Andrew Tyrie

# *Reforming The Lords: The Democratic Case*

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Lords reform, despite outward appearances, is a relatively straightforward subject. The crucial decisions turn on the answers to four questions:

- Does the United Kingdom need a second chamber and what functions should it perform?
- What powers does it need to perform those functions?
- What composition most appropriately enables it to exercise those powers?
- If composition is to be by election, can conflict between two elected chambers be avoided?

## 1. Does the United Kingdom need a second chamber and what functions should it perform?

I believe that the country needs an effective second chamber, both for reasons of constitutional principle and because of the growing strength of the executive in the Commons.

The constitutional arguments for second chambers are well known. Diffusion of power is better than its concentration. Freedom is better protected when it is not entirely dependent on one institution, as it is to the extent that the sovereignty of parliament is coming to mean the sovereignty of the Commons. No doctrine of the separation of powers buttresses freedom in Britain—we remain uncomfortably dependent upon the exercise of self-restraint by the executive.

The practice of modern British government also supports the case for a second chamber. The executive has become steadily more powerful over the last few decades. The professionalization of Commons' politics, the growth of the payroll vote, the increase in the power of the party whips and its corollary, the decline of the independent backbencher, all these have considerably strengthened the position of the executive. In addition the executive now has almost complete control of standing orders, leaving it virtually supreme in the Commons.

Only the most superficial scrutiny of government activity now takes place on many issues and the executive is frequently able to avoid it altogether. It is widely accepted that legislation often reaches the statute book in a poor state. Even the 'bread and butter' task of explaining policy and announcing changes to policy are now frequently made not in the Commons, but directly to the media.

From the above it is clear that a second chamber is needed both to improve scrutiny of the executive and to act as a constitutional longstop. In performing the scrutiny function the second chamber can and should remain ultimately advisory. It can assist the Commons in calling the executive to account and can encourage government by explanation. It can also assist the process of consultation, often the best guarantee of soundly based legislation. Its purpose should not be to stymie executive action but to bring greater transparency and in the process promote a wider understanding, and therefore acceptance, of government decisions. A second and more than merely advisory function is that of constitutional watchdog. The near supremacy of the executive in the Commons suggests the need for some constitutional check on the arbitrary exercise of its power.

There is, of course, a unicameralist response. Some argue that it is possible to imagine a reformed House of Commons performing these roles, without the need for a second chamber, or with a second chamber consigned to little more than a dignified constitutional role. Although theoretically plausible, there is no sign that the executive would permit such reform of the Commons—such evidence as there is points in the opposite direction, that is, to a further accretion of executive power, reinforced by greater control of backbenchers by parties at Westminster.

**2. What powers does it need to perform those functions?**

The existing powers of the Lords are in most respects adequate to enable it to perform both the scrutiny and the constitutional longstop functions mentioned above. The power of amendment, combined with the power to delay a bill by at least a year, can oblige the executive to think again and provide an opportunity for further public debate. In addition to the power of delay, the Lords retains an absolute veto over bills to delay a general election beyond the statutory limit of five years—an essential minimum constitutional check on executive authority.

These existing powers were not arbitrarily arrived at. They are the product of the compromise worked out after the Lords crisis in 1911 and provide for the ultimate supremacy of the House of Commons over legislation, with the one constitutional proviso cited above.

Nonetheless, there is a case for strengthening the powers of the second chamber. The scrutiny powers could be bolstered by providing a delaying power over statutory instruments, rather than the absolute veto still theoretically allowed by the Parliament Act. The second chamber's constitutional role could also be enhanced by increasing the delaying power to, say, two years, or even the lifetime of a parliament over some constitutional issues.

There is no case whatever for any further significant erosion of existing powers, which would weaken the second chamber to the point where it would not be able to perform its scrutiny and constitutional longstop functions. In particular, any further reduction in the power of delay would leave the second chamber virtually toothless—it is the ability to force the executive to reintroduce a bill in a subsequent session which makes the power of delay valuable to a second chamber. Most of the proposals about powers set out in the government's White Paper would have the effect of further weakening the second chamber, and are therefore pernicious.[1]

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[1] See particularly the proposals in the White Paper *Modernising Parliament and Reforming the House of Lords*, January 1999, Chapter 7, paras 23–27.

**3. What composition most appropriately enables it to exercise those powers?**

In my view, in the twenty-first century only a chamber backed by the legitimacy of the ballot box can hope to perform a meaningful constitutional role. A largely, rather than fully, elected House could probably also do so—it could offer a number of other compensating advantages as well. Nonetheless, the democratic case is very strong—the principle, that the electorate should decide upon whom to bestow the authority to legislate over them, seems almost unanswerable.

A crucial question is whether an appointed House could also perform a constitutional role, such as the one outlined above, as well as or better than a largely or fully democratic House. I think it unlikely. An appointed House could not be expected to challenge a democratic House of Commons. An appointed House would carry less legitimacy even than the chamber prior to stage one reform in 1999—at least the pre-existing arrangements had that grain of legitimacy that came from continuity. It is more likely that, however devised, an appointed House would come to be seen as an adjunct to executive or 'establishment' patronage.

Likewise, I very much doubt whether appointees from other democratic institutions, such as local councils or the regional assemblies, could carry sufficient legitimacy, even if elected by those institutions. It is true that within a federation an indirectly elected second chamber can play a valuable constitutional role in representing its constituent parts, but in the absence of elected regional government such a federal approach would be inappropriate for Britain. A House composed of an assortment of representatives from the newly elected regional assemblies, where they existed, and local councils for the rest of UK, where they did not exist, would offer no constitutional coherence. Their right to challenge the will of the executive as expressed in a majority of the House of Commons would carry scarcely more weight than that of an appointed House.

None of these assertions can, of course, be conclusively proved but there is a good deal of evidence to support them. The composition of the pre-1999 House of Lords derived from appointments by Prime Ministers and Monarchs, past and

present. The majority of its work was done by Life Peers, eminent, and many of them capable of influencing public opinion on their own account. Yet the pre-1999 House of Lords found itself extremely unwilling to exercise even the limited legal powers it possessed. In that sense we have been perilously close to unicameralism for a long time. In fact we have had the worst of all worlds: the appearance of a bicameral check on the executive, without its substance.

Nor has the exercise of patronage, particularly over the last few years, made the task of advocating appointed Houses any easier—the recent packing of the Lords with government supporters is without precedent in modern history.[2] An independent appointments commission, if carefully structured, might succeed in restraining this exercise of executive patronage but that would not be enough to imbue an appointed chamber with moral authority. This is the biggest single flaw in the Wakeham proposals. The crucial judgment is whether, in a democratic age, the electorate would regard as legitimate the exercise of parliamentary authority by a self-perpetuating oligarchy of the great and the good. I doubt it.

Opponents of democracy often rehearse the canard that two elected Houses would merely duplicate one another and that the second chamber would become susceptible to the encroachment of the whips/executive, as has the Commons. This is a relatively straightforward problem to address: different electoral systems and particularly different electoral terms, if long and non-renewable, would greatly reduce the power of the whips (and hence the executive) in the second chamber.

### 4. Can conflict between the two elected chambers be avoided?

This would be a serious objection if conflict led to constitutional 'gridlock'. Could the two elected chambers find themselves so gridlocked?

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[2] The average number of life peers created per annum by Tony Blair in 1998 was 67 whereas John Major created on average 25 per annum and Margaret Thatcher 18. Source: House of Lords Library note LLN 98/005 *Peerage creation 1958-1998.*

The Mackay Report dismisses this issue as 'a sterile debate'.[3] I would not go quite that far, but I believe that safeguards can be found to the danger. For such a crisis to be avoided it is crucial that the relationship between the two chambers should remain tightly regulated by law, as laid down in the Parliament Acts. The Acts greatly circumscribe the ability of a second chamber to bring about gridlock. It is difficult to imagine a crisis in which the Commons would allow itself to be bamboozled into releasing the second chamber from the constraints laid down in those Acts—the inability to block money bills and the limitation of the power of delay.

Gridlock can therefore be avoided, but any scheme which obliges the Commons to think again would generate some friction. Those who argue that any tension between the two Houses would be unacceptable are making a unicameralist case—the tension and dialogue between the two chambers would form part of the constitutional safeguard which bicameralists seek.

A more subtle concern, particularly of some Commons' colleagues, is that the authority of the Commons could be compromised by another elected House. It is certainly possible that an elected second chamber might come to command a powerful moral authority over a particular issue but it is at least arguable that, were such mobilization of popular opinion to take place, it should be seen as a demonstration of political maturity rather than a threat to the Commons.

In a deeper sense I believe that the objection misunderstands the source of the primacy of the first chamber. The popular acceptance of the role of the Commons in providing strong and stable government is very deeply entrenched. It is perhaps the greatest strength of the British system and it would remain. The ultimate subordination of the Lords to the Commons, on any of the current proposals, including my own, would therefore be buttressed not only by the rule of law in the Parliament Acts but also by the consent of the electorate.

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[3] See *The Report of the Constitutional Commission on Options for a New Second Chambe*r, April 1999, p. 13.

**5. Other issues**

The foregoing leaves many important issues unanswered. I have dealt with a number of these more fully in Chapter 3 of my paper *Reforming the Lords: a Conservative Approach*.[4] In summary these are:

- The role of Ministers: there is a strong case for excluding Ministers from sitting in the second chamber altogether.
- The scope for the development of joint scrutiny committees: such committees could encourage the resuscitation of scrutiny by the Commons, for example by reviving the flagging standing committee system.
- The system of election: a form of proportional representation commends itself and would entrench the first-past-the-post system and hence 'judgment day'—on which the electorate can judge and dismiss a government—for Commons elections.
- The merit of avoiding extra election days: there is a strong case for holding elections at the same time as the Commons but putting only a proportion (a third or a half) of the membership up for election each time.
- The role of the Law Lords, the bishops, and possibly other groups of particular expertise: the risk of tension between elected and appointed elements in a second chamber could be assuaged by means of a system of 'co-option' of the experts by those elected.
- Size and remuneration: a chamber of about 300 would probably suffice. Cost is the only major argument against a somewhat larger chamber. Remuneration should probably reflect a less than full-time role.
- The relationship between the second chamber and the regional assemblies: without the experience of seeing these chambers in operation for several years it would be premature to try to design a Second House to take a definitive account of them.

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[4] Conservative Policy Forum, June 1998.

### 6. Stage 1 and the Wakeham Report

The government's decision to reform the second chamber in two stages has reduced Britain to a condition of near unicameralism. The 'stage one' House which the government has now created is unlikely to be able to command public respect. Without respect the House will be unable to play a meaningful constitutional role.

Outwardly, the composition of the interim House does not appear very different from what it replaces: the majority of the regular attenders from among the Hereditary Peerage have survived. However, the composition of the new interim House leaves it shorn of legitimacy—in fact it is little short of pantomime.

Under the terms of the Blair/Cranborne deal 92 Hereditary Peers will remain in perpetuity.[5] The terms of the deal, now enacted, enable the hereditaries to replenish their 'charmed circle' of 92 by dividing into electoral colleges to elect replacements for those who die—a self-perpetuating oligarchy. The Conservative college contains 42 electors, rather more than the ultimate pocket borough, Old Sarum. As for the Liberals and the Labour party, their colleges contain four peers each: those who survive a death will therefore be able to vote-in a new legislator over tea for three. An institution containing a rump constituted on such an absurd basis cannot hope to command much moral authority.

The interim chamber's other chief distinguishing feature is the greatly increased power of patronage now in the hands of the Prime Minister. He has already appointed nearly as many Life Peers in under three years as Margaret Thatcher managed in just under eleven. He has appointed a higher proportion from his own side than any Prime Minister since the introduction of Life Peerages in 1958. He controls one House and he is now appointing the other. In the absence of further reform he will continue to do so.

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[5] The terms of the deal, negotiated over a period of several months and sealed in a meeting between Tony Blair and Lord Cranborne, were eventually made public in December 1998. See House of Commons Research Paper 98/105, p. 60.

Both the farce of Hereditary Peers electing one another to a legislature in perpetuity and the massive increase in Prime Ministerial patronage since 1997 will severely erode the credibility of the interim House in the eyes of a wider public and will therefore limit the scope of the chamber legitimately to challenge the executive.

It is true that the removal of nearly half the regularly attending Hereditaries (which is all that stage one reform really achieved) and the introduction of so many new Life Peers has created uncertainty and instability in the interim House. As a result it is more difficult than before to forecast Lords' decisions. Nonetheless, if the interim House acts rationally it will stop short of a major challenge to the executive in the Commons.

In the absence of such a challenge the country is likely to be stuck with the interim House indefinitely. This is because many of the remaining Peers and the Government have an unhealthy interest in seeing it endure. The last thing most Hereditary Peers should want to do is to rock the very lifeboat into which they have just clambered to the point where they might be tipped out. Life Peers will also understandably see further reform, particularly any whiff of democracy, as a threat. Both have an interest in doing whatever is required to make the interim House look permanent. As the sponsor of the Blair/Cranborne amendment, Lord Weatherill, said: 'I'm saying to my friends I believe if this works, as I hope it will work, it's within the bounds of possibility that the Royal Commission may say this has been working well—let's leave it alone. That would preserve continuity…Surely a consummation devoutly to be wished!'

The interim House is therefore likely to maximize the appearance of activity and usefulness, including the adoption of occasional populist causes, while at the same time avoiding serious challenges to the executive in both Houses. Regrettably this is probably what the government wants: the appearance of bicameralism but the reality of almost untrammelled executive supremacy in both Houses. An occasional defeat in the Lords, easily reversed in the Commons, is a small price to pay for that.

For these reasons the Government's justification for two stages of reform—that the Hereditary Peers were a massive obstacle to any reform at all and therefore had to be removed before stage two could be implemented—is bogus. The opposite was the case: the Hereditary Peers, for all their lack of legitimacy, were an (albeit fragile) bulwark against executive supremacy in both Houses.

Lord Wakeham and his Commission could have forced the Prime Minister to loosen his grip on the interim House. He missed the chance. He should have recommended the one thing that can make bicameralism work: democracy. Only democratic legitimacy could give the second chamber a meaningful role in the twenty-first century. I doubt if the public will respect the voice of any other chamber. It was the one recommendation which the Prime Minister would not relish being seen to defeat. Not only would he have had to deploy undemocratic arguments—he would have had to eat his own words.[6]

However Lord Wakeham was reluctant to propose anything that the Prime Minister would veto and so he recommended a largely quango House of appointed Peers, with a residual elected element of only 20% or so. A House constructed on such lines would carry scarcely any more legitimacy than the interim chamber. Worse still, by failing to articulate a clear argument for giving the second chamber a popular mandate Lord Wakeham has left the initiative for further reform firmly in the hands of the executive.

Whether or not Lord Wakeham's proposals are implemented the British parliament is likely to slip further towards *de facto* unicameralism. With stage one reform, far from modernizing Parliament, Labour have entrenched a status-driven second chamber shorn of moral authority—a constitutional shell.

Powerful vested interests now obstruct the route to a more democratic second chamber. The Government will remain deeply wary of any parliamentary impediments to its disposal of power. As they see it, they will not want to create a rod for their own back. Many Commoners will fear that a revived and

[6] For example, at the Labour Party Conference in 1995 Tony Blair talked of 'an end to the Hereditary Peers sitting in the House of Lords as the first step to a proper directly-elected second chamber.

largely elected second chamber might erode their monopoly of democratic authority. And then, as already mentioned, there is the existing peerage. Many of the hereditaries, who have survived the stage one cull, will hope that the Blair/Cranborne/Weatherill amendment could become a permanent arrangement, thereby securing the retention of an hereditary element in perpetuity. As for Life Peers, most will fear democracy every bit as much as the Hereditaries. Democracy would mean extinction for them too.

The feature common to all these powerful vested interests is that they are opposed to any further major change, most especially democratic change. It was partly the strength of the democratic case that forced the government to create a Royal Commission in the first place. By articulating that same case, the strength of which far exceeds that of the arguments so far advanced by the various vested interests, the Royal Commission could have played a historic part in framing the British Constitution. They missed the opportunity. That task now falls to the opposition parties and particularly to the Conservatives.

### 7. Conservatives and the democratic case

How should Conservatives respond to Lords reform? Since 1997 Labour have forced the country on a constitutional journey. If they themselves—as they freely confess—have not identified the end point it is the duty of others, and particularly Conservatives, to make the intellectual effort. In doing so Conservatives must balance their traditional suspicions of abstract constructs with the need to ensure that change accords with Conservative principles. Conservatives should not embark on this task with heady illusions of building a better world.

Conservatives do not turn their minds easily to constitutional theories. Devising neat constitutional arrangements from first principles is alien to them. For the Conservative, political institutions are organic, deriving and learnt from custom and tradition. Most Conservatives agree with Burke: 'politics ought to be adjusted not to human reasoning but to human nature'.

However, it is the very imperfectibility of any constitutional arrangement, based as it is on human nature, which leads Conservatives to certain approaches to constitutional issues: a desire to see limited government and a belief in the need for vigilance in defence of personal freedom against the incursions of the state. Conservatives favour arrangements which provide checks on unlimited authority and which can offer some redress to the inevitable weaknesses of any democratic arrangement. These ideas lie behind the Conservative preference for bicameralism.

It is hardly surprising, therefore, that the Conservatives, more than any other, have been the party of constructive House of Lords' reform.[7] Since the position of the Lords became an issue in British politics, Conservatives have been active in devising schemes to reform its composition and render it a more effective institution. Liberals and particularly Labour have for the most part sought to reduce its powers and effectiveness, or to abolish it.

Since 1918 the majority of leading Conservatives who have examined Lords reform have concluded that some form of democratic solution will eventually have to be found for the second chamber. The list of Conservative contributors to the debate is long and illustrious: Churchill, Curzon, Carrington, Home and Mackay, to name but a few. Conservative support for an elected second chamber, most recently and eloquently expounded in the Mackay Report, has deep roots.

Yet the Conservative Party still stops short of pledging support for democratic reform. Some hanker for the old chamber, now irredeemably lost. Others, understandably but I believe mistakenly, fear the challenge which a more legitimate second chamber could pose to the Commons.

However, a growing number of Conservatives are not only appalled by the gerrymandering of the Constitution which the creation of the interim House represents, they are increasingly aware that only a clear commitment to involve the electorate

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[7] See *Reforming the Lords: A Conservative Approach*, *op. cit.*

in its composition can save the second chamber.[8]

Parliament as a whole, and not just a second chamber, has been under attack these past three years. In its defence Conservatives should now be bold. Since Disraeli, Conservatives have never been afraid of radicalism in pursuit of their principles, particularly on constitutional issues. On Lords' reform Conservatives now need to take another leaf out of Disraeli's book. They should embrace democracy for the second chamber (appropriately safeguarded by constitutional checks) and thereby stimulate a wider public debate about the future of Parliament. In doing so Conservatives will be moving with the tide of popular opinion.[9]

The more public debate the better. It will not look unreasonable to argue that in the twenty-first century the electorate should have a say in choosing those entrusted with the power to frame their laws. By making the case, Conservatives can not only ward off the dangers of the interim quango; they can bolster parliamentary democracy.

**Acknowledgements**

Parts of this article were based on the author's submission to the Wakeham Commission and articles in *The Times* (23 March 1998 and 26 March 1999).

[8] In March 1999 almost half of the Conservative backbenches signed Early Day Motion No. 464 in favour of an elected second chamber, since when parliamentary support in the party has probably grown. The motion attracted support from all sides of the House and was signed by 144 MPs.

[9] Opinion polls have consistently shown support from about three quarters of the electorate for an elected second chamber. In the most recent poll, by ICM in September 1999, 84% supported an elected chamber, while only 11% opted for an appointed chamber.