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A “RADICAL” APPROACH TO SENATE REFORM IN CANADA

James T. McHugh
University of Akron

Introduction

Proposals for significant reform of the Senate of Canada typically have sought to address the themes of federalism and democracy. In the case of the well known “Triple E” proposals of Alberta, the practical effectiveness of the institution also has been a goal, particularly in terms of its ability to challenge the legislation of the government-controlled House of Commons. The comparative models most often cited for these reform proposals have been the Australian Senate and, to a lesser extent (because it is not part of a parliamentary system), the United States Senate.¹ However, given both the institutional nature and purpose of parliamentary systems, generally, and the contentious relationship among various provinces and regions within Canada, a democratically elected Canadian upper house of parliament with strong legislative power is not only unfeasible but it misses an opportunity to become more truly (though, perhaps, more modestly than most proposals for reform typically would envision) effective in a way that does not undermine the parliamentary principle of responsible government and

broader Canadian principles (especially as constitutionally articulated) of democratic government.

Instead, the British House of Lords (especially in the form in which it evolved as a result of reforms instituted throughout the twentieth century) offers an institutional example that could be a much more effective model for reform of the Senate of Canada. Using that model as a guide, though, could be considered “radical” because it starkly departs from general motives and expectations surrounding Senate reform. Those motives and expectations involve themes of federalism, democracy, and legislative authority.² Meanwhile, the House of Lords traditionally is associated with themes of aristocracy, appointed or inherited office, and limited legislative authority.³ Therefore, the House of Lords would appear to be the antithesis of the sort of model that reformers would want to emulate, especially (though not exclusively) in terms of features such as a suspensive (rather than an absolute) veto, an expansive and merit-based appointment system, and an emphasis upon pluralism, rather than federalism.

However, the themes that normally prompt desires and ideas for Canadian Senate reform merit reconsideration. The most prominent recommendations for Senate reform (emanating from Alberta and best known as the “Triple-E” approach) insist that a reformed Senate needs to be “equal, elected, and effective.”⁴ However, it can be strongly argued that the application of reforms designed to achieve the first two “Es” are, ultimately, incompatible with achieving the final “E.” That incompatibility arises from two sources: first, it is based upon a lack of appreciation for the actual purpose of an upper house within a modern parliamentary system; second, it seeks to correct perceived conflicts within principal areas of Canadian politics (primarily the area of federalism) that should be and, often, have been better addressed through other forums and institutions of the Canadian political system. Particularly in terms of those motives and goals arising from Canada’s federal system, adopting a radically different set of expectations relating to the role of the Canadian upper house in this respect also could allow federal politics to be more effectively grounded upon interstate, rather than intrastate, relations.

The House of Lords is the seminal example of a parliamentary upper house. Its evolution not only reflects fundamental changes within British society (including the role of nobility and the class system) but, also, pragmatic experiences in parliamentary development, even at times when it resisted those changes.⁵ While it is not feasible to ignore those controversial areas of Canadian politics (such as the relative power of provinces and the role of bilingualism) and the reform proposals that they have inspired, it is highly advisable to promote reforms that actually address the primary purpose that any parliamentary upper house is supposed to address within a modern liberal democracy. The reformed House of Lords may, at first, seem to be a counterintuitive model for reform of the Senate of Canada. But a critical evaluation of this model and its applicability to the Canadian parliamentary system should reveal some important, though often overlooked, lessons and considerations that truly effective Senate reform ought to include.

Background to the Senate of Canada

The Senate of Canada has been subject to criticism and proposals for reform since its inception. Its most prominent predecessor was the Legislative Council of Canada, which succeeded legislative councils for Upper and Lower Canada that had been created by the Constitutional Act of 1791. Counselors were not conceived as being, strictly speaking, legislators but as advisors to the executive (much like members of the Executive Council) and as a “check” upon the more popular proclivities of the lower legislative body.⁶ Appointments to the Legislative Councils of both of the two largest provinces became dominated by small seg-

ments of the ruling families of both provinces: the Family Compact in Upper Canada and the Château Clique (consisting of the families of British mercantile families but, also, of some French *seigneurial* families) in Lower Canada. The result was a predictably conservative second chamber that was often friendly to the Governor but hostile to the elected chamber.⁷ Despite the disrepute that the Legislative Council often experienced as a result of these conflicts, there was no mention of abolishing it. The fundamental idea that a Westminster system must be a bicameral one appeared to prevail.⁸

The Senate was intended to reflect the elite interests of an entrepreneurial class that, like its neighbor to the South, had been instrumental in bringing this new country to the brink of economic viability as an autonomous (if not yet fully sovereign) political society.⁹ The House of Commons was intended to reflect the popular will and, in the spirit of political developments in Britain, become the prime source of political legitimacy for Her Majesty’s Government for Canada. The Senate was intended to address concerns relating to regional representation, centered upon the two largest former provinces of Canada East (later Quebec) and Canada West (later Ontario) plus the Maritime Provinces. A strong representation of, and protection for, the francophone community, centered in Quebec, provided a particularly strong focus in that respect.¹⁰

During the next century and a half of its existence, the Senate largely confined itself to the role of revising, amending, and improving legislation. Most of its useful functions occurred outside of the direct legislative process. The Senate became particularly active in terms of public discourse, including a busy period of investigative committees during the 1960s and 1970s. It very rarely opposed legislation and, when it did, never in a manner that undermined the overall government mandate. It also was active in facilitating private interests, including as a liaison between business and government.¹¹ Ironically, it was its perceived reticence in its potential political role that led to one of the most outspoken calls for its reform—one that actually called for it to become more politically active and powerful than it has been.¹²

Parliamentary Upper Houses in Theory

This conception was consistent with a traditional understanding of the role of a second house. An upper house was never intended merely to replicate the functions of the lower house. Not only would that feature be redundant but it also could be highly inefficient and, even, counterproductive. Furthermore, once the lower house became instrumental to the process of governance and the legitimization of the state, the upper house risked undermining its purpose and legitimacy. Therefore, a different and, generally, restrained role for the upper house evolved—a role that is

consistent with the concepts such as a suspensive veto and non-elected representation.

The idea of a “chamber of sober second thought” has been attributed to assemblies among early Germanic peoples. One account indicates that members of certain tribes, when considering an important matter, would conduct two assemblies in order to reach a decision. During the first assembly, they would consume alcohol so their deliberations would not lack “vigor” or “imagination.” The second deliberation would occur during the next day, without alcohol, in order to reconsider the decision that they made when they were inebriated. That second counsel would not, necessarily, reject the first one but it typically would modify or amend aspects of the initial decision that might have seemed to be a good idea when inspired by drink but that might not appear to be the most wise or prudent approach from the perspective of a clear mind.¹³

While that account provides an interesting anecdote to explain the traditional reference to a legislative upper house as a deliberative body of “sober second thought,” a more profound consideration of the theoretical arguments in favor of a second legislative chamber would be more instructive. The predecessor of the first legislative upper house, the House of Lords, was the council of leading members of nobility who advised the medieval English king. This council was modeled upon the early medieval concept, adapted from the practice of the Saxons, of an assembly of “wise men” or *witan* who advised their leader. This practice evolved into the establishment of the Witenagemot, an consultative body that eventually evolved within England, under William the Conqueror, into the Curia Regis or King’s Court and which (along with the 13th century development of the Barons of the Exchequer to advise the king on financial matters as well as the rise of other institutions of noble advisors) gradually evolved into the institution that would become the House of Lords.¹⁴

The evolution of the parliamentary system (especially the Westminster model) resulted in certain consistent features of an upper house. If the two chambers resembled each other, too closely, in purpose, composition, and function, bicameralism would be a redundant exercise.¹⁵ It is this sense of difference that is essential for approaching upper house reform (including the Senate of Canada) in a truly effective manner.

Distinctive “Constituencies”

The most conspicuous and important of these distinctions has involved the nature of its “representation.”

As the parliamentary lower house increasingly became associated with representation of the broad social community (with or without a principle of popular representation), the upper house became a repository of representa-

tional difference—a transition that was anticipated to become more diverse through direct appointments.¹⁶ The distinctive nature of that representation would vary among political systems: in England and, later, Great Britain, the upper house represented the landed aristocracy; in the United States, it was created to represent the state legislatures; in Australia, it was created to represent the states as electoral constituencies; in Japan, Italy, France, and other countries, it represents broader and/or specialized constituencies, including distinctive regions within an otherwise unitary system. Typically, it would be practically restrained or legally forbidden from opposing the will of the lower house, especially once those chambers became associated most closely with representation upon the basis of popular sovereignty.¹⁷

A somewhat simple way of expressing that distinction between lower and upper legislative chambers is the trend that the lower house is based upon a principle of representation by population while the upper house is consciously based upon “something else.”¹⁸ Upper houses are particularly prominent in providing this sort of representation within federal systems, especially in terms of subunit states and their particular interests. They also can promote the political and policy interests of the respective subunit governments—indeed, the United States Senate originally had been conceived as performing that precise role.¹⁹ But, as in the American example, that role generally falters and subunit governments promote their interests, more effectively, through direct interaction with the central government.²⁰

Therefore, the “something else” that has an even greater potential for representation by an upper house can be the multifaceted demographic of the overall society.²¹ Institutions such as the Canadian Senate, even in an unreformed composition, have demonstrated a capacity for serving this purpose, such as a greater capacity to include women, the indigenous peoples of Canada, other ethnic and cultural groups, and individual persons who have made a distinctive contribution to Canada but who, otherwise, would have difficulty being elected to a federal office.²² Interestingly (and for many people, ironically and surprisingly), the second chamber that has demonstrated a notable capacity in this respect is the British House of Lords—a feature that some reformers of that upper house have recognized and would like to enhance.²³

Originally, the “something else” that the House of Lords represented was the titled aristocracy and, particularly, the agrarian sector of the economy that it traditionally dominated. That role began to diminish during the latter part of the nineteenth century²⁴ and, eventually, it disappeared during the twentieth century, especially in the wake of economic shifts, the introduction of the suspensive veto, the creation of life peerages (including the severe restriction on participation by hereditary peers), and procedural innova-

tions. Now, rather than being a “house of peers” or a “body of retired politicians,” the upper house can be perceived as a “house of pluralism.” The elevation of people who have distinguished themselves in many different professions, activities, or as representative of particular (and, often, underrepresented) groups within society has been a distinctive feature of the House of Lords that grew throughout the twentieth century (especially through the appointment of life peerages)²⁵ and continues to serve an important function in the twenty-first century.²⁶

Appointed chambers generally are well positioned to serve this sort of consociational function, much as government cabinet appointments often have provided within many different political systems, including Canada. This reflection of diversity can be directed toward regional, ethnic, gender, linguistic, professional, social, and many other features of society. Upper houses can be particularly effective in providing this sort of representation when the electoral system fails to produce an accurate reflection of society in this respect and its visibility, at the center of the political system, enhances its significance at a national level. It also provides an opportunity to represent minorities, though often ones that serve a function that is intended to constrain the will of democratic majorities found within the lower house and government.²⁷

Reduced Partisanship and Broader Public Interest Role

Members of upper houses typically behave in a less partisan fashion than their counterparts in the lower house, especially within Westminster systems that are guided by the principle of “responsible government” upon which the power of the government rests. However, even in non-parliamentary systems, the upper house may be observed to behave in a manner that invokes more decorum and less overt partisan expression. That sense of decorum was considered to be an important, though largely idealized, feature of the Senate under the Roman Republic—a feature that Cicero highlighted in his speeches attacking Mark Antony before that body.²⁸ The United States Senate traditionally has embraced that image (at least in terms of the decorum of its internal proceedings), though the ultimate result of the process usually is a partisan outcome.²⁹ Parliamentary upper houses are even more inclined toward that perception and role.³⁰ Even elected parliamentary upper chambers, such as the Australian Senate, have demonstrated reduced partisanship.³¹ The appointment of members upon the basis of distinguished accomplishments in public (for example, former government officials and senior civil servants) and private service has been facilitated by this practice, encouraging legislative and extra-legislative activity that transcends conventional politics.

An interesting symbol of an inclination toward non-partisan accommodation within the upper house is the Cross Benches of the British House of Lords. The reservation of a specified, and prominent, location for those peers also has been useful for distinguishing those members of the upper house who have been elevated in consideration of distinctive service to the country, especially in offices that have served the public good outside of the conventional political process. Australia’s upper house also has adopted this practice of distinguishing independent and minor-party members found within both chambers of the federal parliament, as well as among state legislatures of that country.

Specialized Roles and Functions

Upper houses typically are identified through specialized functions. Although they play a role in the legislative process, within parliamentary systems they generally (with the notable exception of Italy) are expected or required to defer to the overall legislative authority of the lower house. As a result of that deference, the upper house typically focuses its practical energy upon specific aspects of the process, often in an indirect or supporting role. The informational and publicizing work of investigative committees is an excellent example, particularly as those same committees in the lower house often are constrained by more partisan considerations.³²

Unless it is intended to mirror the legislative activity of the lower house (like the United States Senate), an upper house should address other legislative and political activities that enhance the political process. Those activities should be ones that the lower house finds more constrained or difficult to do. One often noted feature is the capacity to engage in less partisan committee activities that result in constructive revision of legislation that has been sent to it from the lower house—partly a result of a sense of distinctiveness from the political class that occupies the lower chamber.³³

In that respect, the upper house also can serve an effective ombudsman role. Its members often have more latitude and time to provide assistance to citizens groups, individual advocates, or members of the public seeking information or assistance.³⁴ Of course, members of that chamber also may become involved in lobbying efforts that, again, are not constrained by government positions or policy considerations, which can be perceived in a negative way, especially by the general public. Furthermore, second chambers often are assigned (constitutionally or in practice) special roles that are associated with guarding constitutional principles, human rights, and the integrity of the judicial system.³⁵ This sort of specialized function can be powerful.

Separation from the Government

The upper house of a parliamentary system, especially within the Westminster model, typically has a more distant relationship with the government of the day than the lower house. This distinction results from the fact that, under the principles of responsible government, the political survival of a government is not dependent upon or, even, affected by the actions of the upper house—again, chambers such as the Italian Senate represent an exception. “Strong” bicameral systems are not inconsistent with parliamentary government but only with “minimal winning cabinets” and the executive dominance that they support.³⁶

This situation allows the upper house and its members to become disentangled from the political pressures and constraints that the lower house and its members generally experience (including protecting private and minority interests in a manner that members of the lower house frequently feel constrained to do³⁷), particularly within a parliamentary system. Party discipline must be enforced within the first chamber in order for a parliamentary government to maintain its ability to govern. Furthermore, that party discipline and the loyalty that it demands are prerequisites for ministerial advancement within a government, thus imposing additional constraints upon legislative activity that actually make members of that lower chamber less independent and, thus, much less effective as individual legislators.³⁸

Second chambers, whose members frequently (but not always) have an extended tenure of office, generally are not as dependent upon the government and its executive leadership for their positions. Although political patronage often accounts for initial nominations or appointments to that body, members of upper houses tend to be removed from the pressures exerted by the head of government, who also happens to be head of the governing political party.³⁹ Members of that chamber, including members from the government party, are freer to take actions that may not accord with current government policy and action without the risk that a “rebellion” would entail for their counterparts in the lower house.⁴⁰ That characteristic has been described as the capacity to “embarrass” the government (especially over initiatives that are not part of its electoral mandate and may meet with general public disapproval) and it has been noted as being particularly strong within non-elected chambers.⁴¹ This condition creates opportunities for increased freedom of political activity, including of the legislative, publicity, and investigative sort associated with the theme of “specialized roles and functions.”

This characteristic of a second chamber is beneficial to fulfilling the institutional expectations of a polity. Rather than relying upon a parochial principle of majoritarian legisla-

tive decision making, a polity provides guarantees that other interests and fundamental values of other members of the *polis* are considered within the overall political process—a distinction that typically is traced to Aristotle’s distinction between a mere democracy and a true polity as a superior form of government.⁴² That institutional presence does not guarantee an ultimately successful promotion of those interests and values but it does assure that their presence will be expressed, felt, and considered on some level, thus providing some level of visibility and, even, potential influence—a concept consistent with Robert Dahl’s definition of polyarchy.⁴³ The lack of constraint that an upper house enjoys by acting without affecting the status of the government and, thus, without being subject to the same pressures of party discipline and executive control can be very beneficial to the political system as a whole.

Federalism

One of the more “radical” features of this proposal for Senate reform is its relative lack of emphasis upon federalism—unlike many other proposals, especially the Triple-E version. Bicameral systems typically are designed to address a fundamental feature or division within a society. In the case of Canada, it was designed to address the principal regional distinctions among Lower Canada, Upper Canada, and the peripheral Maritime Provinces. Eventually, this focus would be augmented by the more specific role of the provinces within the Canadian federal system. Therefore, it is practically impossible for any proposal for substantial Senate reform to ignore the demands of federalism and the aspirations of the federal subunits.⁴⁴ At the same time, it can be strongly argued that the upper house should not be the principal focus for such efforts.

The Senate of Canada originally was conceived as an institutional representative of regional interests. It has been suggested that its composition was deliberately intended to reflect and, in some way, extend the role that Legislative Councils had played for the pre-Confederation provinces. Those provincial councils had been abandoned with the interesting exceptions of Nova Scotia, until 1928, and Quebec until 1968. The members of Quebec’s provincial upper house represented the same 24 districts that were the basis for the appointment of Senators from that province to the Canadian upper house. Ultimately, though, that regional balance was replaced with a more specific emphasis upon a sense of provincially allotted seats, though that provincial representation was constitutionally framed in a regional context—a framing that may have been critical to the ultimate success or failure of those negotiations.⁴⁵ Thus the relationship between the Senate and federalism, superficially similar to the United States Senate and, arguably, the Senate of Australia, remained an inextricable association, especially for reformers.⁴⁶

Beyond this parliamentary institution, two approaches have emerged for addressing the overall relationship between Canada and its provinces: interstate federalism and intrastate federalism. While reform of the Senate of Canada that could obtain a level of support necessary for the requisite constitutional amendment would, inevitably, need to include provisions related to intrastate federalism, extensive reforms in that respect would tend to detract from an emphasis upon interstate federalism that, arguably, is more appropriate to the context of the evolving nature of Canadian federalism.⁴⁷ Conferences of First Ministers have proven to be the most conspicuous expression of interstate federalism within Canada but other forms of federal/provincial cooperation have developed within the Canadian federal relationship that, also, appear to supersede this role for the Senate. In fact, it has been suggested that plans for reform of the Senate that emphasize its role in facilitating federal relationships would prove to be a distraction from more effective means of addressing those relationships.⁴⁸

Nonetheless, that association has proven to be so firmly rooted that it probably would be practically impossible to obtain constitutional consensus on any such plan that did not attempt to deal with a scheme for greater provincial input into the process—if not the more controversial desire of smaller provinces to achieve greater representation and influence for themselves within that reformed upper house. Furthermore, the association between bicameralism and federalism in general is so persistent that all federal systems have a bicameral system in which the upper house was designed to address the federal principle in some way.⁴⁹ At the same time, the functional centrality of executive federalism among first ministers might be disrupted in ways that might not be appreciated until any such scheme actually was put into effect⁵⁰—especially considering that it would be impractical to expect that party politics (including Senators from parties in opposition to their current provincial government) could be entirely circumvented from it. Therefore, reform proposals that emphasize this role of the Senate ultimately may not achieve those objectives because of the other political influences that affect this complex feature of Canada's overall political system.⁵¹

Conventional Reform Proposals for the Senate of Canada

As already noted, any reasonably successful proposal for a constitutional amendment relating to Senate reform would need to include some provision for intrastate federalism. The federal government's most comprehensive Senate reform proposal was contained in Bill C-60 in 1978, which called for the transformation of the Senate into a new second chamber to be called the House of the Federation. Half of its members would be appointed by provincial govern-

ments and the other half by the federal government. Smaller provinces would achieve greater, though not equal, representation. A complex scheme of suspensive vetoes would be introduced, depending upon the nature of the legislation and its relationship to federal and provincial powers and interests. It also introduced the concept of the "double majority" in which a majority of both anglophone and francophone members would be needed for passage of any legislation dealing with official languages.⁵² This scheme was inspired (especially in terms of its complex diversity of suspensive veto schemes) by the German upper house, the Bundesrat,⁵³ which also has inspired other reform proposals,⁵⁴ though it also has been noted that the German model might not translate well to the Canadian context.⁵⁵ Ultimately, Bill C-60 was abandoned for lack of support among many provinces, which perceived it as solely a federal conception and project.⁵⁶

Perhaps the most well publicized Senate reform proposal has been the so-called "Triple-E" (standing for its three goals of creating an upper house that is grounded upon the principles of "equal, elected, and effective") plan that was particularly prompted by the adoption of the federal National Energy Policy in 1980.⁵⁷ Variations of the plan have been proposed since its genesis (especially the 1985 recommendation of the Alberta Select Committee on Senate Reform)⁵⁸ but its essential features have included equal representation for each province (with lesser representation for the federal territories), direct elections for Senators to be held within each province, and an ability to oppose non-budget and taxation legislation, especially an outright veto over legislation that affects provincial jurisdiction.⁵⁹ Another Alberta select committee modified that final "E" by shifting to a suspensive veto the powers of this reformed Senate over all ordinary (non-money) legislation except for ones that affect provincial jurisdiction.⁶⁰ Despite lack of federal, Ontario, and Quebec support, it has remained one of the most consistently recognized and promoted recommendations for Senate reform, making it extremely difficult to ignore within the context of the broader deliberations on this subject.⁶¹ A somewhat similar proposal emerged from the negotiations surrounding the Charlottetown Accord, which attempted to balance conflicting demands and goals of the Western provinces that included the House of Federation plan for for a "double majority" of votes by anglophone and francophone Senators for approving legislation dealing with the official languages of Canada. The overall failure of the Charlottetown Accord resulted in the abandonment of this proposal as well.⁶²

The inclusion of a provision for an elected upper house (either directly by the public or indirectly through provincial legislatures) reflected the powerful political appeal of the electoral process as a component of any Senate reform proposal. The demand for an elected Canadian upper house (similar demands have been raised regarding the

upper house in other countries, including the United Kingdom) has been supported by the claim that such elections would confer legitimacy upon that chamber. Any other arrangement would be regarded by many critics as being unacceptable because it would “undemocratic.” The most common counter-argument to that demand has been expressed in terms of a different concept of legitimacy—this one associated with the parliamentary principle of “responsible government.” An elected Senate would be able to oppose the government that, under this system, derives its authority from the will of the elected House of Commons. The inability of the government to pass its principal legislation would render it unable to function and, thus, compel it to resign. But if that government continues to enjoy an electoral mandate in the lower house, any alternative government also would be unable to govern. The result would be an ungovernable system or, at best, frequent and potentially distracting national elections. The Australian “Governor General’s Crisis” of 1975 in which this very situation occurred in which the Australian Senate defeated legislation passed by the House of Representatives, thus initiating a controversial dismissal of the government and a contentious election, is a particularly prominent example of this concern.⁶³

The suspensive veto (which the Australian Senate does not enjoy) offers a solution to that objection. But the use of elections as a means for selecting representatives in the upper house fails to address another significant complaint of critics of the Canadian upper house: its “elite” dominance. The composition of the Senate has been, historically and currently, dominated by men from the high-end of the nation’s economic stratus, especially (but not exclusively) over-representing the business community.⁶⁴ A typical populist argument is that elections would make it more likely that Senators who are more representative of “ordinary Canadians” would become members. That argument ignores the fact that the demographic and professional composition of the Senate has largely mirrored the composition of the elected House of Commons. Furthermore, the currently appointed Senate has been more effective (if only marginally) in providing representation for indigenous Canadians, women, and other minority groups. The idea that elections (which generally can be successful contested only by people with the requisite background and financial resources) will produce “non-elite” Senators requires much more analysis than most such criticisms provide—not to mention the very use of “elite” as a pejorative term, rather than as a description of potential preparation and ability.⁶⁵

Numerous other recommendations have been made for variations of Senate reform in Canada. A comprehensive assessment of these recommendations would be too expansive to be feasible within the context of a single essay. However, a summary of this body of scholarship and policy proposals reveals similar patterns in overall approaches to the

current status and potential reform of the Senate of Canada.⁶⁶ Additionally, the Canadian Parliament’s Molgat-Cosgrave Report suggested that Senate reform deemphasize the theme of federalism and, instead, focus upon Canada’s “natural communities” while empowering the upper house through the suspensive veto.⁶⁷ The earlier Molgat-McGuigan Report challenged the idea of an elected upper house and argued that such a body would fail to achieve diversity in representation.⁶⁸ The Beaudoin-Dobbie Report was more specific and ambitious, recommending a system of proportional representation but with a scheme to exclude direct involvement of political parties.⁶⁹ It also recommended the suspensive veto and double majority options.⁷⁰

Other work on this subject has placed it more firmly within its larger political context. In particular, C. E. S. Franks has been diligent in noting the institutional consequences, anticipated and unanticipated, of Senate reform, including its preparatory role in the process of examining legislation.⁷¹ His research has placed this subject within a broader critical perspective, noting, especially, the relationship between the Senate and the principles of parliamentary government, including the effect of elections for the Senate on voter participation, political influence through campaign contributions, and party loyalty.⁷² He also has addressed the potential problems of addressing federal-provincial relations from that basis, including an exacerbation of an asymmetrical relationship in this respect, as well as the potential effect upon conflict between these two sovereign levels.⁷³ Likewise, Donald Smiley and Ronald Watts provided a comparative analysis of this subject in *Intrastate Federalism in Canada* (originally a report for the Royal Commission on the Economic Union and Development Prospects for Canada) that raised similar questions and addressed the prospect of reforms that could improve the desultory record of the current Senate in facilitating federal/provincial relations, especially in comparison to the practical successes of executive federalism.

A particularly difficult problem encountered by all Senate reform proposals is the need to accomplish most conceived changes through the very difficult constitutional amendment process. Reforms that do not require constitutional amendment (such as informally accepting the results of provincial elections through federal appointment of the successful candidate of such a process) have experienced only limited success. Most serious recommendations on this subject must take into account the need to propose changes that can achieve a consensus of acceptance among the various provinces, groups, and other interests, as well as the federal Canadian government and the Canadian populace in general. The ongoing cleavages within Canadian society and among its different regions pose a formidable obstacle to that ultimate goal—though, if presented in the right way and under a favorable political climate, that task is not impossible.

Proposed Constitutional Amendment on the Senate of Canada

Given the considerations that have been addressed so far, it is appropriate to offer a formal proposal for the sorts of constitutional changes for Senate reform within the Constitution Act of 1867 that these considerations suggest within the context of Canadian politics and society. Unlike a traditional institutional (also known as formal-legal) approach, these recommendations attempt to adopt neo-institutional and political culture considerations that anticipate political outputs in terms of broader theoretical ideas and the actual performance of similar institutions. Proposed sections or clauses are indicated in italics. Sections, clauses, or language recommended for repeal have a strike-through line running through them. Provisions that are recommended to be retained have an unaltered font within the reduced margins. Additional comments (in full font and margins) are interposed among the various clauses of this amended constitutional section.

Constitution Act, 1867

IV. Legislative Power

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

18. (1) The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.

Power of the Senate in Relation to Money Bills

(2) *If a Money Bill, having been passed by the House of Commons and sent to the Senate at least 40 days before the end of the session, is not passed by the Senate without amendment within 40 days after it is so sent or if it is rejected by a vote of the whole Senate within that same time period, the Bill shall, unless the House of Commons direct to the contrary, be presented to the Governor General, on behalf of Her Majesty, and become an Act of Parliament upon the Royal Assent being signified,*

notwithstanding that the Senate has not consented to the Bill. Any amendments that are certified by the Speaker of the House of Commons and verified by the Governor General to have been made by the Senate during this 40-day period and accepted by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section

(2) *A Money Bill is defined as a Public Bill which, in the opinion of the Speaker of the House of Commons and confirmed by the Governor General, contains only provisions dealing with all or any of the following subjects: the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes; public supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or its repayment; subordinate matters incidental to those subjects or any of them.*

(3) *Every Money Bill passed by the House of Commons shall include a certificate of the Speaker of the House of Commons that it is a Money Bill. The Governor General shall verify, prior to signifying the Royal Assent, that the certificate is valid in its designation of the bill as a Money Bill.*

One of the most important principles of the legislative process that has developed, especially since the seventeenth century, has been the primacy of popular assemblies such as the parliamentary House of Commons. Even in non-parliamentary systems, such as the United States, this principle has been upheld. All matters relating to revenue and spending in Canada have been considered to be the exclusive purview of the lower house and that principle ought not to be violated by a reformed Senate. At the same time, though, the advantages of the upper house in its role of review should not be entirely dismissed in this respect. The Senate could offer improving amendments, technical corrections, or, simply, express concern in this area, particularly if it stems from an expert assessment or widespread apprehension. A brief suspensive veto over this sort of legislation could provide those advantages without seriously curtailing the authority of the lower house. Furthermore, public pressure should continue to make the Senate extremely reluctant (as it has been under the current scheme in which it possesses an absolute veto over these bills) to exercise even this limited form of suspensive veto, thus enhancing its effectiveness (as will be explained in the next section) if and when it is temporarily invoked.

Powers of the Senate in Relation to Other Bills (Suspensive Veto)

(4) *If any Public Bill (other than a Money Bill and a Bill pertaining to the Official Languages of Canada) is*

passed by the House of Commons in two successive sessions (whether of the same Parliament or not) and, having been sent to the Senate at least one month before the end of each session, is rejected or otherwise fails to be passed by the Senate in each of those sessions, that Bill shall, on its rejection for the second time by the Senate (unless the House of Commons direct to the contrary) be presented to the Governor General, on behalf of Her Majesty, and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the Senate has not consented to the Bill. This provision shall not take effect unless one year has elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the second of these sessions.

(5) When a Bill is presented to the Governor General for the Royal Assent in pursuance of the provisions of this section, the Speaker of the House of Commons shall provide a certificate that the Bill complies with provisions of this section, which the Governor General shall verify.

(6) A Bill shall be deemed to be rejected by the Senate if it is not passed by that chamber either without amendment or with such amendments only as both the House of Commons and the Senate shall mutually agree.

(7) A Bill shall be deemed to be the same Bill as a former Bill sent to the Senate in the preceding session if it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons and verified by the Governor General to be necessary owing to the time which has elapsed since the date of the former Bill or to represent any amendments which have been made by the Senate in the former Bill during the preceding session. Any amendments that are certified by the Speaker of the House of Commons and verified by the Governor General to have been made by the Senate in the second session and accepted by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section, provided that the House of Commons may, on the passage of such a Bill during the second session, suggest any further amendments without inserting the amendments in the Bill and any such suggested amendments shall be accepted by the Senate shall be treated as amendments made by the Senate and accepted by the House of Commons, though the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the Senate.

This reform is modeled upon a similar formula found in Britain's Parliament Act of 1949, which modified the Parliament Act of 1911. It is another version of the suspensive veto scheme. But unlike many other proposed variations of

this option, it is intended to extend beyond a single session of a Parliament *and* it requires a deliberate override on the part of the lower house in order for the vetoed bill to be forwarded for the Royal Assent. Ironically, this requirement may impose an even greater sense of restraint upon the upper house in exercising such a suspensive veto, given the fact that it would require a positive action and public repudiation upon the popularly elected chamber and the government that it supports.

The record of the House of Lords is instructive in this respect. The British upper house has, since the adoption of the Parliament Act of 1949, rejected scores of government bills that have been passed by the House of Commons. Most of this action has been taken against governments led by the Conservative Party, despite the fact that Conservative peers have dominated the chamber during this period. In fact, during the first administration under Margaret Thatcher, the House of Lords rejected 45 government bills sent to it by the lower house.⁷⁴ Most famously, the House of Lords rejected an early draft of the Local Government Bill (which would have eliminated, among other local authorities, the Labour Party-dominated Greater London Council) and only failed to reject a revised version of that bill in 1985 (the opposition to it being led by, among other members of that chamber, the Bishop of London) as a result of the Thatcher government packing the chamber with hereditary peers who had been transported to Westminster specifically for that purpose.⁷⁵

The interesting point concerning these rejections is that in only two instances since 1949 has the government invoked the Parliament Act of 1949 in order to complete the passage of legislation over the objections of the upper house.⁷⁶ Generally, the government will not resubmit a bill that has been rejected by the House of Lords, even though it could ensure its adoption by taking that action.⁷⁷ The pattern appears to have emerged that the House of Lords invokes its suspensive veto only in cases in which it involves a minor bill that is not considered part of the government's electoral mandate, a bill that is deemed to have serious technical flaws that it considers ought to be corrected with a new bill, a bill that appears to violate traditional principles of law (especially in the opinion of the Law Lords who sat in that chamber prior to the Reform Bill of 2009), or a bill that is strongly opposed by public opinion.⁷⁸ Furthermore, the Lords have felt particularly emboldened to oppose government legislation when its majority is of the same political party as the government. In fact, the House of Lords generally has adhered to the Salisbury Convention, which stipulates that it will not reject or, even, closely scrutinize bills passed by the House of Commons that are recognized as part of the current government's election manifesto—a convention that had been preceded by a more general convention on respecting the popular mandate that was violated in 1911, necessitating the first of the Parliament Acts.⁷⁹

The Senate has not generally made use of its absolute veto. Between 1867 and 1967, the Senate only defeated a total of ten bills passed by the House of Commons. Between 1985 and 1993, that rate increased but only to the extent that seven House of Commons bills were either blocked or attempted to be blocked by the Senate. This pattern demonstrates a strong reluctance by the upper house to employ such a strong option against the elected chamber that delegates sovereign power to the government.⁸⁰ It does not account for informal expressions of concern or opposition by the Senate that result in the House of Commons withdrawing or altering bills before they proceed to final votes within that chamber, which does indicate a greater Senate influence over legislation than might, otherwise, be indicated by the formal record.⁸¹ Nonetheless, the overall record indicates an upper house that is reluctant to exercise its formal authority, regardless of the power that it technically possesses.

In comparison, the experience of the House of Lords indicates the effectiveness of a suspensive veto (particularly one requiring positive action in order to override it) in a parliamentary setting. The will of the lower house (and its popular mandate) cannot be thwarted if it has the resolve to pursue it. But the suspensive veto does not constitute a mere symbolic gesture as it places pressure on the government to justify its original position. It is, in a neo-institutional sense, an obstacle that can be easily overcome but only if other political conditions support it. Therefore, the upper house is constrained in its use of that suspensive veto by considerations of those same conditions. Furthermore, the suspensive veto does not need to be invoked in a politically hostile manner, especially when it is used for a genuine reconsideration of the specific construction of the legislation and not as a rejection of its substance.⁸² Of course, the proposal of amendments serves that same purpose, which the upper house is well positioned to provide.

Powers of the Senate in Relation to Official Languages Bills

(8) Any Bill pertaining to the Official Languages of Canada must be approved by both the House of Commons and the Senate in order to be presented to the Governor General, on behalf of the Queen, for the Royal Assent, notwithstanding any other conditions specified within this section and pursuant to the requirements specified within section 36 of this Act.

This clause refers to the idea of the “double majority” that is specified within another section and has been a prominent feature of other reform proposals, including the House of Federation and Charlottetown variations.⁸³ Its inclusion could be deemed necessary for the participation of Quebec in any constitutional adoption of Senate reform. It also serves to provide legislative and constitutional protection

for the official languages of Canada, thus appealing to those parties that support it as a central feature of Canadian identity.

Enacting Formula

(9) Any Bill that shall become an Act of Parliament without the consent of the Senate under the provisions of section 18 shall be enacted with the following formula:

“Her Majesty, by and with the advice of the Senate of Canada and the advice and consent of the House of Commons of Canada (pursuant to the provisions of section 18 of the Constitution Act of 1867, as amended), enacts as follows/Sa majesté, sur l’avis du Sénat du Canada et sur l’avis et avec le consentement de la Chambre des communes du Canada (conformément aux dispositions de l’article 18 de la Loi constitutionnelle de 1867, telle que modifiée), édicte.”

This enacting clause not only would identify those bills that have become laws as a result of a lower house override but it also reinforces an aspect of the participation of the upper house that often is overlooked or underappreciated. The notion of “advice” as being distinct from “consent” also implies the significance of that former action. The rule of law is a principle that includes the idea that law not only follows an identifiable process but that the process is observable. This principle also is central to the broader tradition of positive law that requires the law to be knowable in order to be, ultimately, a legitimate “command of the sovereign.” Public scrutiny can be as important as public approval within the democratic process and additional “advice,” in this respect, can be as important as “consent” within this stage of the legislative process, especially when that extended advice includes expert investigation, additional public hearings, and enhanced publicity—all of which are functions that, as previously noted, are particular characteristics of upper houses (especially parliamentary ones) in general.

The Senate

Number of Senators

21. The Senate shall, subject to the Provisions of this Act, consist of ~~One Hundred and five Members~~, an unlimited number of Members, who shall be styled Senators.

One of the constraints of Senate reform has been arriving at a precise ratio of seats within a finite limit of total seats. Another problem that traditionally has affected the effectiveness of this chamber has been a lack of consistent participation by its members. In an upper house with an absolute veto, these deficiencies can be a source of particu-

lar concern. The unlimited number of peers that the House of Lords can accommodate has led to an expansion of its membership and, simultaneously, an expansion of the number of potential participants in its proceedings who possess specialized knowledge, special backgrounds, and useful expertise. The fact that many of them do not participate in its proceedings on a regular basis is not an impediment to its overall ability to function because of the reserve of available peers, though the opposite argument has been made.⁸⁴

A lack of limitation upon the number of potential Senators makes it possible for governments to be expansive in their approach to appointments. Fewer trade-offs will be necessary for including persons and groups who are representative of the diversity of Canada and its political interests. It would be expected, of course, that a core group of committed Senators would continue to dominate its routine proceedings, just as it has been the case in the House of Lords, which has an informal category popularly known as “working peers” who are expected to attend to political and party business within that chamber.⁸⁵ Given the guidelines that will be described for making appointments, these overall numbers should increase at a relatively slow rate, thus resulting in a number of Senators that will be practical as well as consistent with more inclusive goals.

Representation of Provinces and Territories in Senate

22. (1) In relation to the Constitution of the Senate, Canada shall be deemed to consist of ~~Four~~ Five Divisions:

1. Ontario; 2. Quebec; 3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island and Newfoundland; 4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta; 5. The Federal Territories of the Northwest Territories, Nunavut, and the Yukon, which ~~Four~~ Five Divisions shall (subject to the Provisions of this Act) be ~~equally~~ represented in the Senate as follows: ~~Ontario by twenty four senators; Quebec by twenty four senators; the Maritime Provinces and Prince Edward Island by twenty four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each.~~

The Senate originally was established as an institution for the representation of the regions of Canada (rather than the specific provinces) at the federal level. Regional differences continue to unite provinces in terms of mutual political, social, and economic perspectives and interests.⁸⁶ As will be demonstrated, perpetuating this scheme could facilitate appointments that, while providing proportionally greater representation for demographically smaller provinces, will be acceptable to the largest two provinces that constitute, under the current division, regions unto themselves. This asymmetrical arrangement could, therefore, accommodate the two, otherwise irreconcilable, representational goals of the larger and smaller provinces.⁸⁷

(2) *The Governor General, in the Queen's name and in respect of Canada, shall appoint, every four years, five representatives for each of the first four divisions, as specified in subsection (1), provided that for those divisions with multiple Provinces, no Province shall be denied an appointment during the course of a four-year period. Furthermore, the fifth division, as specified in subsection (1), shall receive one appointment, every four years, provided that no Federal Territory shall be denied an appointment during the course of a twelve-year period.*

~~In the Case of Quebec each of the Twenty four Senators representing that Province shall be appointed for One of the Twenty four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.~~

(3) *Lieutenant Governors of each Province, in the Queen's name and in respect of each Province, shall appoint, each year, one representative to the Senate. Commissioners of each Federal Territory, in the Queen's name and in respect of each Federal Territory, shall appoint, every four years, one representative to the Senate.*

The part of this proposal that could prompt the most immediate and vociferous objections would be the continuation of appointments instead of elections. The legitimacy of this reform often has been tied to the need for the Canadian upper house to become elected. That expectation frequently has been blandly asserted as being a *prima facie* requirement of institutional reform within *any* democratic system. However, that sort of uncritical assertion neglects the important distinction between democracy as a method and liberal democracy as an ideological tradition to which modern societies such as Canada adhere.

The tendency to insist upon elections as the only means for conferring legitimacy upon institutions other than the one that directly supports the government is a phenomenon that could be characterized as the “Cool Whip affect.”

Classic advertisements for Cool Whip desert topping asserted that, in relation to any type of dessert, “everything is better with Cool Whip.” Likewise, there often appears to be a strain of thought that insists that, in relation to any public institution of a liberal democracy, “everything is better when it is elected.” Such a sentiment has prompted many American states to make judgeships elected at all levels of the state court system. But just as the concept of American judges elected upon the basis of their popular acceptability or the approval of the results of particular judicial decisions (as opposed to ones appointed upon the basis of an executive assessment and legislative confirmation of their professional qualifications) has been subject to challenge,⁸⁸ the belief in the automatic desirability of elected Senators also ought to be subject to a critical review.

Elected members of the upper house, like elected members of the lower house, would be subject to partisan pressure, the expense of campaigning, and the need to court favor with particular interests and the general electorate. The upper house characteristic associated with diverse representation also would be affected, as the example of the House of Commons illustrates.⁸⁹ An electoral mandate for the Senate would provide an impetus for challenging the electoral mandate of the House of Commons—a mandate that is central to the concept of the delegation of popular sovereignty to a government that depends upon the mandate of the lower house for its own legitimacy.⁹⁰ Just as a dessert topping does not automatically improve the quality of a dessert (and may, in fact, mask the flavor of a particularly refined dessert) so, too, may elections have an undesired effect that actually may undermine the broader purpose of parliamentary democracy. Furthermore, in comparison with other upper houses, the appointment process, though influenced by partisan considerations, has not resulted in more partisan members than the elected alternative has produced.⁹¹

A liberal democracy, unlike a mere majoritarian democracy, is intended to conform to the ideal of a polity. That concept has been well expressed by modern political scientists and theorists such as Robert Dahl (who describes it in terms of a polyarchy⁹²) but it transcends the modern tradition and can be traced to the writings of Aristotle.⁹³

A polity achieves more than expressing the will of the majority; it also protects the interests and rights of the minority. It can guarantee that condition in various ways (in the modern period, the development of rights and liberties has been a particularly effective method for that purpose) but it ultimately requires an institutional response that is sensitive to the variety of interests and cleavages that distinguish a particular society. In the case of Canada, one of the most distinctive of those cleavages (especially within the concept of its federal system of shared sovereignty) has been expressed in terms of regional (including

the anglophone/francophone communities) and provincial identities.⁹⁴

Conflict between equal provincial representation and a representational scheme that reflects the actual demographic situation within Canada has been a contentious one for Senate reform. Proposals such as the Triple-E scheme have envisioned the Canadian Senate as potentially similar to the United States Senate in this respect. Even the current configuration of Canadian Senate representation is not, strictly, proportional: for example, the Atlantic Provinces are entitled to the same number of representatives as Ontario, even though that former region accounts for only slightly more than 7% of Canada’s overall population, while the latter one accounts for nearly 39% of the country’s population. Therefore, the concept of asymmetrical representation that disproportionately favors smaller provinces already is a feature of the Senate of Canada.⁹⁵

Nonetheless, a province such as Alberta, which accounts for nearly 11% of the population of Canada, could expect to receive more than its current share of less than 6% of the seats in the Senate. On the other hand, a province such as Ontario might object to being reduced to slightly less than 10% of Senate seats under the Triple-E plan while the Western Provinces as a bloc would be elevated to nearly 40% of the seats—even after considering the dominance of Ontario representatives in the lower house. The position of Quebec, in this respect, poses an even more difficult obstacle to reform in this respect, especially given its self-appointed mission as protector of the interests of between one-fifth and one-quarter of the Canadian population, as well as the vast majority of Canadians who claim French as their first language.

This proposal would attempt to provide a system that would allow for a progressive and relative increase in representation for the smaller provinces while also maintaining a proportionately reduced advantage for the two largest provinces. No arrangement could possibly satisfy all parties to Senate reform. Nonetheless, as some sort of compromise in this respect will be necessary, a formula that allows for provincial as well as federal appointments might achieve some sense of just such a compromise.

It also could achieve a sense of compromise between federal and provincial interests in a broader sense, not unlike a similar proposal that was offered as part of the Charlottetown Accord.⁹⁶ In that way, it could be perceived as an attempt at intrastate federal accommodation beyond the typical executive and public administration venues. More likely, though, it will be perceived as a means toward achieving a greater sense of balance between those interests, even if the actual result is not quite as convincing in practice as it might appear to be in presentation.

Representation in Other Categories

(4) *No more than half of the total number of Senators appointed by the Governor-General or Lieutenant Governor, in the name of the Queen, during each four year period, may be representatives or, otherwise, members of the same political party, nor may a Senator serve concurrently in any other legislative body in Canada.*

(5) *Provision shall be made in the Senate of Canada for the accommodation of Senators who have no formal party affiliation, including in terms of their seating within the Senate Chamber and the appointment of appropriate Parliamentary Officers to oversee their organizational and procedural interests.*

An interesting feature of the appointment of peers within the current British system is the practice of including appointments who have been nominated by the opposition parties (especially, but not exclusively, by the Leader of the Loyal Opposition) as well as by the Prime Minister. Additionally (as will be discussed, further), non-political figures also are elevated to a peerage as a result of both government nominations and recommendations from other, non-partisan quarters. Government nominations (with the obvious approval of the governing party) obviously constitute the bulk of those appointments. Nonetheless, the inclusion of opposition nominees has reinforced theoretical characteristics of the upper house within Britain, especially in terms of its less contentiously partisan inner workings and public perceptions.

As already mentioned, British peerages also are awarded upon the basis of non-partisan and non-political considerations—a category that has been popularly labeled as “peoples’ peers.”⁹⁷ This category of peers has reinforced those non-partisan and specialized characteristics of the British upper house in a manner that is instructive for Canada. One of the strongest objections to the election of Senators is a concern about the reinforcing of partisanship that elections would likely encourage. The cost of elections also could cause prospective Senators to require the institutional mechanism and support of organized political parties in order to achieve electoral success. Additionally, given the costs associated with achieving elected office within any democratic system (including Canada and particularly at the national level), it also could actually increase exposure to the influence of formal interest groups (which would provide financial backing in support of such candidacies) that has been an important complaint of current Senate practice, including Colin Campbell’s seminal treatment of the subject.

A notable feature of the House of Lords has been its Cross Benches. Its presence has strengthened claims regarding the relative independence of that legislative body, especial-

ly in relation to the government and to the British party system. It also has provided a place and role for non-partisan peers, including former Speakers of the House of Commons who have maintained the prestigious neutral procedural role that they achieved within the lower house, among other former officials. That arrangement has facilitated the participation of experts and specialists from various fields outside the conventional political path to the upper house, thus also strengthening that characteristic advantage of upper houses within that body.⁹⁸

The elected Senate of Australia also has a Cross Bench section. In that case, this section typically is reserved for elected members of minor parties (such as the Green Party of Australia) or for politicians who have been elected independently of any party affiliation. As all Australian Senators achieve that position as the result of contested elections, the concept of an “independent” Senator does not carry the same meaning or function as it does in a hereditary or (now overwhelmingly) appointed body such as the House of Lords.⁹⁹ This sort of requirement for Canada could have multiple advantages in this respect. The concept of “no party affiliation” could be a difficult one to determine and, in some cases, could be subject to challenge if it were to be abused. Yet the principle could be reasonably expected to be followed in an honest and faithful manner, especially given the conventions of parliamentary government that, ultimately, are intended to guide all Westminster model systems, including the Canadian one.

A practical consideration of this system would be the physical accommodation of both increased numbers of Senators and a Cross Bench section. The current allocation of desks within that chamber (as also is provided within the House of Commons) almost certainly could not be continued. The use of benches (as found within the current House of Lords) might provide a good example of a practical solution, especially if consistent attendance on the part of all Senators were not to be expected. In cases in which a particularly large attendance was expected, the pragmatic arrangements found within both legislative chambers of the Royal Palace of Westminster could be a useful model. In any event, meaningful parliamentary reform certainly would never be a slave to surmountable physical impediments.

(6) *In addition to Senators appointed pursuant to subsections (2) and (3) and notwithstanding the restrictions imposed by subsection (4), the following persons shall be automatically appointed (provided that they meet all other qualifications pursuant to sections 23 and 31 of this Act) as Senators: former Governors General of Canada, former Lieutenant Governors of the several Provinces, former Commissioners of the Federal Territories, former Speakers of the House of Commons, former Speakers of the legislatures of the several Provinces, for-*

mer Speakers of the several Assemblies of the Federal Territories, former Clerks of the Queen's Privy Council for Canada, former occupants of the post of senior civil servant for each of the several Provinces and Federal Territories, former Presidents of the Council of First Nations, recipients of the Order of Canada, former Governors of the Bank of Canada, former Ambassadors of Canada to the United Nations, former Commissioners of the Royal Canadian Mounted Police, former Governors of the Canadian Broadcasting Corporation/Radio Canada, former Directors of the National Gallery of Canada, former Chiefs of Staff of the Armed Forces of Canada, former Commissioners of the Human Rights Commission of Canada, any person who has been conferred the title of Right Honorable in respect of Canada and who is not, otherwise, occupying an elected or otherwise official public post or office.

(7) In the name of the Queen, the Governor General shall be entitled to appoint one additional Senator per year without regard to region, province, or territory, the several Lieutenant Governors may appoint one additional Senator, each, per every four-year period,, and the several Commissioners of Federal Territories may appoint one additional Senator per every eight-year period. None of the Senators appointed under this category shall be a member of a political party and all Senators appointed under this category shall have distinguished themselves in fields of endeavor that may include, but should not be limited to: education, the natural and physical sciences, medicine, the performing and visual arts, the literary arts, the military, police, international diplomacy, business, philanthropy, athletics, journalism, humanist and social science scholarship, and other professional and non-professional fields.

(8) The Governor General, the several Lieutenant Governors, and the several Commissioners of Federal Territories, in the name of the Queen, shall seek to appoint Senators in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

(9) Senators who are serving in the Senate at the time of the adoption of subsections (2) and (3) shall continue to serve in that Chamber, pursuant to the requirements and conditions specified in this Act.

A notable characteristic of the upper house (particularly its parliamentary variety) is its capacity to provide for the representation of distinctive constituencies that are not determined through a scheme of representation by population—in other words, the representation of “something else.” Although legislative chambers often overrepresented certain dominant groups and professions (and the current Senate of Canada is not unlike the Canadian House of

Commons in that respect), an appointed upper house frequently is well-positioned to redress that problem. However, a truly successful application of that principle often requires a conscious effort, leading to a consistent practice and a commitment to these values within a system's political culture.

This characteristic has been particularly noteworthy in connection with the House of Lords. While its membership was, historically, tied to the landed aristocracy, the introduction of life peerages in 1958 had a dramatic effect upon its composition. Previous attempts to allow for the creation of life peers (most notably under Prime Minister the Earl Russell in 1869), especially among persons who had distinguished themselves in the civil service, the military, the judiciary, science, literature, and the arts, as well as politics, had been rejected.¹⁰⁰ But even prior to the eventual adoption of a life peerage system, appointment to the British upper house had been opened by the trend of awarding hereditary peerages to persons upon the basis of having distinguished themselves in some notable way—the mathematical physicist Lord Kelvin is but one example. This trend became even more pronounced during the twentieth century and it has been reinforced through the activities of the House of Lords Appointments Commission, which is responsible for advocating and vetting such appointments.¹⁰¹

The House of Lords also has been notable for advancing parliamentary representation of otherwise underrepresented groups within British society. An anecdotal (yet particularly notable and instructive) example was the elevation of the civil rights activist David Pitt, in 1975, as Lord Pitt of Hampstead. This appointment made him the first person of African descent to have been a member of either chamber of the British parliament. Since that time, many such appointments have been made in an effort to increase the diversity of Parliament.¹⁰² While this practice may be associated with liberal principles of pluralism, it also can be claimed to reflect republican principles of virtual representation, thus enhancing the overall representation characteristic and role of the upper house. That example arguably should be especially relevant to Canada, particularly in relation to its constitutional commitment (enshrined in section 27 of the Canadian Charter of Rights and Freedoms) to multiculturalism and the overall association of Canadian society with communitarian principles of group identity and interests.¹⁰³

~~Addition of Senators in Certain Cases~~

~~26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may~~

be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

Reduction of Senate to Normal Number

~~27. In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty four Senators and no more.~~

Maximum Number of Senators

~~28. The Number of Senators shall not at any Time exceed One Hundred and thirteen.~~

Tenure of Place in Senate

~~29. (4) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.~~

~~Retirement upon attaining age of seventy five years~~

~~(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy five years.~~

Voting in Senate

~~36. (1) Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative except in relation to any vote respecting the Official Languages of Canada.~~

Double Majority for Official Languages Voting

~~(2) Any question arising in respect to the Official Languages of Canada (including pertaining to constitutional amendments) shall be subject to a role-call procedure. No decision shall be deemed to have been decided in the affirmative unless it receives both a majority of the votes cast by English-speaking Senators and a majority of the votes cast by French-speaking Senators.~~

~~(3) The determination and classification of those Senators who shall be considered as either English-speaking or French-speaking in respect of subsection (2) shall be based upon an official declaration and oath, taken before the Speaker of the Senate upon the occasion of that per-~~

~~son's initial summons to the Senate, subject to the provisions of subsection (4).~~

~~(4) The Government of any Province may challenge to the Governor-General, in the Queen's name, the classification of a Senator as being considered, for the purposes of subsections (2) and (3), either English-speaking or French-speaking. If the Governor-General concurs with that objection, the language classification of the Senator in question shall be amended, accordingly, unless another Province protests that decision, in which case the matter shall be referred to the Supreme Court of Canada and its judgment shall be final. If the Governor-General does not concur with that objection, the language classification of the Senator in question shall remain unchanged, accordingly, unless another Province protests that decision, in which case the matter shall be referred to the Supreme Court of Canada and its judgment shall be final. No Senator may ever be subject to more than one challenge regarding language classification.~~

The double majority is, interestingly, another concept that can be associated with republican principles. The guarantee that all important constituencies are politically represented within society has been a traditional feature of republican government, as illustrated by the separation of powers that distinguishes the United States political system.¹⁰⁴ This approach is particularly pertinent to Canada in this instance, especially given the centrality of language to the Canadian experience and Canadian national identity. It is, therefore, also consistent with the role of the second chamber within a polity, rather than a mere majoritarian democracy—especially as it is perceived to be particularly protective of a minority interest and minority rights.

The approval of Quebec for any scheme of Senate reform would almost certainly depend upon such a provision. Provincial interests and language interests are inseparable for Quebec in this respect and they have been central to Quebec's negotiations with the rest of Canada since confederation and into the present century.¹⁰⁵ This interest extends to other provinces with an official or, otherwise, significant francophone population, particularly including New Brunswick, Manitoba, and Ontario. The fact that it has been included within other recommendations for reform (including the Charlottetown Accord¹⁰⁶) reinforces the relevance and importance of this provision. It is a fitting final clause for this particular reform recommendation.

Conclusion

Comparative models can be helpful for understanding the options and consequences of institutional reform. Nonetheless, it can be important to make certain that apples are being compared with apples. Given the institutional nature and purpose of parliamentary systems, those

principles and values that have evolved with that systemic development need to be assessed, carefully.

A democratically elected Canadian upper house of parliament with strong legislative power must be assessed not only in terms of its purposes but, also, its long-term consequences. The upper house of a parliamentary system is not intended to provide confirmation, denial, or reinforcement of the legitimacy of a government that holds office by virtue of an electoral mandate in the lower house. Furthermore, approaching the reform of that institution from that perspective not only may undermine that central parliamentary basis of government legitimacy but it also may miss an opportunity to provide a more truly effective contribution to other facets of this complex system in a way that does not undermine the parliamentary principle of responsible government, especially within a liberal democracy.

Parliamentary upper houses have demonstrated relatively consistent characteristics in terms of the useful functions that they can contribute to that larger system. Themes of the

diversity of pluralistic representation, expert specialization, capacity for technical legislative improvement, and independent liaison and oversight relationships with the government are advantages that ought not to be lost, even if they often lack dramatic value. The British House of Lords (especially in the form in which it evolved as a result of reforms instituted throughout the twentieth century) offers an institutional example of just such an upper house that could be a much more effective model for reform of the Senate of Canada. But that model could be considered “radical” because it starkly departs from general motives and expectations surrounding Senate reform, including redressing provincial grievances, decentralizing the federal system, and providing a more direct opposition to majoritarian interests. Nonetheless, it may be exactly the sort of “radical” reform that is most appropriate to Canada and its evolving tradition of parliamentary liberal democracy. The House of Lords certainly would appear (especially symbolically) to be the antithesis of the sort of model that most Senate of Canada reform proposals typically offer. But it may just be the one that would be most quietly effective to emulate.

FOOTNOTES

- 1 This theme is addressed in Michael Lusztig, "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada," 25 *Publius*, no. 1 (Winter 1995), pp. 36-39; Peter McCormick, Ernest C. Manning, and Gordon Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981), and David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003), pp. 149-158.
- 2 David Elton and Peter McCormick, *A Blueprint for Senate Reform* (Calgary: Canada West Foundation, 1990).
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