Unelected Upper Chambers

in Commonwealth Parliaments

by

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Abstract

This project explores the roles of the Senate of Canada and the House of Lords in their democracies within their legal systems, in their controversies and recommendations for reform or abolition, and in their functionality. Using formal-legal and new institutionalist political science, this undertaking is completed with both a view to the internal legal workings of the countries under consideration, and also with awareness to other chambers and parliamentary systems through the world. This thesis takes the stance that the chambers are fundamentally important to the functioning and the vitality of our parliamentary systems, and that their reform or abolition would undermine democracy itself as their important work must be carried out in the way they have been set up in order to ensure peak functionality.

Acknowledgements

I would like to thank Royce Koop for being my advisor, and for cultivating this project from an unlikely place. Kiera Ladner, my internal examiner who filled in gaps whenever needed and who has supported me through this in ways beyond what I could have expected. And Karen Busby, an amazing external examiner, of whom I am no longer quite as frightened.

They say it takes a village to raise a child, and I'm sure someone says a department to bring up a graduate student; I owe a debt to many people in the Department of Political Studies, but especially to Andrea Rounce who has endured hearing versions of this project from the early days when it was just a joke I told people thinking it unlikely that I could even switch to this discipline.

And all the people in my life who have been there through this, who believed in me. And as someone motivated by proving people wrong, those who did not believe in me - you're wrong now and I want you to know.

Dedication

For my grandparents,

Alexander and Maria Wolosetzky,

and my great aunt Luise Wieler,

whose survival of the scourges of dictatorship and war

inspired a reverence for democracy early on.

They couldn't see this day,

but would no doubt be pleased.

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Chapter One

Introduction

Lord Acton famously said, "power tends to corrupt, and absolute power corrupts absolutely."[1] This oft quoted aphorism tells us that power has for a long time had an ill effect upon those in positions to enjoy it, and that power wielded unchecked is power made dangerous. In systems like the Westminster system, power has been kept unconsolidated for those who wield it. In 1688, William of Orange was invited to become King alongside his cousin Mary; in the *Bill of Rights, 1688* the power of the monarch was severely limited learning important lessons from the deposition of King Charles, the interregnum, and the restoration of the monarchy under King Charles II - the supremacy of the Parliament was made plain. In the intervening 300 plus years, power has been further unconsolidated within the Commonwealth nations, to provide Parliament power to allow the people to govern, but to ensure that power remains checked.

A house of review serves an important function in a democracy, where the will of the majority, or at least of a simple plurality, may quickly take over. Several scholars have outlined fears that the House of Commons in any Westminster system country may overpower the rest of the chamber, or that ministers of the cabinet may become tyrannical. Indeed, this concern feeds the same fear that led to Lord Acton's comment on power. Therefore, unelected review chambers provide important scrutiny and accountability functions to oversee those in positions of power, while seeing that they do not have too much power themselves through popular mandates or seeking satisfaction of an electorate.

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[1] John Emerich Edward Dalberg, Lord Acton, *Acton-Creighton Correspondence* (Carmel, IN: Liberty Fund, 1988), 17.

The House of Lords and the Senate of Canada serve important review functions which hold government accountable. While the House of Lords evolved over centuries, the Senate was created for purpose with its design intentional. The review functions are similar, although they possess different degrees of veto or delaying power. They are important fixtures of a system which has worked to represent people for hundreds of years, and yet they are near constantly the subject of reform proposals for being 'undemocratic' or 'unrepresentative.' Scholars in the area point to conceptual imprecision in the proposals for reform as a profound issue. Many issues facing these proposals are that no reform proposal seems to account for the other and therefore the public's mind remains unmade-up, or otherwise divided by the wealth of options (good or bad).

The Senate of Canada has remained fundamentally unaltered during the time since *The Constitution Act, 1867*, save for a change to the duration of appointment of senators (75 years of age, instead of for life), yet it has been questioned from the start. While for the House of Lords some reforms have been begun (as part of more robust plans to fundamentally change the chamber) they were not followed up by their 'completion.' With this view in mind, following the example of Meg Russell's view in *The Contemporary House of Lords*, these reforms are viewed as complete reforms themselves, not as abandoned part-projects.

This project explores the roles and benefits of unelected upper chambers in Westminster style parliaments, focusing on the House of Lords and the Senate of Canada as productive examples which have undergone some change while remaining close to their purposeful form. The cases studied will be the Senate of Canada and the House of Lords of the United Kingdom, as these are stable houses which have functioned for long periods of time with relatively little or

slow changes made. The Senate having been modelled on but diverging from the model of the House of Lords makes for a prime pairing of cases; other potential cases such as the Australian Senate were not selected for substantial alterations to composition and selection of members. The project seeks to understand those areas highlighted above in the context of calls to reform which would jeopardize the democracy they were designed to protect from corrupt or corrupting forces and the integrity of protective forces.

This work is important in the current context as there has not been a great deal of work on the House of Lords since the reforms in 1999 (save for the work of Meg Russell in *The Contemporary House of Lords*) and no more recent comprehensive work on the Senate than the early 2000s (such as that by David Smith published 2003). This work will seek to explore both chambers in their current contexts as highlighted above to address this intellectual gap. Further, in the current context, democracy faces questions it has not in recent history and its need to be protected from ill-informed political interlopers must be guarded against by those committed to the study of institutions. This study will be of interest to those political scientists and legal scholars interested in institutions of Commonwealth countries, but also might be of some interest to the general public seeking to understand their own institutions more clearly.

The thesis will consist of three principal chapters, dealing with the three broad areas described in the literature review (below). The first chapter will engage a description of the chambers as they exist at this moment, and discuss their composition, as well as their historical and current positive and negative attributes. The first chapter will also engage the legislation which has shaped the chambers, in the case of the House of Lords from 1688 with the introduction of the *Bill of Rights* onward; in the case of the Senate, from inception with the

British North America Act, 1867. The second chapter will discuss reform proposals in general and commentary on them in both abstract and concrete forms; engaging primary materials including The Report of the Royal Commission on the Reform of the House of Lords and the 2014 Supreme Court of Canada Reference regarding Senate Reform. The third chapter will sustain a defence of the chambers against further criticism and suggestion of reform, describing their benefits to democracy in their respective areas and providing discussion of ways in which its understanding might be improved for the public.

This thesis addresses the House of Lords and the Senate of Canada, somewhat limiting the view from that expressed in the title of the thesis, as these are perhaps the most illustrative examples of the important role these chambers can play. Observing the two largest examples of unelected upper chambers in Commonwealth parliaments, of which there are six others, allows this study room to examine without becoming encumbered in other factors outside the scope of the research. The project is similarly not concerned with the provincial-level Legislative Councils which were abolished, as the potential for corruption at the sub-unit level within the Federation that is Canada is limited by the conventions of the *Constitution Acts* and by the oversight provided to those areas through judicial review if necessary.

Method

This project makes use of formal-legal approaches to political science as a method for the study of the chambers under consideration. In recent history, the disciplines of political science and law have been kept separate, almost insulated from one another. Prior to the world wars, the

study of politics was held within the disciplines of law or economics[2], highlighting the

relatedness between these disciplines and the ways in which they are beginning again to work

together. Early Political Science was concerned with descriptive accounts of statutes and

institutions, looking at what was without discussing how it might or could be. Following the

Second World War, behaviouralism became the primary mechanism for the study of politics,

eschewing much of what Miriam Smith describes as the "dry legalities"[3].

However, a movement emerged in the last several decades to move toward 'new

institutionalism' which sought again to explore institutions as they existed within the political

landscape and specifically within the broader understanding of institutions, the development of

which lead one colleague of Thelen and Steinmo to state that "political science *is* the study of

institutions"[4]. New Institutionalism examines the political institutions that exist, while also

allowing political science to examine how these institutions might be used in future to better

accommodate changes in the political landscape. This piece uses this method of study as

something which will set it apart since "description of the formal political institutions is vital for

the understanding of the political process"[5]. The political process must be understood through the

institutions which embody that process in order to make full sense of it all.

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[2] Smith, Miriam, "Institutionalism in the Study of Canadian Politics: The English-Canadian Tradition", *New Institutionalism: Theory and Analysis*, ed. André Lecours, (Toronto: University of Toronto Press, 2005), 104.

[3] Smith, Miriam, 105.

[4] Steinmo, Sven and Kathleen Thelen, "Historical Institutionalism in Comparative Politics", *Structuring Politics: Historical Institutionalism in Comparative Analysis*, ed. Sven Steinmo, Kathleen Thelen, and Frank Longstreth, (Cambridge: Cambridge Univ. Press, 2002), 3.

[5] Macridis, Roy, "Major Characteristics of the Traditional Approach," in *Approaches To The Study of Politics*, ed. Bernard Susser (New York: Macmillan, 1992), 17.

This thesis provides a formal-legal, new institutionalist examination of the houses to provide a fuller understanding of the chambers themselves and the political and legal realities which surround them in their current state as they attempt to conduct their business. The formal-legal method is engaged primarily in the assessment of the legal realities of the chambers including the assessment of the legislative backgrounds in the third chapter, providing important assessment of the legal landscape which has shaped and continues to shape the chambers under consideration here. The new institutionalist examination accommodates discussion of the chambers within the broader conception of institutions facilitating discussions of the House of Lords and the Senate as some examples of chambers throughout a world of diverse parliamentary and other institutional apparatus.

Together, these methods work to assist in the formation the central argument of the thesis concerning the chambers as functional chambers that further democracy, informed by discussion of their legal and institutional shapes taken over time. That, over the last 1000 years of constitutional history of the Britain (and therefore the Commonwealth) the institutions have been shaped to provide stability that makes democracy possible, not simply facilitating it short term.

Chapter Two

Literature Review

The literature in political science surrounding the topics of the Senate of Canada and the House of Lords considered here has fallen into three broad categories, which in turn can be sub-categorized or have running themes. The three broadly constructed categories are (1.) descriptions of the chambers and their roles, which provide meaningful consideration to the chambers places within their national contexts and beyond, including consideration of the constitutions and legal frameworks; (2.) criticism of reform, that is research which will enable discussion of reform proposals that both engage and discuss existing outside proposals or provide alternative suggestions for proposals; and lastly (3.) those which provide for a defence of the institutions, providing information which can be used to discuss the Senate and the Lords being left as they stand at the present moment. The following discussions address each of these categories.

Descriptions of the Chambers and their Roles

Several pieces of literature included here provide meaningful discussions of both the chambers and their roles in the great democracies of the United Kingdom and Canada. They span several sub-themes dealing in areas of constitutional roles, historical, and comparative context.

Walter Bagehot says early in *The English Constitution,* "the peculiar excellence of the British Constitution lies in a balanced union of three powers," the powers he describes being the monarch, the House of Lords, and the House of Commons or the democratic chamber[6]. He goes

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[6] Bagehot, Walter. *The English Constitution*. Edited by Miles Taylor. Oxford World's Classics. Oxford: Oxford University Press, 2001, 41.

on to suggest that the British constitution is superior to others in the time in which he was writing because it is necessary to gain authority before using it[7], therefore the constitution represents not the granted authority but the attainment of that authority over the preceding 800 years to that point.

Often discussed is Bagehot's idea of dignified and efficient[8]; the monarch belongs to the category of the dignified, and the democratic chamber who by Bagehot's time did the majority of the governing were efficient; Bagehot contends the House of Lords could be considered both, that it was bad as part of the dignified, but excellent as efficient.

Bagehot points to the concept of double election within the Westminster system by showing that the people elect members of parliament, and thus a government is formed by those with the most seats, who then select the cabinet[9]. He states that there are (in the Victorian era) real issues with the United States systems of democracy (such as the electoral college system of presidential election) and argues that though the British system lacks certain democratic components, it at least provides better overall function.

Bagehot argues in a later chapter on the House of Lords that the nobility (heredity peers) being present in Parliament prevents the rule of money in itself. This argument suggests that the aristocratic chamber keeps the recent rich from obtaining power without consent, and thus improves the functioning of the British democracy[10]. He also argues that while the House of Commons represents the constituencies, all constituencies are equal within the House of Lords

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[7] Bagehot, 43.

[8] Bagehot, 41.

[9] Bagehot, 57.

[10] Bagehot, 109.

where issues can be represented by any member[11]. He also suggests that the roll of the House of Lords is that of providing review and a steady hand to examine issues with clarity, while the House of Commons is concerned with representation of the people. The Lords acts as a revising and suggesting chamber fulfilling the parliament's need to have work checked[12], Bagheot goes on to suggest that the Commons may be subject to whims, and that the Lords helps to stay the course through its steadfastness[13].

Bagehot also points to Hobbes to suggest that there is some need in any system for a supreme authority, and that the superiority of the British system comes though the decentralization of power through what he has described above as dignified and efficient. The monarch (dignified) holds executive powers which the first minister (a member of the efficient) does not, with the Lords as go betweens or buffers, ensuring that power is spread across different segments at all times[14].

Anthony King begins early in his book *The British Constitution* by suggesting that the idea of constitutional continuity in the United Kingdom is not as valid as it once was as the twentieth century marked many modifications that fundamentally changed the constitution from the state it was in prior[15].

King also clarified the difference between codified constitutions and those that are not codified, reminding the reader that the British constitution has never been written down in its

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[11] Bagehot, 114.

[12] Bagehot, 118.

[13] Bagehot, 122.

[14] Bagehot 191.

[15] King, Anthony. *The British Constitution*. Oxford: Oxford University Press, 2007, 2.

entirety[16]. King also states that while a good portion of the constitution is written down, it includes not just laws but also national customs which have not been codified into legislation, much less a comprehensive constitution[17].

King states late in the introduction to *The British Constitution* that "to concentrate power is to increase the chances of it being abused" and attributes the lack of abuse within the British context to the successful deconsolidation of powers through different chambers and institutions of the United Kingdom[18] (cf. Bagehot).

In the chapter "Democracy Rampant" King states that democracy was something grafted onto existing functional structures of governance in England and Wales[19]. He suggests that the idea of "active democracy" was started as something which Labour championed around 1964[20], and that New Labour (Tony Blair) committed itself to the "democratic renewal" of the country, which culminated in the House of Lords reforms of 1999[21]. King suggests that while points that were important in New Labour's 'active democratic' approach including public consultation, government openness, and elections have increased over the last several years, participation is actually being driven down by these instead of increasing[22]. Ultimately, King says that he views democratic renewal as "the dog that did not bark - though it has growled from time to time"[23].

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[16] King, 7.

[17] King, 8.

[18] King, 12.

[19] King, 249.

[20] King, 250.

[21] King 252.

[22] King, 254.

[23] King 268.

King begins the chapter entitled "Their Lordships" by suggesting that the chapter might need to be printed with several blank pages at the end to accommodate further changes to the upper chamber that may happen quickly or may happen at some point in the future[24]. He highlights that the reforms that were completed in 1911 and 1949 were intended as the first steps toward greater reform[25]. King highlights a point similar to Meg Russell that only 19 of 61 upper chambers in the world are directly elected[26], and points to delay in the Lords (a measure which was seen as making the chamber largely useless) actually has a greater quality that an absolute veto as it forces the government to maneuver if they want to push legislation through[27].

King questions in "Their Lordships" the role of the House of Lords, who have a greater role with matters of a constitutional nature. The House of Lords' role on matters of a constitutional matter are not entirely clear, given that with a non-codified constitution which matters are or are not constitutional are not in simple binary categories but often contestable[28].

Chris Ballinger provides useful historical context in the period that marked reforms to the House of Lords from 1911 onward. Ballinger argues in his book that veto limitation is not reform, suggesting that partial reforms not ultimately completed are not reforms[29]. Ballinger suggests that the People's Budget passed by David Lloyd George's Liberal government was intended to be refused by the House of Lords, as a method of bating them into a situation that

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[24] King, 297.

[25] King 299.

[26] King 304.

[27] King 308.

[28] King, 310.

[29] Ballinger, Chris. The House of Lords 1911-2011: a century of non-reform. Bloomsbury: Hart, 2012, 14.

would result in limitations put on their powers[30]. The idea in 1911 for further reforms was to create a British Senate that would be partially elected and partially appointed[31]. Ballinger argues that while the reforms were not completed, the 1911 modifications to the House of Lords were triumphant in the modification of expectation if not in reform[32].

Ballinger also provides meaningful background to discussions of the *Life Peerages Act, 1958* by pointing out that Labour rejected the invitation of the (Conservative) government to provide proposals for reform in 1953. Ballinger also highlights the Conservative parties commitment to these reforms as the leadership of the party (and therefore the holder of the premiership) changed three times during their discussions leading up to the bill from 1951 to 1958 (Churchill, Eden, and MacMillan)[33], but this drive for change by the Conservative party was designed to prevent a left-leaning party (such as Labour) forming a government and abolishing the chamber entirely or creating an elected house[34].

Ballinger states also that the Labour Party began attempts to further reform the House of Lords as early as the 1960s, and major attempts were made in the period 1977 through to their (partial) success in 1999[35]. The 1999 reforms were to be temporary measures, and as such the Weatherill Amendment that saw the process of elections for the 92 hereditary peers who

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[30] Ballinger, 33.

[31] Ballinger, 43.

[32] Ballinger, 44.

[33] Ballinger, 96.

[34] Ballinger, 100.

[35] Ballinger, 185.

remained in the house was a late addition, not considered by the Labour party[36]. Ballinger

suggests that the Wakeham Commission might only have been set up to show the forward

movement of further reforms, but that the debate of the report yielded little support for the

report's recommendations[37].

Meg Russell provides useful comparative context for discussions of reform (as this was

the period in which her writing is anchored), but also for the discussion of second chambers in

general. Meg Russell begins her book *Reforming the House of Lords: Lessons from overseas* by

highlighting the primary changes to the House of Lords leading up to the reforms in 1999. She

explains that the 1911 act was the first time in its history that the powers of the House of Lords

had been limited[38]. She also summarizes other changes, both successful such as the 1911 act and

the 1958 reform act which was the first to allow women to sit in the House of Lords and created

life peerages, as well as less successful reforms such as the 1968 *Parliament (No. 2) Bill* which

was withdrawn by the Labour government which introduced it[39]. Russell highlights the process

of the 1999 reforms, such as the time limit imposed on the Royal Commission lead by Lord

Wakeham which had to deliver its report by 31 December 1999[40], and the inclusion of an

amendment by sitting hereditary peers who wanted to create a process for selection and re-

selection of the 92 hereditaries who would be permitted to remain in the house (the Weatherill

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[36] Ballinger, 197.

[37] Ballinger, 218.

[38] Russell, Meg. Reforming the House of Lords: lessons from overseas. Oxford: Oxford University Press, 2000, 12.

[39] Russell, Meg, 13.

[40] Russell, 14.

Amendment). This process of selection for hereditaries to remain was excluded initially because it was seen as unnecessary given the impending expulsion of the remaining hereditariness with phase 2 (which never arrived)[41].

Russell fully acknowledges in this book that the concept of upper and lower houses were, originally, to reflect the positions of upper and lower classes, but questions what upper and lower mean today in a more levelled society[42]. She also points to the idea of the UK chamber as a house of review, whereas the United States envisioned a house of states that has led to conflicting view points and misunderstandings in discussions of reform[43] (cf. conceptual imprecision in Smith). She says that the greatest expectations of the house are and should be "sober second thought" alluding to the comment by Sir John A. MacDonald of Canada, and that the greatest objective of the house should be to "provide protection against the danger of rash judgements by an unchecked lower house"[44].

She argues that because composition is the most easily visible feature of the house, it is the feature most often focused on in reform proposals, and is the most clear to deliver on[45]. A different idea of representation may be in use, she argues, in the upper house in relation to that employed by the lower house; this idea provides the point that reform proposals attack without understanding fully[46]. Russell states that although there is a general dissatisfaction with the

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[41] Russell, 15.

[42] Russell, 20.

[43] Russell, 21.

[44] Russell, 21.

[45] Russell, 47.

[46] Russell, 48.

composition of the House of Lords, there is "no great clamour" for reform of the Lords[47]. She

also notes that in the Canadian context, there have been calls for reform for almost as long as the

Senate has existed, noting the first in documents can be found as early as 1874. She notes that,

"upper chambers generally suffer from popularity problems"[48].

Docherty, and in the next paragraph Lawlor and Crandall, provide context to criticisms of

the upper chambers (in both cases, their arguments are framed within the Senate of Canada)

which also highlight unique points about both chambers. Docherty asserts that the issue with the

Senate is what he sees as a lack of say by Senators in the regional assemblies and the lack of say

regional assemblies have with respect to the Senate (cf. Hynes idea of a Bundesrat style Senate).

He suggests that while the Senate completes the functions which are required of it under the

constitution acts, it is still an old-style house and in need of updating, although he provides no

concrete suggestions for how this should be done.

Lawlor and Crandall credit the Senate with having one of its greatest assets in committee

work and its performance there[49]. They suggest that while they view the Senate as undemocratic,

the Prime Minister's ability to select their own new Senators has led to better representation than

in the elected Commons[50]. Lawlor and Crandall suggest that the committees function as an old

institution to accomplish the review and legislative mandates of the Senate, but that a great deal

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[47] Russell, 223.

[48] Russell, 241.

[49] Lawlor, Andrea, and Erin Crandall. "Committee Performance in the Senate of Canada: Some Sobering Analysis for the Chamber of 'sober Second Thought.'" Commonwealth & Comparative Politics 51, no. 4 (2013), 550.

[50] Lawlor and Crandall, 551.

of this work is unacknowledged as often the Senate reviews material in committee during the

debates in the Commons and provides informal advice to ministers which goes largely unseen[51].

Critique of Reform and Reform Proposals

This segment of the literature on the chambers considered provides discussion of reforms

and proposals for reform. Some of the literature seems to be of the view that reforms are still

worthwhile despite roadblocks highlighted in the texts, while others take the view that reform is

largely impossible due to challenges they would face.

Baldwin suggests in his article that the topic of Lords reform is one which is taken up in

afternoons and evenings that fills time but does little[52]. He suggests that the greatest stumbling

block to any of the reform proposals that have been is the lack of uniform conceptions of what

exactly needs reform, which leads to no supportable proposal for reform[53].

Renwick notes that while reform options are often expressed, self interest will dominate

government discussions[54], suggesting that a system which is working won't be changed.

Renwick takes up the claim that it is not possible to reform such a major institution without civil

war or revolution[55].

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[51] Lawlor and Crandall, 558.

[52] Baldwin, Nicholas D J. "The Composition of the House of Lords: Reform Options and Consequences." Representation 36, no. 1 (1999), 53.

[53] Baldwin, 65.

[54] Renwick, Alan. "Reforming the House of Lords : Difficult But Not Impossible," Political Insight 3, no. 3 (2012), 12.

[55] Renwick, 13.

Thomas argues that in the period 1911 to 1935, the conservatives wanted to place more power in the House of Lords as a method of resisting mass democracy that was beginning to take hold in Britain as more and more people gained the franchise[56]. He also notes that the interwar period was one marked by a great deal of constitutional reform[57]. Thomas argues that while the House of Lords is representative of the people, it is representative in a different way from the House of Commons[58]; reform proposals have always taken issue with the composition above any other idea of the House of Lords is set up[59], and that these arguments have always been framed in a 'peers versus people' way to emphasise difference in representation[60]. In 1921, it was noted by Chamberlain that the second chamber's reform attracted more voices than other policy discussions[61].

Conor Farrington writes that members of the Lords are against its reform because the present chamber is characterized by high-quality deliberation and efficacy (of which they are part), and the possibility of change to that would be potentially hazardous to British democracy[62].

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[56] Thomas, Geraint. "Conservatives, the Constitution and the Quest for a 'Representative' House of Lords, 1911-35." Parliamentary History 31, no. 3 (2012), 420.

[57] Thomas, 421.

[58] Thomas, 422.

[59] Thomas, 425.

[60] Thomas, 426.

[61] Thomas, 433.

[62] Farrington, Conor. "Does It Matter If the House of Lords isn't Reformed? Perspectives from a Symposium at Trinity Hall, Cambridge." Political Quarterly 83, no. 4 (2012), 601.

Richard Reid discusses the possibility that House of Lords reform comes up often, potentially as a method to challenge a sitting government's position[63]. He also suggests that House of Lords reform is a cross-cutting issue, which affects the whole democracy; he suggests that peers, as opposed to members of the House of Commons, are motivated by ideas instead of self-interest[64].

Russell and Sandford argue that all second chambers have problems, chief among them are too much or too little democracy and too much or too little power[65]. They also suggest that governments' vested interests may be as much an obstacle to any type of reform as much as any constitutional issues that seem to be blocking[66]; the houses' justifications can also be to blame for issues leading to calls for reform, as the roles of lower houses are more easily expressed and explained, where upper houses are more likely to spur debate due to their complex roles[67].

Defence of Appointed Upper Chambers

The last of the three areas of the literature deals with the defence of appointed upper chambers. It includes discussions of the validity of the chambers as the ways in which they engage in democratic functions that improve on the other parts of their systems.

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[63] Reid, Richard. "Do Ideas Matter? Peers and Reform of the House of Lords." Commonwealth & Comparative Politics 53, no. 4 (2015), 497.

[64] Reid, 512.

[65] Russell, Meg, and Mark Sandford. "Why Are Second Chambers so Difficult to Reform?" Journal of Legislative Studies 8, no. 3 (2002), 81.

[66] Russell and Sandford, 85.

[67] Russell and Sandford, 88.

Meg Russell points first to the fact that a 2006 poll found that only 5% of British public claimed to understand the House of Lords "very well"[68]. She clarifies that her view is that the 1999 reforms were part of larger reforms incomplete, but she views the changes made as reforms complete of themselves.

Russell states that reform debates are common among counties with two chambers, and that the Lords has powers greater than many other second chambers in the world[69]. She states that the Lords is unusual for having adapted rather than undergoing sudden or radical changes, that the chamber has evolved instead of being intentionally designed[70]. The chamber is viewed in this publication as one of a second set of eyes on legislative undertakings, one of quality control[71], with differing roles from the House of Commons, and specifically less with finance but more with constitutional matters[72]. She states that irrespective of the good or bad of the House of Lords, second chambers around the world are "fundamentally controversial"[73].

Russell suggests that while the House of Lords may lack what some would deem democratic legitimacy, it has a great deal of procedural legitimacy in the way it undertakes business - suggesting that there are perhaps different, yet equal legitimacies[74]. Russell suggests that the House of Lords forms a useful part in consensus democracy by making tyranny of the

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[68] Russell, Meg. *The contemporary House of Lords: Westminster bicameralism revived*. Oxford: Oxford University Press, 2013, 3.

[69] Russell, 41.

[70] Russell, 44.

[71] Russell, 45.

[72] Russell, 56.

[73] Russell, 61.

[74] Russell, 228.

majority more difficult, as the second chamber scrutinizes and challenges decisions made in the first chamber[75]. Russell also describes 'conceptual confusion' being rampant in questions of legitimacy, including primarily the differences of opinion in what legitimacy effectively is[76].

David Smith begins *The Canadian Senate in Bicameral Perspective* by suggesting that one of the biggest issues facing the Senate is the lack of responsiveness to provincial issues in the upper house, which was argued as its creation as being responsible for representation of the regions and therefore for the regional issues[77]. However, Smith goes on to suggest that the "British political inheritance overseas was to adopt a practical approach to governments; keep what worked, romanticize or discard what seemed superfluous"[78]. Smith states that bicameralism provides opportunities to study the separation of powers, legislative second thought, oversight, and representation richly in ways that are not provided elsewhere[79].

Smith suggests that while the Senate of Canada was created through a review process that evaluated the American model, and that the American context is one where justification for unicameralism is important and valid[80].

Smith writes in the chapter on representation that a great deal of Senate reform calls concern the idea that the Senate is not representative and that elections for Senators would make it representative, Smith states that the different reform proposals do not pay enough attention to

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[75] Russell, 230.

[76] Russell, 234.

[77] Smith, David. *Canadian Senate in Bicameral Perspective*. Toronto: Univ of Toronto Press, 2003, 5.

[78] Smith, David, 5.

[79] Smith, David, 6.

[80] Smith, David, 14.

other reform proposals and suffer from what Smith deems "conceptual imprecision"[81]. Smith goes on to suggest that if the House of Commons is the engine of Parliament driving the legislative agenda forward, then the Senate is a much-needed brake to keep things from moving out of control[82].

Smith also points to several merits on the part of the Senate, such as the lack of electoral turnover[83] which enables better continuity within the house. Smith highlights that appointment sees the Senate as a type of House of Lords, like a mini aristocracy without the hereditary element, and that the debates of representation and the presence of an appointed chamber have raged as long as the Senate has existed and before[84], but also highlights that the design of an unelected upper chamber was intentional on the part of the founders, despite this being the primary criticism of the Senate as long as it has existed[85].

In later chapters, Smith suggests that proposals for reform place representation over accountability, that is representation of people in the Senate over the House of Commons being held accountable by a second chamber[86]. He also suggests that delaying power is perhaps more effective than veto[87].

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[81] Smith, David, 68.

[82] Smith, David, 74.

[83] Smith, David, 77.

[84] Smith, David, 78.

[85] Smith, David, 79.

[86] Smith, David, 127.

[87] Smith, David, 133.

Serge Joyal suggests in the introduction to his edited collection *Protecting Canadian Democracy* that not a lot of people in Canada have a firm understanding of the Senate but everyone has an opinion on it[88]. He also states that in the 30 years leading up to the publication of his book, there had been a total of 28 different proposals for reform of the Senate.

Janet Ajzenstat suggests in her chapter that the founders of Canada worked within a theoretical frame in which they used Mill's *Representative Government* and the US Federalist Papers, while looking at other reforms from the English Civil War and the French Revolution[89]. She also suggests that Canada wanted to develop a system of checks and balances which fused powers instead of separating them[90]. Ajzenstat suggests that cabinet minister are potential tyrants, and that there is a need to decentralize power within the system[91]. She also suggests that MacDonald wanted the Senate to be composed of the same people who might compose the House of Commons, rather than an elite group[92], but that references to the Senate as 'undemocratic' have occurred from the start, the author highlights one example of Senator Richard Scott doing so in 1886[93].

Remillard suggests in his chapter that the most important part of parliamentary democracy is debate, and that the Senate ensures this important component of democracy

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[88] Joyal, Serge. Protecting Canadian Democracy: the Senate You Never Knew. Montréal: McGill-Queens University Press, 2014, xvii.

[89] Ajzenstat, Janet. "Bicamerialism and Canada's Founders: The Origins of the Canadian Senate." *Protecting Canadian Democracy: the Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, 4.

[90] Ajzenstat, 5.

[91] Ajzenstat, 6.

[92] Ajzenstat, 10.

[93] Ajzenstat, 23.

through its position outside the government of the moment[94]. He goes on to suggest that the

independence of senators must remain one of the most important features as it facilitates free and

open debates[95]. The Senate also facilitates the inclusion of non-government law makers into the

process to ensure many voices can be heard in the discussions on a single piece of legislation[96].

As well, he suggests the Senate provides greater stability to transitional moments in government

as the average tenure of senators is 10-12 years which consists of about 3 to 4 parliaments[97].

Murray suggests in his chapter *Which Criticisms are Founded* that while critique of the

Senate occurs frequently, none seems to happen around justices who are also appointed[98]. He

also states that abolition would do great damage to the democratic process in Canada, but not so

great as the possible ramifications of some of the reform proposals[99].

Alan Haselhurt discusses the House of Lords through its historical context, especially the

Salisbury Convention, which includes ideas that objectives set out in the sitting governments

election manifesto in the previous general election should not be tampered with by the Lords[100].

Haselhurst also draws attention to the fact that House of Lords reform plans such as the one put

forward in 2012 for an elected second chamber would be at risk the primacy of the House of

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[94] Remillard, Gil. "Senate Reform: Back to Basics." *Protecting Canadian Democracy: the Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, 109.

[95] Remillard, 113.

[96] Remillard, 114.

[97] Remillard, 116.

[98] Murray, Lowell. "Which Criticisms are Founded?" *Protecting Canadian Democracy: the Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, 134.

[99] Murray, 140.

[100] Haselhurst, Alan. "Rethinking_House_of_Lords_reform." Canadian Parliamentary Review (Winter 2012), 13.

Commons by giving members of the upper house an electoral mandate[101].

Bochel and Defty characterize Labour as "failing to press on" with phase two reforms after the beginning of reforms in 1999, but acknowledge the need for the party to have continued its other work; the authors also blame a lack of clarity in what was meant by 'representative' for the proposed reforms of the House of Lords[102]. Bochel and Defty take on Pitkin's views on representation, suggesting that a chamber is either representative or not, there are no good or bad forms of representation[103]. They go on to point out that Peers as individual members are not tasked with the representation of anyone, but they represent different people at different times[104]; one Conservative peer suggests that his constituency is common sense, while a Liberal Democratic member says that issues are his[105]. Bochel and Defty conclude by saying that issues with representation and reform on that justification need to answer questions of who or what is being represented now and why that representation is insufficient[106].

Prasser et al. provide in the introduction to their collection that Lord Hailsham described the necessity of the House of Lords in 1976, suggesting that there was concern with how much control governments were able to exert in the House of Commons, and that a less attached house

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[101] Haselhurt, 16.

[102] Bochel, Hugh, and Andrew Defty. "'A More Representative Chamber': Representation and the House of Lords." The Journal of Legislative Studies 18, no. 1 (2012), 83.

[103] Bochel and Defty, 84.

[104] Bochel and Defty, 85.

[105] Bochel and Defty, 87.

[106] Bochel and Defty, 96.

of review was a necessity[107] to provide what they describe as "mechanisms of accountability"[108].

The authors also suggest that bicameralism as it exists in the Westminster system is the answer to

Lord Acton's aphorism[109].

     Hynes suggests in his article that his favourable reform for the Senate of Canada would

be to modify the seat allocation to equally represent the provinces, with each member of the

federation having equal representation, such as in the Bundesrat model of Germany[110], he goes

on to suggest that this redistribution is necessary as the memory of the rationale of independence

is no longer living and cannot be sustained[111]. This proposal includes acknowledgement of the

need to pass through the 7/50 amending formula but does not account for quick changes in

population that may warrant more responsiveness in seat allocation to provinces[112].

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[107] Prasser, Scott, J R Nethercote, and Nicholas Aroney. "Upper Houses and the Problem of Elective Dictatorship," 2008, xv.

[108] Prasser et al, xvii.

[109] Prasser et al, xx.

[110] Hynes, Aaron. "Toward a Rational Redistribution of Seats in Canada's Senate." Canadian Parliamentary Review 33, no. 4 (2010), 28.

[111] Hynes, 29.

[112] Hynes, 30.

Chapter Three

Oh My Lords: A Descriptive Account of the Chambers

In this chapter, the House of Lords and the Senate of Canada are discussed in their legislative and their scholarly contexts. In the first section, the laws which have shaped or reformed the chambers are discussed, followed by the second section which takes up scholarly consideration of the chambers. These discourses are important to any discussion of the chambers as the background is most important when examining the chambers in their present and potential future senses. Ultimately, this chapter acts as a primer for the two following chapters which engage more with the conceptions of the chambers and potential directions that they could be taken in future.

Legislative Background

The next several paragraphs discuss the House of Lords' evolution through legislation over time, from the *Bill of Rights, 1688* through to modifications made to the chamber by the *Supreme Court Act, 2006*. The chamber's history was one of only minor modification until changes began in 1911 and continued to be made through much of the twentieth and twenty-first centuries. As this chapter is written, the possibility of further reform is being discussed in London by Her Majesty's Government led by Theresa May.

The *Bill of Rights, 1688* cemented the role of Parliament as the supreme voice of governance within Britain, as well as establishing the role of constitutional monarchy within the system. The Act was made following the Glorious Revolution, when William of Orange was invited to rule England after several misguided attempts by previous Kings and Queens to rule

directly. The Act left certain state powers with the monarch, which remain there today, but they have not been exercised largely since the establishment of the constitutional monarchy; Parliament was made the main voice of the people. Parliament was also made the final stop for any judicial matter through the Judicial Committee of the Privy Council (JCPC), which was, in practice, a part of the House of Lords and heard cases on appeal from the lower courts. Ultimately, the idea was that the law lords would hear the cases as the makers of the law in order to facilitate both judicial and legislative functions, which were now removed from the Crown. The House of Lords, at this time, was the stronger of the two chambers, as the historical moment's conception of legitimacy saw greater emphasis placed on the aristocratic element than on the elected, common people who were present in the House of Commons.

The Parliament Act, 1911 was the first time that the House of Lords' power was limited, making the House of Commons the primary chamber and limiting the veto power of the Lords to simply delaying of legislation rather than outright rejection of its passage. The Act reflects a shift in attitudes which occurred throughout the Victorian period and had finally taken hold in the Edwardian. Now, the aristocratic element was viewed more as functioning as a chamber of review, and not as possessing the democratic legitimacy which the Commons did and does. This change represents the supremacy of the House of Commons in originating legislation and firmly places the House of Lords as less of an upper chamber in terms of superiority, but a second chamber.

The Life Peerages Act, 1958 changed the ways in which the House's membership was selected; for the first time, members were not selected solely on hereditary right to sit through primogeniture of their titles but were now also appointed as life members who titles would not

pass on genealogically. In addition to life peerages, the Act allowed women to begin sitting in the House of Lords. This change to the way that membership was selected meant that a greater degree of 'democratic legitimacy' could be seen in the chamber, where previously members might have sat solely by the accomplishments of their statesman great-grandfather who has lived some hundred years before; now member of the House of Lords sat by virtue of a title that died with them and did not pass to their heirs. The inclusion of women by the *Life Peerages Act* also meant that women were permitted to sit, hypothetically, by virtue of hereditary peerages (though most hereditary peerages save for only a small handful favoured heirs-male).

The *House of Lords Act, 1999* is perhaps the most significant reform of the Lords in its history, which expelled almost all of the hereditary peers, and permitted only Life Peers to remain in the House. The Act removed the right to sit automatically by hereditary peerage, and instead created a number of seats which are filled by elections of the extant hereditary peers, not otherwise entitled to sit by a life peerage; the only automatic qualification to sit is under a life peerage created since the *Life Peerages Act* (highlighted above), which are completed either by the Prime Minister or on advice of the independent appointments commission who suggest names of potential non-affiliated peers. The styles have remained largely the same, although life peers are only appointed at the rank of Baron or Baroness. Members of the House of Lords are still appointed in a location, for instance Philip Norton was created The Right Honourable Baron Norton of Louth in the County of Lincolnshire, though peers do not represent a geographic constituency (as will be taken up in a later chapter).

Lastly, the *Supreme Court Act, 2006* formally created a Supreme Court for the United Kingdom and eliminated the judicial role of the House of Lords embodied in the Judicial

Committee of the Privy Council. While members sitting on the Supreme Court of the United Kingdom still receive an appointment as peers, they do not sit in the House of Lords as members and complete their functions separately from other Lords Temporal. This changed the role of parliament as supreme authority as it had developed in the *Bill of Rights, 1688*.

While the House of Lords has existed for centuries, and undergone change at various points, the Senate of Canada has remained relatively unmodified in its 150-year history. While the Senate was modelled on the House of Lords, its creation deviated somewhat substantially, and may have been a factor in later conversations in Britain about changes to the Lords, in a circular evolution of both chambers.

The Constitution Act, 1867, formerly *The British North America Act*, made provisions for an unelected upper chamber with a number of seats allocated based on the regions of the new federation. The creation of the upper chamber was, in the famous statement by Sir John A. MacDonald, to provide 'sober second thought' to the legislative process, as well as providing the regional voice.

While other amendments and changed to confederation did change the number of Senate seats, these are not viewed as changes to the chamber as they only changed the number, not the composition (other than numerically) or spirit of the chamber. Women were admitted to the chamber following the *Person's Case* at the Judicial Committee of the Privy Council in the United Kingdom, but this, too, is not viewed for the purposes of this project as a change so much as a minor modification (while important to the history of the nation) to composition amounting to no or little change.

The Constitution Act, 1982 made little change to the Senate except to consolidate the assignment of the seats in the chamber into one act (as the previous constitution acts has been modified significantly by continued confederation through 1949), and to create a tie-breaking formula allowing the Governor-in-Council to increase the number of seats to a maximum amount to be decreased again through attrition (which has only been exercised once, during Brian Mulroney's premiership). The Senate now has a number of seats which are roughly (though frequently criticized) co-equal across the regions and continues in its function of legislative review. However, unlike the House of Lords it retains its power to veto legislation, though it does not use this power frequently or freely.

Further Background

Balances of power are important to the stability of democratic systems, which provide for long lasting governance that represents and is respected by the people. While both the Senate and the House of Lords are frequently criticized in recent times for their lack of representativeness or their lack of democratic quality, they serve important functions to stability from a scholarly perspective.

Walter Bagehot suggests that the most excellent feature of the British system was its balanced union of three powers[113]. In Bagehot's view, the system in the United Kingdom balances between powers of Crown, aristocratic, and democratic elements through the monarch and the two chambers of parliament. These, to Bagehot's view, were utilized in the optimal way to provide unconsolidated power and to ensure that power was not entirely contained in any one part of the system.

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[113] Bagehot, 41-43.

This separation of powers is important to the development of the British system (and by extension Canada's inheritance) as it prevents too much power being held by one person, as King suggests, "to concentrate power is to increase the chances that it will be abused"[114]. One method of preventing unpleasantly powerful governments from coming to power is to unconsolidated power. This consolidation was attempted in varying ways throughout history, as the "separation of powers" was important to the United States in their formation of their system. Power, when held by one person, becomes dangerous, as is reflected in sentiments of Bagehot and King, as well as in Lord Acton's aphorism invoked in the first chapter.

These separations of powers ultimately hearken back to Bagehot's famous idea of the separation of dignified and efficient within the British system - the House of Lords occupies both, and yet it acts as a bridge between the two. Bagehot's idea of dignified and efficient have seen a resurgence in the past several years; they are discussed occasionally again after being shelved for a number of years, where the Crown is dignified (it wields power but does not use it), and the Commons are efficient (they utilize power that is delegated to them, but do not hold it themselves: it is Her Majesty's Government, not the Conservative Party or Theresa May's). In this argument the second chamber also blended the two to create a necessary buffer to ensure that the two weren't able to endanger once another. This might have been especially true in the Victorian period as ministers and prime ministers were still frequently drawn from the House of Lords, a practice which has seen a tapering off in recent years (though still entirely possible in both the United Kingdom and in Canada).

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[114] King, 12.

The concept of democratic legitimacy as it is currently argued suggests that the Senate and House of Lords are not legitimate as they are not directly elected by the people, although the Cabinet is also selected through a means of what Bagehot calls "double election"[115]. Double election is the process by which the representative were elected, and then those representatives selected their leader, who if that party was the party with the most seats, leads the government. The practice of double election is still used in the United Kingdom if a leader is removed, resigns, or fails to obtain their seat in the election; the process was modified in Canada, and now leads to a system of interim leaders until an all-members ballot can be completed to elect a new leader amongst the entire party rather than just the elected representatives. The process of double election was seen as sufficient for a long time as the representatives were acceptable to represent the people of their ridings in any other vote.

Appointments made by the sitting government of a day are seen as legitimate by the previously highlighted idea of indirect election, in the light of which appointments to the upper chamber could be viewed also; elected representatives participate in selection of the Prime Minister who makes recommendation to the Crown for appointments. The appointment of members to the second chamber is done by the government of the day largely and is a function of their representation of the people. This highlights an issue of framing that is present, as the appointment of justices is not seen as 'undemocratic' by the larger part of Britons or Canadians, but the appointment of Lords and Senators respectively is because it has been framed as such through media and commentary.

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[115] Bagehot, 109.

Another idea here is the concept of active and inactive democracy, the active form having been championed by Labour since the second half of the twentieth century, but does active democracy bring about greater representation?[116] Anthony King's argument is that active democracy is painted as something good in the United Kingdom, but ultimately has led to lowered participation as people are exhausted at having to have an election every time someone needs to be appointed to something; King suggests that now having to elect everyone from parents' representatives on school boards up to Parliament has led to a malaise with democracy, which in turn has caused the opposite effect Labour intended when they pushed these ideas.

The majority of upper chambers worldwide are not directly elected; King points out that of all the upper chambers in the world, only 19 are directly elected[117]. With a push toward more elected chambers, but the awareness that a greater number of elections carries a risk of malaise for those who are not interested in greater engagement, this information seems especially important. If the majority of chambers are not elected, the pushes for directly elected upper chambers seems unimportant compared with other issues. The chambers carry out their review functions well, doing the work that they were designed to do; calls to reform to the chambers solely on the basis that they are not representative enough seem ill advised as there doesn't seem to be a proper model elsewhere in the world for this change.

Perhaps a more modern feature of both Houses (and perhaps again something that belongs more to the hereditary House of Lords) is the prevention of an untrained oligarchy taking complete control of Government. While in other systems it might be possible for someone

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[116] King, 249-50.

[117] King, 304.

to obtain control of government and do incredible damage, the setup in both the United Kingdom and in Canada prevents this by ensuring that there is some group with considerable tenure relative to a potential newcomer who can prevent such catastrophe. That some measure of a statesman remains in place to stay the course if things should begin to go off is an important part of separating powers; those who favour a change which would remove this kind of course-staying power are the most dangerous to democracy no matter what they say about representation, as they wish to remove checks and balances that would stand in their way.

Elections for sitting in the chamber might allow only those with the financial resources to compete for the seats, independence from party discipline would not be a measure which could prevent this. Democracy, embodied in elections, is seen as inherently good, but there is no acknowledgement of the ways in which the rich can manipulate outcomes by running for office. This was largely seen in the 2016 United States election, where people of extreme means were able to largely finance their own campaign and shove their way to the ballot. This becomes a real danger to the review functions of the chamber if each member were elected by the public rather than a greater tenure and appointment by government or by some independent commission.

The appointment process for each house allows for the appointment of people who have shown tremendous skill in their own areas to be appointed, rather than simply those who can woo voters or who might be the least of evils, appointees will have already proven themselves at the time of appointment. As opposed to those running for election, appointed members of the upper house have demonstrated themselves worthy, not just popular. This means that both could be framed as houses of specialists, able to commit themselves to some type of work undertaken,

and also to provide valuable insight which members of the House of Commons might not as career politicians.

Appointments also permit the appointment of people who, thought they could not satisfy an electing public, are good at some part of what the chamber does and can be invaluable to the greater democratic undertaking. The popularity mentioned above also carries inherent risks, while a candidate might be popular they may not be good. The value of democracy is that the people have their say, the value in an unelected upper chamber is the stability of appropriately qualified people reviewing what is being made by those popular people who may otherwise not have the appropriate skillsets. Democracy is viewed as a positive until it becomes a negative, similarly it seems that unelected upper chambers, which have a lot of important power to prevent democratic disasters from occurring, are seen as a negative until they are not. The risk is that the viewed-as-negative factor might be removed before it can demonstrate itself purposeful.

Review functions of the chambers are invaluable, they serve as an integral check in the system. The larger purpose of these chambers is the review of legislation originating the lower chamber to ensure that the laws will work the way that they should, that all members of the country will benefit, and that any potential damage is mitigated. The next several paragraphs provide insight into the review function value of the chambers.

Westminster upper chambers provide valuable review functions and a steady hand in a constantly changing landscape shaped by electoral turnover in the lower chamber. While the lower chamber changes quickly and frequency cannot always be established (at least in Canada, where no equivalent to the UK's *Fixed Term Parliament Act* exists), upper chambers provide a measure of regularity to governance to ensure that no errors occur simply out of a government

obtaining their legislative sea legs. While the lower chamber changes over in each election at varying degrees depending on the election, parliament-to-parliament there is little change in the composition of the upper chamber permitting a steady hand in uncertain times.

The most salient functions of these houses are as places of review for current legislative consideration before they are anything else[118]. While the House of Lords and Senate have other mandates as well, they are principally the chambers of review. Their review functions in Parliament ensure that laws are seen while they are under consideration, where in other systems a legislation can be pushed through elected chambers speedily and not properly reviewed until an organization or other level of government takes the law before a judge for review.

Without an upper house acting in a review capacity the potential for a lower house as an only house to inflict incredible damage is omnipresent. As Meg Russell argues, these chambers "provide protection against the danger of rash judgements by an unchecked lower house"[119]. As a government takes power, they are likely to attempt to enact legislation which may be ill-advised to make good on election promises; as an election nears a government might become more likely to make ill-advised decisions that make them more likely to win re-election. The upper chambers prevent this by reviewing the legislation, and by putting, at the very least, a slight slow-down on the process of bills turning into laws.

Changes have been proposed at several intervals to make the chambers elected, arguing this would make them 'more democratic' or 'more representative'[120]. While this would increase

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[118] Russell, *House of Lords Reform*, 21.

[119] Russell, *House of Lords Reform*, 21.

[120] King, 304.

the idea that the chambers are composed democratically, it challenges the idea of primacy which has been worked into the organization of parliament over so many years. Further, the review functions well outweigh the democratic negative. The chambers perform important review work both through their review of bills, but also do so in the committee stages when they make recommendations to ministers and to government to ensure laws have the greatest chance of being appropriate for all of their countries.

An elected upper chamber would change ideas of which chamber had primacy, and the concept of a first and second house, or lower and upper house, would be put into question. If a member of the review chamber is elected, and they win a substantial proportion of their district, are they not then entitled to the same idea of a 'mandate' as members of the lower house who do so? This question becomes problematic as this then might lend itself to their introduction of more and increasingly problematic legislation without a proper review chamber any longer present, in a way similar to the United States where legislation shuttles back and forth between the two houses and is only reviewed when some issue takes it to the judiciary.

Representativeness in the chambers has been better than in elected chambers in the past, which in turn benefits the consideration legislation receives as it moves through[121]. While democracy can be a good, it also can lead to inadequate representation of certain groups. It can be said that women are underrepresented in the House of Commons, or that racial minorities are, but the ability to get these people into the chamber are governed by the will of the voting public across many constituencies without the ability to organize on the large scale.

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[121] Docherty.

Because the chambers are unelected, they can accommodate more and different voices, including better representation of Indigenous voices in Canada, or BAME (Black, Asian, and Minority Ethnic) individuals in the United Kingdom. The appointments process gives the ability to provide representation of these groups without fear that they might be rejected by the popular vote who might see something better in other candidates.

Reforms have been carried out of the House of Lords, but no large-scale modification of the Senate of Canada has taken place. The House of Lords has been modified overtly in the period 1911 through 2006, while the Senate has remained largely unchanged from 1867 through to the present. A constitutional difference could be to blame for this since 1982 when the Canadian constitution was patriated the amending procedure required to change the composition of the Senate is laborious is ways that are not required under the uncodified system of constitutional practice in the United Kingdom.

In 1911, the previously mentioned *Parliament Act* limited the veto of the Lords, but the preamble to the act contained mention of further reforms which were not completed.[122] These changes were mentioned in the Act but never were implemented by the government, their status is relegated to an idiosyncrasy in the preamble to the act and nothing more.

The *Life Peerages Act* was carried out by the Conservative government as a means of limiting the damage that could be done if a party of the left got into government and would attempt to overhaul or abolish the Lords.[123] The Conservative government sought to make a change just enough that the Labour governments that might follow (and indeed did follow)

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[122] Ballinger, 14-44.

[123] Ballinger, 96-100.

would be unable to implement more radical change. This plan worked until New Labour came to

power in the 1990s and made their manifesto promise of the "democratic revitalization of the

country".

Finally, following the 1999 Act, further reforms were intended and recommended by a

Royal Commission lead by Lord Wakeham (*The Wakeham Report*, discussed in greater detail in

the next chapter), which was not followed up on[124]. The report called for sweeping changes to

the House of Lords, but Labour had lost the interest of the people whose appetite seemed to have

been satiated by the reforms already complete, viewed by scholars such as Ballinger to be

reforms incomplete.

There seems to be little appetite for major constitutional change, which prevents these

types of all-at-once changes which were promised or which are intended. In the Canadian

context constitutional reform packages which included many changes not least of which were

changes to the Senate which would have made it elected, failed. It seems that the appetite for

constitutional change is short lived and is not sustained by larger portions, but by smaller reforms

that make the system slightly better.

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[124] Ballinger, 218.

Chapter Four

Dangerous Propositions: Issues with Reform Proposals

Reform proposals provide a useful site for critique of the specific issues with proposal of reform. Reform proposals engage varying ideas, and quite frequently behave as if they are in a vacuum from one another, that is, they do not behave as though they are aware of each other in terms of benefits or hinderances. In this chapter, two cases of proposals for reform are discussed, both of which were ultimately unexecuted for different reasons, and the issues with reform proposals are explored to provide a full picture of why these proposals are frequently inviable before they were even begun.

Reform and its Challenges

Reform proposals have been called a 'passive pastime' of people who throw them around without the same careful consideration a proposal is subjected to before it is given a life in the House of Commons. It seems that frequently, those who are idle can come up with the solution to most any issue. A lazy summer afternoon, or winter evening near a fire becomes an opportunity to correct all of society's problems. Yet, all these opinions espoused do not add up to a complete proposal for reform because they do not benefit from the research, consideration, and development a legislative proposal would.

Because the proposals are without the research mentioned above, they frequently suffer from the issue of what Baldwin termed in the second chapter "conceptual imprecision."[125] The weekend reformer simply does not fully understand the concepts at work, and therefore makes

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[125] Baldwin, 53.

recommendations to those around them that would not likely work if put to task in the real world if only due to the fact that they were unaware of the mechanics of some small part which would find itself broken. If these imprecise reform proposals were accepted they would likely break the full machinery of parliament and of the democracy itself, rather than fix it.

Major reforms are not, and should not be, seen as a possibility due to the near-requirement of upheaval in order to accomplish them (in most cases where they have worked, or worse as a follow up to upheaval). The House of Lords is unique in its demonstrated ability to adapt over its constitutional history[126], where most parliaments are only reformed through major upheaval or civil war. In the case of the British Parliament, the most substantial reform to the whole came with the *Bill of Rights, 1688* which was a moment in history at which Britain had attempted the abolition of one of its major institutions, the Monarchy, and had turned back from that republican moment to develop constitutional monarchy instead. Otherwise, changes to the Parliament have happened in small, manageable increments with the benefit of time to assess their functionality and the need for any further change.

The self-interest of governments may be responsible for a lack of reform, either in the large scale or incrementally, as the system which has established their governments now benefits them by keeping them in power.[127] While on the large part, this paper argues against reform, one of the major challenges to necessary reform is that of the government's own interest in maintaining the status quo, which may in some cases interfere with the introduction of necessary and good reforms which would benefit the democracy they should serve.

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[126] Russell, *The Contemporary House of Lords*, 4.

[127] Renwick, 12.

All chambers globally, whether upper or lower, have their issues and are not without some form of criticism, chief among these issues either too much or too little democracy creating issues for the functionality of the chambers[128]. While criticisms of the appointments process for the House of Lords and the Senate can be seen as potential sites for abuse which need to be checked, the chambers do not suffer at present from issues in this regard. While there have been scandals in the last several years, they have been largely on the part of individual members, not an issue of widespread corruption in the chamber to do with daily business. If the need for reform were present anywhere, are the House of Lords and the Senate of Canada really the sites for it? The answer is likely no, as there are much more reform-worthy houses throughout the world.

Issues for Reform Proposals

These chambers, while criticized for not being elected, represent an important aspect of Westminster-style democracies, that mass democracy is prevented through the establishment of appointed chambers in the event the worst happened. The British system, which Canada has taken much after, is tailored by a millennium and more of history that ensures that the power is used by those who do not hold it and held by those who cannot use it. The unelected upper chambers under consideration here function as scrutinizers who provide valuable oversight in the functionality of parliament; should they lose their impartiality either by election or by other means it would surely be the functionality of democracy that would falter, much in the way that if republicanism were ever successful in the Commonwealth, the movement of power into the

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[128] Russell and Sandford, 81.

direct hands of the government would exponentially increase the possibility of it being abused. All in the system is set to remove power from any one place and to ensure there are those who can respond 'think again' to dangerous behaviour, whether oversight chamber or the Crown.

One of the risks historically has been the development of mass democracy in the form of a majority that becomes or is about to become tyrannical. Originally, a conception of this setup by the Conservatives of the pre-first and interwar periods was to place more power in the Lords to prevent mass democracy eroding the functionality of democracy as more people gained the franchise. The second chamber provided important functions in ensuring that as more obtained the franchise and the risk of a majority developing and producing governments with the idea of mandate behind them, The need to ensure there was a powerful house not voted into existence by the people that could prevent some terrible miscarriage of democracy from taking place was extremely important. The House of Lords in its role as it had existed since the primacy of the Commons had become an important feature was at least outlined in its entirety; the Lords existed to prevent a runaway majority supported by most, but not all, of the people.

It is a not-so-well discussed fact that Aristotle was also against mass democracy as a method of preventing populism which would trample the minority through ultra-powerful majorities[129]. The problem which the House of Lords and the Senate exist to prevent is as old as time, that a majority developed through populist means is a dangerous one. The appointed upper chambers ensure that if the course becomes a problem there is some group who can slow things down at least to bearable levels. The criticism of this viewpoint has been that if a majority wishes to vote in a government then who are Lords or Senators to stop it; the risk of a majority is

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[129] Aristotle, *Politics*, trans. Benjamin Jowett (Kitchener: Bathoche Books, 1999), 101.

running roughshod over minorities or groups which need the protection of the government whoever they might be.

While democracy works when it is working, the risks of it running off the rails is important to be aware of and to seek preventative measures in order to protect those who would be hurt. The need to control democracy at times is an important part of the Westminster system, that ensures democracy is used as long as it works but is checked in situations where it might not such that laws that would do devastating, lasting harm is prevented.

The lack of conceptual precision which was alluded to above is embodied in the lack of clearly formed and uniform concepts in a variety of proposals, which leads to proposals for reform which vary widely in quality and are not supportable or capable of being worked together due to these challenges[130]. There is no universal definition of some things which are undertaken in the upper chambers, such as what legislative scrutiny is necessary: in the eyes of political scientists this level of scrutiny may be greater than that which government may feel is required as they simply try to push through legislation.

While the work of the House of Commons is easily explained, the work of the Lords and the Senate is not so easily explained or mainstreamed, therefore making it more easily criticized. In the case of both, it might appear that the committee work which is public could be done quite easily without the upper chamber, but in the case of the Senate a great deal of work takes place confidentially as the Senate provides reporting to Ministers simultaneous to the bills readings in the House of Commons, which means that the reports are often unseen and unacknowledged

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[130] Baldwin, 65.

though they form an important part of the Minister's own consideration on the bills which they introduce.

Composition is perhaps the most easily criticisable attribute of the Houses, as it is the most visible part of the chambers[131]. This leads to a great number of proposals for reform which concern the composition of the houses without consideration to how changes in composition might affect the work of the house. For instance, the composition of houses by appointment means that there can be specialists in a wide variety of issues to provide important information to government, while an elected house might lack a member sufficient knowledgeable on medical practice such that an appropriately qualified person could question information provided to Parliament on healthcare. A point of criticism of the current parliamentary system is that Ministers are not sufficiently skilled in their portfolio areas, for instance that a health minister should have health training, but this is not always possible in an elective democracy; the possibility of appointment of ministers from an appointed chamber means that there can always be a reserve of appropriate qualified people.

The Chambers are indeed representative but in different ways from the House of Commons, they embody a different type of representation which is not clearly democratic but ensures the protection and sustainability of democracy[132]. The issues of representing a diverse population require many different ways of representing that population; minority and ethnic representation is better in the appointed chambers, as is representation of women. Members of

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[131] Russell and Sandford, 88.

[132] Thomas, 422-433.

the Lords have suggested that their constituencies are not geographic, but rather that they were ideas and issues[133].

The unelected upper chambers are often called out for being non-representative because the people do not have a hand directly in who sits there. However, Hanna Pitkin argues in her conception of representation that there is no good or bad representation, but rather only representative or unrepresentative institutions[134]. The chambers represent the people, albeit in a different way than the House of Commons, but this does not compromise the representation which is simply not what some people want.

These chambers also protect from significant hazards to democracy, as was gestured to above. The need for something to prevent democracy being compromised, either within itself or from some external method, is ever present. Democracies need to be maintained, they do not simply last of their own power.

The current House of Lords (and by extension the Senate) are characterized by high quality debate, deliberation, and efficacy, and to change this would be dangerous as it would lead to lowering the quality of deliberation in the Parliaments[135]. The high-quality debate and consideration that legislation is given happened regardless of whether the government wishes for a speedy passage or not. This delay might not be possible in an unreviewed House of Commons, where the government maintains an ever-present advantage over other parties, especially in situations of a majority.

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[133] Reid, 512.

[134] Hanna Fenichel Pitkin, "Introduction", *The Concept of Representation*, ed. Hanna Fenichel Pitkin (Berkeley and Los Angeles, CA: University of California Press, 1967).

[135] Farrington, 601.

Meg Russell characterizes the changes that would follow the abolition of the House of Lords as causing a "constitutional earthquake" that would be unprecedented in Westminster history[136]. That the modifications would cause a great deal of rewriting of current laws, and the full force of not having a chamber of review might not be felt for a considerable amount of time. While the abolition of the Senate worked in New Zealand, it might not elsewhere with a greater population and different politics, it could easily fail in ways that might not happen elsewhere.

The Wakeham Commission

The Royal Commission lead by Lord Wakeham (here referred to as "the Wakeham Report") held a series of public consultations, as well as legalistic and scholarly discussions of the chambers which it distilled into its final report which championed concepts for further reform of the House of Lords after the 1999 Act discussed in the previous chapter. Notably, the Commission was formed in a time-sensitive manner, as it was intended to make quick recommendations as to what the future of Lords reform would look like. Due largely to its time-based limitations it had to carry out its work quickly and delays for contemplation and consideration were not possible. This lead to expedited proposals in the final report which might have been reduced in their more radical qualities if they had been considered for longer to create a more acceptable document.

The Wakeham Report's recommendations are too radical to be accepted (rendering the Lords an elected Senate), as these are the type of reforms that don't go without major upheaval and are perhaps responsible for the failure on follow-through on the part of New Labour.

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[136] Russell, *Reforming the House of Lords*, 15.

Ultimately, the report proposed that the House of Lords should be reformed into a British Senate, composed of Senators instead of Lords. Canada's Senate as well as others around the world were used as models for consideration, and the proposal shows this type of comparative evaluation of risk-benefit in its justifications. The report does not, however, provide for what would become of those people who had been granted titles, if Peerages would simply become honours bestowed at the pleasure of Her Majesty and used similar in the way Knighthoods and the like are now.

Ultimately support for the Wakeham Report's recommendations fizzled out, not least of all because New Labour became reliant on a coalition with the Liberal Democrats who did not support further reform of the Lords. While the 1999 Act permitted 92 hereditary peers to continue to sit as an interim measure this has become the new normal due to the withdrawal of efforts on the further reforms. It seems that in this case, as with others, the appetite for constitutional and institutional reforms is quick to be whetted, but ultimately is short lived when it comes to the change-making stages.

The Supreme Court of Canada Reference regarding Senate Reform

In 2014, the Senate of Canada was the subject of a reference to the Supreme Court of Canada. Under the *Supreme Court Act*, the Government of Canada is able to submit questions for the court to consider and provide interpretation to assist the government in making decisions which would conform with the way the court would likely interpret the law if a court challenge were ever mounted. On the completion of a reference, the document is made public and becomes part of Canadian jurisprudence, in constitutional matters becoming part of the living document interpretation.

The Reference, which became known as the Reference regarding Senate Reform posed five questions from the government lead by Mr Harper and were largely answered in the negative. The questions pertained to the government's ability to reform the Senate, largely on their ability to change the process of selection of members to elected from appointment by the Prime Minister. The Court ultimately justified their responses by suggesting that the constitution was written in such a way that prevented this, and that even consultative, non-binding elections would change the spirit of the constitution in ways that were not permissible. The court's interpretation found that because of the level of provincial involvement in the design of the Senate (as a chamber to represent the regions) meant that the more complicated amending procedure of provincial approval would be required, not simply the unilateral amending procedure.

Ultimately, the 2014 reference holds important points of constitutional interpretation, embodying the Court's important role in this regard; they have with this interpretation made Senate reform near impossible until a much greater level of consensus is possible. As the chamber of legislative scrutiny, its position is safeguarded by this decision's presence in Canadian jurisprudence, where this interpretation will prevent such attempts at unilateral elimination of important measures holding power to account.

Conclusion

In this chapter, the cases of the Wakeham Report and the Senate Reference were explored, with discussion on reform proposals issues generally and the potential issues with any proposal for reform before it is even begun. Ultimately, reform proposals suffer from the same

problems, though they themselves are diverse and frequently propose different ideas for how the

chambers should be changed.

Chapter Five

'Sober Second Thought': Defence of the Chambers and Their Importance

In previous chapters, the chambers have been discussed as they exist in legislation and in practice. Proposals for reform have also been discussed with two specific cases brought in for consideration. The current chapter explores the importance of these chambers and mounts a defence of them against the forces of reform proposals and criticism of their functions. The chambers provide important functions to the well-being of the nations and to their democracies, which is considered at length here.

One of the largest challenges that unelected upper chambers face is the lack of public understanding. Their work remains misunderstood, if it is at all familiar to the person. The idea that there should be more done is frequently something posed by those who do not understand the work of the chambers and think it a simple place that the elderly parliamentarians are placed to await retirement or death, not a chamber fundamental to the health and vitality of our democracies.

In a 2006 poll, it was found that only 5% of the British public claimed to understand the House of Lords "very well"[137]. This points to, among other things, a great need for better and more consistent civics education on the important role these chambers play, as well as the greater functioning of Parliament. That only one-twentieth of the population should describe themselves as understanding an important part of parliament "very well" casts a disturbing light on the discussions of reform that come around regarding the House of Lords.

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[137] Russell, *The Contemporary House of Lords*, 3.

The conception of the Senate, intentionally designed by the framers of the 1867 constitution, was an unelected chamber to ensure representation was appropriately balanced, not an accident of a quick and unconsidered adoption of British institutions[138]. The framers of the *Constitution Act, 1867* consulted documents of both the British and American systems and were familiar with the way the *Federalist Papers* had envisioned the United States Congress. However, the Canadian framers decided against the American-style system with the advantage of more than 70 years of the United States systems functioning to make determinations about what vision would suit the new federation and serve it better. Ultimately, the decision was made to adopt the model of the House of Lords in that an unelected upper chamber saw the stabilizing power needed but composed it of appointees from the same background as other members of parliament, not a watered-down aristocracy (although some hereditary peerages were granted in early Canada, and those members did sit in the House of Lords).

Hanna Pitkin argues that there is no good or bad representation, only institutions which are and are not representative. The House of Lords and the Senate of Canada represent their populations, they represent them differently from the ways in which their respective Houses of Commons do[139]. While the Commons represent people in rough areas of geography by votes of plurality, the upper chambers seek to represent different segments of the population, the whole population, or individual ideas. Members of the upper chambers are not tied to any one thing, place, or space but to their individual consideration to ensure that all issues are given a thorough

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[138] Smith, David, 79.

[139] Bochel and Defty, 84.

and complete review after the more geographically, majority inclined chamber is finished their deliberations.

Proposals for elected houses create the risk of the idea of mandate, which threatens the impartiality and independence of members of the second chamber[140]. The already present risk to the idea of mandate is the conception that if a government changes the people wished the laws made to have been different; arguments rage on social media that at the passage of the *Constitution Act, 1982* the change of government which followed in the 1984 election was a response to the *Charter of Rights and Freedoms* inclusion in the Act. These types of arguments follow the logic of the defunct legal argument 'post hoc ergo propter hoc' (after this, therefore because of this) which is largely disused as the logic that events which follow must be because of that which happened before them leads to misattribution of cause and effect. If these are the ideas of mandate, that a simply change of government means there is mandate behind a government, what is to stop these issues from bleeding into an elected house? It is practice (as well as law in the United Kingdom) that the lower house has primacy, it is the originator of most efforts and should be deferred to in several cases, yet if the upper house has a mandate, what is to stop perpetual gridlock? The functionality of the important work done by the upper chambers is dependent upon their status as appointed.

Important to the functionality of the democratic system is a system of checks and balances, which ensure that legislation is sufficiently reviewed. That there must be something, somewhere reviewing and ensuring that the course remains good is one which is embodied in almost every political system worldwide and throughout time. The need for review functions is

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[140] Haselhurst, 16.

something that cannot be denied, though different nations do it differently, in the United States where the Senate is less an embodiment of review functions and more a house for the representation of the states more than the people, the review functions are carried out by the courts. The United States, in this regard, could be accused of inefficient practice, as the courts take a great amount of time and cannot pre-empt the legislation, it must have a challenge brought against it once enacted, while the British and Canadian approach is to have another house of parliament review the legislation before it is actually assented by the Head of State (or his or her representative) and made law.

A second set of eyes can do no real harm in ensuring that things which are passed through parliament are good for the whole of the country, along the lines of MacDonald's vision of 'sober second thought'. The need illustrated above for review is furthered when considering that having review complete leads to a better finished product; goods are checked for quality assurance, books are edited before they are published, and so too should legislation be checked for overall goodness and safety for everyone in the nation.

One major criticism of the Senate is that it is not responsive to the provinces, and therefore does not complete its function[141]. When the Senate was established, the justification was the representation of the provinces. Its intent was to smooth over the idea of confederation with the reality that the House of Commons needed to be representing different new provinces in different number in proportion to their populations; the Senate seats were allocated in regional blocks and continue to be allocated largely in this way today.

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[141] Smith, David, 5.

While the provincial representation has not been the Senates primary function in many of its days, as it has sought to scrutinize legislation without respect to its geography. If viewed solely as failing in this way, then the Senate is indeed a failure. But the Senate's great successes remain the ways in which it reviews legislation and continues to offer the all-important delay to legislation which might be pushed through House of Commons a bit too speedily. The Senate also does do important work in ensuring the regions are heard when they need to. An individual Senator has the prerogative to make their voice heard for a region if they choose but are not bound to any specific representation if they do not see it as important.

As globalization has continued, the idea that some system would be better than another has emerged. Frequently, the criticism of institutions outside the United States is that they should more like the United States. However, the system of the United States should be seen as an exception more than the rule; their system works there but in other countries which have adopted similar systems they have seen the failure of their institutions quickly. A parliamentary system requires accountability and review functions built in rather than grafted on and slow to work.

In the case of the Senate of Canada, the system was established intentionally as discussed above. Constitutional framing was done in consultation with both American and British documents as discussed above. American democracy has held up for the past several centuries, but its longevity may not be enough to argue for its establishment elsewhere[142]. In times of globalization and saturation of much of the world with American media, the need to remain steadfast in the distinct non-Americanness of systems is important to ensuring that the checks and balances that are employed in other systems (Bagehot's idea of the perfect distribution of

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[142] Smith, David, 14.

powers, for example) remaining unchanged ensures that they will be responsive in the event they need to be used, which may not be true of the analogous American systems.

Whether they are good or bad, representative or unrepresentative, the House of Lords and Senate of Canada are not unique in their controversy; upper chambers the world over are fundamentally controversial[143]. The presence of another chamber in the process creates controversy because members of the public see it as delay, the gridlock is blamed on the presence of the chamber instead of governments' unwillingness to produce legislation without controversial elements. This again shows a lack of civics education resulting in the misappropriation of blame onto the institutions rather than their functions being served properly and blame resting with the authors of the bills which would not serve the whole public.

Arguments against and for the chambers frequently fall onto the conceptions of democratic or procedural legitimacy, respectively. While the previous chapter explored the issues with proposals for reform and those who stand against the chambers, this segment of this chapter deals with the differences in viewpoint which the chambers experience in those against and for them.

While an unelected second chamber may lack what could be describe as democratic legitimacy, it has procedural legitimacy in the work it does[144]. The important work that is done provides a level of legitimacy that should permit the chambers to continue to exist as they do. The Chambers provide oversight and review functions which stabilize and protect our democracies, while the accusation that they lack democratic legitimacy threatens the strength of

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[143] Russell, *Contemporary*, 66.

[144] Russell, *Contemporary,* 228.

the chambers in their procedural legitimacy: to reform, abolish, or otherwise modify the houses with this great procedural legitimacy would threaten their core functions.

The Senate of Canada, argues Smith, provides an excellent study in bicameralism, the Senate provides important examples of separation of powers, legislative second thought, oversight, and balanced representation[145]. This speaks again to the procedural legitimacy of the second chamber in Canada. The important functions carried out by the Senate are the perfect examples of the way a second chamber should function, especially since the changes Justin Trudeau made to his appointments process in appointing more independent Senators rather than those with allegiances to the party.

Proposals for reform which were critiqued in the previous chapter place democratic or individual representation over accountability and oversight for the lower chamber[146]. The important work which is discussed here is primarily embodied in the fact that the upper chamber makes recommendations to ministers and to committees throughout the process before the bill arrives in the Senate, the House of Lords makes work of bills in its committee stage[147]. Frequently, the discussions of the Houses and their functions concern solely the work which is done in a full session and do not see or appreciate the fullness of the work of the chambers done outside the most obvious sessions. The need for accountability which is emphasized in this

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[145] Smith, David, 6.

[146] Smith, David, 127.

[147] Lawlor, Andrea, and Erin Crandall. "Committee Performance in the Senate of Canada: Some Sobering Analysis for the Chamber of 'Sober Second Thought.'" *Commonwealth & Comparative Politics* 51, no. 4 (2013).

chapter is embodied in the upper chambers who have the power to force the Commons to take a second look at the work they have done and to insist upon them to do better.

Criticism that the Senate of Canada lacks in terms of democracy have been seen as early as 1886, and likely were said off the record well before that[148]. The calls for democracy have existed since the beginning and will likely not stop. However, the emphasis of the importance of the Senate as it exists now must be made in the face of these calls, the Senate has and continues to be important to the protection of democracy. The only reform which would safely make the Senate better would be to codify into law the changes to appointment which Justin Trudeau has made, which are at this point *ad hoc*.

The Senate is important to the Canadian Parliament as it promotes debate and facilitates larger and different discussions about new laws and their impacts[149]. The Senate ensures that considerations are not just made of whomever the majority seat-holder is in the House of Commons but that all people, all Canadians are considered in terms of the way their wellbeing might be affected by law. The important conversations which might not be held in the House of Commons are held in the second chamber as their party discipline does not extend, in many cases, to that chamber; the whips no longer present mean that discussions can take place that cannot necessarily happen in the first instance.

While these chambers are viewed as undemocratic for the appointment of their members as opposed to election, the appointment of judges is not seen as undemocratic[150]. The standard

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[148] Ajzenstat, 23.

[149] Remillard, 109-114.

[150] Murray, 134.

set by reforms to the Senate in the future might also lead to a change in the way judicial

appointments are viewed. In many jurisdictions in the United States, judges are elected which

has led to many issues in the American justice system. For Canadian systems to continue to

function the way they were intended the view that appointments are not democratic and therefore

not legitimate must be stemmed to prevent Americanization of all Canadian institutions and

therefore their ultimate corruption.

As the chambers are criticized, they have evolved over time. Ideas have emerged during

the 20th and 21st centuries that the House of Lords and Senate of Canada have been houses free

from time, unchanged since their establishment which simply is not the case and never has been.

As was illustrated in chapter three, both have undergone significant change, the House of Lords

having changed significantly within the twentieth century, and the Senate having used as a

template the House of Lords but modifying itself for the new federation.

The Lords has been adapted as times have changed, rather than having to be significantly

reformed in punctuated intervals[151]. From the *Bill of Rights, 1688* through to the present day, the

House of Lords has gone through minor modifications which have shaped it into a very different

chamber from the one which existed at the time of *Magna Carta*. Save for the English Civil War,

major upheaval has not changed the shape of the chamber, only a series of reasonable, and fairly

uncontroversial acts of the parliament which have made changes as they have become necessary.

For this reason, the House of Lords is unique, as in other contexts similar types of changes and

renegotiations of institutions have required major upheaval in order to have their ends

accomplished.

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[151] Russell, *Contemporary*, 44.

The 'Canadian political inheritance' was not simply taken, as was discussed above, but was reviewed, considered, and adapted to the specific situation of the Canadian context[152]. The taking the good, discarding what didn't work approach has been emphasized in other places earlier in this chapter. The primary issue with the view that the Senate was simply and quickly modelled upon the House of Lords is that it ignores the framers work in exploring alternative options, evaluating them openly and fairly, and employing small amounts of change to create a chamber that would work uniquely for Canada.

In the previous chapter, the issues of conceptual imprecision were discussed. This imprecision continues to be an issue and provides a major site for the defence of the chambers. Gestures have been made throughout the chapter to a need for greater civics education in order to ensure that future generations of Britons and Canadians have the tools they need to understand their systems and governments fully, which in turn would lead to more useful proposals for change to institutions if they were necessary (potentially, this might yield fewer proposals for reform in general).

There is substantial confusion about what democracy actually is[153]. What seems to occur most frequently in discussions of the democratic situation facing the House of Lords and the Senate is that our societies lack one uniform, agreed upon definition of what democracy actually *is*. The idea that democracy should be something controversial is not in line, for many thinkers, with the underlying concept, and yet we would need to work for some time to develop a concise, single definition that would work.

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[152] Smith, David, 5.

[153] Russell, *Contemporary*, 234.

'Conceptual imprecision' characterizes the reform proposals that do not consider one another, or the totality of the entire system[154]. As has been taken up in chapters previous, the issue of conceptual imprecision continues to abound, and the lack of uniform conceptions is only one part of this. That many people proposing reform will evaluate different areas as lacking and acceptable with many overlaps and grey areas complicates any discussion of reform.

There is a lack of a firm understanding in many of the 'solutions' to the 'problem', yet there is no lack of opinions[155]. One of the biggest issues facing the second chambers under discussion here is that there is an issue in the number of problems seen, and the solution to those problems only multiply the potential sites of contention. Ultimately, the number of proposals for reform are the biggest issue facing the chambers as it is not possible to respond to all of them, and to therefore be called 'unresponsive' to some faction of the people.

While the House of Commons is a vehicle being driven forward, frequently with haste by new or changing governments, the need for something to slow things down emerges. The need for review chambers who can at least delay the haste with which governments might approach legislation that could have far-reaching consequences is important to the continual functioning of the states involved.

Smith describes in his work the Senate as a form of brakes for the engine that is the House of Commons[156]. While the House of Commons drives forward, potentially at great rates of speed, the Senate provides the important slowing down actions by scrutinizing legislation and

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[154] Smith, David, 68.

[155] Joyal, xvii.

[156] Smith, David, 74.

potentially sending it back to the Commons for further review. While the House of Lords now lacks the ability to veto legislation, the idea that they are breaks on the engine is even more powerful, as they can be circumvented, but in a way which causes great embarrassment to governments attempting to push through legislation quickly (at the time of writing a very pertinent example of this is the current Brexit legislation, still making its way through parliament in the UK).

Cabinet ministers are potential tyrants, as government whips push all members of the party to support promises, a second unaccountable-to-cabinet chamber circumvents this possibility and protects the people from rash decisions made in the first chamber[157]. Party discipline is criticized at times as creating too easy a path for governments in the House of Commons, and unelected upper chambers which do not have to worry about re-election, party affiliation, or keeping a leader happy provide respite from the democratic malaise of extreme party discipline.

Lord Hailsham expressed concern that government has too much control for unicameralism, and that the way to avoid this was to keep a strong-enough chamber to keep them at bay[158]. By ensuring that second chambers are unencumbered by parties' leaders and whips, they ensure that no matter how far party discipline advances in the elected chambers, the second chamber will remain loyal to the people and ensure they are well served by their institutions even if the elected members do not.

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[157] Ajzenstat, 6.

[158] Prasser et al, xv.

Lord Acton's aphorism, invoked in the introduction to this thesis, is again considered. If governments are given absolute power through the abolition of the second chamber, then what is to stop them further consolidating and running roughshod over everything in their way. Lords Hailsham and Acton both expressed similar concerns, that if power were consolidated in the government present in the House of Commons, who then is there to stop a government from making changes that threaten the vitality of the democracy, and of the country as a whole? Power tends to corrupt, and it does at times in both Canada and the United Kingdom, but to consolidate power onto government without oversight immediately present in the parliament grants absolute power, and absolute power corrupts *absolutely*.

This chapter mounted a defence of the Senate of Canada and the House of Lords against proposals for reform and their precursors. The chambers can be further defended, as this chapter discusses at length, by the provision of better civics education to young Britons and Canadians to enable better understanding of the systems and how they are best served. By understanding the functioning of the whole of the system, at-length defences of these chambers would become obsolete as the greater portions of the population would understand the important benefit these chambers provide.

Chapter Six

Conclusion

The House of Lords and the Senate serve valuable democratic functions. They preserve the system by ensuring that laws are reviewed for fairness and suitability of implementation. The chambers provide important expertise and advise to government and to the lower chamber in order to allow them to make the laws the put forward better. The chambers also complete important representative functions, by representing different aspects of the nations at different times.

Consultation on legislation is frequently done in ways unseen or unacknowledged, enabling more easy passage for legislation. The important work which is done by the chambers is frequently done in such a way that it is largely invisible to the ordinary citizen. Critics frequently critics the 'rubber stamping' which goes on, legislation breezing through the upper chamber, the upper chamber has already at that point made recommendations which have shaped the bill to be acceptable. The acceptable bill passing through without much interference is therefore the product of these hidden processes, not simply being rubber stamped.

Different forms of representation are made possible through the appointed nature of the houses. Women were included in the House of Lords from 1958 onward, and in the Senate the first woman Senator was appointed in 1930. These chambers ensure that representation that might not be possible through an elected chamber can be made. Ministerial appointments are possible through these chambers to ensure people with expertise can hold certain positions if it were ever necessary to do so. Even if not directly representative of any one thing, the chambers enshrine a type of possible representation by providing a movable representation, members who

can represent different things at different times rather than simply one plot of geography decided by a boundaries commission.

The upper chambers provide protection to the overall democracy. The Senate and the House of Lords provide valuable oversight functions, providing a much-needed brake to the engine of the commons, as David Smith's argument used in earlier chapters points out. Those who wish to abolish such potential power, although frequently unused, have nefarious purposes in mind and should be openly considered the threats to democracy which they are.

Outright abolition threatens the functionality of the parliament. Parliament's design has evolved over many centuries, adopted in part by Canada which also benefits from the more than eight hundred years of constitutional history of Britain. The parliament is made functional through its small evolutions which have perfected a system over time, an accomplishment which belongs to almost no other institution on the earth.

The abolition of the chambers runs many risks, chief among them what Meg Russell describes as a 'constitutional earthquake' the full effects of which cannot be accounted before the fact. We cannot know that damage which would be done in eliminating the reviewing chambers; New Zealand is frequently held up as an example of a Commonwealth country where this has gone positively, but New Zealand is unitary, and has substantially less population than both Canada and the United Kingdom. The risks in eliminating the chamber which have been alluded to throughout this thesis are simply too great to know without the ability of foresight.

As was argued in the fourth chapter, democracy works when it works, but the machinery can be quickly misused without some kind of oversight. The risks of tiny tyrants in cabinet, the possibility for majorities to run right over minorities, and other concerns are justification enough

for some form of decentralizing power away from government and ensuring that someone, somewhere is watching to ensure that laws passed as good for everyone.

This piece began by invoking Lord Acton's words 'power tends to corrupt' which in the case of the abolition of the upper chamber lean heavily into the second half of the phrase 'but absolute power corrupts absolutely.' Walter Bagehot said that the greatest single attribute of the British parliament was its decentralization of power across holders of office united in purpose to ensure that no one held more parts than would allow them to misuse their power. It is important to ensure that power remains checked, that it cannot be wielded for ill effect.

Reform proposals are often misguided and are stoked by idea that suffer from issues of 'conceptual imprecision' and a lack of complete understanding of the importance of the chambers. The frequent criticism of the Senate is that it does not do what it is meant to do. As was gestured toward earlier, it does, simply in ways unseen by the general public, ensuring it does not have to use its greatest power of all, the veto. The House of Lords finds itself in a similar position, although its greatest power is delay, and is therefore my likely to use it. The reality is that no one accuses a gun of being useless for not being fired if there is no reason to use it, but when the time comes that someone with sinister purposes enters a home, the firearm is a welcome addition to the resident.

There are different conceptions of what democracy and representation mean. Because there are so many different conceptions, it is not possible to reform an institution for another, as there will likely be no consensus on the nature of that either. The need to develop better, more uniform definitions through more robust civics education would alleviate these issues, if not cease the less well-formed reform proposals altogether.

There are also different conceptions of legitimacy. It is important that before embarking on any reform journey, it is understood that while the chambers might be seen as 'illegitimate' by some, their reform or abolition are seen as illegitimate also.

This thesis has argued that the House of Lords and Senate as unelected upper chambers in Commonwealth parliaments have benefitted the stability of democracy, along the lines of the view of the formal-legal political science method utilized throughout this thesis. The chambers under consideration have provided stabilizing input on legislation for centuries, and there is no reason that this should stop now. Indeed, those who wish to see it stopped wish only to push through legislation which would potentially be dangerous. If certain political parties feel these chambers do not represent anyone's interests now, and they do push ahead with abolition they will find a chamber they like even less in an unchecked House of Commons soon after.

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