

What does the failure of the House of Lords Bill tell us about the constitution?

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INTRODUCTION

It's a huge honour to be invited to give the inaugural lecture of the Bingham Constitutional Studies Programme, in the name of my beloved father-in-law Tom Bingham, and in the presence of Elizabeth and members of the family. Between them, Scot Peterson and Peter Scott have done marvels to make this occasion possible, and I thank them too, on behalf of us all.

It is also a great pleasure to speak at a Balliol event. Tom was a Balliol man to the core and, I suspect, quite committed at heart to the Asquithian ideal of an apparently effortless superiority, even though in fact his own life was one of unremitting effort and hard work. While at Balliol Tom was elected JCR President, defeating the future US Senator Paul Sarbanes by one vote; though as Tom liked to point out his majority should really have been two votes, since Sarbanes voted for himself. His term of office proceeded, as far as I know, without the requirement to destroy any college statuary or return any lost artefacts; though it may have been during Tom's presidency that the College sent its relief mission to Budapest following the Russian invasion of Hungary. He was an entrance scholar, President of the Arnold & Brackenbury Society, graduated with stellar honours, was later made Honorary Fellow and Visitor of the College, and retained a lifelong love of the college.

But it's fair to say not all Balliol men have had such a happy experience. I am presently working on an intellectual biography of the Balliol's greatest alumnus, Adam Smith, who attended the college in the 1740s. Alas, Smith evidently had a miserable time at Balliol; hardly surprising, perhaps, since the college at that time was High Church, Tory, Jacobite, factional, expensive and Scotophobic; and Smith was Presbyterian, Whiggish, sociable, impecunious and a Scot. Nor was Balliol at that time an academic powerhouse in the tiniest degree. In his first known letter, Smith complained that "it will be his own fault if anyone should endanger his health at Oxford by excessive study, our only business here being to go to prayers twice a day, and to lecture twice a week." I understand things have changed a bit round here since then.

But Balliol does have one distinct claim to fame from that time. Smith's view was that the superiority of Scottish universities—of which, lest we forget, there were five at the time, vs. England's two—lay in the reliance of the Professors on income from tuition fees from students, which made the Professors harder

working and more attentive. As you will know, Balliol has long been associated with intellectuals and politicians of the left. But actually it was thanks to Balliol that Smith first saw the difference that economic incentives could apparently make to academic outcomes, an argument he made vigorously in the *Wealth of Nations*, and for the rest of his life. So whatever the merits of that view, one thing is clear: Balliol has proper claim to be the true intellectual home, the *fons et origo*, of today's tuition fees. The college is rarely accused of hiding its light under a bushel; perhaps this too is an achievement that it should be highlighting with students and the general public.

THE HOUSE OF LORDS BILL 2012

Ladies and Gentlemen, my topic today is a rather different one: What does the failure of the House of Lords Bill 2012 tell us about the constitution? We seem to be swimming—or perhaps more accurately, drowning—in constitutional issues these days, what with the Scottish referendum, Brexit, English Votes for English Laws, arguments about sovereignty and the like. So perhaps my timing isn't so bad.

Before getting stuck in, I should enter a few initial caveats. The first is that I am not a lawyer, or a constitutional expert of any kind. My academic background is in classics and philosophy, and to some extent history, and I am simply sharing some thoughts with you today as a working Member of Parliament. Nor am I speaking for Tom Bingham, whose views on the Lords in particular were somewhat different from my own. If this talk has any merit, it may just be to show that even an enthusiastic amateur can have something useful to say about the constitution.

The second is that I am not for one moment arguing that the House of Lords is beyond improvement. On the contrary it badly needs reform: including, perhaps, to reduce the numbers, introduce a term limit and/or a retirement age; boost the independent appointments process, cut back on political patronage and the like. The key is to do so not from ignorance, expediency or the desire to neutralise opposition; but from a clear and sympathetic understanding of the history, nature and functions of the institution.

The third is that in recent years I have somehow acquired a reputation as the Che Guevara of the Conservative party. But nothing could be further from the case. To understand my position and its relation to modern demagogic politics, imagine a political rally in a vast football stadium packed to the rafters with people from every imaginable walk of life. Only this is a rally of Burkean conservatives. Suddenly the chant goes up: "What do we want?" "Careful and intelligent reform." "When do we want it?" "In the fullness of time." Ladies and Gentlemen, THAT is a political dream to be cherished.

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But even Edmund Burke recognised a Lockean right of resistance in the face of an extreme threat to established institutions. This is the thread that explains what many have misunderstood over the years—his quite consistent combination of support for the American colonists against the oppressive power of the Crown; and opposition to the French revolution against the oppressive power of the *sans culottes*. And it was rather in the spirit of a Lockean right of resistance that I found myself inadvertently leading a rebellion against the House of Lords Bill in 2012.

The facts of the matter can be easily summarised. In May 2011 the Coalition Government published a draft Bill to turn the House of Lords into an elected chamber. A Joint Committee of thirteen MPs and thirteen Peers was then appointed to review it; this reported in March 2012, and a slightly revised Bill was given its first reading in June.

As presented, the Bill provided for a House of 450 members, 360 of whom were to be elected, with the remaining 90 nominated. Election was to be in thirds, coincident with General Elections, the existing membership being culled pro rata. The new House was thus expected to be in place after three elections over roughly ten years, from May 2020 to May 2030. Members would be elected by large multi-member constituencies, and serve a single term of 15 years. The 92 current elected hereditary peers would be allowed to die off over time without renewal. Twelve Bishops would continue to sit *ex officio*, and the Prime Minister would appoint additional members to serve as ministers.

The Bill was introduced at Second Reading by Nick Clegg, in a two-day debate over Monday and Tuesday, July 9-10 2012. The Labour party had indicated its support for the principles of the Bill, but was opposed to the abridged timetable which the Government had set in a Programme Motion. However, the Programme Motion was crucial because otherwise the Bill could be filibustered, creating endless delay and so preventing the passage of other legislation.

The 57 Liberal Democrat MPs supported the Government almost without exception. The Bill therefore hinged on the votes of Conservative MPs, who were very heavily whipped as a result. It was expected that a rebellion of 30-40 MPs might be enough to defeat the Government. However, on the morning of Monday July 9th, the first day of the debate, a letter was published against the Bill signed by 57 Conservative MPs, with more than a dozen further names withheld. On the following morning, the Government withdrew the Programme Motion, signalling the effective defeat of the Bill. On the substantive vote itself, 91 Conservative MPs voted against the Government. This was the largest rebellion by Government MPs on the Second Reading of any Bill in the post-war period.

The Liberal Democrats then withdrew their previous support for the Boundaries Review, although this was unconnected to the Lords Bill; and the Lords Bill itself was formally withdrawn in September.

These, then, are the bare facts of the matter. And whatever one's political opinion, there can be little doubt that both the substance and the process of the

Bill were grievously flawed. Technically, the Bill was highly defective. In the words of David Pannick QC, one of the most respected lawyers of his generation, "The Bill does not adequately address the central issue of constitutional concern." This was the question of how to govern the future relations between the new elected chamber and the Commons. Moreover, the Government struggled to offer any plausible financial costings for the new chamber, refused to publish the official numbers and was unable to explain how the considerable likely extra expense could be justified in a time of austerity. Nor could it explain why this Bill—which almost entirely changed the composition and selection of the Lords, and so its practices, ethos and powers, and which would likely have been followed by changing its name to "the Senate"—did not amount to the effective abolition of the Lords.

But the political process involved was also deeply unsatisfactory. The Joint Committee was chaired by the distinguished peer Lord Richard, who was not an independent figure but a known supporter of an elected house; and it contained a majority of other known backbench supporters. Not only did the Committee fail to reach a unanimous conclusion on most of the key issues—destroying any authority it possessed as a cross-party, cross-house institution—but a group of its members, including six Privy Councillors, took the almost unprecedented step of issuing a minority report.

The Committee's two key recommendations were that such a major constitutional change required a referendum, and that a key clause should be rethought. Both were ignored by the Government. Truly, the father of every political blunder is the attempt to brush an issue under the table. And most crucially, at no point did the Government properly address the vital questions of what the purpose of the new Chamber should be, and what the constitutional and political effect of electing it would be. Overall then, whatever one's views on the issues, the Bill did not deserve to succeed; and yet its failure effectively killed off the possibility of genuine reform at that time.

However, on the positive side, the whole episode did have the effect of highlighting—and puncturing—a number of myths about the House of Lords. For example, it was frequently argued that an elected upper house would be better able to hold the executive to account. But the Blair government was defeated just four—that's four—times in the House of Commons over a ten year period. Over the same period, it was defeated 460 times in the House of Lords. In other words, the Lords was far better than the Commons at holding the government to account.

It was also said that an elected upper house would be more accountable than the present Lords. Unfortunately this claim was contradicted by Lord Strathclyde, the then Leader of the Lords, himself: "They're not accountable... There will be no power of whips, there will be no deselection. Once they're there, they're there for 15 years." That is power without accountability. Finally, it was suggested that elections would increase the diversity of the House of Lords. But at the time at least—I have not been able to check the latest figures—the Lords was significantly more representative in many ways than the Commons: it had

relatively more women, more people from ethnic minorities and from different religious groups, and more people with disabilities. Thus an elected upper house would not only deter many people of great talent but no appetite for party politics from attending; it would also almost certainly select for relatively more white men than has the Lords.

CONSTITUTIONAL IMPLICATIONS

Now to some, perhaps many, of you here now, this may seem the very epitome of all that is wrong with politics today. Programme motions, Joint Committees, first and second Readings—isn't this just another example of ever-decreasing circles by the stale, pale and tragically male? Could there be anything duller? And all this fuss about the ermine-sporting, elderly and unelected House of Lords?! Surely, this is the stuff of Gilbert and Sullivan. What could be less relevant to the problems of today?

Ladies and Gentlemen, these are tempting, and to some seductive, thoughts. But they are also quite wrong. To explain why, I hope I may advance a series of propositions for your favourable consideration.

1. The first is that there is such a thing as the British Constitution; and that Tocqueville was therefore wrong when he wrote that “In England the constitution may change continually, or rather it does not in reality exist.”

We do not have a single constitutional document; but we have a constitution, although it is fuzzy and ill-defined in places. Indeed, our constitution exists at two levels: first, written down in great documents such as Magna Carta, in statutes such as the Bill of Rights and the Acts of Union, in certain judicial decisions and more prosaically in such items as the Ministerial Code. And secondly, it exists through established institutions, conventions and traditions which have earned their keep over time. In this latter sense the constitution is an evolved expression of our culture, history and values.

These tacit understandings cannot be written down, and they cannot be fully learned in books. But it would be a mistake to think that they lack substance; they include, as Tom pointed out in his book *The Rule of Law*, the doctrine of the sovereignty of parliament itself. There is a contrast here with modern constitutions, which have generally been rationalistic in nature and designed to found or re-found a nation after war. Those of Germany and Japan were effectively imposed by the victors after the 2WW, and the genius of each country has been to make its constitution its own since then. For its part France has had twelve constitutions since 1789, during which time it has been governed by a dictatorship, three monarchies and five republics. As these cases remind us, I do not think we have cause for embarrassment at our own very different constitution and its history.

2. My second proposition is that it really matters that we have the kind of constitution we do.

What is the point of a constitution? It is to help create what David Hume called “a government of laws, not of men”; to enable us to change our governments periodically without violence; to enable power to be exercised strongly, flexibly and accountably. A constitution is the rules’ rulebook.

Our constitution is not entrenched. We have no fundamental laws, and no constitutional court charged with checking to see if legislation is compliant with them. Rather, our constitution is in large part an extension of the methods of the common law to the practice of governing. It is provisional, and any aspect of it can in principle be revised or repealed. The result is to keep our constitution in a perennial dynamic tension with political consent and consensus. The narrow rulebook stays connected with what one might term, à la Montesquieu, the spirit of the nation.

Our constitution is thus radically different from that of the United States. It has a different purpose: to manage the flexible exercise of centralised power, not to prevent it. And it is, I would argue, vastly superior as a result. In case you haven’t noticed it, the US is in a rolling constitutional crisis at the moment. Capitol Hill is beset by legislative gridlock, vulnerable to powerful special interests from the gun lobby to the American Association of Retired People, its representatives elected via corporate Political Action Committees recently liberated by the Supreme Court from any spending constraints under the First Amendment, its judges highly politicized, yet the whole thing almost incapable of amendment or fundamental change.

Our constitution is perennially vulnerable to executive over-reach. But it is intrinsically far harder for outside interests to suborn or capture than that of the USA. Individual MPs rarely have much power, the whipping system inhibits the formation of factions, there is virtually no money power in Parliament, and our judges are not elected or subject to political appointment. These are colossal strengths. We have a constitution, therefore; and though imperfect, it is one of extraordinary value.

3. My third proposition is that the House of Lords is a crucial part of our constitution.

To see why, you need to understand that although Parliament looks like a bicameral system, in reality it is not: it is a unicameral system, with a single deciding chamber, the House of Commons, and a secondary advisory chamber whose function is to scrutinise and give sober second thought to legislation which is often rushed and under-scrutinised in the Commons. The Lords is thus not in the full sense a legislative chamber. No legislation can pass unless the Commons wishes it so, and if necessary the Commons can pass legislation by itself, irrespective of the Lords.

Nevertheless, the Lords is extremely effective. It takes its scrutinising function very seriously; its debates are less partisan and often of much higher quality than in the Commons; and its record of standing up against the executive is in many ways superior to that of the Commons. To repeat: the Blair government was defeated just four times in the House of Commons over a ten year period. Over the same period, it was defeated 460 times in the House of Lords. Which chamber did the better job of checking executive power? The truth is that a strengthened and properly reformed Lords is needed more than ever today, to scrutinise and constrain executive power.

The recent imbroglio over tax credits makes the point perfectly. The Government criticised the Lords for sending back a Statutory Instrument—it appeared that not since the voting down of Lloyd George’s 1909 Budget had there been such an affront to democracy—and set up a Review in an effort to clip the Lords’ wings. But the truth is that this was neither a Money Bill nor a manifesto commitment; and as the Review effectively acknowledged, the convention is that the Lords may on rare occasions send back SIs. In this case they did so in part on the quite proper grounds that a matter of such importance should never have been placed in minor legislation in the first place.

And the Lords considered the matter not from a whim, but because the Tax Credits Act 2002 specifically placed them under a duty to do so. If this had been a Money Bill the Lords would never have had a chance to consider it at all. In effect, therefore, the Government is in the extraordinary position of having called a review into the Lords for acting precisely as it and Parliament required them to act. Not only that: the Lords behaved with restraint, since they had the power to kill the SI altogether and did not. They forced the Government to think again; and the Government accepted their view. It did not press forward with the cuts to tax credits, and the Lords thus saved it from a huge public furore. In other words, the system worked.

4. My fourth proposition is that creating an elected Senate instead of the Lords would have destroyed the legislative balance of the constitution.

With the creation of an elected Senate, the Commons would become just one of two fully legislative chambers. Moreover, over time a new Senate would act as a second House of Commons. More ministers would come from the Senate. More legislation would be started there, more Urgent Questions answered there and more ministerial statements made there. The chamber would inevitably become more party-political and less expert. The quality of legislation would fall, because the Lords’ detailed consideration of amendments would be replaced by often automatic rejection driven by party whips, as occurs in the Commons now. The Senate’s emphasis would be on competing with the Commons, not on improving legislation and checking executive power.

But this is just the start of the problem. The point of elections is to confer power. Over time the new elected Senate would start to argue that it had greater legitimacy than the Commons, since its members would have electorates of

millions of people rather than just an average of 75,000-odd voters for MPs. Senators would feel they possessed a mandate, indeed an obligation, to stand up to the Commons where necessary; just as when the European Parliament switched from being appointed to being elected in 1979, and its members started to demand more powers. As matters presently stand, when people elect their MPs they elect the government. But with an elected Senate as an alternative source of political power, that would no longer be true.

The result would be to create competition between the Commons and the Senate, and turn Parliament into a version of the US Congress. Result: gridlock, greater partisanship and more low-quality legislation driven by interest-group politics. The legislative balance of the British constitution, fragile but intact today and widely admired across the world for over three hundred years, would be destroyed. Britain would become a significantly harder place to govern. The recent spat over tax credits would become an absolutely regular feature of the Parliamentary process.

5. My fifth and final proposition is, in a way, a summary of the argument so far: that it is vital to build a better understanding of the British constitution, both among the general public and in Westminster.

Yes, this subject is not sexy. It is complex and hard to get one's head round. It is resistant to brief summary, tweets and sound bites, and there are no votes in it. But it really matters. With every new codification and clumsy attempt at change, the tacit understandings on which our constitution rests become less tacit and less well understood. A classic example is the very ill advised recent idea of a Parliamentary Sovereignty Bill, which would be all but guaranteed to reduce the sovereignty it allegedly sought to uphold.

Our constitution rests on shared public understanding. Yet today we have a creeping crisis in that constitutional understanding. There are three specific threats: lack of understanding; confusion of our model with others, and specifically the US constitution; and willful misconstruction for reasons of political advantage. To some extent the Lords Bill was the product of all three, as I hope will be clear by now.

But there is a deeper issue that needs to be addressed. We appear to be losing an understanding of the politically fundamental idea of legitimacy. Legitimacy answers the question: by what right is power properly exercised? Max Weber described it as charismatic, traditional or rational. But for now it is enough to say that our democracy has historically recognized at least five means of legitimating public action: through the ballot box, by due process, by disclosure, through the use of recognized expertise, and through established standards of custom, precedent and the like.

Part of the genius of our constitution is precisely that it does not fetishize the ballot box. It uses the very strong and direct legitimacy conferred by voting at general elections and for legislation, but it tempers and balances this with other

forms of accountability that do not confer such power, but allow expertise, consultation and scrutiny to play their parts. Democracy in general, and ours in particular, is not simply a matter of elections. We do not elect our judges, for example; but no-one can properly suggest that their functions are not discharged democratically.

Ladies and Gentlemen, it is a paradox of modern life that at a time when more information and expertise is more widely available than ever before, our public debate is becoming ever more foreshortened and shallow. There is a well-known and entirely proper concern about threats to free speech. But there is also a parallel concern about threats to intelligent debate, about what one might call the Trumpisation of our wider political culture. The US presidential election is showing what can happen when a political party, and a political culture, is overtaken by an often ignorant and angry anti-politics. As David Hume famously said, “it is on opinion only that government is founded”. But opinion, and informed consent, demand that educated public realm that Adam Smith argued for in the *Wealth of Nations*. It would not go amiss to have a little more education in our public realm today.

In this context the status of the House of Lords can serve as a kind of litmus test. People can properly differ over the issue, of course. But to write off the Lords, or to seek radical change to it without the most careful and delicate prior consideration, is to betray a deep ignorance, a misunderstanding or willful disregard of our constitution—which in my book at least is a capital offence. We need not revere our constitution, as they do in America. But we could pay it a little more loving respect.

Constitutional issues place peculiar demands on politicians: for a good measure of legal, historical and philosophical understanding, and for a capacity for measured and reflective action. These qualities are lacking far too often in politics today, I am afraid to say. But whether it is Brexit, Scotland or a new Parliamentary Sovereignty Bill, they will be badly needed to navigate the storms ahead.

Let me close this inaugural Bingham lecture by saying one final thing. Tom did an extraordinary amount to enrich our public understanding of these issues: through the clarity and brilliance of his judgements; through his writings, and in particular his book on *The Rule of Law*, copies which should be issued to every MP on election; and by his personal authority and example.

It is an honour to speak at an event in his name. Thank you very much indeed.