Report

Financial Privilege

The Undoubted and Sole Right of the Commons?

Sir Malcolm Jack KCB PhD FSA
Richard Reid PhD

THE CONSTITUTION SOCIETY

UK Constitutional Law Association

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About the Authors

Sir Malcolm Jack was Clerk of the House of Commons from 2006–2011. He is editor of the current, twenty-fourth edition of Erskine May's *Parliamentary Practice*, 2011. He lectures and writes on constitutional and historical subjects, having published widely on the history of ideas as well as on aspects of British, European and South African history. He is a Fellow of the Society of Antiquaries and a member of the Advisory Board of the Constitution Society.

Richard Reid is a Research Fellow at the Institute for Governance and Policy Analysis at the University of Canberra and completed his PhD on reform of the House of Lords in 2016. He is currently Associate Editor of the *International Political Science Review*, and has published articles in *Parliamentary Affairs*, *Commonwealth and Comparative Politics*, *Asia-Pacific Journal of Public Administration* and *Australian Journal of Public Administration*. His research focuses on the House of Lords and its reform, but also encompasses studies of legislative reform both in the UK and Australia.

Summary

This paper examines the relationship of the House of Commons and the House of Lords in the area of financial privilege, considering the basis of the Commons' claim to financial primacy and the conventions that have grown up around that claim; it considers the provisions of the Parliament Acts and the way in which they have affected the handling of financial business between the Houses – particularly in respect of bills – before turning to the subject of secondary legislation and the way in which it impinges upon the matter of financial privilege. Finally it examines the conclusions and recommendations of the Strathclyde Review on secondary legislation and the primacy of the House of Commons.

PART 1
Conventions in Respect of Financial Privilege

Relations between the Houses: conventions

1. The powers and relationship of separate legislative chambers are likely to be ambiguous in a country, such as the United Kingdom, which does not have a single, codified constitutional document defining such arrangements. There are indeed certain statutes affecting the relations between the two Houses, principally the Parliament Acts (1911 and 1949) and in the distant past, the two Houses held joint meetings under specified, agreed terms to consider amendments to bills.[1] In modern times, joint committees of both Houses meet together but each constituent part of the committee is a separate entity, governed by the rules of its respective House. There are no joint rules of procedure such as those that exist in certain Commonwealth countries like South Africa[2] or provision for joint meetings of the Houses to conduct business (rather

1 See *Erskine May, Parliamentary Practice*, 24th Edition (2011) page 171 n.59 for a description of the ancient conferences that took place between the Houses. [All further references are to this edition.] A brief list of statutes with constitutional significance is set out in D. Oliver, *Constitutional Guardians: The House of Lords* The Constitution Society (2015) page 13. A fuller list is set out in A. Blick, D. Howarth, & N. Le Roux, *Distinguishing constitutional legislation A Modest proposal* The Constitution Society (2014) pages 44/47.

2 See Joint Rules of [the South African] Parliament, 6th Edition (2011).

than just to meet on ceremonial occasions) as provided for in the Australian constitution.[3]

2. Instead the relationship between the two Houses has grown from traditional practices which have, from time to time, been articulated as conventions. According to Government evidence given to the last Joint Committee on Conventions, the most important feature about a convention is that 'there must be a shared understanding of what it means'[4] at any given time, and that 'a contested convention is not a convention at all.'[5] Given the possibility, and indeed likelihood, that conventions will evolve over time, an element of ambiguity enters the constitutional dialogue which, according to a recent observer 'presents something of a puzzle for those seeking authoritative sources for the meaning of 'constitutional'…'[6]

3. A number of parliamentary reports, both of select and joint committees, have been concerned with reform of the composition of the Lords over recent years. Earlier committees took the view that a reform in the composition of the House of Lords would not affect its role and, by implication, its function in respect of Commons' privilege. In a report of the Commons Public Administration Committee in 2002, the Committee insisted that reform had to be based on the notion that there would be no change in

3 Constitution of the Commonwealth of Australia, Section 57. In practice, joint meetings of the two Houses are rare.

4 Joint Committee on Conventions, *Conventions of the UK Parliament* Report (Session 2005–06) HL Paper 265-1 HC1212-1, vol. 1 pages 31/32. [All further references to the Joint Committee on Conventions are to this Report.]

5 Ibid.

6 D. Oliver, *Constitutional Guardians* page 8.

the role of the Lords viz. a viz. the Commons; that is, there would be no challenge to the primacy of that House.[7] The Joint Committee on Lords Reform (Session 2002–03) set out a range of possible changes to the composition of the Lords from a fully appointed to a fully elected chamber but added that it saw a 'continuation of the present role of the House of Lords and of the existing conventions governing its relations with the House of Commons.'[8]

4. This opinion has been set aside by the Joint Committee on Conventions. While the Committee concentrated on analysing its understanding of specific conventions – principally the Salisbury-Addison convention in respect of the self-restraining exercise by the Lords in respect of certain bills brought from the Commons[9] – and how they worked, it also acknowledged that a convention, by its nature, may change or 'outlive its usefulness…' and 'needs to be re-examined in the new conditions that arise.'[10] That might apply over a given historical period or when some constitutional change, brought about by political pressure, is suddenly made. By implication, any reform of the House of Lords, even if it were to be limited to its composition, would be bound to affect the conventions that govern the relations between the Houses which would need to be re-examined. The Government, in its response to the Joint Committee, agreed with that view stating that reform of the Lords 'will raise the question of whether or not the current

7 Public Administration Select Committee, 5th Report *The Second Chamber: Continuing the Reform* (Session 2001–2002) paragraph 69.

8 Joint Committee on House of Lords Reform, *House of Lords Reform* 1st Report (Session 2002–03). HL Paper 17, HC 171 page 5.

9 See paragraph 32 below.

10 Joint Committee on Conventions, (Session 2005–06) page 26.

conventions should be carried forward to a differently constituted House.'[11]

5. However, how such redefinition might be achieved remains unclear. One way of dealing with changes considered by the Joint Committee on Conventions was for some form of codification of conventions to be agreed so that it would be easier to implement changes by amending an existing code. However, no clear agreement about what form such a code could take emerged from the evidence the Committee took. The then Leader of the House of Commons hinted at some broadly agreed set of practices which would need to be endorsed by resolutions in both Houses and incorporated into the Standing Orders.[12] Some witnesses warned of the difficulty of defining conventions; others cast doubts on the wisdom of writing down conventions and thereby limiting their flexibility.[13] The Committee concluded that codification was not an option since 'Conventions, by their nature, are unenforceable.'[14] There the matter was left.

Handling of constitutional reform

6. Subsequently, various committees have returned to the subject of how constitutional changes are handled. In its report (of Session 2010–12), the House of Lords Select Committee on the Constitution regretted the absence of any

11 Government Response to the Joint Committee on Conventions *Conventions of the UK Parliament* (December, 2006) Cm 6997 page 4.

12 Joint Committee on Conventions, (Session 2005–06) page 68.

13 Ibid. pages 69–73.

14 Ibid. page 73.

clear process for introducing constitutional change.[15] In 2013, the Political and Constitutional Reform Committee (wound up at the end of the Parliament in 2015) recommended the establishment of a constitutional convention which would take stock of the various ad hoc constitutional changes of the two previous decades, including the roles of, and relations between, the Houses. The Committee, although not unanimous in its view of the need for a convention as opposed to a commission, concluded that an overview of all UK constitutional arrangements was needed. There has been no positive response from Government.[16]

7. In a paper in 2014 from the Constitution Society, its authors noted that unlike the practice in most democratic states 'in Britain there is no legislative process for constitutional change other than ordinary legislation, nor is there any clear or generally agreed distinction between constitutional and other laws.'[17] They argued that the potential shortcomings of such an approach had become increasingly evident from 1997 as successive governments introduced constitutional reforms piecemeal.

8. In appearances before various select committees of both Houses, the Constitution Society had previously emphasised the need for distinguishing constitutional legislation from other measures in a manner widely understood, for example along the lines of definitions drawn up by Professor Sir John

15 See Select Committee on the Constitution *The Process of constitutional change* 15th Report (Session 2010–2012) HL 177.

16 See Political & Constitutional Reform Committee *Do we need a constitutional convention for the UK?* 4th Report (Session 2012–2013) HC371.

17 Blick, Howarth & Le Roux, *Distinguishing Constitutional legislation*, page 9.

Baker.[18] The Government had consistently opposed such an approach on the grounds that it was not possible to define clearly constitutional features of legislation. In response the authors of the paper, setting aside the attempt to define an 'exhaustive' list of constitutional characteristics, proposed instead that committees should be set up in both Houses to monitor bills and statutory instruments with the purpose of distinguishing which provisions were of a constitutional nature.[19] No steps have been taken to do so.

Origin of Commons' 'sole' right

9. In the area of financial privilege, the most significant of the conventions governing the relations between the Houses, is the insistence by the House of Commons that it has pre-eminence in financial matters and indeed a sole and undoubted right in respect of them. That assertion of pre-eminence is based upon two resolutions of the seventeenth century, although they were restated in later periods.[20]

10. The first resolution, of 1671, dealt with taxation, stating simply 'That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords.'[21] Taxation remains a major part of the source of money voted to the Executive and forms the major provision of Finance Bills.

18 Ibid. page 27 where the Baker criteria are set out.

19 Ibid. page 32.

20 See *Erskine May*, page 786 n. 7. For a discussion of parliamentary privilege in general, see Richard Gordon & Malcolm Jack, *Parliamentary Privilege: Evolution or Codification?* The Constitution Society (2013).

21 *House of Commons Journal* Vol. 9 13 April 1671.

11. The second Resolution, of 1678 went wider and it is worth setting it out in full. The House resolved:

> *That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords.*"[22]

The resolution of 1678 thus widened the scope of the claim to privilege so that it henceforth included supply of money to the Crown and thereby some control over the policy for which revenue was being raised.

12. Taken together the two resolutions form the Commons' claim that in both areas of financial legislation – whether that dealing with public expenditure (the granting of Supply) or that concerned with raising revenue (Ways and Means) it has sole rights. In respect of charges or taxation the Commons would henceforth treat as a breach of privilege any alteration to such a charge by the Lords, whether to increase or reduce the amount or alter its duration, mode of assessment, levy, collection, appropriation or management. In modern times the claim has extended to bills dealing with local revenues or charges although the Commons has waived its privilege in respect of Lords amendments proposing changes to council tax and in respect of certain other charges.[23] The National Insurance Fund, supplemented by money provided

22 *House of Commons Journal* Vol. 9 3 July 1678.

23 *Erskine May*, page 786.

by Parliament, is also deemed to be within the scope of Commons' privilege.

13. These rights, to impose taxes and to vote money for the public service, give the Commons the most important powers vested in the legislature and are a mark of its dominant influence as the elected assembly which represents the people and to which the Government of the day is accountable. In the Speech from the Throne to both Houses at the opening of Parliament, the demand for Supply, which is the sole right of the Executive to seek, is addressed to the Commons only. In its reply to the Joint Committee on Conventions, the Government put the matter in this way:

> *Commons' financial privilege and the limitations on the powers of the House of Lords in this area are fundamental cornerstones of our Parliamentary system. Their erosion or undermining carry grave constitutional consequences.*[24]

Restrictions on Lords' rights in principle

14. The Commons' rights underlie the constitutional convention that primacy rests with the Commons and in cases of conflict the Lords should ultimately give way. In respect of financial privilege, certain restrictions on the Lords' right to initiate or amend bills of a financial nature are the context in which the convention of Commons' primacy applies.

15. The restriction of the Lords to initiate financial legislation means that, in the absence of some device to lay aside its privilege, the Commons will not entertain any bill sent from the Lords which infringes the conditions attaching to privilege outlined in paragraphs 9 to 13 above. Such a bill

24 Government response to Joint Committee on Conventions, page 16.

would be either laid aside or in the traditional manner of putting things off indefinitely, postponed for six months.

16. It has not always proved convenient for the Commons to insist on its 'unwaivable' privilege and various devices have been introduced to relax its application. Thus in respect of bills whose provisions are concerned with exacting fees and penalties, a Standing Order of the Commons (no. 79) has been adopted whereby in respect of a bill, subject to certain specified conditions, containing 'any pecuniary penalty, forfeiture or fee shall be authorised, imposed, appropriated, regulated, varied or extinguished, this House will not insist on its ancient and undoubted privileges…'[25]

17. The other major restriction on the Lords is in respect of that House's right to amend bills. The principal bills to which this applies are the annual Finance Bill (setting out tax proposals but in modern times presented in the context of Government economic policy as well) and the Consolidated Fund Bills (providing for appropriation of monies to the public service), historically known as bills of 'aids and supplies.' Other bills, founded on Ways and Means resolutions, such as the bill for increasing National Service contributions, have been regarded as having the characteristics of bills of aids and supplies and are therefore also exempt from amendment by the Lords.

18. Where bills touch upon the Commons' right to impose taxation, they may also be considered as bills having the character of bills of aids and supplies. In some cases in the past, the Lords have offered amendments which the Commons have rejected on grounds of privilege but in most cases, such

25 Standing Orders of the House of Commons (Public Business) (10th February, 2016) pages 63/64. [All further references to the Commons Standing Orders are to this edition.]

as in the National Contributions Bill (2002), the Lords have not held a committee stage or offered amendments.[26]

19. A further relaxation of Commons' privilege is provided for by the device of waiving its privilege in respect of Lords amendments which have been identified as impinging on it. If the House agrees to waive its privilege in respect of any amendment so identified, a record is made in the *Journal of the House* that the Commons has waived its privilege. If, on the other hand, the Commons insists on its privilege, the hallowed formula it uses in the message back to the Lords is that 'the Commons do not offer any further reason, trusting that this will be deemed sufficient.'

20. In the event that the Lords amendment involves a charge which has not been authorised by a money resolution moved by a Minister of the Crown in the Commons, Standing Order 78 (3) of the Commons provides that:

> *If the Speaker is satisfied that a Lords amendment imposes a charge such as is required to be authorised by resolution of the House under Standing Order No. 49 (Certain proceedings relating to public money) and that such charge has not been so authorised, on reaching that amendment the Speaker shall declare that he is so satisfied and the amendment shall be deemed to have been disagreed to and shall be so recorded in the Journal.*[27]

This Commons practice is sometimes known as 'unwaivable financial privilege'. For their part, the Lords are advised against introducing such amendments unless it is clear that a money resolution covering such a charge will actually be moved in the Commons.

26 For examples see *Erskine May*, page 791.

27 Commons Standing Orders (Public Business) page 63.

Tacking

21. A historically controversial matter in respect of Commons' financial privilege has been the 'tacking' to bills of aids and supplies provisions not strictly within the exemption attaching to matters affected by Commons' privilege. Very early on, in 1702, the Lords considered that such a practice infringed their normal right to amend bills and passed a resolution which has subsequently been embodied in a Standing Order (no. 52) as follows:

> *The annexing of any clause or clauses to a bill of aid and supply, the matter of which is foreign to and different from the matter of the said bill of aid or supply, is unparliamentary, and tends to the destruction of constitutional government.*[28]

22. The problem of tacking has arisen in Finance Bills because provisions not necessarily connected with national finance have been included despite the limitations of their scope. This is traditionally done in the Commons by a procedural Motion which takes the form 'Notwithstanding anything to the contrary in the practice of the House' such and such a provision shall be included in the bill. These matters, strictly outside the scope of the long title of the bill, have for example set out arrangements with other EU member countries of measures to control tax evasion or even contained specific instructions to an industry not to engage in certain activity which Government has decided to prohibit. Such material is, in the strictest sense, tacked on to, rather than forming an intrinsic part of, a Finance Bill.[29]

28 *Erskine May*, page 791.

29 Ibid. page 781.

23. The Lords Standing Order has not been invoked in modern times but from time to time complaints about tacking have been raised particularly in respect of matter tacked onto bills whose primary purpose is financial. These complaints are understood in the Commons and, as in the case of the operation of all conventions, must be heeded if the convention is to remain valid. From time to time Government will consider it necessary to insert certain provisions outside the scope of a bill on grounds of public urgency. If understood by the Lords, such provisions, though of a tacking nature, will be ignored.

24. Instead of complaints about tacking, disquiet has been expressed in recent times in the Lords about the very wide interpretation that the Commons make of financial privilege with the result that it has been used as a way of preventing the Lords debating substantive policy matters. This may be the result of an increase in the number of provisions relating to charges and the manner in which Lords amendments are grouped when taken in the Commons. We shall return to these issues in Section 3 below when discussing the manner in which the Houses conduct business of a financial nature.[30]

Lords' right to reject Bills

25. However, there remains one area of the Lords power which may complicate the application of Commons primacy, mainly in its undoubted right to reject bills, even those of an out rightly financial provision. *Erskine May* states that such

30 For a discussion of this matter from the point of view of the Lords, see Appendix 2: Financial Privilege (A Note by the Clerk of the Parliaments), Committee on Constitution *Money Bills and Commons Financial Privilege* Tenth Report (Session 2010–12) HL Paper 97.

a right is 'unquestionable'.[31] Prior to 1860 the Lords rejected many bills with financial provisions affecting public policy. In order to stop this practice, the Commons consolidated financial provision into a single annual bill. That bill, being one of aids and supplies, could not be amended by the Lords.

26. So far as provisions in bills which were not in themselves financial, the Lords retained a right to omit provisions creating charges on the people when such provisions form a separate subject in a bill which the Lords were otherwise entitled to amend. On that basis, Part III of the Land Commission Bill (1966–67) was struck out by the Lords. When the bill returned to the Commons, it disagreed to the Lords amendment removing Part III but made its own amendment which in certain respects incorporated the changes that had been made in the Lords. That amendment was agreed to by the Lords and written into the bill.[32]

27. The last occasion when the Lords rejected outright a bill of aids and supplies occurred in 1909 when the Finance Bill was rejected. This led to the restrictions imposed by the Parliament Act (1911) a subject to which we shall now turn to in Section 2 of this paper. We will also consider in what respects this right may be exercised in the context of secondary legislation in Section 5 below following the recent dispute over the draft Tax Credits Regulations in 2015.

31 *Erskine May*, page 794.

32 See *Erskine May*, page 795.

PART 2
Parliament Acts

Parliament Acts 1911 and 1949: background

28. Through the great reform acts of the nineteenth century[33] the House of Commons increased its democratic legitimacy, gradually drawing power from the House of Lords. Indeed two of the great nineteenth-century prime ministers, Disraeli and Gladstone led from the House of Commons. Nevertheless, it was still just as common for a prime minister to be drawn from the House of Lords as from the House of Commons. This is demonstrated by the fact that it was from the House of Lords, under the prime ministership of the Marquess of Salisbury, that Britain entered the 20th century.

29. Despite the increased legitimacy gained by the House of Commons throughout the nineteenth century, the Lords became a road-block to successive Liberal governments. As Perceval argues 'After 1867, the Lords became even more of an immovable object to the Liberals, and the Commons an even more irresistible force.'[34] The predictable effect of this contestation was that 'Radical schemes began about 1880 to be ventilated for abolishing or reforming the House

33 The widening of the franchise during this period was secured through: The Reform Act 1832, The Second Reform Act 1867, and The Third Reform Act 1884.

34 Perceval, R.W. (1953) 'The Origin and Development of the House of Lords', *Parliamentary Affairs*, 7 (1), pages 33/48, page 46.

[of Lords].'[35] Although the Commons had increased in its power, its supremacy over the Lords was yet to be formally established and accepted.

30. The Parliament Act 1911, introduced by Asquith's government, finally established the supremacy of the House of Commons over the House of Lords.[36] Although debate about limiting the powers of the House of Lords was well established in the nineteenth century, it was the election of the Liberal government in 1906 that placed political majorities in each House (Liberal in the Commons and Unionist in the Lords) at odds, the result of which were clashes between the two chambers of parliament. The Liberal government began considering its options for Lords' reform. Ballinger[37] argues that the two plans given most consideration were joint sittings of the two chambers and a suspensory veto. It was the suspensory veto that won most favour amongst Liberals.

31. The immediate trigger for reform was the use of the veto by the House of Lords of the 1909 'People's Budget'. The party political obstruction of the House of Lords of the Government's agenda was seen as sufficient grounds for curbing the power of the House. Crucially the government secured, from both King Edward VII and his successor King George V, a guarantee that they would create as many new Liberal peers as necessary to ensure the passage of the reform. Following the Liberal victory in the 1910 general election, the Parliament Act was introduced into the House

35 Ibid.

36 Norton, P. (2012) 'Resisting the Inevitable? The Parliament Act 1911', *Parliamentary History*, 31 (3), pages 444/459, page 444.

37 Ballinger, C. (2011) 'Hedging and Ditching: The Parliament Act 1911', *Parliamentary History*, 30 (1), pages 19/32.

of Commons. In spite of sustained opposition by a small group of peers, the bill was passed and became law in 1911. The 1911 Act removed the right of the Lords to reject or amend money bills, and reduced the outright veto of the Lords over other bills introduced in the House of Commons to a suspensory veto of two years, except any measure to prolong the life of a Parliament.

32. The next important reform came in 1949. The 1945 Labour Party manifesto stated that 'we give clear notice that we will not tolerate obstruction of the people's will by the House of Lords.'[38] Following the election of the Labour government under Clement Attlee, the then leader of the opposition in the House of Lords and scion of the great Conservative family, Lord Salisbury, established the convention that became known as the Salisbury Doctrine. The convention was that the House of Lords should not use its powers to delay legislation that had formed part of the election manifesto of the party commanding a majority in the House of Commons. This restraining measure was to protect against the in-built majority of non-Labour peers in the House of Lords.

33. The Parliament Act 1949 itself was a pre-emptive measure introduced by the Attlee Labour government to enable the circumvention of any potential opposition by the House of Lords to their radical legislative programme. The 1949 Act further reduced the Lords' suspensory veto over Commons legislation from two years to one. Peter Dorey[39] argues that the reform was introduced for two reasons. In the first

38 Dorey, P. (2006) '1949, 1969, 1999: The Labour Party and House of Lords Reform', *Parliamentary Affairs*, 59 (4), pages 599/620, page 600.

39 Ibid. page 601.

place, the government had had, for various reasons, to delay the introduction of their controversial plan to nationalise the British iron and steel industries. That meant that its introduction would fall within the timeframe whereby the Lords would be able to delay it until following the election to be held at the latest in 1950. Secondly, that the Labour government needed to placate its Left wing. Reform of the House of Lords provided such an opportunity.

Bills other than Money Bills

34. The purpose of the Parliament Act 1911 was to restrict the power of the House of Lords in the legislative process. It did so in two different ways by distinguishing between Money Bills and bills other than Money Bills, with the certification of the Speaker of the House of Commons as final in designating bills as Money Bills. The House of Lords was stripped of its powers in regards to Money Bills but was given a suspensory veto of two years over bills other than Money Bills. The Parliament Act 1949 reduced this suspensory veto over Bills other than Money Bills to one year. It is important to note that there are a range of legislative types which are exempt from the Parliaments Acts, namely: bills originally introduced in the House of Lords, bills to extend the life of a Parliament beyond five years,[40] provisional order confirmation bills, private bills or delegated legislation.[41] Therefore the designation of bills other than Money Bills covers all bills that have either not received certification

40 This is a lesser-known part of the Parliament Act 1911. Along with restricting the powers of the House of Lords, the Act reduced the maximum life of a Parliament (the time between elections) from seven to five years.

41 Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, (2015), page 164. 8.196. [All further references are to this edition.]

from the Speaker as a Money Bill, or are not covered by the Parliament Acts.

35. Although much is made of the role of the House of Lords as a 'revising' chamber, this description of its function underestimates the amount of legislation that is first introduced into Parliament in the House of Lords, rather than in the House of Commons. Although the proportion is variable, it hovers around a third of all government bills.[42] The important point here is that the Parliament Acts do not apply to this third of legislation, meaning the House of Lords has a significant role in legislating, not only revising.

36. Public bills in the House of Lords are considered in five distinct stages: introduction and first reading, second reading, committee, report, and third reading and passing.[43] The bill is then returned to the House of Commons with or without amendments. The procedure for bills other than Money Bills depends on whether the Parliament Acts are applicable, i.e. are not one of the types of legislation discussed above in paragraph 34 above. In the case of bills which are not covered by the Parliament Acts, the House of Lords retains its absolute veto.

42 Figures for the most recent session (2014–2015) are lower than average with 22 bills originating in the Commons and 4 in the Lords, compared to the previous session where 17 bills originated in the Commons and 8 in the Lords. One explanation for this could be the strength of opposition in the Lords to government legislation and the concomitant desire to ensure the applicability of the Parliament Acts to the majority of proposed legislation.

43 Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, page 121 8.01.

37. If a bill is covered by the Parliament Acts, and not designated as a Money Bill, then:

> *it is provided that a bill which is passed by the House of Commons in two successive sessions (whether of the same Parliament or not), and which, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, shall, on its rejection for the second time by the House of Lords, unless the House of Commons direct to the contrary, be presented to Her Majesty and become an Act of Parliament on the Royal Assent being signified to it. One year must elapse between the second reading of the bill in the House of Commons in the first of these sessions and its passing in the House of Commons in the second session.*[44]

38. The intervals written into the Parliament Acts, even with the reduction provided for in the 1949 Act (from three to two sessions and from two years to one year), has limited the ability of respective Governments to proceed under the Acts except in the early period of a five year Parliament. In political terms that has meant difficulty in proceeding with any measure strongly opposed in the House of Lords except in the early stages of a Parliament.

Procedure in respect of Money Bills

39. The Parliament Act 1911 defines a Money bill as:

> *a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other*

44 *Erskine May*, page 649.

> *financial purposes of charges on the Consolidated Fund, or the National Loans Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation", "public money", "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.*[45]

The Speaker of the House of Commons provides a certificate designating a bill as a Money bill for the purposes of the Parliament Acts. He or she is advised by an impartial official, the Clerk of Legislation, on criteria for certification. The Companion to the Standing Orders and Guide to the Proceedings of the House of Lords makes it clear that the House accepts the position defined in the Act, namely that the certificate of the Speaker is conclusive for all purposes.[46]

40. If a bill is designated as a Money Bill by the Speaker, then the following procedure applies:

> *A 'Money bill' which has been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, but is not passed by the House of Lords without amendment within one month after it is so sent up, is, unless the House of Commons direct to the contrary, to be presented for the Royal Assent and becomes an Act of Parliament on the Royal Assent being signified to it.*[47]

45 Parliament Act 1911, section 1, subsection 2.

46 The Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, s8.197, page 164.

47 *Erskine May,* page 796.

Other provisions

41. Certain provisions in the Act provide for compromise to be reached during the passage of a bill under the Act between the Houses. In Section 2(4) there is a provision for the Lords to make amendments which, if agreed to by the Commons, can be put in the bill which will nevertheless be enacted under the Parliament Act.

42. In the proviso to Section 2(4) the Commons may 'suggest any further amendments without inserting them in the bill.' Such amendments accompany the bill when it is sent to the Lords but are not part of it. The concluding words of the subsection make it clear that the making of such 'compromise' amendments does not affect the ability of the Commons to proceed with the bill under the Parliament Act.

43. Suggested amendments must be proposed before the third reading of the bill in the Commons. Each suggested amendment is treated as a separate resolution for which notice has been given. If a suggested amendment is agreed to, it is sent to the Lords with the bill after it has been passed by the House of Commons. If such an amendment is agreed to by the Lords, it is treated as an amendment made by the Lords and agreed to by the Commons. It is also provided that the exercise of this power shall not prejudice the position of the bill in the event of its rejection by the House of Lords.

Challenge to Validity of 1949 Act

44. The most recent prominent use of the Parliament Act 1949 was in 2004 when the Blair government secured passage of the Hunting Act in the face of opposition by the House

of Lords. The legislation banned the hunting of mammals with dogs and was defeated in the House of Lords twice, following passage in the House of Commons, thus satisfying the enacting formula for use of the Parliament Act. The bill was strongly supported by the government backbenches in the Commons and equally vigorously opposed in the House of Lords.[48]

45. Nevertheless, an attempt was made by way of a suggested amendment in the Commons to get agreement to the bill in the Lords.[49] Proceedings in that House were governed by a complex set of procedural motions; one of which was to leave out a clause of the bill thereby providing for the deferral of the commencement date of various provisions of the bill.[50] Some questioning of when the Lords needed to consider such an amendment arose (i.e. if it could be free standing of the bill) but the Speaker of the House of Commons did not have to make a decision on whether or not to include the suggested amendment in the bill to be sent for Royal Assent because, in the final stages of ping pong, it was rejected in the Lords.

46. The Government ensured Royal Assent through use of the Parliament Act 1949 on 18th November 2004.[51]

48 Plumb, A. and Marsh, D. (2013) 'Beyond party discipline: UK Parliamentary voting on fox hunting', *British Politics*, 8 (3), pages 313/332.

49 See para 41 to 43 above on the procedure for suggested amendments.

50 See House of Commons: Votes & Proceedings, 15th September, 2004.

51 This being the fourth occasion where the 1949 Act was employed, the others being the War Crimes Act 1991, the European Parliamentary Elections Act 1999, and the Sexual Offences (Amendment) Act 2000. Three Acts were passed under the 1911 Act – the Government of Ireland Act 1914, the Welsh Church Act 1914, and the Parliament Act 1949.

47. An important sequel followed the passing of the Hunting Act 2004 as three private citizens went to the courts to challenge its validity. The main argument of the claimants was that since the Parliament Act 1949 was itself passed under the Parliament Act 1911, it was a form of 'delegated legislation' rather than an Act in its own right. It could not be used as to extend the power of the 1911 Act[52] and thereby further amend the powers of the House of Lords.[53]

48. The Appellate Committee of the House of Lords unanimously rejected this significant challenge to the validity of the use of the Parliament Act 1949. The Court held that the basis of the validity of the Parliament Act 1949 was that the Parliament Act 1911 allowed for the House of Commons to by-pass the House of Lords when certain requirements were met. The Parliament Act 1949 met these requirements and was therefore a valid use of the Parliament Act 1911, and consequently a valid piece of legislation. A pronouncement of this sort by the courts on the validity of an act was without precedent.

49. The unusual nature of the case was recognised in the judgment of the Court of Appeal in the following words:

> *The reality is that the 1911 Act was a most unusual statute. By that statute the House of Lords, the House of Commons and the King used the machinery of legislation to make a fundamental constitutional change. Nearly 100 years after the event, the court has been invited to rule on the precise nature and extent of that change. We have decided that it was right for the Administrative Court*

52 See R. (*Jackson) v. Attorney General* [2005] UKHL 56, [2005]3 W.L.R. 733.

53 Elliott, M. (2006) 'The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts', *Cambridge Law Journal*, 65 (1), pages 1/4.

> *to accept that invitation. The authority of the 1949 Act purported to be derived from the 1911 Act. The latter Act, by s.3, expressly envisaged the possibility that the validity of subsequent Acts enacted pursuant to its provisions might be subjected to judicial scrutiny. The effect of the 1911 Act was undoubtedly susceptible to judicial analysis. However, in considering that effect, the Administrative Court was acting as a constitutional court. There was no precise precedent for the jurisdiction that it was exercising.*[54]

50. Although the Court accepted the validity of the 1949 Act as a reasonable amendment of the 1911 Act, it articulated certain constitutionally important reservations. The Court's basis for accepting the validity of the 1949 Act was that the fundamental balance between the two Houses was not substantially changed by it.

51. However, the Court stated that it was not willing to guarantee that any amendment of the 1911 Act would be similarly valid but rather reserved judgment for future cases as they arose. The Court added that 'the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act.'[55] This reservation may be important in any attempt to further amend the 1911 Act that the courts deem a substantial revision of the fundamental balance between the Lords and the Commons.

54 [2005] EWCA Civ 126, at para 12.

55 [2005] EWCA Civ 126, at para 100.

PART 3
Handling of Bills with Financial Provisions

Financial Bills in the Commons

52. The two broad categories of financial bills in the Commons – or in the traditional term bills of 'aids and supplies'– reflect the difference between bills that deal with taxation on the one hand and those that grant money (Supply) to the Executive on the other, a distinction reflected in the language of the Resolutions of 1671 and 1678 which we have considered in Part 1 above.[56]

53. Such bills are immediately identifiable by words inserted into the enacting formula that precedes the long title of the bill. In respect of Consolidated Fund Bills the formula is fairly straightforward – and is to the effect that the House resolves to authorise the use of resources out of the Consolidated Fund to defray expenses voted in the Estimates by the House in the current Session.

54. However, in the case of Finance Bills, the formula is more elaborate and runs as follows:

56 See paragraphs 9 to 13 above.

> *We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and to grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted, etc.*[57]

55. As we have also seen, in both cases the Commons claims financial privilege in respect of these bills, as is made clear in the restrictive words of the formula.[58]

56. By long standing convention legislation is necessary to sanction both taxation and expenditure. The method by which this requirement is effected is by resolution of the House. All the provisions of a Finance Bill must be covered by such resolutions, known as 'charging' or 'founding' resolutions. The principle being observed by this practice is that the Commons agrees only to specific amounts of money and the Executive is only authorised to act in respect of those specific sums. The other principle is that of annuality so that both types of financial bills have been introduced sessionally over a long historical period. However, as we shall see, provisions for future years can be inserted into a Finance Bill.

Finance Bills

57. In modern practice the annual financial statement of the Chancellor of the Exchequer includes details of Government plans for public expenditure and taxation within the broad

57 *Erskine May*, page 529.

58 See paragraphs 12 and 13 above.

context of the state of the economy. While all the founding resolutions of the Finance Bill are before the House, the debate, which is of a general nature and lasts for several days, takes place on the basis of the first of the resolutions, known as the 'Amendment of the Law' Resolution.

58. The Amendment of the Law Resolution is stated in wide terms and is amendable. Amendments may seek to remove restrictions or to modify provisions which, if agreed to by the House, could lead to changes in taxation proposals. Amendments cannot, of course, propose increases on the principle that only the Government initiates charging motions as we have considered in Part 1 above.[59] Once the Amendment of the Law Resolution is passed, the remaining resolutions, under Standing Order 51 (3) are put forthwith and a bill is ordered to be brought in on such of the resolutions as have been agreed to.[60]

59. The scope of the Finance Bill is 'to consider the Ways and Means for raising the supply to be granted to Her Majesty' formerly done by the House in the Committee of Ways and Means.[61] This was the whole House sitting in Committee, presided over by the Chairman of Ways and Means, in order to ensure a more informal manner of proceeding than in the House itself. Committee stage could last many days.

60. The public revenue and finance covered by the Bill applies to central government only: the financing of other bodies, such as local government, is outside the scope of such

59 See paragraph 13 and 20 above.

60 Standing Orders of the House of Commons, (Public Business) page 50.

61 The Committee of Ways and Means was abolished in 1967 but sections of Finance Bills continue to be taken in Committee of the Whole House.

bills. In addition the Finance Bill relates to the imposition and alteration of taxes for a particular year, the current financial year. This limitation can be lifted (and frequently is) by procedural motions allowing for the authorisation of taxation for future years which can be moved as founding resolutions to the bill. However, by convention such matters should not be too far removed from central finance.[62]

61. In modern practice the committee stage of the annual Finance Bill is divided between Committee of the Whole House and Standing Committee, the former which takes place on the Floor of the House where any Member can attend, the latter upstairs in a committee room with nominated Members. Apart from the usual restrictions applying to amendments on scope, amendments at Committee Stage must be authorised by the founding resolutions unless an Amendment of the Law resolution has been agreed. In the latter case the Committee is free to consider new clauses for the remission of taxes in force not spelt out in the founding resolutions. Other complex arrangements exist in respect of amendments seeking to alleviate taxes or to reduce or omit drawbacks or other alleviations in the bill.[63]

Consolidated Fund (Appropriation) Bills

62. In respect of Supply the effects of the passing of a Consolidated Fund Bill is to authorise the Treasury to issue money out of the Consolidated Fund to defray the cost of public services. The first bill of the session, introduced in the autumn, incorporates Votes on Account for the defence

62 See *Erskine May*, page 781 for details of the kind of provisions authorised by such resolutions in recent years.

63 Ibid. page 783.

and civil services, Winter Supplementaries and certain other public expenditure. As in the case of Finance Bills, the principle of annuality applies: separate provision is made in the bill for each financial year.

63. The second Consolidated Fund Bill of the session becomes known as the Appropriation Bill. It authorises the issue of further sums and the use of resources up to the amounts voted in the main Estimates, agreed in spring. A third Consolidated Fund Bill (which becomes the Appropriation (No 2) Act) authorises and appropriates the 'balances to complete' set out in the Main Estimates and any Excess Votes required.

64. Under Standing Order No 56 proceedings on a Consolidated Fund or Appropriation Bill are entirely formal.[64] The questions on second and third reading are put forthwith and no debate takes place. These bills are invariably certified by the Speaker as 'Money Bills' under the Parliament Act 1911.[65] In the Lords they are not committed and no debate takes place on them.

Restrictions on Lords' Rights in practice

65. We have considered the principles that restrict Lords' rights in respect of financial legislation in Part 1.[66] They may be summarised as confining the role of the Lords to agreeing to bills (and by implication retaining the right to reject them outright) but neither initiating nor amending bills of a financial nature.

64 Standing Orders of the House of Commons (Public Business) page 54.

65 See paragraphs 39 and 40 above.

66 See paragraphs 14 to 20 above.

66. In respect of Money Bills under the Parliament Acts, we have also noted that, in the words of the Acts, they are certified by the Speaker of the House of Commons *only* if all the provisions in the bill are of a financial nature. Those subjects are defined as the

> *imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund or the National Loans Fund, or on money provided by Parliament or the variation or repeal of any such charges*'

and in the case of Supply:

> *the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them.*[67]

67. So far as the passage of such bills between the Houses, when the Speaker has certified a bill to be a Money Bill (and his certification is final and cannot be challenged in the courts), that fact is recorded in the *Journal of the House of Commons* and the bill is transmitted to the Lords with the certification. In reaching his decision the Speaker is advised by the Clerk of Legislation, a senior official of the House whose advice is entirely impartial. The Speaker will not be drawn into any discussion about whether proposed amendments might prevent the bill from being certified at any earlier stage in its proceedings. His certification is given only when the bill is about to leave the Commons.

67 *Erskine May*, pages 795/6.

68. In the case of bills of aids and supplies which may not be Money Bills, no certification takes place but the Lords will refrain from detailed consideration of such bills by negativing committal (the stage at which detailed amendments are considered). From time to time other bills are presented which have the character of bills of aids and supplies, being founded on Ways and Means Resolutions in the manner we have described.[68] In such cases the Lords have occasionally offered amendments to such bills and although the Commons has asserted privilege (in the imposition of some taxes or charges) it has not been claimed that the bill cannot be amended without a breach of privilege. But in the majority of such bills, although not strictly bills of aids and supplies, the Lords have exercised the conventional restraint.[69]

69. If the Commons has rejected Lords Amendments on grounds of financial privilege, the Lords should not send back amendments in lieu (a standard procedure in exchanges between the Houses which involves one House offering the other alternative amendments to ones rejected by the other House) which clearly invite the same response. While that practice has happened in the past, the Joint Committee on Conventions made it clear in its report that it was 'contrary to convention.'[70]

68 See paragraphs 18 and 26 above.

69 For details of such bills, see *Erskine May*, page 791.

70 Joint Committee on Conventions, (2005–06) page 67.

Privilege Amendment

70. The method by which Parliament sets aside Commons' privilege for policy or practical reasons is by the device of the 'privilege amendment' as we indicated in considering the principles that apply in Section 1 of this paper.[71]

71. The 'privilege amendment' is resorted to when a bill containing provisions which involve charging is introduced in the Lords. The most likely reason for that happening is that the Government legislative programme (outlined in the Queen's Speech at the beginning of each session) is so heavily loaded that it would not be able to complete the passage of all the bills in it if they began only in the Commons. In this respect the Lords is in fact an initiating chamber for legislation (not only of a financial sort), something often overlooked in discussions focussing only on its role as a revising chamber in the legislative process.[72]

72. In the past the expedient of the 'privilege amendment' was considered justifiable only in cases where the financial provisions were a subsidiary portion of the bill rather than its main purpose. However, in 1972, the Commons agreed to a new Standing Order (No. 80) whereby the House would proceed with a Lords bill (except a bill of aids and supplies) even though it had as its main object the imposition or alteration of a charge on the people or on public funds so long as it contained a formula stating that no such charge is imposed or altered, and provided that it is taken charge of by a Minister of the Crown in the Commons.[73]

71 See paragraph 19 above.

72 See paragraph 35 above.

73 Standing Orders of the House of Commons (Public Business) pages 63/4.

73. The method by which Commons' privilege is protected is by the insertion in the Lords of a 'privilege amendment' on the third reading of the bill in the form of a subsection added to the final clause. The subsection reads:

> *Nothing in this act shall impose a charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge.*

74. This device negates the financial consequences of the bill to which it relates, showing that while the Lords have the right to legislate on such matters; its right is not absolute and it does so only with the agreement of the Commons. The words of the privilege amendment appear in bold type when the bill is printed by the Commons. Any provisions in the bill which would have a charging effect then has to be authorised by a Ways and Means resolution which, as we have seen, can only be moved by a Minister of the Crown.[74] If such an amendment has not been properly inserted, the Lords will seek the return of the bill from the Commons for its insertion. The terms of Standing Order No. 80 also prevent the taking up of a bill with a 'privilege amendment' by any private Member.

Lords' scrutiny of financial business

75. Despite the restrictions imposed by convention on the Lords in respect of Commons' claim to financial privilege, the House has insisted on its right to scrutinise financial matters. Its insistence is symbolised in taking exception to being excluded from pecuniary requests for aid from the

74 See paragraphs 13 and 20 above.

Crown. As a result such requests are usually made to both Houses on the same day and the Lords' concurrence to the Commons decisions is sought.

76. The Lords also consider matters of public expenditure, including methods of taxation and financial administration in general debates. Such debates are not based upon financial bills so as to avoid infringement of Commons' privilege.

77. In addition, Select Committees of the Lords inquire into financial subjects as policy matters arise. In 2002 the Lords appeared to go further and agreed that each Finance Bill should be scrutinised by a sub-committee of the Economic Affairs Committee. This led to strong reaction from the Government of the day who considered such a step a risk of intrusion into Commons' financial privilege. The Leader of the House of Commons went further saying that the exercise was 'a quite deliberate claim to additional powers.'[75] The Government also considered it 'highly irregular' for the Lords to scrutinise the Bill while it was in the Commons.[76]

78. Opinions were sought by the Joint Committee. Members of the Lords tended to emphasise the importance of the Committee's contribution to parliamentary scrutiny of financial matters and denied that it infringed Commons' privilege. While the Clerks of both Houses gave their opinion that they did not consider financial privilege to have been infringed, the Clerk of the House of Commons added that 'he could see why the Government might feel there was a breach of the spirit' of the convention.[77]

75 Joint Committee on the Conventions, (2005–06) page 64.

76 Ibid.

77 Ibid. page 65.

79. The Joint Committee itself concluded that so long as the Lords Committee refrained from investigating the incidence or rates of tax, and addressed only technical issues of tax administration, clarification and simplification, then no infringement had occurred The Committee added that 'If the House of Commons believe that their primacy or their privileges are being infringed, it is for them to act to correct the situation.'[78] How the Commons could do that is by no means clear. It has no jurisdiction over committees in the Lords though it could perhaps express its displeasure in a resolution. It would still then be for the Lords to decide whether and how to respond to any opinion set out in such a resolution.

80. The activity of the Lords sub-committee in this area shows the flexibility but also the ambiguity that arises in a system governed by conventions. We noted at the beginning of this paper the Government view that there must be a 'shared understanding of what it [a convention] means.'[79] Nevertheless, in a system where the two Houses have different views and against the background of shifting historical functions and practices, reaching such a common understanding may not always be easily achieved.

78 Ibid. page 66.

79 See paragraph 2 above.

PART 4
Secondary Legislation

Secondary Legislation: types

81. 'Secondary legislation' is but one term used to describe what could otherwise be categorised as non-primary legislation. Other terms include 'delegated legislation' and 'subordinate legislation'. In this paper we will use the term 'secondary legislation' to cover this type of legislation, but we acknowledge the preference of some for the term 'delegated legislation'. The purpose of secondary legislation is to enable ministers to exercise various powers granted to them by the original primary legislation, otherwise known as the 'parent' Act.

82. An important factor in considering the overall context of secondary legislation is that the House of Lords still plays a full role in its passage. Secondary legislation is not covered by the Parliament Acts, and they are therefore not applicable. However, certain statutory instruments, for example some of a financial nature, are confined by their parent act to proceedings in the Commons only.

The Statutory Instruments Act 1946

83. The Statutory Instruments Act 1946 was *inter alia* concerned with codifying parliamentary procedure for considering

secondary legislation.[80] The Act defines a statutory instrument as follows:

> *Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, if the power expressed –*
>
> *a. in the case of a power conferred on His Majesty, to be exercisable by Order in Council;*
>
> *b. in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,*
>
> *any document by which that power is exercised shall be known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly.*[81]

Types of statutory instruments

84. There are two types of statutory instruments, namely affirmative instruments and negative instruments. Affirmative instruments require the explicit approval of Parliament. If the statutory instrument relates to taxation the statute will require that it is laid only for approval in the House of Commons. Otherwise the approval of both the House of Commons and the House of Lords is needed. It is important to note that statutory instruments are laid before Parliament by the Executive, not by one House to the other – statutory instruments are affected by the relationship between Parliament and the Executive, not explicitly between the House of Commons and the House of Lords.

80 See Craig, J.T. (1961) 'The Working of the Statutory Instruments Act, 1946', *Public Administration*, 39 (2), pages 181/192, page 181.

81 Statutory Instruments Act 1946, S.1 (I).

85. There are three types of affirmative statutory instruments:[82]

> *a. An instrument which takes immediate effect (although for a short, specified, period) and expires at the end of this specified period unless it is agreed to by one or both Houses (depending on the framework outlined by the parent Act).*
>
> *b. An instrument which is laid in draft for before one or both Houses and does not take effect until it has been approved by one or both Houses (depending on the framework outlined by the parent Act).*
>
> *c. An instrument, not in draft form, laid before one or both Houses that will not take effect until it has been approved by one or both Houses (depending on the framework outlined by the parent Act).*

It is the second that is the most utilised type of affirmative statutory instrument. The first type is most commonly used when there is a case for expediency, and 'usually, but by no means always, in the field of taxation.'[83] In regards to the third type, 'The Government has agreed in normal circumstances to avoid the use of the third type.'[84]

86. Another type of affirmative instrument is known as a 'super-affirmative'. This type of instrument allows for a greater level of dialogue between Parliament and the relevant minister. For other affirmative instruments, either or both Houses can either approve or reject the measure. In the case of the super-affirmatives, however, the procedure enables Parliament to provide suggested amendments to the Minister, which the minister can either include in a re-drafted measure or ignore

82 See *Erskine May*, pages 675/676.

83 Ibid. page 676.

84 Ibid.

before re-laying the statutory instrument before Parliament. The matter of their content is therefore entirely in the Minister's hands, without any opportunity for amendment in the Houses.

87. By contrast with affirmative instruments, negative instruments do not need to be approved by one or both Houses. A negative instrument takes effect *unless* action is taken against the measure in Parliament within a specified time limit. Motions to negate such instruments are colloquially known as 'prayers'. There are two types of negative instruments: draft and non-draft negative instruments. Draft negative instruments are laid in Parliament in draft form and are enacted if neither House passes a resolution disapproving. The more common type of negative instrument though is laid in final form and takes effect but is subject to annulment by either House within a specified period.

88. Significant additional provisions within an Act of Parliament have been termed 'Henry VIII clauses'. Under such provisions the minister is able 'to amend the statute itself by delegated legislation or to amend other statutes.'[85] The use of 'Henry VIII clauses' has been heavily criticised.[86] An example of such criticism can be taken from Lord Judge's speech on the Strathclyde Review:

> *we have too many Henry VIII clauses, and we call them Henry VIII clauses because they are draconian and potentially tyrannical.*[87]

85 Ibid. page 667.

86 For a number of examples of the use of Henry VIII powers which have been noted by the House of Lords Delegated Powers and Regulatory Reform Committee see their report 'Special Report: Response to the Strathclyde Review', 25th Report (Session 2015–16) pages 17/18.

87 Lord Judge, HL Deb, 13 January 2016, col 321.

Although many statutory instruments are of a technical and uncontroversial nature, a number of them implement significant changes to the law and for that very reason their use has become a matter of controversy in both Houses and outside Westminster.

Proceedings in both Houses

89. Statutory instruments subject to parliamentary scrutiny, whether they are affirmative or negative instruments of any description, are accompanied by an explanatory note setting out their purpose. The Government Legal Service Guidance states that:

> *The Explanatory Note should give a short, clear, comprehensive statement of what the instrument does. The length of the note should if possible be proportionate to the length of the instrument and rarely longer than a page. The note should help readers decide whether they need to refer to the instrument. It should not try to explain or justify the policy or offer a debatable construction of the law.*[88]

An explanatory memorandum, which also accompanies the statutory instrument, goes further than the explanatory note, addressing the question of the purpose of the statutory instrument rather than simply outlining what the instrument does.

88 Government Legal Service. (2015) *GLS Statutory Instrument Drafting Guideline.* March 2015, page 60.

Secondary Legislation: Scrutiny in the Commons

90. The Select Committee on Statutory Instruments (SCSI) is the House of Commons' committee that considers only those statutory instruments laid before the House of Commons, and not the House of Lords. Its membership consists of those MPs who are members of the Joint Committee on Statutory Instruments. Whether a statutory instrument must be laid before the Commons or the Commons and Lords is specified in the parent Act, and where the statutory instrument is concerned with taxation, scrutiny is confined to the Commons. The Committee concerns itself with technical matters such as drafting and compliance with the parent act.

91. The Joint Committee on Statutory Instruments (JSCI) consists of seven members from each House and is concerned with the scrutiny of statutory instruments laid before Parliament. It provides advice to Parliament, drawing the attention of parliamentarians to any statutory instruments it deems problematic for technical reasons rather than the particular merits of the instrument from a policy perspective. Nevertheless, by its scrutiny, the Committee may affect or delay the implementation of policy. For that reason government departments have the right to explain any instrument by giving evidence to the Committee.

92. Affirmative instruments are laid before the House in either draft or final form and must be approved of by either the Commons alone in the case of taxation instruments, or by both Houses. The responsible minister brings forth a motion that is then approved of or not by the House/s.

93. Negative instruments take effect unless a successful 'prayer' is made disapproving of the instrument usually within 40 days of their having been being laid. In both instances there is currently no legal requirement that any of the scrutiny committees have approved the instrument or reported on it, although it is common practice that the relevant committees report within good time, allowing the House/s to consider the recommendation of the committee before proceeding on the instrument at hand.

Secondary Legislation: Scrutiny in the Lords

94. There are two committees in the House of Lords which provide advice to the House on secondary legislation and statutory instruments. The first of these is the Delegated Powers and Regulatory Reform Committee (DPRRP). The DPRRP is concerned with scrutiny of primary legislation, and the extent to which the instrument delegates powers to the Executive. The DPRRP's remit is defined as:

> *to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.*[89]

95. When the Government introduces a bill containing delegations of power, it also provides a memorandum (authored by the relevant government department) providing an explanation for each of the delegations of power. The DPRRP takes that explanation into account in reporting to the Lords whether it deems the delegations appropriate or not. If the Committee concludes that any of

89 http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/role/

the delegations are inappropriate then the Lords itself will debate the matter and come to a conclusion.

96. The other committee of the House of Lords that considers secondary legislation is the Secondary Legislation Scrutiny Committee (SLSC). Where the DPRRP focuses on the primary legislation which delegates powers to the executive, the SLSC focuses on the actual usage of the delegations. It has a wide remit which is to examine the policy merits of regulations and other types of secondary legislation that are subject to parliamentary procedure.[90] The Committee's work therefore involves scrutiny of all the statutory instruments laid before the House of Lords. Unlike the DPRRP which reports on specific bills, the SLSC reports to the Lords weekly, providing its analysis of recently laid statutory instruments, and drawing the Lords' attention to statutory instruments it deems worthy of further debate.

Growth in the volume of statutory instruments

97. The importance of parliamentary scrutiny of statutory instruments has become more significant due to the increase in their volume over recent decades. There has always been a fluctuation in the number of statutory instruments with for example a peak of 2,877 SIs in 1962 to a low of 1,641 in 1966[91] during the period from 1950 to 1990. However, for most years during this period, the numbers ranged between the high 1000s to the low 2000s.

90 http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/

91 Figures from the House of Commons Library (2015) *Acts and Statutory Instruments: the volume of UK legislation 1950 to 2015*. Briefing Paper Number CBP 7438, 21 December 2015.

98. During the period from 1990, however, there has been a marked increase in the number of UK statutory instruments. In 1990 the number was 2,667 in contrast to a peak of 4,150 in 2001. There has been a reduction since this peak, but most years range between the high 2000s and the low 3000s – a significant increase to the pre-1990 period. The figures are even more significant when the fact that Scottish Statutory Instruments have been taken out of the total UK figures since 1999 and range between 200 and 600 a year.

99. Anxiety about the scale of Government reliance on secondary legislation and the difficulty that presents in terms of parliamentary scrutiny has been expressed in the report of the Commons Public Administration and Constitutional Affairs Select Committee in its response to the Strathclyde Review. The Committee made the point in this way:

> *The sheer size and scale of the use of statutory instruments makes scrutiny, particularly in the House of Commons, an incredibly difficult task and Parliament has relied heavily on the House of Lords for the expertise and skill it has cultivated in scrutinizing SIs.*[92]

100. Criticism of statutory instruments has not been solely focused on the growth in volume, but also the changing nature of the instruments. As one House of Lords committee argues:

> *Delegated powers in primary legislation have increasingly been drafted in broad and poorly-defined language that has permitted successive governments to use delegated*

92 Public Administration and Constitutional Affairs Committee *The Strathclyde Review: Statutory Instruments and the power of the House of Lords*, 8th Report (Session 2015–16). HC 752 page 21.

> *legislation to address issues of policy and principle, rather than points of an administrative or technical nature.*[93]

101. Another House of Lords committee recommended:

> *the issue is not the delegation of powers in principle but the scope and nature of the delegations sought by governments. The fundamental point as far as consideration of the Strathclyde Review is concerned is that the use and misuse of provision for the delegation of powers underpins any examination of the role of the House of Lords, and of Parliament more generally, in relation to delegated legislation.*[94]

102. These reports demonstrate the strength of feeling in both Houses, but particularly in the House of Lords, that statutory instruments are being used more often in a way deleterious to the ability of Parliament to effectively scrutinise the actions of the government. The increasing volume of statutory instruments with a significant policy effect further compounds this issue. We shall now turn to considering this matter in the context of the Strathclyde Review.

93 House of Lords Select Committee on the Constitution *Delegated Legislation and Parliament: A response to the Strathclyde Review*, 9th Report (Session 2015–16), HL Paper 116, page 7.

94 House of Lords Delegated Powers and Regulatory Reform Committee, loc. cit. page 10.

PART 5
The Strathclyde Review

Context of the Review on Secondary Legislation and Commons Primacy

103. The Conservative Government, returned to power in the General Election of 2015, had done so on the basis of its Party Manifesto which, among many other measures, made a commitment to reduce welfare benefit expenditure (running at approximately £12 billion over a Parliament). Tax credits, designed to assist workers on low incomes, were not specifically mentioned in the manifesto.

104. In September 2015 the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, a draft statutory instrument, with the object of reducing government expenditure of approximately £4 billion, was debated and approved by the House of Commons on a division. (Ayes, 325, Noes 290.)[95]

105. On a separate occasion just over a month later, the Commons debated a Motion in backbench business time to the effect:

> *That this House calls on the Government to reverse its decision to cut tax credits, which is due to come into effect in April 2016.*

That Motion was negatived. (Ayes 295, Noes 317.)[96]

95 *Votes & Proceedings of the House of Commons*, 15 September 2015.

96 Ibid. 20 October 2015.

106. A short while later, on 26th October, the House of Lords debated a motion to approve the Draft Regulations. A series of amendments was tabled to the Lord Privy Seal's Motion. The first, seeking to decline agreement to the Motion, was disagreed to by 310 to 99.[97]

107. Two further amendments were agreed to. The first was that the House declined to consider the regulations until the Government laid a report before it detailing its response to the analysis of the regulations by the Institute of Fiscal Studies and considering possible mitigating action. The second went further, requiring the Government in addition to lay before Parliament a scheme for full transitional protection for a minimum of three years for all low income families and individuals currently receiving tax credits.[98] Both amendments were agreed to.

108. It is important to note that the first Motion, to reject the regulations, was not agreed to by the Lords. Nevertheless, there was considerable criticism by Ministers and MPs who claimed that the Lords' action in not passing the Draft Tax Credits Regulations and instead asserting its opinion in the amendments, amounted to a breach of the Salisbury Convention[99] as well as infringing Commons financial privilege, thereby challenging its primacy. The Chancellor of the Exchequer stated that he would bring forward proposals to deal with the situation in his Autumn Statement. Lord Strathclyde was appointed to investigate what was said to be a constitutional crisis.

97 Lords *Minutes* 26 October, 2015.

98 Ibid.

99 See paragraph 32 above.

109. When the Autumn Statement was made, the Chancellor of the Exchequer withdrew the tax credit proposals, possibly as a result of the expression of opposition to them in the Commons. Meanwhile the Government set up the Strathclyde Review:

> *to conduct a review of Statutory Instruments and consider how more certainty and clarification could be brought to their passage through Parliament.*[100]

Strathclyde versus the Joint Committee on Conventions

110. In summing up the impasse which had occurred, the Strathclyde review emphasised the importance of the measures in the Draft Tax Credits Regulations which related 'to matter contained in the budget which was central to the Government's fiscal policy.'[101]

111. It added:

> *The convention that the House of Lords should not, or should not regularly, reject SIs is longstanding but has been interpreted in different ways, has not been understood by all, and has never been accepted by some members of the House. Even after the Joint Committee in 2006 listed specific circumstances when it might be appropriate to reject SIs, nothing has been done to agree those circumstances or properly to define the convention. The rejection of the Tax Credits Regulations broke new ground and the votes divided along conventional political lines. It suggests that the convention is now so flexible that it is barely a convention at all.*[102]

100 Strathclyde Review: *Secondary Legislation and the primacy of the Commons*. December 2015 (Cm 9117) page 3.

101 Ibid. page 14.

102 Ibid. page 15.

112. A certain glossing over can be found in that statement, the first example of which relates to what the Joint Committee on Conventions said; the second to the effect that the Lords rejected the Draft Regulations, whereas they sought conditions to be attached to them.

113. In respect of what the Joint Committee said, the words in the Strathclyde Review gloss over what was a clear conclusion about the nature of the convention, namely:

> *That the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate for it to do so.*[103]

114. As the Joint Committee noted, the Government of the day argued that it was for the Commons alone to withhold or grant their endorsement of Ministers' actions and a defeat of a statutory instrument in the Lords was a breach of convention.[104] That view is countered by the conclusions of the Joint Committee itself which asserted that it was consistent with the function the Lords as a revising chamber and for Parliament as a scrutiniser of delegated legislation for it to 'threaten to defeat an SI.'[105]

115. The Joint Committee set out six situations in which it felt that such action by the Lords was legitimate and within the convention. The examples it gave were:

> *a. Where special attention is drawn to the instrument by the Joint Committee on Statutory Instruments or the Lords Select Committee on the Merits of SIs;*

103 Joint Committee on Conventions, (2005–06) page 62.

104 Ibid.

105 Ibid.

b. When the parent act was a "skeleton Bill" and the provisions of the SI are of the sort more normally found in primary legislation;

c. Orders made under the Regulatory Reform Act 2001, remedial orders made under the Human Rights Act 1998, and any other orders which are explicitly of the nature of primary legislation, and are subject to special "super-affirmative" procedures for that reason;

d. The special case of Northern Ireland Orders in Council which are of the nature of primary legislation, made by the Secretary of State in the absence of a functioning Assembly;

e. Orders to devolve primary legislative competence, such as those to be made under section 95 of the Government of Wales Act 2006; and

f. Where Parliament was only persuaded to delegate the power in the first place on the express basis that SIs made under it could be rejected.

116. The Joint Committee concluded that the most appropriate way for the Lords to proceed in such cases, as a revising chamber, is by agreeing 'a motion incorporating a reason, making it clear before and after debate, what the issue is.[106] That is precisely what the Lords did on the occasion of its consideration of the Draft Tax Credit Regulations: it did not reject the Statutory Instrument.

Strathclyde recommendations

117. The Strathclyde review set out three options whose object was 'to provide the House of Commons with a decisive role

106 Ibid. page 62.

on statutory instruments.'[107] The options were set out with reasoning as follows:

> *The first option was to remove the House of Lords from statutory instrument procedure altogether. This has the benefit of simplicity and clarity. However, it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.*
>
> *The second option would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused. This option seeks to codify the convention. However, since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application.*
>
> *A third option would be to create a new procedure – set out in statute – allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy. This would better fit with the established role of the House of Lords as regards primary legislation.*[108]

118. The Review recommended the third option of creating new process set out in statute on the following grounds:

> *This would provide the government of the day with a degree of certainty, while maintaining for the House of Lords a simplicity of procedure in keeping with already established procedures for other forms of legislation. It would preserve and enhance the role of the House of*

107 Strathclyde Review, page 5.

108 Ibid.

> *Lords to scrutinise secondary legislation by providing for such legislation to be returned to the Commons. In the event of a further Commons vote to approve a statutory instrument, it would enable the Commons to play a decisive role.*[109]

Reactions and conclusions

119. In effect, by recommending the third option, the Strathclyde Review proposes a considerable change to the powers of the House of Lords by removing its 'unquestionable right' to reject legislation, including subordinate legislation.[110] Although, as we have seen, the Joint Committee on Conventions set out the ambits within which rejection should take place and advocated that it should not happen frequently, it re-affirmed the Lords' right to reject statutory instruments within the defined areas.[111] In its response to the Strathclyde Review, the Secondary Legislation Scrutiny Committee restates the view that the right of rejection was well within the understood conventions.[112] While the Commons Select Committee is less certain of what the convention is, it too rejects Option 3 and recommends pre-legislative scrutiny of any proposals for reform.[113]

120. A further point is that the matter proposed in the Draft Tax Credits Regulations was not set out in the manifesto on which the Conservative Government was elected although it was undoubtedly of a financial character.

109 Ibid.

110 See paragraph 25 above

111 See paragraph 115 above.

112 See Secondary Legislation Scrutiny Committee 32nd Report (Session 2015–16) HL Paper 128 page 35.

113 Public Administration and Constitutional Affairs Committee, loc. cit. page 21.

121. Certain other considerations arise in the context of the Tax Credits imbroglio. The first is whether the Government should, in any case, have proceeded by way of a statutory instrument to introduce a measure of such significance which made the Draft Tax Credits Regulations more of the nature of primary, than secondary, legislation.

122. The question of the boundary between primary and secondary legislation is taken up in by the Delegated Powers and Regulatory Reform Committee in their report responding to the Strathclyde Review.[114] The Committee takes the view that the real issue arising from the Tax Credits episode is the 'use and misuse of provision for the delegation of powers.'[115] They concur with the opinion of Lord Norton of Louth that the real 'mischief' to be addressed is the extent to which government uses unamendable secondary legislation to advance policy objectives, in this case of a significant type.[116] The Committee concludes 'that the relationship at issue is not between the two Houses but between the Government and Parliament.'[117] That view was supported by the Secondary Legislation Committee in its response to the Strathclyde Review.[118]

123. The point, about the relationship between Parliament and Government rather than that between the Houses, is made explicit by the Select Committee on the Constitution in

114 Delegated Powers and Regulatory Reform Committee Special Report: loc cit.

115 Ibid. page 10.

116 Ibid page 11. The opinion of Lord Norton of Louth was given in written evidence to Secondary Legislation Scrutiny Committee, loc. cit. RSR0007.

117 Ibid. page 26.

118 Secondary Legislation Committee, loc. cit. page 25.

their response to the Strathclyde Review.[119] The Committee criticises the Review which, by focussing on inter-House relations, has ignored the balance of power between Parliament and the Executive, consequently addressing the wrong issues.[120]

124. Another factor of considerable importance is the increased use of statutory instruments, as we have considered in Part 4, over recent decades.[121] The fact that they cannot be amended suggests a considerable restriction on the proper process of parliamentary approval which, in respect of primary legislation, must involve the power to amend provisions in Government proposals and arguably should do so in subordinate legislation which has the character of primary legislation, a matter referred to by the Joint Committee on Conventions.[122]

The way forward

125. There is no clear evidence that there has been a breakdown in the conventions that apply to the handling of secondary legislation. Rather what happened in respect of the Draft Tax Credits Regulations was an embarrassing inconvenience for Government which has led to a proposal in the Strathclyde Review to alter an important constitutional principle, namely that the Lords have the power to reject secondary legislation as they do of bills.[123] As the Select Committee on the Constitution

119 See Select Committee on the Constitution loc. cit.

120 Ibid. page 19.

121 See paragraphs 97 to 99 above.

122 See paragraph 115 above.

123 Option 3, if brought in under the Parliament Acts, might be challengeable in the courts. See paragraph 51 above.

has also pointed out, weakening the House of Lords' power to hold government to account over secondary legislation would increase incentives for Government to widen its use.[124]

126. We note that in the recent Queen's Speech there is no mention of legislation on this matter but merely the intention of Government 'to uphold the sovereignty of Parliament and the primacy of the House of Commons.[125] The absence of a bill in the Queen's Speech on the Strathclyde Review vindicates the recommendation of the Commons Public Administration and Constitutional Affairs Select Committee in its report that such a step would be an 'overreaction and entirely disproportionate.'[126] Nevertheless, the Review, as the three Lords select committees have acknowledged, provides the opportunity for Parliament to look at the whole system of secondary legislation in the round.[127] The Delegated Powers and Regulatory Reform Committee suggests that the proper way to do that is by the establishment of a Joint Committee of both Houses 'to consider the scrutiny of delegated legislation by Parliament as a whole.'[128]

127. As we have shown in this paper, the matter of Commons' financial privilege depends on the interpretation of certain conventions that have grown up over long historical periods. Their application to modern circumstances, particularly in the context of the considerable increase in

124 Select Committee on Constitution, loc.cit. page 17.

125 Queen's Speech, 18 May, 2016.

126 Public Administration and Constitutional Affairs Committee, loc. cit. page 21.

127 Ibid. page 28.

128 Delegated Powers and Regulatory Reform Committee, loc. cit. page 28.

the use of secondary legislation by the Executive, is not a straightforward matter. Different interpretations of what these conventions entail have arisen.

128. We endorse the view of the committees of the House of Lords which have recommended that the relationship between primary and secondary legislation and, in particular, the use of statutory instruments by the Executive be examined by a Joint Committee of both Houses. The terms of reference of such a Committee should include its ability to consider how Commons' financial privilege impinges upon the whole matter. This is certainly something Parliament needs to act upon if it is to continue with its core duty of effective scrutiny of the legislative proposals coming from the Executive. It should do so before the Government takes any further steps.

Appendix 1
Parliament Act 1911

1911 CHAPTER 13 1 and 2 Geo 5
An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament.

[18th August 1911]

Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:

And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:

1. Powers of House of Lords as to Money Bills

1. *If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the*

Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

2. *A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, [F1 the National Loans Fund] or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation," "public money," and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.*

3. *There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection.*

Amendments (Textual)

F1 *Words inserted by National Loans Act 1968 (c. 13), s. 1(5)*

2. Restriction of the powers of the House of Lords as to Bills other than Money Bills

1. *If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons [F2in two successive sessions] (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection [F2for the second time] by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless [F2one 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 [F2in the second of these sessions.]*

2. *When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.*

3. *A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.*

4. *A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such*

alterations as are certified by the Speaker of the House of Commons 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 House of Lords in the former Bill in the preceding session, and any amendments which are certified by the Speaker to have been made by the House of Lords [F2in the second session] and agreed to 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, if they think fit, on the passage of such a Bill through the House [F2in the second session,] suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but 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 House of Lords.

Amendments (Textual)

F2 *Words substituted except in relation to Bill for Parliament Act 1949 (c. 103), by ibid., s. 1*

3. Certificate of Speaker

Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

4. Enacting words

1. *In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say:*

"Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of [F3the Parliament Acts 1911 and 1949] and by authority of the same, as follows."

2. *Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.*

Amendments (Textual)

F3 *Words substituted by Parliament Act 1949 (c. 103), s. 2(2)*

5. Provisional Order Bills excluded

In this Act the expression "Public Bill" does not include any Bill for confirming a Provisional Order.

6. Saving for existing rights and privileges of the House of Commons

Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons.

7. Duration of Parliament

Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the M1Septennial Act 1715.

Marginal Citations

M1 *1715 c. 38.*

8. Short Title

This Act may be cited as the Parliament Act 1911.

Appendix 2
Parliament Act 1949

1949 CHAPTER 103 12 13 and 14 Geo 6
An Act to amend the Parliament Act 1911.

[16th December 1949]

Commencement Information

I1 *Act wholly in force at Royal Assent*

1. Substitution of references to two sessions and one year for reference to three sessions and two years respectively

The M1Parliament Act, 1911, shall have effect, and shall be deemed to have had effect from the beginning of the session in which the Bill for this Act originated (save as regards that Bill itself), as if –

a. there had been substituted in subsections (1) and (4) of section two thereof, for the words "in three successive sessions", "for the third time", "in the third of those sessions", "in the third session", and "in the second or third session" respectively, the words " in two successive sessions", "for the second time", "in the second of those sessions", "in the second session", and "in the second session" respectively; and

b. there had been substituted in subsection (1)of the said section two, for the words "two years have elapsed" the words "one year has elapsed":

Provided that, if a Bill has been rejected for the second time by the House of Lords before the signification of

the Royal Assent to the Bill for this Act, whether such rejection was in the same session as that in which the Royal Assent to the Bill for thisAct was signified or in an earlier session, the requirement of the said section two that a Bill is to be presented to His Majesty on its rejection for the second time by the House of Lords shall have effect in relation to the Bill rejected as a requirement that it is to be presented to His Majesty as soon as the Royal Assent to the Bill for this Act has been signified, and, notwithstanding that such rejection was in an earlier session, the Royal Assent to the Bill rejected may be signified in the session in which the Royal Assent to the Bill for this Act was signified.

Modifications etc. (not altering text)

C1 *S. 1 repealed in part by Statute Law (Repeals) Act 1986 (c. 12), s. 1 (1), Sch. 1, Pt. X*

C2 *The text of s. 1 is in the form in which it was originally enacted: it was not reproduced in Statutes inForce and does not reflect any amendments or repeals which may have been made prior to 1.2.1991*

Marginal Citations

M1 *1 & 2 Geo. 5. c. 13.*

2. Short title, construction and citation

1. *This Act may be cited as the Parliament Act 1949.*

2. *This Act and the [M2]Parliament Act 1911, shall be construed as one and may be citedtogether as the Parliament Acts 1911 and 1949, . . . [F1]*

Amendments (Textual)

F1 *Words amend Parliament Act 1911 (c. 13), s. 4 (1)*

Marginal Citations

M2 *1911 c. 13.*

Previous publications by The Constitution Society include:

- *Brexit: The Immediate Legal Consequences* by Richard Gordon QC and Rowena Moffatt, published 20th May 2016
- *The Crisis of the Constitution*, 2nd Edition, by Vernon Bogdanor, published 17th March 2016
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- *Select Committees and Coercive Powers – Clarity or Confusion?* by Richard Gordon Q.C. and Amy Street, published 2012

Financial Privilege

The Undoubted and Sole Right of the Commons?

By Sir Malcolm Jack KCB PhD FSA and Richard Reid PhD

Since ancient times the House of Commons has claimed privilege in respect of financial legislation, whether over bills dealing with taxation or the granting of money to the Executive. Conventions governing the way restrictions apply to the House of Lords in handling such bills have grown up over a long period and are regulated by the Parliament Acts, 1911 & 1949. In 2015 the Lords delayed the draft Tax Credits Regulations, a statutory instrument dealing with fiscal legislation that had passed the Commons. The Government claimed that Commons' financial privilege had been infringed and subsequently set up the Strathclyde Review to examine the 'constitutional crisis' that had arisen and to make recommendations. Since then a number of parliamentary committees have made critical reports of the Review.

In this paper the authors examine the historical origin of the Commons' privilege, consider the provisions of the Parliament Acts and how they apply to the passage of financial bills between the Houses before turning to the subject of statutory instruments and the Executive's increasing reliance on them as a means of legislating. They conclude by examining the issues brought out by the Strathclyde Review and endorse the position of the parliamentary committees in recommending that a Joint Committee of both Houses be established to inquire into the whole area of secondary legislation and financial privilege. They stress that this is a matter for Parliament and it should act before Government takes any further steps.

This pamphlet presents the views of the authors and not those of The Constitution Society, which publishes it as a contribution to debate on this important subject.

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