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Bicameralism

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BICAMERALISM

Jeremy Waldron

1. Introduction

My topic this evening is excessively tedious: bicameralism and the virtues of a second chamber, the basis of election to a second chamber, the functions that may be served by debating and voting on legislation in two places rather than one, and the relationship of all that to the old formalist principle of the separation of powers. All very solemn and dry, particularly because it is my intention to pursue these themes without very much in the way of direct reference to the current debate in the United Kingdom about further reform of the House of Lords. (Well, we'll see.) Of course, some contact with this will be unavoidable. But my aim is to pursue bicameralism as a topic in political theory rather than modern politics, and I am afraid that will lend a certain tedium and detachment to our discourse.

Because of that, it is perhaps not inappropriate to begin with some observations about alcohol and sex.[1]

Herodotus and Tacitus report that the ancient Goths of Germany, when they had to decide anything important—like going to war, or moving their settlements or entering into a treaty—they would debate it not once but twice. The first time, they would debate the issue drunk, the second time they would debate the issue sober. Drunk—to give a bit of vigour and spirit to their deliberations; sober, to add a dimension of prudence and discretion.

The observation is reported by Laurence Sterne in his great comic novel *The Life and Opinions of Tristram Shandy, Gentleman,* published in the middle of the eighteenth century, and sometimes referred to as "the dirtiest novel in English." The narrator reports that his father was very much impressed by this custom of the Goths and sought to emulate it in his own domestic decision-making—for example, about whether young Tristram should be kitted out with a pair of leather pants. The trouble was that Mr Shandy, senior, was a teetotaller;

1 Some of this material is adapted from the beginning of Jeremy Waldron, "Parliamentary Recklessness: Why we Need to Legislate More Carefully," the inaugural John Graham Lecture, Maxim Institute, Auckland, New Zealand, July 2008, available at http://www.maxim.org.nz/files/pdf/jeremywaldron_parliamentaryrecklessness.pdf or (on video) at http://www.maxim.org.nz/index.cfm/media/article?id=1740

he couldn't emulate the Goths, deliberating drunk as well as sober. We are told that

> [i]t was not till the seventh year of his marriage … that he hit upon an expedient which answered the purpose—and that was, when any difficult and momentous point was to be settled in the family, which required great sobriety, and great spirit too, in its determination—he fixed and set apart the first Sunday night in the month, and the Saturday night which immediately preceded it, to argue it over, in bed with my mother

The narrator passes over in silence the exact difference in spirit of these two nights in what his father called "his beds of justice," but if you consider what used to be the rules and customs upheld by the church for the conduct of married life on various days of the week, you will understand that he had found a method for successive and varied modes of deliberation so that, as Shandy puts it, "from the two different counsels taken in these two different humours, a middle [course] was generally found out which touched the point of wisdom as well, as if he had got drunk and sober a hundred times."[2]

The Goths, in Tristram Shandy's account, debated every measure twice: once drunk and once sober. You can use this as an image of bicameral legislation. Think of the English Parliament of Laurence Stern's time: the House of Commons and the House of Lords; and every piece of legislation had to gain acceptance in both settings: debated first in the cold puritan sobriety of the Commons, and debated second—well, I won't say, drunk as a Lord. But debated second, in an upper house that presented a different style or spirit of deliberation. Or maybe it is the House of Commons that sometimes seemed intoxicated, on the Eric Joyce principle; and the House of Lords that contributed a senatorial measure of slow, deliberate wisdom.

George Washington used a different image: he "illustrated the need for a Second Chamber by asking Thomas Jefferson, who had queried the need for a senate, why he poured his coffee into his saucer before drinking it? "To cool it," Jefferson said; "my throat is not made of brass." "Even so," said Washington, "we pour our legislation into the Senatorial saucer."[3]

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2 L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, Vol. 6, Chapter 17. For "the dirtiest book," see F. Brady, "Tristram Shandy: Sexuality, morality, and sensibility," *Eighteenth-Century Studies* 4 (1970): 41.

3 3 *The Records of the Federal Convention of 1787*, at 359 (1911), quoted by Adrian Vermeule, *Second Opinions and Institutional Design,* 97 Virginia Law Review 1435, 1449 (2011).

2. The debate in the UK

My topic is bicameralism, and I want to relate it to the theory of representation, the theory of legislative due process, and, as my title suggests, to the separation of powers.

Now, as you know, the English House of Lords is being reformed as we speak. It has already moved away from being a plenary assembly of hereditary peers;[4] the hereditary element is now represented rather than assembled and hereditary peers can stand now for seats in the House of Commons. The judges have been moved out.[5] The bishops are still there,[6] but they and the representative rump of earls, dukes and viscounts are now seen as an anomaly in what is really now an appointed assembly, although the appointments basis has been over the past fifty years as much a system of public honours (a step or two above a knighthood) as a system of senatorial selection.[7]

Everything I say here tonight will be *relevant* in some way or another to the present British debate about the future of the House of Lords. But that debate will not be my focus. For there is a world out there that wrestles with issues about bicameralism that have nothing to do with what Jeremy Bentham called our particular "aristocracy-ridden" and "blind-custom-begotten" arrangements.[8] Some of the issues are particular to other countries like the creaky and decrepit appointments-based system for the Senate of Canada,[9] the demographically disproportionate basis of representation in the U.S. Senate

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4 House of Lords Act 1999, section 1: No-one shall be a member of the House of Lords by virtue of a hereditary peerage.

5 Constitutional Reform Act 2005.

6 The Bishoprics Act, 1878, 41 & 42 Vict., c. 68, § 5, (Eng.) fixes the number of "Lords Spiritual" at 26.

7 Life Peerages Act 1958: "1. (1) Without prejudice to Her Majesty's powers as to the appointment of Lords of Appeal in Ordinary, Her Majesty shall have power by letters patent to confer on any person a peerage carrying right for life having the incidents specified in subsection (2) of this section. (2) A peerage conferred under this section shall, during the of life of the person on whom it is conferred, entitle him- (a) to rank as a baron under such style as may be appointed by the letters patent; and (b) … to receive writs of summons to attend the House of Lords and sit and vote therein accordingly - and shall expire on his death."

Until recently, people were appointed barons for their service in the past, not necessarily with much thought to their legislative service for the future.

8 *Jeremy Bentham to his Fellow-Citizens of France, on Houses of Peers and Senates* (1830), XII §1 and XIII §8, available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1925&chapter=116768&layout=html&Itemid=27

compounded by the peculiar super-majoritarian arrangements that that Chamber has adopted,[10] not to mention the disgraceful abandonment of legislative due process in what has been since 1950 the unicameral Parliament of New Zealand.[11]

There are also broader issues in political and legal theory like the relationship between bicameralism and judicial review (can they be, in effect, substitutes for one another?) or the relation between bicameralism and super-majoritarianism within a parliamentary assembly (again, is this an either-or choice?)[12] and the relation between bicameralism and other second-look or two-heads-are-better-than-one doctrines in constitutional theory—I mean, for example, principles in the American constitution that do not allow the President to act in certain matters (like judicial appointments or treaty-making) without "the advice and consent of the Senate."[13] (Mention Vermeule's interesting article)

In my comments tonight, I want to allow some of these broader themes to emerge, without worrying too much about how they might be embodied in the British context or how their realization in Britain could possibly be brought about. We are going to have to say a little bit about that, because one of my main themes is going to be the way in which a second chamber can help establish the legislature as an institution genuinely independent of the executive, in a way that is not true of the House of Commons in this country, or indeed of elected legislatures in any Westminster-style system. I sometimes wonder, when people say how important it is for the House of Commons to retain its ascendancy in our constitution, whether it is really the ascendancy of an elected chamber that they want, or whether they really want to preserve the guaranteed

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9 Compare Herman Bakvis, 'Prime Minister and Cabinet in Canada: An autocracy in need of reform?' 35 *Journal of Canadian Studies* 60 (2001) and Paul Thomas, "An Upper House with Snow on the Roof and Frozen in Time: The Case of the Canadian Senate" in Nicholas Aroney, Scott Prasser and J.R. Nethercote (eds.) *Restraining Elective Dictatorship: The Upper House Solution* (University of Western Australia Press, 2008), 130.

10 For a good discussion, see Stephen Macedo, "Toward A More Democratic Congress? Our Imperfect Democratic Constitution: The Critics Examined," 89 *B.U. L. Rev*. 609 2009

11 See note 1 above; see also Waldron, "Parliamentary Recklessness" [2008] NZLJ 417.

12 Levmore, 155 considers "the question of why, in the American Constitutional Convention and elsewhere, bicameralism is preferred over supermajoritarianism when either would seem to stop or stall legislation."

13 US Constitution, Article II. §2. For a broad taxonomy of second-opinion mechanisms, see Vermeule, *Second Opinions and Institutional Design*, 1436-42.

ascendancy of the Crown and its ministers acting through their whip-based domination of the Commons.

3. Bentham and the issue of difference

The key to bicameralism is difference. If a second chamber offers nothing different from the first, then as the eighty-year-old Bentham wrote in 1830 (after the July Revolution) in a letter to the only slightly younger General Lafayette—*Jeremy Bentham to his Fellow-Citizens of France, on Houses of Peers and Senates*—if a second chamber offers nothing different from the first, then it is redundant, and every cost incurred in its establishment and maintenance is wasted and every legislative delay incurred as a result of its separate proceedings is "so much net loss in the account of profit and loss."[14]

I don't know whether any of you have actually read Bentham's letter. It is often quoted, but I think seldom read. It is actually available in the Liberty Fund's "*Online Library of Liberty*"—which by the way is a massive and most valuable resource. One commentator writing in 1928 called Bentham's letter "succinct."[15] It is not. It runs to about 45 repetitive pages, much of it ranting, but a form of breathless, batty, and garrulous[16] ranting that is distinctively Bentham.[17]

There are one or two lovely touches. Bentham often refers to his fellow-citizens of France—Bentham was made an honorary French citizen in 1792—he refers to them as "my children – *mes enfants*, I suppose"—(he was, I guess, 84). And he referred to the United States, when he had to, when he wanted to talk

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14 Bentham, op. cit., III §8.

15 Lewis Rockow, "Bentham on the Theory of Second Chambers," *American Political Science Review*, 22 (1928), 576, at 577.

16 Cf. Bentham himself, op. cit., XI §5: "But I am straying into the path of garrulity—a tempting and seducing path to old age."

17 Ibid., III §4: "Antecedently to all development in detail, one plain reason against [a second chamber] presents itself to a first glance. Of a chamber of deputies, in the character of a first chamber—that is to say, first in the order of importance—of a legislative body—principally, where not exclusively acting as such—the utility, nay, the indispensable necessity, is recognised on all sides: the existence of this necessity therefore may be—it must be—taken for a postulate. But, that from the force and efficiency of this body, the existence of any other body—before which must be carried, ere the force of law be given to it, every proposed law—should not make deduction more or less considerable, is not possible: the time during which the measure continues in the second chamber before it is otherwise disposed of, is so much delay; and, even supposing adoption and consummation to be the ultimate result, in so much that an ultimate negative is not applied to it,—still delay, so long as it lasts, is a temporary negative: and, if the measure has any net benefit for its result, the value of the loss by the delay is in the exact proportion of the length of it."

about the Senate, as "the Anglo-American Union" (not exactly a title that has caught on). Also, at 84, Bentham hadn't lost the power to sting.[18] He thought that American enthusiasm for an upper house—their "quasi-Lords"[19]—was due to their excessive veneration of Blackstone, whose "servility" and "anility," Bentham said, were well known.[20] Nor have Bentham's stinging critiques lost their power to stop us in our tracks also, as with his denunciation of the endemically corrupting effect on British public life of the whole system of place-holding and honours—the peerage.[21] He was even prepared to toy with anti-monarchism:

> Well then, my fellow-citizens of France! Well then, my fellow-citizens of England! My fellow-citizens of the civilized world! My fellow-citizens of future ages! ... If no use can be found for a house of peers, why should I not say so? If no use can be found for any second chamber, or any sovereign governing body, other than a set of men chosen and commissioned by the people at large—why should I not say so? If no use can be found for any such functionary as a ... as a ... king—(there—the word is written, and the world is not yet come to an end)—why should I not say so? If king and second chamber are—both of them—worse than useless—why should I not say so?[22]

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18 As with these reflections on the late King George (I think he means the fourth of that name): "By cramming them with money, kings are ... made fit for reigning. ... By cramming, fowls are fitted for the table: true. By cramming, the queen-bee is fitted for her throne: true. By that same process, when then will kings be fitted for this same seat? To the process of cramming, in the case of fowls, nature sets bounds. So does she in the case of the queen-bee. But, in the case of a king of England, or any of his creatures, where are the limits set by anything or anybody?" (Ibid., V §29)

19 Ibid., XII. 25

20 Idem. Apparently, "anility" means (according to the OED) "The state of being an old woman; old-womanishness; dotage, foolishness."

21 Ibid., VI §36. See also ibid., VI §26: "Of the matter of corruption in this shape (need it be said?) is composed, the motive, by which men are induced to do their utmost for the upholding of a form, system, and practice of government, on which the appellation of matchless constitution, in the endeavour of covering its deformity by a veil of unmerited laudation, is with such unblushing perseverance bestowed; the possessors and cravers of the matter of corruption in this shape, all the while bestowing upon themselves, and one another, the praise of disinterestedness, and so forth." See also Rockow, op. cit.,, 579: The aristocrats and their dependents will be eager for appointments to sinecures, while the king as the grand corrupter will use the appointments as a means to extort subservience."

22 Ibid., XIII §8.

Having said that, it is only fair to acknowledge that Bentham's apprehensions about the delays and abuses of a second chamber were motivated by something more serious than anti-monarchism. What mattered above all, for him, was legislation;[23] and to the extent that it held up legislation, the downside of bicameralism consisted in "all the evils which … the community is suffering, for want of such remedies as it may be in the power of legislation to supply."[24]

4. Imperfectability of representation

Everyone knows that Bentham was utterly hostile to second chambers like the House of Lords. But Bentham was also opposed to the prospect of an *elected* second chamber, though he wrote less about it—*much* less about it—in the letter than about houses of peers. There were few if any models; for even the Senate of the Anglo-American Congress was not elected in Bentham's day. His objection to a properly elective second chamber was the same as the objection attributed to Emmanuel Sièyes a generation earlier: "if a second chamber dissents from the first, it is mischievous; if it agrees it is superfluous."[25]

Bentham's strategy here was to say that if there were features of a second house that were thought important for serious and responsible legislation—like the particular aptitude of the members of the second chamber, or their longer parliamentary terms, or gravity of consideration given to legislative measure sin the second chamber—then that should be an argument for changing the character of the first chamber, not for instituting a second.

> No need of a second chamber.... For, to the first [chamber] belongs the power of giving to the measure whatsoever length of consideration is, in the opinion of that same first chamber, best adapted to it: and the correspondent quantity of deliberation and time being bestowed upon it, any further quantity must, according to that same opinion, be useless….[26]

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23 Cf. David Lieberman, *The Province of Legislation Determined* (get cite)

24 Bentham, III, §24.

25 Aroney article p. 213: "In its classic form, commonly attributed to Emmanuel-Joseph Sieyes (1748-1836), the argument is that upper houses are either undemocratic and illegitimate, or else democratic and redundant. As the Abbé Sieyes is reputed to have put it, 'if a second chamber dissents from the first, it is mischievous; if it agrees it is superfluous'. 41 {n. 41: Despite the fact that this line of reasoning is often attributed to Sieyes, there is reason to doubt .whether he actually ever said (or even thought) anything like this.}.

26 Bentham, op. cit., III §6.

Or again

> [W]ill it be said that to the second chamber belongs more appropriate aptitude ... than to the first? ... [T]his cannot be said: if to this same second chamber more such appropriate aptitude belongs than to the first, [then] not second ought it to be, but first, or rather ... the only chamber.[27]

Or, as Adrian Vermeule has put it, "if the upper house supplies the sober second thought, why have a politically intemperate lower house in the first place?"[28]

What Bentham didn't consider, however, (though Vermeule did) was the Tristram Shandy principle, that we don't just want to introduce sobriety into the legislature; we might actually want our measures to be debated *both* ways—to be debated soberly and also to be debated drunkenly. Tacitus tells us that the Germanic tribes believed that drunken consideration produced honesty and enthusiasm:

> At no other time, they think, is the heart so open to frank thoughts or so warm towards noble sentiments. ... [I]n the freedom of such [deliberation] their inmost feelings are still expressed. … On the next day the subject is discussed again, and account is taken of both occasions. They debate while they are incapable of deceit and take the decision when they cannot make a mistake.[29]

The example is a bit silly, but the principle is not. Particularly if we direct it to the idea of representation. Forget drunk and sober. There may be some virtue in arranging different bases of legislative representation in two assemblies, rather than putting all one's eggs in one basket, so to speak, and working to perfect a single scheme of legislative representation.

Bentham assumes that anything we want in the way of election to and representation in a second chamber can be melded with what we already have or what we already want in the first chamber, to produce both a more complicated and a more perfected scheme for a unicameral legislature. But his argument can be turned on its head. No matter how good we make the scheme of representation is in a given chamber, no matter how many of our good thoughts

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27 Ibid., III §7.

28 Pincite.

29 Publius Cornelius Tacitus, *Agricola and Germany* 49 (A. R. Birley trans., 1999), quoted by Vermeule at 1451

about election, representation, and deliberation we have already taken on board, it is always possible to improve things by complementing that scheme of representation with another.

It's a kind of anti-perfection thesis. Bagehot observed that "[w]ith a perfect lower House, … if we had an ideal House of Commons perfectly representing the nation … it is certain that we should not need a higher chamber."[30] I suppose that is a tautology, except that there is no such thing as perfect representation of the people. I am inclined to say there is no such thing as the people.[31] There is just a large array of individual persons, millions of them, related to one another in various ways, with various interests, desires, and views. And there are innumerable ways of mapping onto that array another array, namely, the five or six hundred seats that there are in a given legislative assembly. We call these various ways of mapping the one array onto the other procedures and relations of representation. They involve things like elections (their nature and frequency), the separation of the country into constituencies on various bases, and functions like MMP or "first-past-the post" which enable territorial representation to be cut with party affiliation to make possible outcomes which are in various ways "proportional." There are all sorts of ways of doing this, and of course intense controversy along all these dimensions. As always, the fact of disagreement does not mean that some views are not better than others. But here's my theorem: even the best of the contestant views should acknowledge the possibility of enrichment by still other modes of representation, which can't necessarily be incorporated into the best view while keeping it practicable in and of itself.

Perhaps Bentham's perfecting manoeuvre would work if there were no constraints of manageability and practicability so far as schemes of representation are concerned. Perhaps an ideal scheme could be infinitely complex, taking on board successively every good feature that is said to distinguish the scheme of representation in a putative second house from the scheme of representation in the first. I actually doubt whether even this is true, except for the limit case of a direct democracy where the whole array of persons is represented literally by itself. It is evidently untrue for manageable and politically practicable schemes of representation.

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30 Bagehot, *The English Constitution*, ed. Paul Smith (CUP, 2001), Ch. 5, p. 80.

31 Cite to JW in Estlund.

As the Australian law professor Nicholas Aroney has pointed out, the assumption of the Sieyes/ Bentham approach that is that each political society "can be conceived of as being composed of a unitary 'people' which can be represented unproblematically in a single institution—the lower house—based on a particular electoral process."[32] But this is a wrong assumption. Because there is no such unitary thing as "the people," there can be no single canonical way of representing it. There are *people* to be represented—persons, not the people—and they are diverse along many thousands of more axes than can possibly be incorporated into a single electoral scheme. So there are many—perhaps infinitely many—ways of representing them.[33] I don't mean to infer that electoral reform for the lower house is futile. Of course it is not. But even if it succeeds, there will still be other possible schemes of representation to complement it with.

5. Mill's principle of separate concurrence

In the English debate, people make a big deal about there having to be "distinct logics of representation"—that's Meg Russell's phrase.[34] Vernon Bogdanor "How can the same electorate be represented in two different ways in two different chambers?"[35] He is particularly exercised by the prospect of the most recently established system of representation coming to convey an implicit reproach against, or diminution of legitimacy of, the system of representation in the other place. I guess some people will seize the opportunity of an elected second chamber to experiment with PR[36] or forms of quasi-federal

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32 Nicholas Aroney "Four Reasons for an Upper House Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability," 29 *Adelaide L. Rev*. 205 (2008), at p. 218.

33 Aroney 219-20: "Rather than giving us reasons to reject upper houses and bicameralism, the many 'peoples' with which we identify ourselves suggests that single houses of Parliament are going to struggle to represent us in our pluralities and diversities. Proportional voting systems can certainly go a long way towards remedying this problem, at least to the extent that they reproduce more accurately the many varied shades of opinion and commitment within our electorates. However, consolidating representation into one house within which majority rule prevails means that even in complicated proportional and mixed electoral systems, there is an assumption that there remains a unitary / 'will of the people' which it is the task of the electoral and parliamentary system to consolidate and express."

34 Meg Russell, "Reform of the House of Lords: Lessons for Bicameralism," in Aroney et al. (eds.) *Elective Dictatorship*, 119, at p. 127.

35 Bogdanor, *The New British Constitution* (Hart Publishing, 2009), 160

36 But how much do the arguments for proportional representation have to do with government formation rather than representation in the legislature?

representation. But other differences are imaginable that wouldn't raise questions about legitimacy. The second chamber might be elected on a different schedule, rather than under a radically different system; and another concern of Bogdanor's—about one House being able to claim that its mandate was more recent than the other's[37]—could be solved by having a U.S.-style system of rolling elections, with one third of the senators facing election (for a 6 year term) every two years. There is, as I said, a world out there and some of these problems have been faced and dealt with. "Distinct logics of representation" might still be important. But even without them, bicamerality might ensure that each given bill or legislative measure would have to get by two different sets of representatives, sampling the spirit of the country in two different ways—once by an assembly of representatives of the nation elected according to one schedule, and then a second time by a structurally similar assembly of representatives elected according to a second schedule.

So, in principle, in order to answer Bentham's challenge, the lines of difference need not be particularly great.[38] The quality yield from relatively small differences may be quite considerable. Even if the two houses are elected on exactly the same scheme of representation, they may still exhibit what Chief Justice Warren called "differing complexions and collective attitudes" by virtue of the different personalities that inhabit them and the interactions among them. "Every large assembly," said Bagehot, is … a fluctuating body. … It is one knot of men tonight and another tomorrow night."[39] Not only that but the mere fact that the examination of a bill in the first house may precede its examination in the second will mean that there are different things to think about and talk about

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37 Ibid., 166.

38 For consider this observation by Chief Justice Earl Warren in the American case of Reynolds v. Sims 377 U.S. 533, 576-7 (1964) about cases where, as he puts it, "the predominant basis of representation in the two ... legislative bodies is required to be the same—population."

> Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. ... One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ ... and the geographical size of districts from which legislators are elected could also be made to differ. ... [A]pportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. ... [T]hese and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

39 Bagehot, op. cit., p. 81. He adds (ibid.) "it is not one house, so to say, but a set of houses."

in the other place. Among these different things will be the reactions of the electorate at large to what has been said in the first house, for we should always understand formal deliberation in the legislature as something connected to and helping to focus and being affected by informal deliberation in civil society. And our thinking about bicameralism should be informed by that also.

John Stuart Mill, whose *Considerations on Representative Government* is still the best book on democracy in the canon of political theory, is sometimes cited as a fellow-traveller of Bentham's on this matter of bicameralism and sometimes as an opponent. He began his chapter "Of a Second Chamber" (Chapter XIII) by touching all the Benthamite bases: two chambers of similar composition will both "obey the same influences"; and if there is a case for more deliberation, we can modify "the established forms of business" in the primary chamber.[40] But then Mill went on to say this:

> The consideration which tells most … in favour of two Chambers … is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking any one else for his consent. A majority in a single assembly … when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority.

This, I think, is very important indeed. It need not matter much whether the second authority is constituted differently from the first, so long as it is not under the control of the first, so long as it is genuinely another constituted authority. Of course the Principle of Separate Concurrence, as I shall call this principle of Mill's, will have its salutary effect most strikingly when the second authority is constituted on a quite different basis than the first, and this was what Mill argued for in the second half of Chapter XIII: an unelected Senate consisting of veterans of high office in the existing system. But I don't think we should underestimate the sheer power of separateness, quite apart from qualitative difference in the mode of selection. In this matter, we should not be bullied by Leibnitz's identity of indiscernibles. People, even people who are

40 Mill, CRG, pincite

similar to one another, talk about things in different places in different combinations with one another in different ways. And their different talk would be enough to open up substantial disagreement or allow it to express itself in different ways. That difference by itself might be enough to satisfy the Principle of Separate Concurrence, requiring as it would (and I am adapting some language from Mill) a willingness to concede something to opponents, when the opposing views are presented afresh or in different ways: "of this salutary habit, the mutual give and take between two Houses is a perpetual school."[41]

6. Independence of the executive

What is crucial, I have said, is that the two chambers, however similar, should be independent of one another. The membership of the one should not be subject to the leadership of the other, nor should the two of them be subject to a single political leadership. That's the crucial thing if Bentham's accusation of costly redundancy is to be avoided and if Mill's Principle of (genuinely) Separate Concurrence is to be satisfied.

And this brings me to the point that I most want to emphasize in this lecture. The most important difference that can possibly be established between the two chambers of a bicameral legislature—more important than aristocracy, more important than federal representation, more important than proportional representation—the most important difference that can possibly be established between the two chambers of a bicameral legislature in a Westminster-style system is a different relation to the executive.

We all know that what distinguishes a Westminster-style system is that the body that exercises the executive powers of the Crown is a committee of one of the houses of parliament and dominates that house of parliament through the party system and the system of whips. This committee—I mean the Prime Minister and the cabinet—exercises the highest executive powers, not just prerogative and (as Locke would say) federative powers (i.e., foreign policy),[42] but it also sets and dominates the legislative agenda. And the very thing that entitles this body to exercise executive authority also, in nature of things, gives it the power to determine what bills will be considered and what bills will be

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41 Mill, *CRG*, pincite

42 Locke, *Second Treatise*, §§145-8.

enacted. In both cases, the power stems from its ability to command from within a majority in what we fondly call the lower house.

This is a fundamental principle of the constitution in a system like ours. The celebrated Montesquieu may have regarded the constitution of England as the matchless epitome of the separation of powers, but there—at the very core of the Constitution—is a repudiation of the principle that requires each separate powers (in this case legislature and executive) to have "a will of its own" and to be, in Madison's words, "so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."[43] Now, Madison argued that even Montesquieu would have to accept that his idealization of England would have to be modified to reflect the involvement of the monarch in legislation, through the Royal Assent.[44] The British legislature is the Queen-in-Parliament. But that's not what I mean. I mean cabinet domination of Parliament, arising from the subordination of the Crown in all its functions to the advice of ministers who arise out of the lower house and who in turn dominate it in the interest of the government's authority.

Tonight, here, is not the time or the place to evaluate or denounce this feature of Westminster systems; Bagehot regarded "the nearly complete fusion of the executive and the legislature" as the "the efficient secret" and the "characteristic merit" of the English Constitution.[45] Others think of it as a constitutional abomination, transforming representative legislatures into instruments of elective dictatorship. For us, it is enough to say that this a defining feature of a Westminster-style constitution and it is not going away anytime soon.

But we can take the opportunity in the reform of the second chamber to limit its scope, to limit the compromise or setback that this arrangement requires us to accept so far as the separation of powers is concerned.

We do this by insisting that no matter how the second house is constituted, it should be separated from the authority of the executive in a way that—as things stand—the first house is not. If that is not granted, then all else is lost. Effective extension of executive authority into the upper house not only compounds this inherent breach of the separation of powers, but it undercuts

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43 Madison, #51.

44 Madison, #49.

45 Bagehot, p. __, cited by Aroney 220-1.

almost everything that can be said in favor of bicameralism. Extension of executive power into the second chamber would amount to a surrender to Bentham and a repudiation of Mill's principle. Why pay for two houses rather than one, when they are effectively under the control of one body? What is the good of requiring separate concurrence in a second chamber when it is bound to be forthcoming at the say-so of the body responsible in effect for eliciting the concurrence of the first?

It may seem difficult to do this, especially if—as I am assuming—the Second Chamber is elected. If it is elected there will be politics; if there is politics, there will be party politics; and parties would naturally do what they could to ensure that their members in the second chamber were brought under the same discipline as their members in the first. Probably there is no way of ruling that out. As Professor Bogdanor has wisely observed, "the dominance of party politics in modern democracies" means that "the practice of bicameralism bears very little relation to the theory."[46] Still some prophylactic measures can be envisaged.

Some of the power that the executive has in a first, elected chamber, has to do with the hopes and prospects of office for its more able and ambitious MPs. MPs know that voting in defiance of party whips is a way of radically diminishing the chance that one will be tipped for ministerial office (or shadow ministerial office). So one introduces a rule that members of the cabinet (or, more radically, ministers of the Crown) may not sit in the Second Chamber.[47] There are to be no hopes or prospects of executive office in the elected second chamber. In Britain, as things stand, the Prime Minister and (I believe) the Chancellor of the Exchequer may not sit in the House of Lords; they must be members of the Commons. The same was thought to be true of the Foreign Secretary, but the appointments of Lord Home in 1960 and Lord Carrington in 1979 revealed this to be a practice rather than a convention—assuming you accept the rather infuriating English distinction between the two. Extending this to Cabinet or ministerial rank generally would, at a stroke, diminish the authority of the Prime Minister in the Second House and already define that chamber in a quite different relation to the executive.

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46 Bogdanor, *Politics and the Constitution*, p. 258

47 For a proposal radically opposed to this, see Jeremy Mitchell and Ann Davies, *Reforming the Lords* (IPPR 1993), p. 53—arguing that each department should have a minister from each House.

Apart from anything else, this would also cut off at the pass something that has threatened to creep in as an abuse. In 2008, Peter Mandelson, who did not at that time hold a seat in Parliament, was made eligible for membership of Gordon Brown's Cabinet precisely by being created a Life Peer. This amounted to a surreptitious hijacking of the Westminster principles that govern cabinet office in the direction of something like the American arrangement, whereby individuals can be appointed to the Cabinet whether they are members of Congress or not. The Mandelson appointment was effectively of this kind—facilitated by the Prime Minister's power over the system of peerage—with this difference (a characteristic one where British imitation of American arrangements is concerned): there was no *safeguard* provision in the UK for the advice or consent of any other body to the appointment as there is, under Article II of the Constitution in the United States: there, cabinet officers may be appointed from private life but only with the advice and consent of the Senate.

The difference made by the promise of ministerial office can be seen, particularly in small Parliaments, like New Zealand's House of Representatives. Do the math. With only 120 or so MPs, and with a Cabinet strength of 20 (plus 8 non-Cabinet ministerial appointments), virtually every member of both major parties will reckon that he or she has a 50% chance of ministerial office, probably higher over the lifetime of her participation in New Zealand's triennial parliaments. New Zealand MPs don't get much of a chance to scrutinize legislation properly anyway, what with the abuse of urgency, the lack of a quorum, the incessant resort to closure motions, and the party vote system whereby members don't even have to be present in order to be counted. Don't get me started.[48] But you can imagine how powerful the whips are in this in this small unicameral chamber, with this pervasive inducement to offer. In larger Parliaments, the evil is not so striking, but it is significant still, and its reduction or elimination in at least one chamber could go a long way to helping to define genuine difference in the legislative process as between the first house and the second house.

I know it's quite a radical change I am envisaging – freeing a part, a half of the bicameral legislature, from executive domination. It is not a complete departure from the Westminster system; but it is one step towards some degree of legislative independence. In many legislatures in the world, both chambers are independent of the executive.

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48 See notes 1 and 11, above.

And it is not as though the evils of executive domination have never occurred to anyone. We all know James Madison's observation in *Federalist* 62 about the danger of legislators' neglecting their obligations to the people and pursuing some ulterior purpose:

> In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.

It's Mill's principle again, but with a more radical tilt. And it is worth remembering Walter Bagehot's gloss on this in Chapter V of *The English Constitution*. Bagehot, who was by no means a fanatic enthusiast for bicameralism, conceded the danger of "sinister interest" in the lower chamber, and acknowledged that it was "therefore of great use to have a second chamber of an opposite sort, differently composed, in which that interest in all likelihood will not rule." Do you know what he gave as his example of such a sinister interest? "The most dangerous of all sinister interests is that of the executive government"[49]—the cabinet, with the power that it has in the Commons.

There has not been nearly enough attention to this issue in the debate about constitutional reform in the UK: Nicholas Aroney is an honourable exception. I hope if I can drive one point home with you tonight it is this: that although we want a second chamber that is different form the first to avoid Bentham's objection of redundancy, what we most want is a second chamber that independent of the government so that it can perform functions of genuinely legislative debate, which is not just acclamation of the executive's agenda.

Probably for just this reason, it is not going to happen. Professor Anthony King's cynicism knows no bounds, but even he out-does himself, calling it "highly unlikely that any government … based on the House of Commons, would wittingly create a second chamber with sufficient power and prestige to mount a serious challenge to its own authority. Pigs will fly; flies will turn into pigs."[50] But it is delicious to entertain the possibility of a

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49 Ibid., p.p. 80-1.

50 Anthony King, *The British Constitution* (OUP 2007), p. 310.

genuinely independent legislature, is it not? Or half of one. Genuine realization of the old principle that before it becomes law, a bill should be debated and scrutinized in a representative body that is quite independent of, and has nothing to hope for or fear from, the agency that is going to be charged with its administration. Delicious but forlorn. Still I emphasize these principles so at least we know what we are missing. As Locke put it in another context, "You will say, then, the [government] being the stronger will have [its] will … Without doubt; but the question is not here concerning the doubtfulness of the event, but the rule of right."[51]

7. Separation of powers – judicial functions

It's funny. We talk freely enough about the separation of powers. And most of us would accept—as the English say "in theory"—that there is something inherently inappropriate about institutional entanglements that place all the functions of government—judicial, executive, legislative, and federative—in one body (with the possible result that these functions will be accumulated in one set of hands). And there has not been much trouble taking on board the idea that the judges who are charged with the administration of a statute should have no part in enacting it. It only took us a few centuries to get to the point where the ultimate power of appeal in matters judicial was removed from the upper house of Parliament and vested in an independent Supreme Court, thus ending the anomaly whereby her Majesty's Lords of Appeal might participate also in legislative debate (as they sometimes did), not to mention the problem that it was only by informal convention that Lords Spiritual and Temporal were precluded from voting on the outcome of legal cases.[52]

Bentham, oddly enough, thought he had to spend time refuting the proposition that one of the advantages of an upper house was that it could combine legislative and judicial functions. He made short work of that (to the extent that he made short work of anything in the letter), substituting for it a rather batty proposal that the final power of judicial appeal should be vested in one judge electively accountable to the members of the lower house and punishable by it for "criminal misdecision"—something that might appeal perhaps to our present political leaders, but which to the rest of us should cast

51 Locke, *Letter Concerning Toleration*

52 The Appellate Jurisdiction Act 1876 provided that a minimum of three Law Lords must be present to hear any appeal to "her Majesty the Queen in her Court of Parliament" but did not provide appear to prohibit Lords who were not Law Lords from participating.

doubt on Bentham's overall defense of unicameralism under the rubric of "the thirteenth chime of a crazy clock.…"

Some of you will know about my opposition to the practice of strong judicial review of legislation, on the American model—a practice whereby legislation once enacted may be struck down by a court because a majority of judges reckon that it is at odds with a bill of rights. I have said elsewhere that it is hard to sustain this opposition against a unicameral Westminster-style parliament (In New Zealand, for example), and certainly it is hard to sustain what I have called "the dignity of legislation" as a premise of this opposition when the legislative process is entirely dominated by the executive.[53]

The point of the debate about judicial review is not, as we sometimes put it, about a clash between elective and non-elective institutions, and majority-rule and rule by some non-majoritarian entity. The specific issue is about the constitutional standing of an elected representative assembly devoted specifically to legislative functions. That standing can come under attack in a variety of ways. Strong judicial review is one; but so is executive ascendancy, and the attack is still an attack even when the executive has independent elective credentials, as the Presidency has for example in the United States, or even when the executive's elective credentials are partly those of the legislative assembly. To put it the other way round, executive ascendancy in, through, and over Parliament is not what opponents of judicial review should be seeking to vindicate. Opponents of judicial review are committed by their position to showing that the legislature itself—not the Cabinet, not even the plebiscites of the people, but the institutions and processes of representative legislation—is the appropriate place for the community to air and resolve its fundamental disagreements about what the law should be on matters of rights, justice and the common good. And that requires the legislative process to be robust and satisfactory on this own terms, not just satisfactory to its masters in Whitehall.

Whether the work of a properly constituted upper house could be conceived as an adequate substitute for judicial review is another matter. Many advanced democracies have both, and many supporters of judicial review defend the practice even for systems that have a robust and independent senate. Meg Russell and a colleague authored a paper back in 1999 on *Second Chambers as Constitutional Guardians and Protectors of Human Rights*, and if I understand her position correctly it would be conceived as a supplement to

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53 Jeremy Waldron, "Compared to What? Judicial Activism and New Zealand's Parliament," *New Zealand Law Journal*, Dec. 2005, 441 at p. 442.

rather than a substitute for the judicial protections that were envisaged at that time under the Human Rights Act. [54]

Probably what we say here depends a little on how far support for judicial review is based upon suspicion of democratic procedures, as such, even in their most responsible legislative manifestations. And it depends also how far opposition to judicial review is based on the appointive rather than elective character of the institution doing the reviewing. My own view is that constitutional review by an appointed second chamber would be the worst of both worlds. Dawn Oliver is right to ask whether "attitudes to reform of the House of Lords [would] be changed if it were re-named 'The Council of State'?"[55] But I am inclined to agree with Professor Bogdanor that "[i]f one is looking for an upper house with the authority to fulfil the function of constitutional protection … the conclusion seems inescapable that it must be an elected body."[56]

8. Commons ascendancy – Montesquieu, Harrington etc.

I mentioned at the beginning of the lecture the sentiment often expressed in Britain that it is important, in the course of second chamber reform, not to undermine the authority of the House of Commons.

The concern is often expressed that the establishment of an elective second chamber might do just that. Certainly, the justification of the present ascendancy of the Commons defined by the Parliament Acts and the Salisbury Convention would find little justification in a fully elective bicameral arrangement. We must remember that the original Parliament Act—whose passage, in Anthony King's provocative formulation, led to Britain's legislature "abruptly becoming, in effect, unicameral"[57]—was passed explicitly as a stop-gap: "[W]hereas 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

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54 Aisling Reidy and Meg Russell, *Second Chambers as Constitutional Guardians and Protectors of Human Rights* (1999), p. 5 et passim.

55 Oliver, *Constitutional Reform in the United Kingdom*, p. 201.

56 Bogdanor, *Politics and the Constitution: Essays on British Government* (Dartmouth, 1996), p. 247.

57 Anthony King, *The British Constitution* (OUP 2007), p. 2.

basis, but such substitution cannot be immediately brought into operation."[58] Or at least it was phrased that way; Bogdanor says it was disingenuous.[59]

I am sure there are sentimental reasons for wanting to preserve the ascendancy of the House of Commons but I wonder how far the real motive, in the minds of our cold-eyed masters has to do with preserving executive hegemony via the ascendancy of the House of Commons rather than preserving the ascendancy of the latter institution for its own sake. Dawn Oliver may be right in her formulation, in *The Changing Constitution*, that this is more a matter of the relation between the second chamber and the government than of the relation between the second chamber and the first.[60]

In any case the arrangement I am envisaging is not necessarily incompatible with some sort of primacy for the Commons, at least in assigning to one of them the characteristic role of proposing and initiating legislation that the government is committed to and the other the characteristic role of scrutinizing and amending it.

Political theorists in the 17th and 18th centuries used to envisage a relation of this kind between the two houses in a bicameral system. Montesquieu, who was a proponent of bicameralism as much as the separation of powers, imagined that the assembly of nobles should take part in legislation only through its power of rejecting legislation, not through any faculty of ordaining, or initiating the ordaining of law, by its own authority.[61] And a century earlier, the republican theorist James Harrington drew an analogy between a bicameral legislature and the admirable practice of what he called "two silly girls" who have figured out how to divide a cake among themselves. "'Divide', says one

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58 Parliament Act 1911 (1911 Ch. 13 1 and 2 Geo 5)

59 Bogdanor, *The New British Constitution*, pp. 154-5.

60 Dawn Oliver, "Reforming the United Kingdom Parliament" in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution*, 7th edition (Oxford University Press, 2011), 167 at 169-70.

Ditto for the "clear accountability argument.": "To go on talking about the need to maintain the supremacy of the Commons … is a mistake. It is naïve to go on arguing that British democracy depends on some form of unambiguous accountability, whereby the electorate know exactly which set of politicians to hold accountable for what, because only a single party wields power through a House of Commons that wields untrammelled supremacy. Doing so might flatter MPs; … but it is no longer in accord with reality. British democracy is more complicated in both its form and expression." (Donald Shell, "The Future of the Second Chamber, 57 Parliamentary Affairs 852 (2004) 865)

61 Montesquieu, *The Spirit of the Laws*, Bk. 11, Ch. 6, p. 161.

unto the other, 'and I will choose; or let me divide, and you shall choose'."[62] It is, he says, an indictment of unicameralism that it cannot offer this diversity:

> in a commonwealth consisting of a single council, there is no other to choose than that which divided; whence it is, that such a council faileth not to scramble, that is to be factious, there being no other dividing of the cake in that case but among themselves.

But in a diversified system of governance, these functions—"dividing and choosing, [or] in the language of a commonwealth … debating and resolving" are assigned to different legislative bodies: "the wisdom of the commonwealth … in the aristocracy" and "the interest of the commonwealth … in the whole body of the people" or in a representative council "so constituted as can never contract any other interest than that of the whole people." This, says Harrington, is

> the whole mystery of a commonwealth, which lies only in dividing and choosing; nor hath God … left so much unto mankind to dispute upon as who shall divide and who choose, but distributed them for ever into two orders, whereof the one hath the natural right of dividing, and the other of choosing.

I don't want to try your patience too much with this antiquarian nonsense. The fact that something has been mentioned by a figure like Harrington or Montesquieu is no guarantee that it is sensible: look at David Hume with his daft constitutional ideas: a Court of Competitors, composed of those who are runners-up in senatorial elections and the idea, which Hume thinks is of Roman origin, of having two independent co-equal legislatures, each capable of enacting laws on its own motion.[63]

In particular we are unlikely to accept the association that these two writers make between the second chamber and aristocracy, a hereditary elite in the case of Montesquieu. (In Harrington, it is a little different, and I will come back to that in a moment.) A mixed regime, in the classical sense—king, nobles, and commons—is no longer an option for us.

However, we don't have to accept that in order to see the value of this sort of separation of function inside a bicameral legislature. There can still be a distinction of this kind between certain actions and tasks in relation to law-

62 James Harrington, Oceana

63 David Hume, Idea of a Perfect Commonwealth in *Essays: Moral, Political and Literary* Part II, Essay XVI

making. And maintaining the legislative initiative in the chamber where the executive is the more dominant is a way of keeping faith with our Westminster traditions, without surrendering the whole of the legislative process to its domination. And equally defining a role for the second chamber that does not include control over the legislative agenda can highlight the importance of deliberative functions within parliament, understood independently of the urgent tasks of government.

9. Aristocracy and the thesis of Bernard Manin

Let me come back finally to this issue of aristocracy. In all of this I have assumed an elected second chamber. There is considerable support in Britain for an appointed chamber, particularly (and—is this unfair?—predictably)[64] among those who have already have seats by appointment in the House of Lords. I would have thought the Canadian experience would give us pause, but it is barely mentioned in the British debate.[65] Anyway, it seems to me that if we want a second chamber over which the power of the Prime Minister and the Cabinet is diminished, then probably it is not a good idea to fill it with people who one way or have another recommended themselves to the powers that be for appointment. Just as we don't want the business of the second chamber to be distorted by its members' hopes of ministerial office so we don't want it to be skewed by their sense of beholden-ness to those who dominate the other house.[66]

James Harrington, the 17th century republican I mentioned a moment ago, suggested that a senate might be aristocratic by election rather than inbreeding. He had a touching faith in the ability of the common people to recognize their betters, "a natural aristocracy diffused by God throughout the whole body of mankind."[67] Beginning with Harrington—actually beginning in a way with Aristotle—there is a constant theme in the canon of Western political theory that it may be a mistake to oppose elective and aristocratic forms too sharply. Election may be conceived as a way of identifying the best person; certainly it

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64 As Anthony King remarks, op. cit., p. 311, "they would say that, wouldn't they?"

65 See the sources cited at note 10 above.

66 Possibility of a chamber largely appointed on a party basis (on nomination of parties). Dawn Oliver's comment: this would give "immense patronage and power to the parties, which could be open to abuse, for instance in rewarding party donors" (Dawn Oliver, *Constitutional Reform in the United Kingdom* (OUP 2003), p. 200).

seems to be quite different from selection by lot, which the Athenians regarded as more democratic. I wonder whether this thought is something we can make use of.

One of my distinguished colleagues at NYU in the Department of Political Science is Bernard Manin, and in a book called *The Principles of Representative Government* (1997), Manin has pursued this suggestion. Like the Athenians he argues that the principle of election is that the best person is chosen—and that this is so, not only from the logic of the elector's choice—he or she is voting for who they takes to be the best person—but often also from the design point of view in regard to the electoral system itself. I actually think this is a mistaken view at least so far as the voter's choice is concerned, because although he may indeed be striving to identify the best person, the idea of the best leaves open the question – the best *what*? "The best legislator" is one possible answer and that might be a vaguely aristocratic idea; but "the best spokesman for my interests" or "the person best able to convey to others what it's like to be someone like me" are other possible answers—quite plausible in the context of political of class representation—and those are not aristocratic at all.

This is a difficulty for Manin's account, but it represents perhaps an opportunity for ours. For although Manin is wrong that all election is necessarily aristocratic, he need not be wrong in the claim that election is sometimes aristocratic, and that there are ways in which an electorate can orient itself to electoral choice that brings into play elements that are appropriate to some of the work that aristocracy—the idea of aristocracy—has sometimes done for bicameralism.

Some of the structural features I have mentioned may be important here. I am voting for—choosing—a representative to help determine the political complexion of the government; the best representative for that purpose: that is one sort of electoral choice. Those are the auspices of electoral choice for the first or primary chamber. I am voting for, choosing, the best person (of the

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67 "Twenty men, if they be not all idiots -- perhaps if they be -- can never come so together, but there will be such difference in them that about a third will be wiser, or at least less foolish, than all the rest. These upon acquaintance, though it be but small, will be discovered and (as stags that have the largest heads) lead the herd; for while the six, discoursing and arguing one with another, show the eminence of their parts, the fourteen discover things that they never thought on, or are cleared in divers truths which had formerly perplexed them; wherefore in matter of common concernment, difficulty or danger, they hang upon their lips as children upon their fathers, and the influence thus acquired by the six, the eminence of whose parts is found to be a stay and comfort to the fourteen, is auctoritas patrum, the authority of the fathers. Wherefore this can be no other than a natural aristocracy diffused by God throughout the whole body of mankind to this end and purpose…"

candidates presented to me) to hold office for a longer period and scrutinize and deliberate about legislation. That's a different sort of choice, more appropriate to a Senate or a second chamber. In each case, choosing the best means something different: the best what? But the second might pick up on some of the attributes that make Manin's thesis plausible. The second might pick up on some aspects of aristocracy, in Harrington's literal sense that doesn't mean class or breeding.

Or—aristocratic or not—the idea of choice with an eye to the specific functions performed by the members a second chamber—the best at that—uncontaminated by these questions of choosing a government—might help nourish the sense that we want of the two chambers having different work to do. And it might do this—in a way that an appointed second chamber on the Canadian model could not—without sacrificing democratic legitimacy.

10. Conclusion

Bicameralism is an attractive topic, especially for someone interested in the dignity of our legislative institutions. By conceiving of the legislature as a them, rather than an it—by focusing on Parliament as something composed of two separate parts (each, in addition, comprising an assembly of hundreds of members), it offers the political theorist something of an anatomy lesson.

Under the ancient regime of mixed government, the anatomy of the legislature mirrored the anatomy of the society at large in its different estates. But even in the modern era, dissection is instructive.

With the two halves of Parliament opened up, we can look at systems of representation and election, each as just one possibility among others, each as possibly complemented by another in a still imperfect but now two-fold sampling of the people. With the two halves opened up, we can or easily think of legislation itself as a complexity of tasks—agenda-setting, particular proposal, principled deliberation, focused debate on particular parts or sections, constitutional scrutiny, and eventual resolution—an articulated sequence of functions mapped on to different institutions and processes. Finally, with the two halves of this branch of the state opened up, it is easier to grasp the various modes of connection and disconnection with other branches of government and to imagine new and different possibilities of respecting the principle of the separation of powers even in a Westminster system.

If I may be allowed one last digression. What we have been doing here this evening is comparable to the way in which dissecting the executive (along

Lockean lines) into its constitutive functions—its enforcement and administrative functions, its federative role, its prerogative powers, and its high-level representation of the state—this dissection of the executive opens up for clearer view its relations to other branches of government. And indeed the theorist's dissection of the executive actually works best when it is brought into relation with exactly the exercise in bicameral anatomy that we have been performing. (I have in mind here—as an exemplar—James Madison's and Thomas Jefferson's insistence against Hamilton and Washington in *The Pacificus-Helvidius Debates* of 1793 that the Senate must be allowed to play its party in the process of determining whether and how to honor the United States' treaty obligation to France, not only because the Senate advises and consents on foreign policy appointments, but because it participates in the ratification of treaties, which are according to Article VI of the Constitution part of the supreme law of the land.)

These lessons in theoretical anatomy may excite impatience in political commentators—particularly in Britain—who prefer at best a blurred glimpse of institutional articulation in their rush to see who is winning in the bottom line of party politics. But there is an alternative perspective, even in the real world—we call it constitutionalism—which does take time to take structure seriously and structural design. And it is refreshing in this case study to see structure made prominent in the constitutional view, not (as so often) for limiting the legislative function, but for constituting and actually vindicating the independence of this power against the other branches of government.