of political peers in the House given that women are under represented in the profession as a whole.

The sheer number of problems that had been identified illustrate why it is essential to ground any reform programme in a comprehensive theory of the English constitution. The strength of any criticism of the House depends upon the meaning we attribute to the concept of legitimacy, and what exactly we mean when we argue for a more representative chamber. There is a risk that these different criticisms may encourage a departure from the appointment system in favour of an electoral one, simply because legitimacy and popular elections are believed to go hand in hand. There is also likely to be a temptation to address the problems associated with the gender, age and ethnicity imbalance by imposing membership quotas. Such temptations should be avoided unless they are conducive to realising what *must* be the objective of any reform: to increase the capacity of the Lords to ensure that public policies take account of a wide variety of social interests. Under theorised reforms are unlikely to enhance the legitimacy of the House in the long term if they do not, at the same time, improve the quality of public policy making.

The concerns identified in this paper are but a select few of those which dominate the contemporary debate over how to reform the House of Lords. The extent to which these individual problems need to be addressed, and how, depends upon the constitutional theory we believe best describes the English constitution. This is why we must situate the Lords within the broader context of the British constitution, and articulate more precisely what is understood by the terms legitimacy and representativeness, *before* embarking on reform. The definitions offered in this paper provide a useful starting point for this exercise. Conceiving of legitimacy as a combination of input and output legitimacy, and linking the latter with a substantive conception of representation, is a useful foundation from which to build a programme for reform. Such a programme would have as its ultimate objective the

[25] 'Research Briefings - Peerage Creations since 1997', accessed 12 December 2015, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05867#fullreport.
[26] 1. 'Lords by Party, Type of Peerage and Gender', *UK Parliament*, accessed 12 December 2015, http://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/.
'Research Briefings - Peerage Creations since 1997', accessed 12 December 2015, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05867#fullreport.

improvement of public policy making, and the protection of a broad range of interests in society.

2.5 LOOKING FORWARD

The issue of House of Lords reform cannot be addressed in the abstract. House of Lords Reform has been on the political agenda since the early 19th century, but reform initiatives before now have all been piecemeal and ad hoc. The present government has recently suggested that Lords reform is not one of its priorities. [27] Building political consensus, not simply over *how* the Lords ought to be reformed, but also *whether* and *when* will not be easy. Any reform initiative will also have to recognise the potential disruption that would be caused by any drastic reform. The nature and extent to which transition periods can be implemented will have to be carefully considered. The potential effect of any reform on day to day practice will also have to be taken into account, as will any knock on effects on other constitutional bodies, or on the powers of the Lords itself. Given that the House of Lords is governed by a combination of legislation, custom and convention, the interaction between these different sources will have to be carefully navigated; it cannot simply be a matter of introducing reform through legislation. Moreover, it is clear that any reform of the House of Lords can only be implemented gradually.

It is important not to be discouraged by the number of obstacles that lie in the path to reform. The composition of the House of Lords today does not reflect the important constitutional role that an upper house has to play in the context of the contemporary British constitution. In recent years, the House has shown itself able and willing to stand up to the government in order to protect important social interests.[28] But its ability to continue to do so is heavily constrained both by the nature of its composition, and the fact that as an institution, its declining legitimacy makes it more difficult for it to exercise those few powers it does enjoy with confidence. Reforming the House of Lords, starting with the issue of its composition, is a necessary step towards improving the legitimacy of the constitution as a whole. If reform efforts embrace a comprehensive theory of the British constitution, and a conception of representativeness which is consistent with it, a reformed House of Lords has the potential to once again become a central pillar of the constitution.

[27] Http://www.telegraph.co.uk/news/11497756/Elected-House-of-Lords-not-a-priority-for-next-Tory-government.html
[28] A number of defeats over the Legal Aid Bill (2013), and over the Welfare Reform Bill (2015), are but two of the most recent examples.

3 THE WEAK CASE FOR ABOLITION

In light of the preceding analysis of the problems facing the House of Lords, this chapter considers one potential option: the abolition of the House of Lords in its current form. Firstly, the ramifications of abolition and the possible alternatives to a bicameral system will be examined. Secondly, the details and legality of the implementation of abolition will be considered. The chapter will conclude that a bicameral system should remain, and that the more sensible means to proceed to address the present problems should attempt a series of moderate reforms, rather than total abolition.

3.1 THE CASE FOR ABOLITION

In light of the criticisms levelled at the House of Lords, as explained in the introductory chapter, it makes sense to consider the merits of the case for abolishing the House of Lords completely. In fact, calls for abolition stretch back almost as long as the criticisms. The Labour party's historic stance towards the House of Lords, until relatively recently, had been abolition. The Scottish National Party continue this stance. In 1978, the Labour Party described the House of Lords as an "outdated institution, completely inappropriate to a modern democratic system of government", as it no longer limited itself to the role of a revising chamber that accepted the government's mandate. It proposed abolition as the most straightforward and practical course.[29]

As discussed previously, the main purpose of a second chamber is to provide for revision and scrutiny of proposed legislation; a kind of legislative second opinion. The removal of the second chamber then, is the removal of this second opinion stage, at least in its current position in the legislative process. Indeed, to remove it completely would likely be disastrous, as this stage of revision is needed to allow for the highest possible quality of legislation. It will be seen later that, even in unicameral legislative systems without a second chamber the review and scrutiny procedure takes place, but in different forms. The legislative "second look" at the first chamber's proposals will often be built into the first chamber's own procedures.

[29] "Machinery of Government and the House of Lords' (Labour Party Statement by the National Executive Committee, 1978)

Observing global trends, unicameral systems can usually be found in smaller countries with proportional voting systems.[30] To observe these characteristics in unicameral systems is logical because it would ensure a wider range of views in a legislative process with only one chamber. There are however, political drawbacks to such an arrangement.

As a rule, bicameral parliaments are often found in larger countries where there is a diverse population such that subsidiary mechanisms are needed to facilitate access to the legislative process. Ensuring that this diversity of opinion is given a voice improves public confidence and helps to ensure that the political process is representative.

3.2 MORE FAVOURABLE OPTIONS FOR REFORM

We might consider the situation where abolition is achieved, whereby there is no second chamber to provide scrutiny and revision functions. As a result, Parliament must build in other procedures and mechanisms to ensure the ultimate quality of legislation through proper scrutiny somewhere in the legislative process. In countries with voting systems that provide for diversity in the views represented in the sole chamber, such as New Zealand (which became unicameral in 1950) a special Select Committee stands as the stage between the first and second reading of the bill. This committee has the specific responsibility of scrutinising legislative proposals. That is not to say however, that this is a perfect system, and there remains plenty of debate in New Zealand over whether to re establish a second chamber. Such a revival would not be unheard of. Former communist countries, such as Poland and the Czech Republic, which had had unicameral Parliaments, established or reinstated a bicameral Parliament in the 1990s.[31]

This is similar to the argument put forward by the Labour Party in the 1970s, that the problems of too much work for the Commons and too much power for the executive could be addressed by reforming the House of Commons. Additionally, other means of revising and applying scrutiny to legislation could be developed. An example of this would be a

[30] 'BBC News | In Depth | UK Politics | Open Politics'. Accessed 13 January 2016. http://news.bbc.co.uk/hi/english/static/in_depth/uk_politics/2001/open_politics/lords/unicam_bicam_list.stm.
[31] "Machinery of Government and the House of Lords' (Labour Party Statement by the National Executive Committee, 1978)

special Select Committee, whose role would be to consider Bills which had received their Third Reading.[32]

The counter-argument to this proposal is that those who are within Parliament, but able to take a longer-term view of the issues brought before them is the best way to provide the necessary level of scrutiny to legislative proposals in the UK. The issues described in the first chapter remain, but these can be addressed during a reform process. They do not stand as adequate reasons for dispensing with the second chamber altogether. Furthermore, based on the international examples we have considered, it is fair to predict that a country the size of the UK should probably have a bicameral parliament. The additional advantage of having a second chamber is that it can perform other functions (examine the effectiveness of the executive through questioning and committees, provide a forum for debate, different views and interests from those represented in the primary chamber). Equivalent functions in a unicameral system result in an increasingly complicated network of committees and procedures to deal with new functions.

Lord Houghton of Sowerby argued that the House of Lords should be allowed to get on with its job without talk of reform or abolition. The House of Lords was needed as a restraint on elective dictatorship, which would arguably exist were the House of Commons to legislate alone, but it did not need more power. The House needed to work out its position within the modern parliamentary system, fulfilling its powers as a constitutional element of Parliament. This is however, an issue for reform, not abolition.[33]

3.3 PRACTICAL OBSTACLES TO ABOLITION

Finally, abolition would create considerable practical problems for the House of Commons. Lord Denham summed up the argument in a point that encapsulates well the entire issue with abolition. He wrote that abolition was not a practical option, since the House of Commons would then have to be reformed to such an extent as to build a new second chamber within its framework.[34]

At best then, it is possible to say that the argument for abolition in theory is unconvincing from the outset and inconclusive at best. The implementation in practice of such a policy,

[32] "Machinery of Government and the House of Lords' (Labour Party Statement by the National Executive Committee, 1978)
[33] Parliamentary Role of the House of Lords" (HL Hansard, 19 December 1984, vol 458, cols 656–85)
[34] Time to Reform the Lords? (Lord Denham, The Field, November 1991)

and the political and legal issues it raises, is another issue entirely and one that will be explored now.

There is an argument that abolition of the House of Lords concerns a question of legality. A fundamental rule of the UK constitution is that whatever the Queen in Parliament (A Holy Trinity-esque body of the Queen, House of Commons and House of Lords acting together) enacts is law.[35] It can be argued that this rule depends on the existence of these three bodies *in fact*, and not just law. It depends on the relationship between the courts and Parliament, whereby the courts enforce the rules that the three other bodies enact. An act therefore, that would abolish the House of Lords would break the continuity of the legal system, as the Courts would be enforcing legislation passed by the House of Commons alone. This would be true whether such an Act was passed by normal procedure, or under the terms of the 1911 and 1949 Parliament Acts.

Use of the procedures under the 1911 and 1949 Parliament Acts to pass a Bill for abolition would further complicate matters. The 1911 Act provides for legislation to be passed without the consent of the House of Lords on the basis that a second chamber continued to exist. An Act of Abolition would result in the House of Commons using the procedure in the Parliament Acts to destroy that procedure itself. Additionally, abolition the upper house would place the judiciary in a difficult position; rejecting an Act of abolition would result in judges having to reject any subsequent Acts passed without reference to the House of Lords. This would cause political turmoil.[36]

There is a counterargument: this interpretation of the 1911 Parliament Act, given by Peter Mirfield, may be inappropriate. George Winterton argued that, although Muirfield's argument had political clout, it was legally irrelevant. There was nothing to legally prevent the House of Commons from using the Parliament Acts procedure to enable all Bills to be subject to that procedure and then abolishing the House of Lords by that amended procedure. Moreover, an abolition that would be effected by amending the Parliament Acts would enable Bills to be presented for Royal Assent immediately on approval by the House of Commons. This would then take the House of Lords out of the legislative process.[37]

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[35] *See*, for instance, A. V. Dicey, An Introduction To The Law Of The Constitution 39–40 (10th ed. 1959); Jeffrey Goldsworthy, The Sovereignty Of Parliament: History And Philosophy ch. 2 (1999); Peter C. Oliver, The Constitution Of Independence: The Development Of Constitutional Theory In Australia, Canada, And New Zealand Chs. 2–4 (2005).

[36] Can the House of Lords Lawfully be Abolished?" (Peter Mirfield, Law Quarterly Review 95, January 1979)

[37] Is the House of Lords Immortal?" (George Winterton, Law Quarterly Review 95, July 1979)

Another issue concerning the implementation of such a drastic measure concerns the Queen: the Queen might not permit such a change. This may, however, be unlikely given that the Queen, by convention, follows Parliament's lead in matters of legislation. Nonetheless, the Queen might not permit a constitutional change which may in future force her to act regularly against her own government in the constitutional interests of her people. In this instance, it becomes clear that the House of Lords has a crucial role to play in a country without written constitution.[38]

Stuart Bell offers an insight on this issue when he explored various proposals for abolition and found that there were too many legal, constitutional, legislative and political stumbling blocks in the way of total abolition unless some form replacement was envisaged.[39] Any formula for abolition without a corresponding replacement would lead to a constitutional crisis and political upheaval, i.e. a General Election. Bell's proposals, like the majority of other critics, favour reform. This is seconded by most of the modern literature and scholarship. For example, Shell maintains that the House of Lords performed its functions well overall and that attempts at outright abolition could only weaken Parliament.[40] Shell also echoed concerns over the compositional elements of the House of Lords, but this is an issue for reform.

3.4 CONCLUDING THOUGHTS ON THE CASE FOR ABOLITION

It seems that there can be no abolition of the House of Lords without significant reform to the rest of the Parliamentary system. This reform, for the most part, would only stand to correct the absence of the upper house's functions. It seems logical then that reform, rather than abolition, is the most prudent course of action. This is particularly important considering the concerns over implementation of an abolition proposal, and its potentially destructive ramifications to the UK's political and legal systems. Perhaps the words of Lord Shepherd, are most apt: Shepherd stressed the need for an effective two chamber Parliament, and called for both Houses to cooperate in seeking agreement on how they could work together most effectively.[41] This summarises the remarks that have been covered here well: a bicameral system is needed, but so too is reform.

[38] Abolishing the House of Lords" (Lord Crowther-Hunt, The Listener, 4 December 1980)
[39] How to abolish the Lords (Stuart Bell, September 1981)
[40] The House of Lords (Donald Shell, The Politics of Parliamentary Reform, 1983)
[41] "The House of Lords" (Lord Shepherd, Parliamentarian 53 January 1972)

4 RELATIVE MERITS OF AN ELECTED OR APPOINTED SYSTEM

Despite its current challenges, it is in the UK's interests that the House of Lords remains an appointed chamber. The UK political system and constitution does not require and will struggle to adjust to, the level of wholesale change that a shift to an elected upper House would entail. While it is important to build on the initiative to phase out hereditary peers, as commenced by New Law, any further steps towards reforming the House must be made incrementally.

This chapter examines some specific issues associated with the Lords as it exists today. Specifically, it considers the problems relating to its current composition as regards issues of legitimacy, democracy and representativeness. In this sense, it briefly engages with the arguments presented in favour of elected or hybrid forms of upper chambers. However, rather than accepting these proposals for sweeping reform as the only logical resolution to what Lord Richard and Damien Welfare describe as "unfinished business",[42] it argues that modifying the current appointed system is not only equally advantageous, but is also more in keeping with the UK constitution's gradual evolution. As such, this chapter proposes that the most significant problems undermining the Lords relate not to its lack of elected representation but the perception that: (a) the Lords is a lucrative retirement home for former politicians; (b) that it is too political to offer objective scrutiny and (c) that its members are not committed to its work as a scrutinising body. Rather than a comprehensive overhaul, such issues are better resolved by tweaking its current composition to better reflect the breadth of society's collective wisdom, ensure its objectivity and offer scope for removing members who do not satisfactorily contribute to the House's work.

That the Lords should be retained in some form has already been demonstrated. Bicameral legislatures are well-established in British and international political history. As Washington purportedly told Jefferson, just as one cools coffee in a saucer, so too does the US Senate serve as a vessel in which tempestuous legislation is cooled.[43] Bringing metaphor to life, the Lords embodied this calming influence on Parliament's legislative programme in its recent rejection of government proposals for tax credit reforms.[44] Despite persistent objections to its size and composition, the Lords stands as a body of expertise that checks overzealous

[42] Ivor Richard and Damien Welfare. 1998. *Unfinished Business: Reforming the House of* Lords. London: Vintage.
[43] John J. Patrick, Richard M. Pious and Donald A. Ritchie. 2001. *The Oxford Guide to the United States Government*. Oxford: Oxford University Press, pp. 46.
[44] independent.co.uk/news/uk/politics/tax-credits-baroness-hollis-delivers-powerful-speech-as-house-of-lords-rejects-conservative-proposal-a6710011.html

governments. As this conveyed the House at its best, it is proposed that that any reforms should strengthen this function. These reforms however must be appropriate for the constitutional make-up of the UK, and implemented gradually.

4.1 LEGITIMACY OF THE HOUSE OF LORDS

Challenges to the House of Lords commonly focus on issues of legitimacy, democracy and representativeness. As Meg Russell argues, rather than taking these issues in isolation, public perceptions of the Lords' legitimacy are irrevocably tied to questions of democracy and representativeness. As she puts it, "when discussing Lords reform, 'legitimacy' is often used synonymously with 'democratic legitimacy' i.e. whether or not the institutions' members are elected".[45] Similarly, that the upper chamber might "over-represent certain sections of society" at the expense of others is perceived to undermine the Lords' relevance in the legislative process[46] . These views have become synonymous with its perceived deficit in legitimacy.

As questions of legitimacy are largely subjective, it must be emphasised that the Lords' need not necessarily mirror the House of Commons. Certainly, as is consistent with any modern liberal democracy, there is an expectation that the UK's executive and primary legislative chamber derive its legitimacy from free and fair elections. Broadly, despite a growing national feeling that its first-past-the-post electoral system might need reform, the Commons meets these expectations. The Lords meanwhile, as M. L. Sondhi puts it, is a "scrutinising body" that only serves as a "useful supplement … to the House of Commons".[47] Here, the wisdom of members (whose very presence is predicated upon considerable expertise in their respective fields) can be approached as legitimate enough in itself, providing it enhances Parliament's capacity to produce quality public policy. Ultimately, the Lords is neither expected to govern, nor to initiate, legislation. It is instead left to oversee. Why then need its members be elected?

An elected or partly-elected Lords would not augment Parliament's effectiveness. Conversely, it would dilute it. While many bicameral systems incorporate a provision that both chambers be elected, politicians should exercise caution before hurtling into a similar

[45] Russell, Meg. 2013. *The Contemporary House of Lords: Westminster Bicameralism Revived*. Oxford: Oxford University Press, pp. 238.
[46] Ibid, pp. 62.
[47] Sondhi, Manohar L. 1998. *Foreign Policy and Legislatures: An Analysis of Seven Parliaments*. Hauz Khas: Abhinav Publications, pp. 18.

model. Richard Steven Conley for example refers to the "the permanence of [the] divided government" that plagues the US Congress.[48] Here, both Houses can claim a mandate to govern. Similar stasis could foreseeably encumber an autonomously elected Lords whose party share did not match its counterpart in the Commons. Even a partially elected House might occasionally assert its dominance by citing different emphases in seat share, regional representation or timeframe since the last election as indicative of a greater mandate. Sharing these misgivings, in a 2006 Populus poll 56% of the British public agreed that:

> "If both Houses of Parliament were elected it would become much harder for governments to get things done since both Houses could claim democratic legitimacy and neither would be willing to back down, bringing the risk of frequent stalemate."[49]

Therefore, while the Lords' legitimacy can and should be reinvigorated through reform, we must be careful not to offer the House a mandate sizeable enough to initiate legislation. An elected Lords of any kind would grant it a level of legitimacy approaching parity with the House of Commons. Such a measure can only undermine Parliament's efficiency.

Leaving aside the value an appointed Lords has in scrutinising Parliament, many people would still welcome an elected upper chamber. Although gridlock would undoubtedly render the mechanics of government more difficult, a second elected chamber would have further scope to block policies such as "the corrosion of libert[ies]" that K. D. Ewing identified in New Labour's anti-terror legislation.[50] While this view has some merit, attempts to reverse the now well-established primacy of the Commons would be unrealistic, and such a radical change would have little traction in today's Parliament. As Ann Lyon explains, our constitution is "the product of a unique process of evolution over many centuries".[51] As such, any expectations for a sweeping reversal of the current parliamentary settlement are impractical. For similar reasons, calls to reform the Lords to better reflect the UK's regional diversity in a manner compatible to the US Senate or the German Bundesrat should be rejected. Parliament must first perfect its *current* appointed model and its valuable work as a scrutinising body. Anything else would be too much too soon.

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[48] Conley, Richard S. 2003. *The Presidency, Congress and Divided Government*. Texas: Texas A & M University Press, pp. 3.
[49] http://researchbriefings.files.parliament.uk/documents/LLN-2012-021/LLN-2012-021.pdf, pp. 9.
[50] Ewing, K. D. 2010. *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law*. Oxford: Oxford University Press, pp. 2.
[51] Lyon, Ann. *Constitutional History of the United Kingdom*. London: Cavendish Publishing Limited, pp. xxxvii.

5 VOTING SYSTEMS IN CONTEXT

This chapter will explore the merits and disadvantages of the different voting systems which might be considered if an elected House of Lords is deemed desirable. The choice of district size and term length may influence the capacity for an elected House of Lords to realise the purpose of a bicameral UK Parliament.

5.1 FIRST PAST THE POST

The First Past the Post (FPTP) system is the current system used to elect Members of the House of Commons. In this system, voters have one vote which they assign to their most preferred candidate. The candidate with the most votes in a given constituency wins the seat. FPTP is unlikely to be suitable for electing the House of Lords as it fails to increase the representation of minor parties and does not reflect the overall distribution of votes in the makeup of the House. As it is the same system used to elect the House of Commons, FPTP is likely to generate an Upper House that is too similar to the Lower House to have practical impact.

Benefits of the FPTP system include greater efficiency, more centrist policies and greater accountability. This system tends to generate single-party governments, which are less complex and have lower transaction costs.[52] FPTP also encourages centrist policies, as candidates must be the preferred candidate of the majority of voters. Parties are incentivized to design middle ground policies to gain a greater proportion of voters. As only one candidate is elected per constituency, MPs are connected to a smaller group of voters and have a greater inducement to be active in representing the views of their constituency.

However, the FPTP system allows representatives to be elected with a small amount of public support. There is no requirement that a candidate have the support of the majority of their constituents. In the 2015 election, the SDLP candidate broke the United Kingdom record for the lowest winning share of the vote, with just 24.5%.[53] Not only does FPTP lead to elected representatives who do not represent the majority of their constituents' views, it also leads to a large number of votes being 'lost', as votes cast for the losing candidates are not represented in the final makeup of the House. FPTP can often generate a House which

[52] Tsbelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press
[53] 'What Is First Past The Post'. Accessed 25 January 2016. http://www.electoral-reform.org.uk/first-past-the-post.

does not reflect the overall proportion of the vote gained by each Party. In particular, it tends to result in a two-Party system. Third parties with a reasonable level of support can be disadvantaged by this system, while parties whose supporters are concentrated in geographical areas may be advantaged.

Furthermore, as the House of Commons is elected using this system, both the advantages and disadvantages of FPTP are already present within Parliament. If the House of Lords was elected using the same system, it is likely to lead to an Upper House which largely mirrors the Commons and which scrutinises legislation in a similar manner to the Commons.[54] More importantly, perhaps, the first past the post system is not likely to see smaller political parties represented. While its simplicity as compared to some of the alternatives works in its favour, the real question to be asked is whether a second House constituted in this way provides any additional benefit in the constitutional architecture as a whole. If the House of Lords is to remedy some of the problems associated with the lack representativeness in the Commons, adopting a voting system that does not share the same drawbacks and offers *different* benefits as the system used to elect the Commons, is surely the necessary first step. FPTP precludes the election of independents and small parties and ensuring that such minority voices have some form of representation in the constitutional system is surely something that House of Lords reform should endeavour to achieve.

5.2 ALTERNATIVE VOTE

In an alternative vote system, voters rank candidates in order of preference. Candidates who gain more than 50% of the votes as first preferences are elected after one round of counting. If no candidate gains an absolute majority of votes, the candidate with the least first-preference votes is eliminated. Their votes are allocated to the voters' second preferences. This process is continued until a candidate has more than 50% of the votes.[55] Alternative voting is used to elect the lower House of the Australian Federal Parliament.

The primary benefit of alternative vote systems is that candidates require an absolute majority, rather than a relative majority to secure the seat. Therefore, all MPs are supported by the majority of their voters. This system reduces the number of 'lost votes' as a greater degree of voter preferences are taken into account. Alternative vote systems have similar

[54] This problem is elaborated upon in: Britain, Great. *The House of Lords: Reform.* The Stationery Office, 2007, 34
[55] https://www.psa.ac.uk/sites/default/files/TheAlternativeVoteBriefingPaper.pdf

benefits to FPTP, as it tends to generate single-party governments and incentivises centrist policies.

As with the advantages of the alternative vote system, the disadvantages of the system are similar to those of FPTP. Alternative voting does not increase the overall proportionality of the House and, in some cases, can over-exaggerate voter support for the larger party. While minor parties have a greater chance of gaining votes under an alternative vote system rather than FPTP, they are still unlikely to gain a large enough share of the vote to gain seats. Alternative voting is also similar enough to FPTP that it is likely to produce a House of Lords that very much resembles the House of Commons. The 2008 White Paper "An Elected Upper Chamber: Further Reform to the House of Lords" demonstrated that under both AV and FPTP it is highly likely that the party forming the government of the day would secure a majority in the upper chamber even if elections to the Lords were staggered.[56]

5.3 SINGLE TRANSFERABLE VOTE

Under a single transferable vote system, constituencies elect multiple MPs. It is a form of proportional representation where voters rank candidates in order of preference. Candidates need to gain a minimum number of votes to be elected. Where candidates gain more votes than the threshold, the excess votes are transferred to the voters' second choice candidate. The same process occurs if a candidate has no chance of being elected. STV is the most appropriate system for an elected House of Lords as it increases the number of parties given a voice and the ability to scrutinize legislation.

Under STV, no votes are lost. All voters have at least one elected representative who was elected via their vote. Not only does this ensure greater democracy and representativeness, but voters also have an increased sense of enfranchisement and incentive to engage with the political process as their vote directly contributes to the election of a candidate. Voters also have multiple representatives to approach with specific concerns and are thus more likely to approach an appropriate representative who is in the best position to assist them.

Independent and minority party candidates are far more likely to gain seats under an STV system.[57] This is particularly true of parties whose supporters are not geographically

[56] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228706/7438.pdf, 32
[57] http://www.electoral-reform.org.uk/sites/default/files/Direct-Elections-for-the-House-of-Lords.pdf

concentrated in specific districts. A House elected under this system is likely to have a greater diversity of views and mandates, incentivising the creation of more inclusive policy. The presence of more voices within political discourse also increases the perception that Parliament is representative of all society.

Furthermore, women and minority candidates have a greater chance of success when elections are conducted using systems of proportional representation. In Australia, 15.2 per cent of Senators (elected by STV) before 2014 were female, while only 8.8 per cent of Members in the House of Representatives, who are elected using AV, were female[58]. The adoption of a proportional representation system can increase the proportion of traditionally excluded groups within the Parliament without needing to resort to quotas or targets.

The preference system distances parties from the process and allows voters to express their views about specific candidates. Although parties are likely to place candidates in their preferred order, as is done in the Australian Senate elections, voters can preference the candidates out of order. Therefore, political candidates are accountable to the voters, rather than the Party.

The primary disadvantage of the STV system is that it increases complexity within the system. As candidates have to rank all the candidates in order of preference, in large constituencies with many candidates this can lead to uninformed voting. Voters are more likely to enter 'donkey votes', where they rank the candidates in the order in which they appear on the ballot paper.

The 2008 White Paper demonstrated that under the STV system it would be very difficult for any single party to gain a majority, without obtaining a significant majority over successive election cycles. Based on past general election results, a House of Lords elected via STV would have been hung in every election since 1983[59]. In such a system, the inability for parties to have a majority can make the passage of legislation difficult and perpetual gridlock is more likely to occur. Furthermore, the preference system may incentivize parties to play to the fringes of the political system, in order to gain a greater number of first-

58 http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/WomanAustParl/Append10

59 http://www.electoralcalculus.co.uk/Analysis_LordsReform.html

preference votes. Nonetheless, STV offers the benefit of making it much easier for parties other than the main two to gain seats in the Lords, thereby increasing diversity.[60]

5.4 PARTY LIST PROPORTIONAL REPRESENTATION

Party list proportional representation operates in much the same way as STV, but parties provide lists of candidates. Voters rank the parties in order of preference and each party is given the number of seats that corresponds to their proportion of the votes. Candidates are elected in the order that they were ranked on the party-provided list. Party list PR may not be suitable for the House of Lords, as it reduces the amount of choice voters have over their representatives.

This system retains many of the advantages of STV. Under this system, there is a high degree of party proportionality, smaller parties are more likely to gain a greater share of the vote and minority candidates are more likely to be elected. Furthermore, complexity is reduced as it is more simple for voters to make a choice between a smaller selection of parties that are likely to be more recognizable to the average voter than a candidate name.

Likewise, as with STV, party list PR also increases the likelihood of fragmentation and inefficiency and the incentives for parties to play to the fringes of the political system. However, party list PR differs from STV as it provides increased power to internal, undemocratic party structures. As the order in which candidates are placed on the list determines who is elected, candidates must manoeuvre and play internal Party politics in order to be placed in winnable positions on the list. This means that candidates may be accountable to the party leadership rather than to their constituents. As voter choice is exercised with regard to the party rather than the individual, party list PR may be perceived as a less democratic and legitimate system as individual candidates owe their seat to the party rather than the voter.

5.5 TERM LENGTH

Another issue with regard to the form of representation is the term for which Members will be elected. The status quo, in which Lords are appointed for life, is incompatible with an elected system. A key aim of an elected system is that Members are accountable for those

[60] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228706/7438.pdf page 32

who have voted for them. If election was for life, there would be significantly less accountability within the system as voters would not be able to express their dissatisfaction with the performance of their representatives after they had been elected.

It is also desirable that elections for the House of Lords coincide with those for the House of Commons. This has practical benefits in terms of the cost of administering elections. Voters are then not asked to vote more frequently, increasing the election turnout and the chance that they will be well informed when they do vote. The fixed five-year term is also designed to reduce the incidence of highly politicized election-year cycles and prevent Governments designing short-term policies with one eye on the upcoming election. If House of Lords elections did not coincide with those of the House of Commons, it would create a dual political cycle. Therefore, an elected House of Lords should have either five-year or ten-year terms.

There is a trade-off between accountability and political independence. A longer, ten-year term would provide members with greater political independence and allow them to focus on legislation and country-wide governing rather than be concerned with re-election. Conversely, a short, five-year term increases the accountability of Members to the votes. Furthermore, a House that is elected for a long term locks in the voter preferences of a particular time. It is likely that the political climate will change in the intervening years between elections and thus the House may become highly unrepresentative.

The trade-off can be resolved through the use of staggered elections, in which only half the candidates are re-elected at the end of each term. In this system, candidates would be elected for a ten-year term, but their terms would be staggered, so they ended at different times. Thus, voters would have the opportunity to express their preferences at five-year intervals and the House would be more contemporary and representative. Members would, however, have increased security and political independence and be more likely to take a long-term view of policy-making.

5.6 DISTRICT SIZE

The final consideration for an elected House of Lords is the optimal size of constituencies. There is a trade-off between proportionality and simplicity. Potential district sizes include retaining current constituencies, combining multiple House of Commons constituencies to

create "super-constituencies" for House of Lord elections, using the European Parliament constituencies.

In large districts, elected representatives are more likely to reflect the proportion of votes gained by a party across the country. In large, multi-member districts it is likely that there will be a greater diversity of smaller parties elected,[61] as geographical concentration of votes is less important. However, complexity is increased as there are a greater number of candidates for voters to choose from.

Small districts reduce complexity and ensure that candidates retain a deeper sense of connection to a specific group of voters. However, as the House of Commons has small district size, a small district size for an elected House of Lords may just recreate the political situation in the Commons.

5.7 CONCLUDING THOUGHTS ON VOTING SYSTEMS

Ultimately, the question of which form of representation is most appropriate for an elected House of Lords must be answered with regard to the specific functions of that chamber. In the United Kingdom, the House of Lords scrutinises legislation and provides a system of checks and balances to ensure that policy is well-designed for a diverse population. The powers of House of Lords also influences which system is most appropriate. With that in mind, a single transferable vote system with large district sizes and staggered ten-year terms is most likely to deliver a functional and effective House.

The benefits of the single transferable vote system are most likely to deliver an Upper House that will incorporate diverse, expert views that are more divorced from the highly politicized discourse within the Commons.
Likewise, large district sizes will achieve a diverse House which is more likely to effectively scrutinize legislation from a variety of perspectives. While this can lead to greater complexity, it is possible to resolve that issue through staggered ten-year terms. Not only will staggered ten-year terms resolve the trade-off between accountability and political independence, it will also reduce the complexity of the ballot paper. As only half the seats in the House of Lords will be up for re-election at any given time, there will be a reduced number of candidates to choose from and thus less complexity for voters.

[61] The Electoral Sweet Spot: Low Magnitude Proportional Electoral Systems

6 REFORMING THE PRESENT SYSTEM OF APPOINTMENTS

Sensible, palatable reforms would enhance the Lords' legitimacy and its capacity to produce good policy. As established in the introduction, this chapter recommends that three fundamental problems within the Lords' existing composition should be addressed. Primarily, there is the issue of the chamber's representativeness. While the disparity in race, gender and region are certainly problematic (as of 2012 only 22% of peers were women),[62] simply limiting the number of former politicians who become peers (incidentally a notoriously male-dominated career) would constitute an essential improvement to the House's collective experience.[63] To this end, one should be cautious about using formal quotas to appoint more female, ethnic minority and regionally diverse peers. Quotas are not the only, nor the most effective, means to guarantee the Lords have the ability to adequately represent the diversity of interests in society.

The actual numbers, types of career and their proportional share should be left to the discretion of parliamentary committees.[64] Nonetheless, one can envisage a system that better reflects a broader share of society's collective knowledge. Whereas 29% of Blair's appointments were former politicians,[65] here their share would be fixed at 12.5%. The only means through which a new peer could be appointed is if a slot opened in his relevant area. This depth of knowledge would lend credibility to the Lords as a more legitimate scrutinising body.

On the appointment process itself, upon the opening of a relevant slot, accomplished members of the public would make an application to the now expanded House of Lords Appointments Commission. Dispensing with the problematic and archaic concept of Prime Ministerial patronage, this *independent* commission would assume responsibility for *all* appointments to the House of Lords, selecting the best qualified candidates. While the commission would neither exclusively appoint apolitical peers nor reflect the vote share or composition of the Commons, it would be encouraged to fairly encompass the spectrum of reasonable political views. What constitutes fair and reasonable would be left to their discretion. Indeed, despite David Cameron's suggestion that the composition of the House

[62] http://researchbriefings.files.parliament.uk/documents/SN03900/SN03900.pdf
[63] http://www.telegraph.co.uk/comment/personal-view/3637386/Why-the-Lords-doesnt-need-more-politicians.html
[64] We would advise the use of public consultations for this purpose.
[65] See policy paper introduction

of Lords should mirror the results of the elected Commons,[66] it is submitted that creating an overtly political house would hamper its legitimacy as a scrutinising body. Let the Commons remain the elected, political House that produces legislation. Let the Lords be the *objective* saucer in which it is cooled.

Thirdly, given such complaints as Nicholas Baldwin's emphasis on the varied "reasons for non-attendance" amongst peers,[67] the imposition of a mandatory attendance requirement would be sensible (the details of which are to again be decided by parliamentary committee. Were a peer to consistently fall below the required standard of commitment without good reason, he would be removed. The issue of non-attendance is certainly problematic for today's Lords. During the last Parliament alone, £360,000 was claimed by peers for sessions in which they did not vote. In the same period, £100,000 was claimed by peers who did not vote at all.[68] In order to enhance its credibility, the Lords must take steps to stamp out this kind of behaviour. While it is recognised that in tempering the Commons' legislation, peers must be granted certain immunities to the fluctuations of political life, this freedom should only apply only insofar as they exercise good character and are able to commit to their House's work. To this end, it is proposed that there be *two* sets of 400 peers, each sitting for 6 months via a staggered transition. This would give peers sufficient time away from Parliament to stringently commit to their work while minimising disruption to the House.

Addressing the argument that an elected Lords is necessary to check the UK's arguably over-powerful Commons, one must not underestimate the effect that reforming the appointment model could have in bolstering the House's legitimacy. Historically, improving the perception of legitimacy enjoyed by the Lords has led to greater confidence in its engagements with the legislative process. Richard Worf for example notes how, following New Labour's reforms, the previously "dormant" Lords began "using the legitimacy it gained … to mount an opposition to the House of Commons and to the single-chamber system of Parliamentary government".[69] Passing the reforms presented in this paper could instigate a similar boost to our upper chamber. Indeed, beyond providing more effective scrutiny of public policy, the new Lords would bolster its confidence to block legislation that

[66] http://www.theguardian.com/commentisfree/2015/jul/29/david-cameron-half-right-house-of-lords-reform
[67] Baldwin, Nicholas. 1999. "The Membership of Work in the House of Lords". *The House of Lords: Its Parliamentary and Judicial Roles*. Ed. Paul Carmichael, Brice Dickson. Oxford: Hart Publishing, pp. 34.
[68] See policy paper introduction
[69] Worf, Richard. 2001. Lord's Revenge: The Revival of the House of Lords. *Harvard International Review* 22(4), pp 7-8

violates the rule of law or is abhorrent to the majority of the public, as it did in for tax credits cuts last year. Eventually, the Commons may then come to regard the Lords' scrutinising legitimacy as comparable to that of the significance of the Supreme Court. Like the Court, the new Lords may feel mandated to dismiss particularly problematic legislation.[70] As the objective overseer of public policy, this would be a welcome contribution to the Lords' work.

6.1 CONCLUDING THOUGHTS ON APPOINTMENT

As there is no real agreement about what form a reformed Lords should take, it is proposed that a tentative approach is required at the present time. There are problems within the current appointed model that could significantly improve the quality and character of the House. Such incremental change is both necessary and in keeping with the British political tradition. Anything more would be a step too far, too soon. The proposals in this chapter build on the improvements made by New Labour in the House of Lords Act 1999. It is suggested that a negative quota should be used to limit the number of former politicians and better reflect society's interests. The exact details of this quota should be decided by Parliamentary committee. In addition a procedure should be formulated whereby potential peers would apply to the independent House of Lords Appointments Commission whenever there is an opening in their area of expertise. The Commission would advertise these posts on its website. To improve the work of the House, a Parliamentary Committee should set a minimum participation requirement, and Peers who fall below it should be removed and their post re-advertised. Finally, in order to encourage proper participation, peers should only sit for 6 months out of the year and in order to minimise disruption, a staggered changeover system should be established.

Enacting these reforms would bolster Lords' legitimacy and enhance its potency as a scrutinising body. At the same time, consistent with Lord Strathclyde's emphasis on the importance of "conventions in Parliament [as] a cornerstone of our Constitution,[71] they are measured enough to respect tradition. In short, they are the next step in the UK's constitutional evolution.

[70] See Lord Cook'e judgment in *R (Daly) v Secretary of State for the Home Department* (2001)

[71] Gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf, pp. 3.

7 THE HOUSE OF LORDS IN COMPARATIVE PERSPECTIVE

The functions, composition and principles espoused by upper houses around the globe have frequently been called into question; the UK House of Lords is not alone in this respect. These debates provide fertile ground for considering the prospects for reform of the House of Lords. Many of the criticisms that have been made of Upper Houses are equally applicable in the context of the UK constitution – (1) lack of equal representation, (2) ineffectiveness, (3) lack of democratic accountability. The UK may learn from the conventional wisdom of its international peers and consider these insights when making proposals for reforming its own upper house.

The experience of other civil law and common law systems in respect of their own Upper Houses provides key insights into the impact any steps taken towards realising an upper house that more effectively engenders a representative "microcosm of the nation"[72] would have on the perceived democratic legitimacy and ultimate efficacy of the House of Lords as a legislative body. To face the similar identity crisis which faces the House of Lords, it will be suggested that: (1) peers of the House of Lords should be appointed on the basis of both regional and non-territorial considerations (e.g. occupation, gender, religion and ethnicity), and (2) provisions giving effect to this representative appointment mandate should be added to the Selection Criteria used by the House of Lords Appointment Commission, and to the Ministerial Code pertaining to the Prime Minister's power to appoint peers.

7.1 CANADA

The Canadian Senate

The original purpose of the Canadian Senate was to reflect the interests both of regions and of the propertied class[73] in providing a 'sober second thought' with respect to lower house proceedings. Regional representation, however, remains a fundamental purpose of the Canadian Senate. Although senators are appointed to fulfil regional quotas, the number of senators apportioned to each region reflects neither population nor provincial distributions.[74] Much like the UK, Canada is an amalgam of regions distinct in history, language, culture, tradition, and interests. These interests are so politically diverse as to have,

[72] Meg Russell, The Contemporary House of Lords: Westminster Bicameralism Revisited, 2013, pp 286–7.
[73] Docherty, The Canadian Senate, fn.85, p.28
[74] Hynes, Aaron. "Canadian Parliamentary Review - Article". *Revparl.ca.* N.p., 2015. Web. 22 Dec. 2015.

in the recent history of both nations, spawned political parties.[75] The objective of the Canadian Senate in fulfilling its regional representation mandate is to provide an alternative means for the voicing of regional concerns that is otherwise unavailable in the lower house. The Canadian Senate is incapable of fulfilling this mandate because of the unprincipled and arbitrary regional distribution of Senate seats. This might be a lesson for the UK House of Lords should the UK government seek to establish the upper house as a regionally representative legislative body.

The fact that the Canadian Senate has shown itself to be unrepresentative means that one must question its capacity to perform its 'sober second thought' function. While at first glance, the Canadian Senate appears to have more power than does its UK counterpart, in practice, it rarely acts contrary to the will of the democratically accountable lower house.[76] It seems that the Senate believes that it is inappropriate for it directly to implement its own initiatives, and has opted instead to focus its powers on meaningful legislative scrutiny.

Both the Canadian Senate and the UK House of Lords occupy a relatively weak position as compared to their lower houses and both have traditionally acted primarily as forums for the scrutiny of matters not considered by the House of Commons. The matters scrutinised are often delegated by necessity, e.g. they are too contentious for House of Commons debate, or there is insufficient time in the Commons for analysis. In cases of the former, it is precisely because the Canadian Senate is not answerable to the electorate that it is able to air issues otherwise too contentious for the politicized (and electorally responsible) lower house. The House of Lords is seen to be the appropriate body with which to air these issues because of the relative expertise of its peers, and their supposedly greater political independence. As has been mentioned elsewhere, in practice, 34% of peers used to work as professional politicians with only one peer representing the manual trade profession.[77] Cross-benchers themselves make up only 23% of peers, and their politically-affiliated colleagues vote significantly more: 47% voting participation to a paltry 16%.[78] Since representation plays such a key role in the effective fulfilment of the 'sober second thought' function, it is imperative that a reformed appointment process of the House of Lords (discussed in the representation section) be capable of appointing more peers that can actually contribute to the expertise that is necessary for it to fulfil its scrutinizing functions.

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[75] Harrison, Trevor. "Reform Party Of Canada". *The Canadian Encyclopedia*. N.p., 2001. Web. 22 Dec. 2015.
[76] Hynes, Aaron. "Canadian Parliamentary Review - Article". *Revparl.ca*. N.p., 2015. Web. 22 Dec. 2015.
[77] Garland, Jess, and Chris Terry. *House Of Lords Fact Vs. Fiction*. 1st ed. Web. 23 Dec. 2015.
[78] Ibid.

Canada: Lessons From an Appointed Upper House

In terms of its constitutional status, the Canadian Senate is among the world's most powerful upper house. In practice, however, it is precisely because senators are appointed and not elected that they are perceived to lack the democratic legitimacy that would enable them to exercise these expansive powers. That members of the upper house ultimately are not responsible to the electorate is made abundantly clear where senate appointments "are used … as a political reward for party faithful,"[79] spawning accusations of cronyism in Parliament. "A dignified pasture for superannuated political war horses,"[80] the Senate, due to the absence of regulation over the appointment process, remains a depository of older Anglo-Canadians representing, to some extent, business or political interests. As indicated by the generally negative media coverage, the Canadian public lacks sufficient confidence in the Senate for it effectively to contribute to the legislative process. Instead, its contribution is confined to the pursuit of its function as an additional review body.[81] The Senate's precarious position in this regard highlights why it is so urgent for Britain to introduce a transparent and fair appointment process for peers. The Canadian experience provides an example of how the UK might proceed. The British appointment process could be used, as it has recently been in Canada, "to make up for the lack of broad-based representation in the House of Commons, by appointing people on the basis of other non-territorial considerations such as occupation, gender, religion and ethnicity."[82]

Canada: Lessons Re Regional Representation

The Canadian Senate differs fundamentally from its British counterpart in one key respect; the Senate is founded upon a provincial representation mandate that was born out of the federal compromise. There is no such mandate underpinning the House of Lords. If the Senate can be criticised for failing to fulfil this mandate, then it must also be true that "the [UK] chamber falls well short of being a 'microcosm of the nation.'"[83] The UK House of Lords underrepresents the North, North-East, and heavily-populated urban areas (with the exception of London).[84] The term "microcosm" was intended to denote representation not

[79] Docherty, The Canadian Senate, fn.85, p.31
[80] C.E.S Franks, The Parliament of Canada, University of Toronto Press, 1987.
[81] Russell, M. An Appointed Upper House: Lessons from Canada (London: Constitution Unit, 1998)
[82] Docherty, The Canadian Senate, fn.85, p.33
[83] Meg Russell, The Contemporary House of Lords: Westminster Bicameralism Revisited, 2013, pp 286–7.
[84] New Local Government Network, Lords of our Manor? How a Reformed House of Lords can Better Represent the UK, 1 September 2008, p 11.

merely on regional grounds, but also on the basis of non-territorial considerations such as those mentioned above: occupation, gender, religion and ethnicity. It is submitted that the representation discrepancy be resolved, as above, by introducing a new emphasis on regional representation in the reformed appointment process.

Provisions to this effect should be added to the Selection Criteria of the House of Lords Appointments Commission and to the Ministerial Code as it pertains to the Prime Minister's power of appointment. These recommendations are deliberately more moderate than, for example, the recommendations contained in the 1997 Labour manifesto, because reform recommendations are more sustainable where they propose specific augmentation of established status quo (i.e. the vesting of appointing powers jointly in the Prime Minister and in the House of Lords Appointments Commission) as opposed to wholesale reform with wider constitutional ramifications.

Broadly speaking, an upper house that is representative of the nation is less likely to suffer from the lack of public confidence that currently plagues the Canadian Senate, and will thereby be better situated more effectively to partake in parliamentary processes. In the context of devolution, regional representation offers an additional advantage specific to the United Kingdom. Devolution in the UK at present follows a pattern of "demand and supply."[85] Political pressure from devolved regions elicits further devolution of power from Westminster. Westminster's position in this state of affairs is to attempt to prevent further regional fragmentation by devolving specific powers to subordinate parliaments. It might be said that, on occasion, the devolution process itself contributes to the 'demand' pressure by reinforcing the existence of an alternative option – independence –that might better suit their needs.[86] This suggests that increasing the degree of regional representation in the House of Lords could be an alternative to further investment in devolution. As is the case in the more regionally representative Canadian Senate, regions represented within the upper house may feel empowered, reducing the frustration that leads them into further action against a centralized government.

Among the recent discussions that have taken place concerning reform of the Senate appointments process, the current Canadian government has proposed the establishment of provincial appointments panels. These will work in cooperation with a federal appointments panel to develop a shortlist of candidates. The Prime Minister will then choose from this

[85] Elliott and Thomas, *Public Law* (OUP 2014), 2nd edition, pp 274-275
[86] Elliott and Thomas, *Public Law* (OUP 2014), 2nd edition, pp 271-288

shortlist when making appointments to the Senate.[87] If this reform were to be realised, it would be a demonstration of the extent to which the Canadian government is committed to establishing a regionally representative Senate. It would also be a concrete step towards recognising that the provinces should have a say in the makeup of their regionally representative house of parliament. This idea could prove effective in the context of House of Lords reform. Regional House of Lords appointments panels could collaborate with, and make suggestions to, the Appointments Commission. As the UK devolved legislatures are unicameral, regional appointments panels would better reconcile the proposed House of Lords regional representation mandate with the UK's broader devolution commitments.

7.2 AUSTRALIA

The Australian Senate

In the Australian Senate, senators are elected by a form of single transferrable vote to represent the federal states,[88] while the lower house – the Australian House of Representatives – is elected by the alternative vote system. The regional representation mandate of the Australian Senate can (and often does) give rise to a political composition that is different, or directly opposed to, that of the lower house.

That the Senate often has a political disposition different to the lower house has been described as a key tenet of the 'strong bicameralism,' that the Australian Senate typifies.[89] This is desirable because it prevents the upper house being perceived merely as a rubber stamp for party political will, and promotes a more scrutinizing parliamentary body able to effectively analyse, criticise and contribute 'sober second thoughts' (informed by regionally relevant political interests) in parliamentary proceedings. The major drawback in this arrangement has proven to be the potential for gridlock in the legislative process, given that the two houses have comparable legislative powers. Since the UK House of Lords has less capacity to create gridlock, this drawback may be seen as particular to the nature of the American Congress and the Australian Parliament.

[87] The Globe and Mail,. "'Trudeau's Proposal To Appoint Senators On Merit Looks Promising". N.p., 2015. Web. 15 Jan. 2016.
[88] Russell, M. (2000). *Reforming the House of Lords: Lessons from Overseas*. England: Oxford University Press.
[89] Russell, M. (2000). *Reforming the House of Lords: Lessons from Overseas*. England: Oxford University Press.

The difference in political composition between the Australian upper and lower houses is a direct result of the two different voting systems used to elect each house. Given that, at present, Britain appoints its upper house, there is a strong case for arguing that it would need to realise by other means an upper house with a political makeup consistently different from that of the government in the House of Commons. The United States Congress achieves this result simply by virtue of the regional representation mandate of its Senate. The different political makeup of the two houses of the American Congress has been a source of contention because of the gridlock it causes when the different legislative bodies thwart each other's wills. While the gridlock criticism could apply also to the Australian Senate, it would not be nearly as relevant to upper houses such as the Canadian Senate and the UK House of Lords because of the power imbalance in these two legislatures (the UK House of Lords rarely exercises its legislative powers to create gridlock situations). Consequently, it is important to recognise that the risk of legislative "gridlock" does not arise simply by virtue of there being different political compositions in the two houses.

Achieving the "Australian result" (different political makeup) by "American means" (elected regional representation), would not be possible through the appointment process as it exists at present in the UK. The Canadian Senate – an appointed upper house with a regionally representative mandate – has its draw backs because it fails to achieve adequate regional (provincial) representation in the Senate because the Prime Minister often chooses to award Senate seats to the party faithful regardless of a region's political disposition. This is not the case in Australia where the senators are elected within the region, and thus largely reflect regional political partiality. That Britain, like Canada, appoints members of its upper house does not preclude the benefit afforded by the Australian-style contrasting political composition of the two houses. By reforming the House of Lords appointment process to ensure that regional representation (and the political dispositions of particular regions) is taken into account, Britain could choose a middle way between the gridlock associated with an elected American Senate and the failure of the Canadian Senate to adequately reflect the political affiliation of its regions. The benefit afforded by the discrepancy between the political makeup of the two houses that is a tenet of 'strong bicameralism' could be embraced as part of the recommendations made in this paper.

7.3 ITALY

Senato della Repubblica : Pre- 2016 Direct Representation

Until the 1st July 2016, Italy is one of the rare countries in the world to maintain a system of perfect bicameralism. The system is currently composed of two chambers: the Chamber of Deputies (*Camera dei deputati*) and the Senate of the Republic (*Senato della Repubblica*)[90], which both have identical powers and duties. The foundations of this "perfect" bicameralism are found in articles 70 and 94 of the Italian Constitution, which respectively state that: "the legislative function is exercised collectively by both Chambers" and that "the Government must receive the confidence of both Houses of Parliament". The legislative process is the result of a collaboration on equal-footing between the two Houses, and the government is equally responsible before both Houses. This is crucial in understanding the election system of the Upper House. The Italian Senate is composed of 315 elected members, 6 of whom are Italian citizens living abroad, and another 6 are life members. The system differs drastically from the UK's as article 57 of the Italian Constitution provides for direct representation: with the exception of life members, each Senator is elected by direct and universal suffrage by voters over 25 years old. Senators are elected on a regional basis, in proportion to the population of the concerned region.[91] The elective system differs slightly from the elective system of the Chamber of Deputies, which is elected on the basis of electoral districts[92]

The Italian Direct Representation

The "perfect" bicameral system was introduced with the enactment of the Italian Constitution in 1948, the objective of which was to avoid Fascism and contain the rise of Communism. The three anti-fascist political parties that composed the Constituent Assembly had agreed to establish a Parliament which acted as a serious check upon the

[90] Article 55 of the Italian Constitution, which in its original version, provides: "Il Parlamento si compone della Camera dei de- putati e del Senato della Repubblica", which translates, according to the official English translation of the Italian Senate: "Parliament consists of the Chamber of deputies and the Senate of the Republic" (https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).
[91] Article 55(4) provides that: "the division of seats among the Regions, with the exception of the number of seats assigned to the overseas constituency [...], is made in proportion to the population of the Regions *as per the latest general census*, on the basis of whole shares and highest remainders".
[92] Art 56

government, as reflected in articles 70 and 94[93]. Piero Calamandrei, a member of the Constitutional Assembly, stressed this aspect in a 1955 Speech[94] where he insisted upon the anti-fascist roots of the Constitution. In order to provide the Parliament with the adequate and necessary power to exercise effective control, both Chambers had to be seen to be legitimate. The system is thus founded on the principle of direct democracy, the two Houses being directly elected by the Italian citizens. This is key to understanding the roots of the Italian constitutional system and to analysing how it differs in origin from the House of Lords. Thus, similarly to the UK but for different reasons, Italy holds a vision of a weak separation of powers to avoid degeneration of Parliamentarism[95].

Evolution of the Italian Electoral System

As explained above, the Members of the *Senato della Repubblica* are elected for a period of five years. Until 1993, two electoral laws governed the way elections were held[96], these laws led to the fragmentation of the political landscape[97]. Because Italy held a strong tradition of direct democracy, in the face of rising legitimacy concerns of Italian political parties in the 90's, the Italian Parliament took steps towards realising a higher degree of representativeness. The Parliament enacted law N°276 of the 4th August 1993, also called *Lege Matarellum*, according to which three quarters of the Senators would be elected in single member constituencies, by a simple majority single round vote (first past the post). The remaining quarter would be distributed by a proportional representation system. This system was inspired by the objective of softening the consequences of the first-past the post electoral system and aimed to encourage the presence of small political parties in order to achieve greater representativeness of the electorate.

However, similar to the UK, the First past the post system quickly caused a bipolarisation of the Italian political landscape. In 2005, the Berlusconi majority passed law N°270 of 21 December 2005, which aimed at reducing bipolarisation by encouraging coalitions. It abandoned single member constituencies and established majority bonuses assigned to the

[93] Clarck, Martin *Modern Italy: 1871 to the Present*, 3rd Edition (p. 384) Pearson Longman, Harlow, 2008
[94] Piero Calamandrei *Discorso sulla Costituzione*, Milano, 26th January 1955, last paragraph « Se voi volete andare in pellegrinaggio nel luogo dove è nata la nostra costituzione, andate nelle montagne dove caddero i partigiani, nelle carceri dove furono imprigionati, nei campi dove furono impiccati. Dovunque è morto un italiano per riscattare la libertà e la dignità, andate lí, o giovani, col pensiero perché lí è nata la nostra costituzione. »
[95] G.L. Certoma, *The Italian Legal system*, Butterworths, 1985
[96] Decree of the President of the Republic N°361 f 30 March 1957,incorporating most of the content the laws N° 6 and 20 January 1948 of the Chambers of Deputies, and law N°29 of 6 February 1948 of the Senate.
[97] Antonio d'Andrea et al, *Constitutional law in Italy*, p111, Wolters Kluwer Law & Business, 2013.

lists or coalitions which obtained the highest number of votes. The electoral system will still be governed by this complex system until 1st June 2016. It establishes quorums and bonuses, which make the system extremely complex and favours bipolarisation by encouraging coalitions. The Italian Constitutional Court declared it unconstitutional on the 4th December 2013. The first-past-the post system, combined with the coalition's incentives, failed to represent Italian political diversity: the system lacked representativeness and clearly required reform.

The Renzi Reform

On the 13th October 2015, the Italian Senate adopted a bill proposed by the Renzi government[98] designed to alter the system of perfect bicameralism and the principles of direct democracy and representation. In the adopted bill, article 55 is substantially modified to change the role of the Senate, which will become the representative of "local institutions", namely, Regions. The revised article 57 of the Constitution also provides the new composition of the Senate: 95 Senators elected by regional councils and 5 by the President of the Italian Republic. Italian citizens no longer directly elect the 100 Senators. Among the 95 peer elected Senators, 74 will have a double role of regional represent and senator, and 21 will be mayors. Consequently, Senators are no longer elected from the electorate but from the body of regional Counsellors and Mayors. Each region will have at least 2 Senators, the rest of the seats being divided according to population proportions. According to the Finocchiaro 2004 amendment, the length of the mandate coincides with the length of the mandate of the local institution from which they were elected. Finally, article 10 of the adopted proposition substantially scales down the role of the Senate in the legislative process. The Senate will no longer play an active role in the enactment of legislation: it is relegated to a secondary and consultative function[99]. It will be able to provide suggestions for amendments but will not have any power of initiative. Its veto power is removed from the constitution and its control powers over the government significantly altered. However, the bill will not become law until it is approved again, twice by the lower chamber of parliament and once by the Senate. The bill will also be subject to a referendum next year, which promises to give rise to substantial debate and public discussions.

[98] http://www.bbc.co.uk/news/world-europe-34521311
[99] Stefano Ceccanti, *Le bicamérisme italien dans la transformation*, colloquium held in Paris on the 16th October 2015, "Le Président Etat du bicamérisme en Europe". (https://stefanoceccanti.wordpress.com/2015/10/14/le-bicamerisme-italien-dans-la-transformation-de-stefano-ceccanti/)

Italian System: Lessons from Direct Suffrage

Although the constitutional history of Italy significantly differs from the UK, a few conclusions may be drawn from the Italian case. First, rules favouring small parties may not always lead to greater satisfaction within the public. The pre-1993 Italian experience demonstrates the difficulty for directly elected small parties to justify their legitimacy when favoured by electoral rules. This implies that direct democracy may not always achieve greater representativeness. However, the concern over lack of representativeness was not addressed to the law N°276 of 4th August 1993, which established a system of first-past-the-post with appointed members. However, similarly to the UK, the first past the post system contributed, despite the fact that 25% of appointed Senators remained, to the bipolarisation of the Italian political landscape. Thus, although concerns about representativeness were not a serious concern thanks to the fact that some appointed peers remained thereby contributing to the representation of smaller political factions, the bottom-lind consequence remains identical. The 2005 reform was appropriately condemned, and reform seems appropriate. The Italian lesson also teaches us that perfect bicameralism can lead to political stagnation and inertia. The lack of rules governing conflicts between the two Houses lead to serious difficulties. In line with the growing request for larger powers for the House of Lords, the Italian case demonstrates that having direct representation within the Upper house ultimately calls for greater powers for the former, which may not always be deemed to be desirable[100]. Indeed, perfect bicameralism can create identical roles which may come into conflict.

What lessons can we learn from this reform that we can apply to the House of Lords? Gianfranco Pasquino appropriately reminds us that governing a country is not solely achieved though greater stability, but also representativeness[101]. The Renzi reform, although achieving better regionalism, faces the risk of losing its legitimacy. It gives up on representativeness (by eradicating direct suffrage) to benefit the voicing of regional interests. According to Gianfranco Pasquino "in no sense does Renzi believe that the Italian problem derives from the poverty and the inadequacies of the political representation". The lack of representativeness of the Upper House, represented in the reduced number of deputies and their little democratic backing, directly impacts the legitimacy of the *Camera dei deputati*. In the

[100] Richard Heuzé, *Renzi pousse le Sénat Italien à se réinventer*, Le Figaro, 14 April 2014: http://www.lefigaro.fr/international/2014/07/14/01003-20140714ARTFIG00179-renzi-pousse-le-senat-italien-a-se-reinventer.php
[101] Gianfranco Pasquino (2015), *Italy has yet another electroal law*, Contemporary Italian Politics, 7:3, 2930-300

context of reform of the House of Lords, the Italian Constitutional reform allows us to apprehend the importance of both representativeness and regional representation.

7.4 FRANCE

Sénat: Representing Regional Interests Through Indirect Suffrage

France holds a strong tradition of bicameralism, but on which nonetheless differs from the Italian system despite their common Napoleonic roots. Article 24 of the French Constitution defines the role of the Senate: "The Senate shall ensure the representation of the territorial communities of the Republic."[102] Furthermore, this mission is reaffirmed at article 39(2) of the French Constitution, amended by the 2003 Constitutional reform[103], which provides that "Bills primarily dealing with the organization of territorial communities shall be tabled first in the Senate." Thus, much like Canada and the forthcoming Italian Senate, the Senate's prerogatives are thus very clear: ensure the representation and defense of Regions and regional interests. The goal of the Senate is not to represent the confederate States, nor to establish an Aristocratic Chamber, nor even, to establish a House representing the socio-professional forces of the Nation[104]. In this respect, the role of the *Sénat* differs from its UK Counterpart.

Guy Carcassonne further described the Institution as the "General council of French Communes"[105]. This regional mission is reflected in the Senate's election form. Article (4) of the French Constitution provides that Senators are elected on the indirect suffrage model[106]. A college of approximately 168,000 *Grands électeurs* elects the 348 Senators on a two round majority basis. The candidate of the second round who obtains the majority of votes is elected. Article L280 of the Electoral Code defines the *Grands électeurs* as follows: Members of Parliament (deputes and Senators themselves[107]), regional and general counselors (*Conseils*

[102] Translation obtained from the official website of the Assemblée Nationale : http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly#Title4
[103] 28 March 2003, Constitutional reform
[104] Dominique Turpin, Droit Constitutionnel, PUF, 2013, p 630
[105] Guy Carcassonne, La Constitution, Onzième Edition, 2013, Editions Points, p141 §171
[106] Article 24 of the Constitution : « The Senate, whose members shall not exceed three hundred and forty-eight, shall be elected by indirect suffrage."
[107] The fact that the Senators themselves vote has been describes as a "quirk to which it is time to put an end" by Guy Carcassonne, in French "une bizarrerie à laquelle il serait temps de mettre fin". The Jospin Commission (Commission sur la rénovation et la déontologie de la vie publique), in its 2012 reform proposition, called for this reform. The 2013-702 law dated on the 2nd August 2013 does not however retain the proposition.

régionaux et généraux) and delegates elected by the municipal council. 95% of the college is composed of municipal delegates, which confirms Carcassonne's description. The number of delegates depends on the municipal population as counted on the 1st January of the election year. Despite the legitimacy concerns raised by this indirect model, the French Constitutional Court (*Conseil Constitutionnel*) confirmed its attachment to this indirect representation model in a decision dated 6th July 2000 (2000-431) by founding it on the regional mission of the Upper House: "the Senate must, as it undertakes to represent of regions of the Republic, be elected by a college which is itself the emanation of the Communes". The system thus ensures that the different categories of regional institutions are represented and takes into account the population of these communes[108]. The distribution of seats is set on the department level. The 2013-702 law dated on the 2nd August 2013 retains the Jospin Commission's proposition to extend proportionality to departments. Departments each have at least three Senators, the rest is divided according to population proportions.

The 2013 legislation takes note of the rising criticism over representativeness. Criticism essentially focused on the observation that the former system protected the conservative and rural electorate, to the detriment of the urban left-voting population. As previously explained, similar concerns have been raised in the context of the House of Lords and in Canada. The French reform can shed light on how to solve this problem. In the case of France, before the 2013 reform, villages of less than 500 inhabitants counted for 8,4% of the population but 16% of the *Grands électeurs,* for communes of less than 1500 inhabitants the population accounted only for 22,3% but 37,5% of the electorate body. Strikingly, however, cities of more than 30,000 inhabitants accounted for 32,9% of the population but only 16,3% of the voters[109]. The 2013 reform corrects this inequality by allocating delegates on a fairer basis[110], and by providing for an additional delegate per 800 inhabitants for communes of 30,000 inhabitants or more. Thus, Senators possess a double legitimacy: first their number of seats is allocated according to departmental population, and secondly, the number of voters electing them aims to represent the regional population[111]. Flowing from their regional mission and better representation, their legitimacy is also founded on their expertise

[108] Verpeaux & Rimbault, *Le Sénat et la Représentation des Collectivités Territoriales*, 13 février 2015, site officiel Vie publique.
[109]Dominique Turpin, Droit Constitutionnel, PUF, 2013, p 666, footnote 1
[110] Articles L284, L285, LO286-2, L287, L288 of the Electoral Code
[111] Verpeaux & Rimbault, *Le Sénat et la Représentation des Collectivités Territoriales*, 13 février 2015, site officiel Vie publique.

of local affairs.[112] This new reform addresses the Constitutional Court's concerns expressed in its decision 431 DC which stated that "in order to respect the principle of equality before universal suffrage derived from article 6 of the Declaration of the rights of Man and of the Citizen and article 3 of the Constitution, the representation of each local authority and of the various types communes must take into account the population which reside in them"[113].

Senatorial Mandate: Towards Better Representation

As in most of its Upper House counterparts, the Sénat faced severe criticism over its lack of representativeness given the diversity of the population. The 2013 reform aimed for a sense of greater "openness"[114] in the Second Chamber and improved the 2003 attempt, which had been described as a "pseudo-reform"[115]. The 2003 reform had decreased the mandate's length from 9 years to 6 years, with a 3 year turnover. The goal of this reform was to achieve frequent and direct accountability to the electorate[116]. The main contribution made by the 2013 reform is to bring down the minimum age of candidates to 24 years old. It addresses the criticism according to which the *Sénat* fails to represent the French population, notably because of its high average age. This criticism is not unfounded. Before the 2014 election, the average age of the Senators of the second group was 66 years old[117], which clearly conflicted with the 59 years old average of the new 2012 National

Assembly[118]. The effect of the 2013 reform was immediate: the average age of the second series of Senators was reduced to 60 years old[119].The age average is now aligned to the

[112] Rapport n° 333 (2002-2003) de Jacques Larché, fait au nom de la commission des lois, déposé le 4 juin 2003: "Rapport sur la Propoition de loi organique portant réforme de la durée du mandat et de l'élection des sénateurs ainsi que la composition du Sénat"
[113] Conseil constitutionnel, decision of the 6th July 2000, 431 DC, considérant (paragraph) 5
[114] Rapport n° 333 (2002-2003) de Jacques Larché, fait au nom de la commission des lois, déposé le 4 juin 2003: "Rapport sur la Propoition de loi organique portant réforme de la durée du mandat et de l'élection des sénateurs ainsi que la composition du Sénat"
[115][115] Guy Carcassonne, La Constitution, Onzième Edition, 2013, Editions Points, p142, para 172
[116] Loi ordinaire du 30 juillet 2003
[117] Renouvellement de septembre 2014 composition de la série 2 composition par âge avant renouvellement: http://www.senat.fr/fileadmin/Fichiers/Images/senatoriales/2014/composition_par_age_avant_renouvellement_2014.pdf
[118]Archives de la XIIIe legislature – composition à la date du 19/06/2012 - Liste des Deputes répartis par: http://www.assemblee-nationale.fr/qui/xml/age.asp?legislature=13
[119]Renouvellement de septembre 2014 composition de la série 2 composition par âge après renouvellement: http://www.senat.fr/senatoriales2014/listes/composition_par_age_apres_renouvellement_definitives_serie.pdf

average of the National Assembly, which is elected at direct universal suffrage. The age critique thus does not hold anymore.

However, a significant problem concerning representation remains: the French Senate, which was established to represent regional diversity, fails to do so; demographic statistics clearly demonstrate a substantial social fracture between the Senators and the French population.[120]. This has led the public to criticize the lack of representativeness of the Senate, emphasizing its lack of understanding of the diversity of the French population[121]. Statistics thus seem to confirm the observation according to which the Upper House has become "the place of all the conservatives, in inheritance of all the old aristocratic chambers"[122] and "an assembly of Notables, in the XIX century meaning of the term"[123].

Furthermore, similarly to the House of Lords, the French Senate also fails to achieve a balanced gender representation. Despite the 2013 reform, which in addition to lowering age also required equal representation of men and women on lists, only 26% of Senators are women[124]. Although it has slightly increased (21% in after the last renewal in 2011[125]), parity is far from being achieved.

Lessons from the French Reform

The French case demonstrates an interesting point. Indirect elections may be seen to be a more legitimate way of appointing members of the Upper House. This idea could be a source of inspiration for the House of Lords. Introducing some elements of democracy into the process may lead to enhanced legitimacy. Pursuant to this, lowering the minimum-age

[120] For example, after the 2014 elections, only one senator was a worker and two were merchants. However, there are now 20 business owners, 12 doctors, 19 lawyers and 27 senior civil servants.
Renouvellement de septembre 2014 composition du Sénat (liste définitive) composition par catégorie socioprofessionnelle après renouvellement :
http://www.senat.fr/senatoriales2014/listes/composition_par_categorie_socio-professionnelle_apres_renouvellement_definitives_senat.pdf
[121] Paul Alliès, *Le Sénat: une anomalie démocratique*, 21st May 2008, Médiapart, https://blogs.mediapart.fr/paul-allies/blog/210508/le-senat-une-anomalie-democratique
[122] Philippe Baumel, *Sénat : vous avez dit anomalie ?*, 10th January 2014, Libération:
http://www.liberation.fr/france/2014/01/10/senat-vous-avez-dit-anomalie_971851
[123] Paul Alliès, *Le Sénat: une anomalie démocratique*, 21st May 2008, Médiapart, https://blogs.mediapart.fr/paul-allies/blog/210508/le-senat-une-anomalie-democratique
[124] Site officiel du Sénat: Liste des Sénatrices: http://www.senat.fr/senateurs/femsen.html
[125] Eric Nunès, *Le Sénat manque encore son rendez-vous avec la parité*, 29th September 2014, Le Monde:
http://www.lemonde.fr/politique/article/2014/09/29/le-senat-manque-encore-son-rendez-vous-avec-la-parite_4496429_823448.html

for elections also improved legitimacy in the French context, which may be a source of inspiration for the House of Lords.

7.5 CONCLUSIONS FROM THE COMPARATIVE ANALYSIS

Drawing from the Canadian and Australian experiences, it seems that to effectively fulfil its roles as (1) a check and balance within the Westminster constitutional architecture, and (2) a forum for scrutiny of policy initiatives, the United Kingdom House of Lords ought to be able to describe itself as a representative 'microcosm of the nation'.[126] Representativeness in this context would entail both apportioning seats regionally *and* in consideration of factors such as occupation, gender, religion and ethnicity. As well as imbuing the upper house with the public confidence necessary to fully assert itself within its constitutional confines, a representative House of Lords would be better equipped effectively to apply relevant scrutinizing expertise in fulfilment of its 'sober second thought' function. This aim could be achieved by establishing region-specific appointments panels that cooperate with, and make suggestions to, the Appointments Commission, and by introducing an emphasis on representative appointment to the House of Lords, that would be incorporated both into provisions in the Selection Criteria of the House of Lords Appointment Commission, and in the Ministerial Code as it would pertain to the Prime Minister's power to appoint peers.

Comparing between the UK and these other legal systems allows us to identify the key problem with Upper Houses: Aristocratic representation is just not accepted anymore[127]. "In a Democratic context, the principle of territoriality seems to be the sole valid foundation for an Upper House"[128]. In addition to representativeness issues, which ultimately lead to legitimacy concerns, a substantial problem faced by both Upper Houses is an identity crisis. In the case of Italy, having a directly elected House led to conflicting identities. In the case of France, the indirect election method, combined with a socio-professional fracture, leads to concerns about representativeness and legitimacy, founded on its failure to represent regional interests and diversity.

Solving the legitimacy concern thus comes with solving the problems over this identity crisis; achieving better representation of the diversity of local population is a possible means of achieving it. In both the Italian and French cases, however, recent reform seems to be

[126] Meg Russell, The Contemporary House of Lords: Westminster Bicameralism Revisited, 2013, pp 286–7.
[127] Sévrine Nicot, La Quête identitaire de la seconde Chambre: l'affirmation de sa spécificité territoriale, p5
[128] Duprat, Les anomalies du bicamérisme: l'influence des particularismes nationaux sur la représentation territoriale, p96

positive, and the House of Lords might learn from what its two civil law neighbours are doing. Two aspects of the Upper House identity crisis have been identified: first a crucial need to re-regionalise the Upper House's mission, and secondly, a need to achieve better representation of the population's political and cultural diversity. Each of these systems provides some insight as to how to achieve this.

8 CONCLUSION

The House of Lords is suffering from an identity crisis. This is as much due to short sighted reform efforts as it is to issues of legitimacy. Reform needs to be seen as a priority, conceived as part of a normative vision of the role that the House of Lords could, and should play in the context of the modern British constitution. It is therefore time to stop seeing the House of Lords as a constitutional anomaly. We need to recognise the House as a prized asset and one of which we can be proud.

There is little doubt that the legitimacy of the Lords is under threat today. But the legitimacy crisis it is facing is made worse by delaying reform and allowing this criticism to continue. It is time to recognise that the House of Lords can make a meaningful contribution to our democracy, and defend it against the widespread criticism to which it is subject today. This is why now more than ever is the time to take the issue of reform seriously.

This paper has sought to highlight the importance of the scrutinizing function the House of Lords performs. It has sought to demonstrate that the question of expertise cannot be separated from the nature of its composition. It is mistaken to see the powers of the Lords as the priority for reform. The powers that the House can legitimately enjoy depends entirely on the nature of its composition, its representativeness and therefore also its legitimacy. This is why reforming the procedure for appointment ought to be the first step towards reform.

The question of representativeness is not merely one of legitimacy. The quality of the Lords' legislative scrutiny depends on the social resources it has at its disposal. This requires giving a diverse array of social groups a voice in the political process. Increasing the representativeness of the Lords can help to bring new perspectives to bear on policy-making, ensuring at the same time a fairer representation of social interests in the system as a whole. It is time to recognise that representativeness and expertise are merely two sides of the same coin.

This paper has advised against introducing a system for the election of peers. It has suggested that while a single transferable voting system would be the best such system to adopt, there are distinct advantages to maintaining the appointed character of the House. The paper has suggested that reforming the procedures involved, and the criteria used in the appointment process could offer significant benefits in the long-term. For this purpose it has advised that the powers of the appointment commission be significantly increased. These reforms would improve the diversity of the interests represented while insulating it from politicisation. To complement this reform, the paper has suggested limiting the number of former politicians that could be admitted. Combined with minimum participation requirements, this should further enhance the accountability of the Lords.

These reforms will by no means address all the issues that the Lords is facing. But they would nonetheless make a big contribution to addressing the central problem of its legitimacy. Before these other issues can even begin to be addressed, the House needs to demonstrate it represents a diverse cross-section of society. By focusing on the central issue of composition, the proposed reforms should help to convince the public of the important contribution that the House of Lords can make to the quality of our democracy today.

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