

REPORT

The House of Lords:
Conventions and Brexit

By Richard Reid

THE
CONSTITUTION
SOCIETY

First published in Great Britain in 2017 by
The Constitution Society
Top Floor, 61 Petty France
London, SW1H 9EU
www.consoc.org.uk
© The Constitution Society

ISBN: 978-1-9998886-1-9

All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without the prior written permission of both the copyright owner and the publisher of this book.

Acknowledgements

The author thanks the Constitution Society for commissioning the paper and its President, Sir Malcolm Jack, for his interest in the project. The author would also like to thank the ANU Centre for European Studies for the Europa Visiting Fellowship which supported this research, and Nicolas Besly for his comments on earlier drafts. All views expressed are those of the author alone.

Contents

Acknowledgements	3
About the Author	5
Summary	6
PART 1	Paragraphs 1-9
Conventions	
PART 2	Paragraphs 10-16
The Salisbury-Addison Convention	
PART 3	Paragraphs 17-47
The House of Lords and Brexit	
PART 4	Paragraphs 48-59
Brexit: Possible Scenarios	
Conclusion	Paragraphs 60-63

About the Author

Richard Reid is Europa Visiting Fellow at the Australian National University Centre for European Studies, and completed his PhD on reform of the House of Lords in 2016. He lectures at the Australian National University, and is Associate Editor of the *International Political Science Review*. His research focuses on the House of Lords and its reform, but also encompasses comparative studies of second chambers. In 2016 he co-authored *Financial Privilege: The Undoubted and Sole Right of the Commons?* with Sir Malcolm Jack for the Constitution Society.

Summary

This paper examines the role of the House of Lords in Britain's exit from the European Union. In particular, the paper considers the future passage of the European Union (Withdrawal) Bill in the House of Lords. It begins with a discussion of conventions which provide a guide to the potential behaviour of the House of Lords towards Brexit. The paper then considers the Salisbury-Addison convention, concluding that this is not likely to be significant in the context of the Withdrawal Bill due to the contested nature of the convention's applicability. Rather, it is the vaguer convention of the primacy of the House of Commons which will guide the action of the second chamber.

Part 3 of the paper provides a detailed discussion of the role of the House of Lords in Brexit, and highlights the work of committees in this process. It identifies three areas of concern about the European Union (Withdrawal) Bill expressed by committees. These are: the degree and method of incorporation of the EU *acquis*; the powers and competencies of the devolved administrations; and, the relationship between Parliament and the executive. The government will need to consider handling strategies and concessions to the Lords to successfully navigate these issues, if they are not addressed sufficiently through amendments in the House of Commons.

In the light of this discussion, Part 4 provides three possible scenarios. These scenarios, in order of least likely to most likely, are: the House of Lords passes the Bill without amendment; the House of Lords vetoes the Bill or passes 'wrecking' amendments; or, the House of Lords passes significant amendments to the Bill. The paper suggests that the House of Lords is likely to significantly amend the Bill on issues relating to the three areas of concern outlined in Part 3.

Part 1: Conventions

Definition of Conventions

1. Conventions can be simply defined as ‘rules not directly supported by the force of law’.¹ The Cabinet Manual provides a similar definition: ‘[Conventions are] rules of constitutional practice that are regarded as binding in operation but not in law.’² As can be seen from both these definitions, the nature of conventions is that they act as rules – they bind. Their binding nature, however, does not come from law but rather from, in the words of Dicey, ‘understandings, habits, or practices’.³ For conventions to be binding there needs to be a consensus about the understanding, and what habits and/or practices are expected to be adhered to.
2. When conventions fail to bind, in some cases there will be a legislative route to enforce constitutional principles – for example the Parliament Acts 1911 and 1949. In addition, there is an idea that conventions could be considered in judicial review. However, while certain constitutional principles, such as the primacy of the House of Commons, are binding both in law and convention, conventions alone are free from legislative enforcement, and can thus be amended or overwritten by a changed consensus.

Importance of Conventions within the uncodified constitution

3. The uncodified nature of the British constitution increases the importance of conventions in guiding and binding actors. Andrew Blick argues that:

*Within uncodified constitutions, of which the UK provides one of the few examples internationally, conventions can be even more prominent than in their codified counterparts ... Any change to the way conventions develop or operate is therefore of exceptional importance to an understanding of the governance of the UK.*⁴

Within this context there has been close consideration of conventions, and how their understandings and applications change. One example was the Joint Committee on Conventions.

4. The Joint Committee on Conventions was convened in May 2006. Its terms of reference were:

That, accepting the primacy of the House of Commons, it is expedient that a Joint Committee of the Lords and Commons be appointed to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation, in particular:

(A) the Salisbury-Addison convention that the Lords does not vote against measures included in the governing party’s Manifesto;

¹ Blick, A. (2014) ‘The Cabinet Manual and the Codification of Conventions’, *Parliamentary Affairs*, 67(1), pages 191/208, page 191.

² Cabinet Office (2011) *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government*. London: Cabinet Office, page 3.

³ Dicey, A.V. (1915) *Introduction to the Study of the Law of the Constitution* (London, Macmillan, pages cxl/cxli.

⁴ Blick, A. (2014) ‘The Cabinet Manual and the Codification of Conventions’, *Parliamentary Affairs*, 67(1), pages 191/208, page 191.

(B) conventions on secondary legislation;

(C) the convention that Government business in the Lords should be considered in reasonable time;

(D) conventions governing the exchange of amendments to legislation between the two Houses.⁵

The Joint Committee reported on 31 October 2006. Its overall view on conventions was:

*We do not recommend legislation, or any other form of codification which would turn conventions into rules, remove flexibility, exclude exceptions and inhibit evolution in response to political circumstances. And, however the conventions may be formulated, the spirit in which they are operated will continue to matter at least as much as any form of words.*⁶

*Self-Regulation and the House of Lords*⁷

5. Conventions operate not only between the House of Lords and the House of Commons, but also within the House of Lords itself. One such important convention is that of self-regulation.

6. Sir Michael Wheeler-Booth argued that self-regulation is a long-standing tradition in the House of Lords, one which is now unique amongst second chambers.⁸ The *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* provides a useful working definition of self-regulation:

*The House is self-regulating: the Lord Speaker has no power to rule on matters of order. In practice this means that the preservation of order and the maintenance of the rules of debate are the responsibility of the House itself, that is, of all the members who are present, and any member may draw attention to breaches of order or failures to observe customs.*⁹

7. Wheeler-Booth notes that the ‘law and custom’ of the House of Lords has its written root in 1621.¹⁰ Indeed, the Lords had written standing orders before the House of Commons. These original standing orders consisted of three core principles¹¹: equality of membership, the absence of a speaker with power to control proceedings, and ‘procedural freedom and flexibility’ (Wheeler-Booth, 2001, pp. 80-81).

8. The House of Lords Select Committee on the Speakership of the House of Lords identified the key aspects of self-regulation as:

5 Joint Committee on Conventions (2006) *Conventions of the UK Parliament*. London: The Stationery Office Limited, page 7.

6 Joint Committee on Conventions (2006) *Conventions of the UK Parliament*. London: The Stationery Office Limited, pages 4/5.

7 This section builds on unpublished work conducted by the author and Lachlan Jones.

8 Wheeler-Booth, M. (2001) ‘Procedure: A Case Study of the House of Lords’, *Journal of Legislative Studies*, 7(1), pages 77/92.

9 House of Lords (2017) *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*. London: House of Lords, page 47.

10 It should also be noted that some authorities treat ‘law and custom’ of Parliament as a category distinct from ‘convention.’

11 Wheeler-Booth appears to consider there to be four principles, but two of these concern the notion of equality of membership and have here been treated as one.

Lords address the House, not the Woolsack.

The Lord Speaker (we return later to the question of the title) has no power to rule on points of order.¹²

The Lord Speaker has no power to call on Lords to speak in debates. In theory the House decides whom it wishes to hear. In practice a list of speakers is usually determined through the “usual channels”.

There is no selection of amendments; all are debated unless not moved.

The Lord Speaker has no power to adjudicate at question time when two or more Members rise together, and neither gives way. This is a matter for the House, advised when necessary by the Leader of the House, or in her absence by the Deputy Leader or Chief Whip.

The Lord Speaker has no power to intervene if a Member speaks too long in a time-limited debate, or comments at undue length on a Ministerial Statement, or strays from the point or is repetition us. These are matters for the House as a whole, again advised as necessary by the Leader, the Deputy Leader or a Government Whip.

Thus conventions do not just guide and binde the interactions between the two chambers, but also within the chambers.

Conventions between the Houses

9. The main convention between the House of Lords and the House of Commons is the primacy of the latter. Whilst this is rarely, if ever, contested, there is still uncertainty about how the convention should operate and in which circumstances. Importantly, there is a difference of opinion about when the House of Lords may assert its powers. The Joint Committee on Conventions highlighted this at the beginning of its 2006 report:

We were asked to accept the primacy of the Commons, and we do. But we detect a good deal of shading around what it means in the context of legislation, and what role it leaves for the House of Lords. No-one challenges the right of the Lords to consider Bills, including acting as “first House”, and to consider Statutory Instruments where the parent Act so provides. It is common ground that the Lords is a revising chamber, where government measures can be scrutinised and

¹² Committee on the Speakership of the House (2005) *The Speakership of the House of Lords*. London: The Stationery Office Limited, page 6.

*amendments proposed. But there is a range of views on what should be the proper role of the Lords in the legislative process.*¹³

In 2014 the Constitution Committee stated:

*We recognise that a practice has evolved that the House of Lords does not normally block government bills, whether they are in a manifesto or not.*¹⁴

This question of manifesto bills relates to the Salisbury-Addison convention which will be considered in the next Part of this paper.

¹³ Joint Committee on Conventions (2006) *Conventions of the UK Parliament*, page 3.

¹⁴ Constitution Committee (2014) *Constitutional Implications of coalition government*, London: House of Lords, para. 100.

Part 2: The Salisbury-Addison convention

History of the Salisbury-Addison convention

10. The Salisbury-Addison convention was first formulated in 1945 following the election that July of a Labour government with a large majority in the House of Commons. Although, the doctrine of Commons' mandate superseding the Lords was developed over a long period from the 1860s at least. The Convention was designed to address the overwhelming majority of non-Labour peers in the House of Lords:

*The Salisbury-Addison Convention thus began, and continued, as a compact between the Labour and Conservative parties to deal with the relationship between a Labour Government and a House of Lords with an overwhelmingly large and hereditary Conservative Opposition.*¹⁵

Due to the disparity in numbers, Conservative peers could defeat any government measure they desired, and whilst the Parliament Act 1911 would ensure that the government could eventually pass its legislation without the consent of the House of Lords, resorting to such an approach would severely delay the legislative agenda of the newly elected government. In addition, it would leave the House of Lords vulnerable to charges of obstructing the democratic will of the British people.

11. The Salisbury-Addison convention, as articulated by the Constitution Committee when considering the effects of coalition government, is that 'bills foreshadowed in a government's manifesto are given a second reading in the Lords, are not subject to wrecking amendments and are passed in reasonable time'.¹⁶ The Constitution Committee has recently published evidence it has received on the applicability of the Convention under the current Conservative minority government.¹⁷ Its report contains a short introduction and written evidence from peers in leadership roles in the House of Lords and Professor Meg Russell from the Constitution Unit, University College London. This applicability of the Salisbury-Addison convention to the current Parliament will be considered in Part 4 of this paper.

Connection with the Parliament Acts

12. The Salisbury-Addison convention is concerned with ensuring the government's business, approved by the electorate, is not frustrated by the second chamber. This convention, and the convention of the primacy of the House of Commons, is part of a broader principle of strong executive government in Britain. This broader principle binds peers not just through convention, but also through legislation. As the Joint Committee on Conventions state:

Though rarely used, these [the Parliament Acts] have defined the fundamentals of the relationship between the two Houses ever since 1911, expressly limiting the powers of the Lords compared with the Commons, and acting as a long-stop to save

¹⁵ Joint Committee on Conventions (2006) *Conventions of the UK Parliament*, page 24.

¹⁶ Constitution Committee (2014) *Constitutional implications of coalition government*, London: House of Lords, para. 98.

¹⁷ See Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords.

*a Bill and to vindicate the primacy of the Commons when there is deep disagreement between the two Houses.*¹⁸

As such, relations between the two chambers is not just based on convention, but also on the legislated primacy of the Commons through the Parliament Acts 1911 and 1949.

Life Peerages Act 1958

13. The Life Peerages Act, introduced by the Macmillan government in 1958, has had a significant effect on the House of Lords. First, it made it more palatable for potential Labour peers to accept membership of the House of Lords without having to accept a hereditary peerage. Indeed, the focus of the legislation was to enable more peers to be appointed to the Labour and Liberal benches. Second, it undermined the hereditary principle as the primary means of membership of the House of Lords. This has meant that there is no longer a preponderance of Conservative peers in the House of Lords. As the Leader of the Opposition in the Lords, Baroness Smith of Basildon, stated: ‘This may be the first Conservative administration in history that has not had an automatic majority in the Lords’.¹⁹

Changing profile of peers since Blair

14. In addition to the changed party balance in the House of Lords since 1958, the types of people appointed to the Lords has expanded. Some have argued that under Tony Blair not only did the background of peers increase in its variety, but that these new peers had a very different approach to their work in the House of Lords. It has been argued that these peers approached their work not only more professionally, but also with increased levels of partisanship.

The House of Lords Act 1999

15. The House of Lords Act 1999, which removed all but 92 hereditary peers, has been well covered elsewhere, so this paper will not consider its effects at length. Suffice to say, as Meg Russell argues, that the effect of the Act was that ‘the second chamber’s dominance by the hereditaries, and consequently the Conservative party, was at an end’.²⁰
16. The House of Lords is much changed from the House of Lords at the time of the Parliament Act 1911, and indeed from the House of Lords at the time of the Salisbury-Addison convention in 1945. The increase in Labour peers as a result of the Life Peerages Act 1958, and the expulsion of the majority of the hereditary peers by the House of Lords Act 1999, removed much of the rationale for the Salisbury-Addison convention as it was first formulated. In addition, the assertiveness of peers,²¹ particularly peers created since 1997, has increased. These changes are fundamental to understanding the House of Lords which is to consider the European Union (Withdrawal) Bill.

18 Joint Committee on Conventions (2006) *Conventions of the UK Parliament*, page 12.

19 Baroness Smith of Basildon, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 6.

20 Russell, M. (2010) ‘A Stronger Second Chamber? Assessing the Impact of the House of Lords Reform in 1999 and the Lessons for Bicameralism’, *Political Studies*, 58(5), pages 866/885, page 867.

21 See Russell, M. (2010) ‘A Stronger Second Chamber? Assessing the Impact of the House of Lords Reform in 1999 and the Lessons for Bicameralism’, *Political Studies*, 58(5), pages 866/885.

Part 3: The House of Lords and Brexit

The role of the House of Lords in Brexit

17. The House of Lords has played, and will play, an important role in the United Kingdom's withdrawal from the European Union. This role can be considered in five ways:
- i) triggering of Article 50,
 - ii) ongoing scrutiny of the negotiation process,
 - iii) scrutiny of the European Union (Withdrawal) Bill,
 - iv) debate on the negotiated deal, and
 - v) scrutiny of post-exit primary and secondary legislation.
18. The emphasis of this Part of the report is on iii) scrutiny of the European Union (Withdrawal) Bill and, in particular, the part played by select committees of the House in that process. The composition of the House of Lords and the application of the Parliament Acts 1911 and 1949 are also taken into account.

Triggering of Article 50

19. Following the judgment of the Supreme Court on 24 January 2017, in *R (Miller) v Secretary of State for Exiting the European Union*, the government required the consent of both Houses of Parliament before triggering Article 50 of the Treaty on European Union, formally commencing the Brexit process. The House of Lords finally agreed to the European Union (Notification of Withdrawal) Bill on 13 March 2017, after not insisting on amendments guaranteeing the rights of EU and EEA citizens in the UK and requiring parliamentary approval for the outcome of negotiations with the EU.²² A vote during the report stage of the Bill on the latter of these two amendments received 366 votes in favour and 268 against, 'the largest vote in the House of Lords on record, with a turnout of 634 members'.²³ This makes clear the interest in the House of Lords on the Brexit process.

Ongoing scrutiny of the negotiation process

20. The House of Lords is scrutinising the negotiation process. The European Union Committee has held evidence sessions with David Davis, the Secretary of State for Exiting the EU, questioning him on the progress of the negotiations. The most recent of these sessions was on 27 October 2017; the Committee has requested more frequent sessions with Secretary of State or other department ministers and/or officials. On 26 September 2017 the European Union Committee launched an inquiry *Brexit: deal or no deal* which:

22 See <http://www.parliament.uk/business/news/2017/february/lords-debates-european-union-notification-of-withdrawal-bill/>

23 See <http://www.parliament.uk/business/news/2017/february/lords-debates-european-union-notification-of-withdrawal-bill/>

will examine the key components of any implementation, or transition period, including its legal basis, the institutional structures that will be needed to support it, and the likely cost to the UK, particularly in form of ongoing budgetary contributions. On the other side of the coin, the Committee will consider the implications of a failure to reach agreement on transition – a ‘no deal’ scenario.²⁴

21. The House of Lords’ scrutiny of the negotiation process is also being conducted through frequent oral and written questions from a variety of peers. The government is represented in this work by Lord Callanan, Minister of State at the Department for Exiting the European Union. Lord Callanan replaced Baroness Anelay of St Johns, who resigned on 27 October 2017. Baroness Anelay was an experienced government minister in the Lords, and was Government Chief Whip 2010-2014. Lord Callanan is a former local councillor and MEP, entering the House of Lords in 2014 and joining the frontbench in June 2017. Other ministers and whips are involved with various aspects of the negotiations pertaining to different departmental responsibilities.

Scrutiny of the European Union (Withdrawal) Bill

22. Committees of the House of Lords have published reports on the European Union (Withdrawal) Bill, and have ongoing inquiries which will report at a later date. In addition, the whole House will consider the Bill once it passes the House of Commons. The likely scenarios for the Bill’s progress in the House of Lords depend largely on any amendments passed, or concessions won, by the House of Commons, and whether the government takes into consideration the concerns already raised by House of Lords committees, outlined later in this report. It should also be noted that programming of Bills is not a procedure followed in the House of Lords.

Debate on the negotiated deal

23. On 7 February 2017 David Jones, then a DExEU minister, announced in the House of Commons the government’s plans for a parliamentary vote on the deal negotiated between the United Kingdom and the European Union. He said:

I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded. We expect and intend that this will happen before the European Parliament debates and votes on the final agreement.²⁵

As such the House of Lords will be given the opportunity to vote on the deal, although it is likely that the that the deal/agreement cannot be reopened by the House alone. It seems unlikely that the Lords will reject a deal if the Commons agrees to it. What will happen in the case of a no deal scenario is as yet unclear.

Scrutiny of post-exit primary and secondary legislation

24. Once the United Kingdom begins its exit from the European Union the House of Lords will play a significant role in the scrutiny of primary and secondary legislation. In particular, as set out in more detail below, there will be a considerable amount of secondary legislation to implement

²⁴ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/inquiries/parliament-2017/brexit-deal-or-no-deal/>

²⁵ David Jones, HC Deb, 7 February 2017, col. 264.

Brexit – estimated to be between 800 and 1,000 instruments.²⁶ Given the amount and nature of the secondary legislation the House will be faced with an unprecedented and gargantuan task. House of Lords committees have been considering how this is best administered. The Delegated Powers and Regulatory Reform Committee made the following recommendation:

Ministers should not have an unfettered choice to apply the negative or the affirmative procedure for statutory instruments under those clauses [7 to 9 and 17]. We propose instead a sifting mechanism:

- *Ministers lay all instruments in draft before Parliament, proposing either the affirmative or the negative procedure.*
- *Where the Minister proposes the affirmative procedure, it applies.*
- *Where the Minister proposes the negative procedure, a parliamentary committee has 10 sitting days in which to recommend the affirmative procedure instead. If no such recommendation is made, the negative procedure applies.*
- *Where the committee recommends the affirmative procedure, it applies unless the relevant House rejects the committee's recommendation within a further period of five sitting days.²⁷*

This seems a wise recommendation as it will allow the House of Lords to increase the level of scrutiny of statutory instruments where it feels there is cause. The issue of course will be how the House of Lords will be able to manage the effective scrutiny of a large number of statutory instruments subject to the affirmative procedure.

Work of the Committees in scrutiny

25. Much of the work of scrutiny in the House of Lords is done by its select committees. In the area of European Union affairs this has primarily been the task of the European Union Committee and its six sub-committees. Naturally, these committees have taken a lead in the scrutiny of Brexit by the House of Lords. However, important work is being done across Lords select committees, particularly by the Constitution Committee and the Delegated Powers and Regulatory Reform Committee.

European Union Committee

26. The European Union Committee and its six sub-committees, with their total membership of 72 peers, are an important part of the House of Lords committees. The European Committee:

scrutinises the UK Government's policies and actions in respect of the EU; considers and seeks to influence the development of policies and draft laws proposed by the EU institutions; and more generally represents the House of Lords in its dealings with the EU institutions and other Member States.²⁸

26 Patrick, S. (2017) *Scrutiny of Delegated Legislation in Relation to the UK's Withdrawal from the European Union*. London: Constitution Society, page 5.

27 Delegated Powers and Regulatory Reform Committee (2017) *European Union (Withdrawal) Bill*. London: House of Lords, page 30.

28 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/role/>

The main committee is appointed by the House of Lords, and the sub-committees are appointed by the main committee.

27. The European Union committees have taken a leading role in scrutiny of the Brexit process. As outlined above, the main committee has evidence sessions with the Secretary of State, David Davis. In addition, the committees have held, and plan to hold, numerous evidence sessions as part of their inquiries into Brexit and its effects. The committees have published several reports on Brexit but since the Bill is a piece of purely domestic law it is not expected that the EU Committee will report on it. The Committee's report *Brexit: devolution*, published on 9 July 2017 and debated on 9 October 2017, raised serious concerns about the proposed approach to the repatriation and amendment of legislation relating to devolved competencies.

Constitution Committee

28. The Constitution Committee 'examines all Public Bills for constitutional implications and investigates broad constitutional issues'.²⁹ Whilst the European Union Committee and its sub-committees are taking the lead in scrutinising the Brexit negotiations in general, it appears that the Constitution Committee is focusing more attention on the European Union (Withdrawal) Bill.
29. On 7 September 2017, the Constitution Committee published its interim report on the Withdrawal Bill. The report expressed concern over three areas, which will be discussed in more detail later in this report. They were: 'the relationship between Parliament and the executive, the rule of law and legal certainty, and the stability of the UK's territorial constitution'.³⁰ This interim report is part of the Committee's inquiry into the Withdrawal Bill, and a final report is expected.

Delegated Powers and Regulatory Reform Committee

30. The remit of the Delegated Powers and Regulatory Reform Committee is:

*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.*³¹

The Committee published its report on the European Union (Withdrawal) Bill on 28 September 2017. The Committee expressed similar concerns to the European Union and Constitution Committees about Henry VIII powers, insufficient remit for parliamentary scrutiny in the Bill, its effects on the devolution settlement, and the open-ended nature of the powers being granted to ministers. In addition, they raised concerns about ministers imposing taxation by statutory instrument.

Areas of Concern

31. House of Lords committees have identified three areas of greatest concern with the European

29 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/role/>

30 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*. London: House of Lords.

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

Union (Withdrawal) Bill.³² These are: the degree and method of incorporation of the EU *acquis*; the powers and competencies of the devolved administrations; and, the relationship between Parliament and the executive. The government will need to consider handling strategies and concessions to the Lords to successfully navigate these issues.

The degree and method of incorporation of the EU acquis

32. The Constitution Committee has sought clarification on how the body of EU law – the EU *acquis* – is to be carried over into UK domestic law. This has raised complex and constitutionally important questions about how the government is going to make workable EU law, formerly adjudicated by the Court of Justice of the European Union (CJEU). Issues include the process by which the wording of EU law is to be changed for the domestic UK context (which will be further discussed below when considering the Henry VIII powers in the Bill), whether, and how, EU regulations and decisions which are part of EU law will be brought over into UK domestic law, and how case law from the CJEU should be treated by UK courts.

33. The Constitution Committee concluded in its interim report:

While the European Union (Withdrawal) Bill provides some welcome clarity regarding judgments of the Court of Justice of the European Union, it is at least arguable that the Bill should provide more guidance to the courts. We will explore in our forthcoming inquiry the status of post-exit judgments by the CJEU on any pre-exit laws that still apply in the UK. We will also consider whether, post-Brexit, UK courts are likely to take into account CJEU case law which overturns or clarifies pre-exit law.³³

The effects on the devolution settlement

34. The European Union Committee and the Constitution Committee have both made clear their concern about the effect of the Withdrawal Bill on the internal relations of the United Kingdom, with reference to the relationship between the government and the devolved administrations. The EU Committee argued that ‘the EU has, in effect, been the glue holding together the United Kingdom’s single market’.³⁴ The issue is how this is to be managed once the UK leaves the European Union. The EU Committee recommended, and Lord Jay of Ewelme (the acting chairman of the committee) in a speech in the House of Lords argued this was their most important recommendation,³⁵ that:

We call on the UK Government and the devolved Governments to work together to put in place the frameworks needed to ensure consistency at UK level, thereby preserving the integrity of the UK single market, while respecting national, regional and local diversity, and the autonomy of the devolved institutions. We note the suggestion of some witnesses that, in the long term, some form of impartial internal arbitration between the constituent parts of the United Kingdom may be required to

32 There are many other areas of concerns for peers in relation to Brexit and the negotiations. This report is focusing on those concerns about the European Union (Withdrawal) Bill itself.

33 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 20.

34 European Union Committee (2017) *Brexit: devolution*. London: House of Lords, page 10.

35 Lord Jay of Ewelme, HL Deb, 9 October 2017, col. 32.

*ensure the integrity of the UK single market.*³⁶

35. Whilst the Committees calls for more collaboration and consultation between the government and the devolved administrations in the withdrawal process, the Withdrawal Bill has done little to assuage the concerns of the Constitution Committee:

*While clause 10 and schedule 2 confer powers on the devolved administrations to make regulations which correspond to the powers conferred by clauses 7 to 9 on UK ministers, clause 11 amends the devolution settlements to prevent the devolved institutions from modifying the body of retained EU law. The effect is that the devolved administrations will only have powers (under clauses 7 to 9) if they are subsequently granted by the UK Parliament.*³⁷

36. One approach which has been suggested by Lord Jay of Ewelme is the use of sunset clauses – which will make clear at what point the powers of ministers at Westminster over areas of devolved competency will cease:

*Of course time is short, but even if the Government were simply to add a sunset provision to Clause 11, all sides would have time to come together and reach a lasting agreement on the common standards needed to protect the UK's internal market, which could then be implemented by the legislatures in London, Edinburgh, Cardiff and Belfast.*³⁸

Lord Jay of Ewelme continued:

*I do not know why the Government have not pursued that approach. Any attempt to use the EU withdrawal Bill to impose common frameworks on the nations of the United Kingdom against their will would contradict the principles that underpin the devolved settlements. Of course the politics, particularly between Whitehall and Edinburgh, are difficult. I will not pretend that securing agreement will be easy, but so much is at stake that all sides—led, I hope, by the Government—must surely make the effort. The Brexit negotiations are complex enough. The last thing we want is to create unnecessary difficulties, too, for the make-up of the United Kingdom.*³⁹

37. The Delegated Powers and Regulatory Reform Committee has been even stronger in its recommendations, calling for primary rather than secondary legislation for repatriating devolved competencies:

*The Government should bring forward separate Bills to confer on the devolved institutions competencies repatriated from the EU. It is inappropriate for an issue of such constitutional importance to be left to secondary legislation.*⁴⁰

The devolved administrations have also made clear their concerns. In the case that the devolved

36 European Union Committee (2017) *Brexit: devolution*. London: House of Lords, pages 65/66.

37 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 21.

38 Lord Jay of Ewelme, HL Deb, 9 October 2017, cols 32/33.

39 Lord Jay of Ewelme, HL Deb, 9 October 2017, col. 33.

40 Delegated Powers and Regulatory Reform Committee (2017) *European Union (Withdrawal) Bill*. London: House of Lords, page 2.

administrations withhold consent for the Bill this may influence some peers to push harder for concessions from the government through amendments.

The relationship between Parliament and the Executive

38. Committees of the House of Lords have expressed serious concern about the effects of the Withdrawal Bill on the relationship between Parliament and the executive. Of particular concern has been the granting of Henry VIII powers. Henry VIII clauses confer power to the executive ‘to amend the statute itself by delegated legislation or to amend other statutes’.⁴¹ The Constitution Committee provides a helpful distinction between such clauses which allow for primary legislation to be amended and ‘normal delegated powers (that cannot be used to amend primary legislation)’.⁴²
39. The role of the House of Lords in scrutinising delegated legislation in all forms has sometimes been controversial, as demonstrated by the government’s indignation over the Lords’ positions on the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015.⁴³ However, the Lords still have commensurate powers over delegated legislation to the House of Commons, and have previously expressed their concern about how statutory instruments are used by government, and in particular concern about Henry VIII clauses. For example, Lord Judge argued that:

*we have too many Henry VIII clauses, and we call them Henry VIII clauses because they are draconian and potentially tyrannical.*⁴⁴

40. Within this already hostile environment to Henry VIII clauses in particular, and broader delegated powers in general, it is unsurprising that the House of Lords has demonstrated strong concern about the inclusion of such clauses in the European Union (Withdrawal) Bill; a concern shared by members of the House of Commons in its second reading debate. The concern of the House of Lords has been most clearly highlighted by the Constitution Committee’s interim report on the Bill:

The executive powers conferred by the Bill are unprecedented and extraordinary and raise fundamental constitutional questions about the separation of powers between Parliament and Government. In the broader context, it is not merely that the Bill invests the executive with deep legislative competence by authorising the making of “any provision that could be made by an Act of Parliament,” it is that the Bill contains multiple such powers, which overlap to a very considerable extent, and which are not subject to an enhanced scrutiny process...⁴⁵

The Committee highlighted areas of the Bill of particular concern:

These are set out not only in the main clauses (7 to 9) which give regulation-making

41 See *Erskine May*, page 667.

42 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 14.

43 For further discussion of these issues see Jack, M. and Reid, R. (2016) *Financial Privilege: The Undoubted and Sole Right of the Commons?* London: The Constitution Society, in particular pages 41/61.

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

45 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*. London: The House of Lords, page 2.

*powers, but throughout the Bill, including clause 17.*⁴⁶

The Committee goes on to argue that:

*the Bill weaves a tapestry of delegated powers that are breath-taking in terms of both their scope and potency.*⁴⁷

41. The Committee accepts the need for delegated powers in the Bill but urges self-restraint on the government in how they are used. In its interim report the Committee proposes a series of mechanisms to help ensure that ministers do not use their new powers to amend legislation to make new policy, but rather only to ensure the legislation continues to operate as already intended by EU law post-exit day. The Government has argued that the Bill is in that sense a “technical” mechanism, not a policy implementing measure.
42. The Constitution Committee does not regard Henry VIII clauses as the only provisions of concern. It highlights the potential importance of any delegated legislative powers:

*our point is that in these highly unusual circumstances, the fact that a Henry VIII power may not be needed should not be taken to signify that important constitutional concerns are necessarily absent.*⁴⁸

The Committee will therefore continue to provide intense scrutiny in respect of the use of delegated powers:

*We accept that the Government will require some Henry VIII powers in order to amend primary legislation to facilitate the UK’s withdrawal from the European Union, but they should not be granted lightly, and they must come with commensurate safeguards and levels of scrutiny. We do not believe that the Government has engaged with the need for such safeguards and we will pursue this issue in our forthcoming inquiry.*⁴⁹

Absence of a government majority

43. An important concern for the government is its lack of a majority in the House of Lords. This is made even more important as the mood of the House seems to have been in support of remaining in the European Union rather than exiting.⁵⁰ Table 3.1 below gives the different party proportions in the House, and shows that the Conservative peers currently number 253 (31.7%) of the House.

46 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 15.

47 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 2.

48 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 14.

49 House of Lords Select Committee on the Constitution (2017) *European Union (Withdrawal) Bill: interim report*, page 15.

50 It should be noted also that there are vocal supporters of Brexit in the House of Lords.

Table 3.1 Lords by party/group as of 1 October 2017 – House of Lords Library

Party/group	Number of peers	Proportion of the House
Conservative	253	31.7%
Labour	199	24.9%
Liberal Democrat	100	12.5%
Crossbench	176	22.1%
Not-affiliated	30	3.8%
Bishops	25	3.1%
Other	15	1.9%
Total	798	100%

44. Given the lack of a government majority in the House of Lords, the government will need to ensure that it takes seriously the concerns already raised by committees of the House of Lords. The three areas of concern, outlined earlier in this report, will need to be addressed carefully by government.

Large number of Liberal Democrat Peers

45. A related factor which will make the government’s task more difficult in the House of Lords is the presence of a large number of Liberal Democrat peers. As shown in Table 3.1 there are currently 100 Liberal Democrat peers, making up 12.5% of the House. This compares to 12 Liberal Democrat MPs (1.8% of the House of Commons). It is Liberal Democrat policy to oppose Brexit; their leader, Sir Vince Cable, has said they want “an exit from Brexit”. Liberal Democrat peers are a cohesive voting bloc on most issues, and could provide the government with significant difficulties. In addition, the view of most Liberal Democrats is that significant reform is needed to the House of Lords. As such Liberal Democrat peers have less incentive to work with the government on the passage of the European Union (Withdrawal) Bill. It is unclear at this stage what stance the group will take on the Bill.

Extended session and the Parliament Acts

46. Following the 2017 General Election, the Conservative government decided to extend the first session of the new parliament to two years, rather than the usual 12 months.⁵¹ This was to allow both Houses time to consider the legislation necessary to carry out Britain’s withdrawal from the EU. It is understandable that the government decided that it needed an extended session to pass the European Union (Withdrawal) Bill; however, this means that the Parliament Acts cannot be used to ensure the passage of that Bill or other Brexit-related legislation before the expected deadline for the negotiations in March 2019.

47. *Erskine May* states:

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,

⁵¹ House of Lords Library (2017) *Parliamentary Sessions: Years Without a Queen’s Speech*. <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2017-0032#fullreport>.

*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.*⁵²

As the current session has been extended beyond the expected deadline for Article 50 exit negotiations the Parliament Acts cannot be used by the government as there will only be one, rather than the necessary two sessions. However, it is unclear what effect, if any, the announcement of a two-year ‘transitional’ period may have, if the Withdrawal Bill is delayed by the House of Lords.

⁵² *Erskine May*, page 649. For more detail on these procedures, see *Parliament Act 1911* and *Parliament Act 1949*.

Part 4: Brexit: Possible scenarios

Applicability of the Salisbury-Addison convention to Brexit

48. In considering the applicability of the Salisbury-Addison convention in the current Parliament it is helpful to refer to evidence published by the Constitution Committee in its recent report on the Convention, which was referred to in Part Two of this report. The government's position as outlined by the Leader of the House of Lords, Baroness Evans of Bowes Park, is that:

*The Government is clear that the Salisbury-Addison convention – that the House of Lords should not seek to prevent the Government from implementing manifesto pledges in legislation – continues to apply.*⁵³

49. The position of the official opposition in the House of Lords was not as adamant about the applicability of the Salisbury-Addison convention to the current government. Baroness Smith of Basildon in her evidence to the Constitution Committee stated that:

*It is far from clear that the Salisbury Addison convention was ever intended to apply to minority Governments.*⁵⁴

She goes on to state that:

*However, there is a clear and fundamental constitutional relationship between the elected House of Commons and the unelected House of Lords. The House of Lords is keenly aware of the balance of power in this relationship. While there may be a residual case for the Lords to in extremis reject a bill at Second Reading, it is not in keeping with our constitutional role and I detect no appetite or serious interest in changing that.*⁵⁵

From these statements it can be seen that the official opposition feels less constrained by the Salisbury-Addison convention when there is a minority government, but nonetheless respects the convention of the primacy of the House of Commons.

50. The position of the Liberal Democrats was given by Lord Newby, the leader of the Liberal Democrat peers. Lord Newby stated his party's position that:

We believe that the position today is now very different from when the Salisbury-Addison Convention was agreed, and as such, the Convention is now largely redundant. Our views on the democratic reform of this House are well known, and as such we respect the views of the democratically elected House of Commons but believe that the scrutinising and revising role of the House of Lords is invaluable. Therefore, we will consider every proposal brought forward by any government on

53 Baroness Evans of Bowes Park, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 3.

54 Baroness Smith of Basildon, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 5.

55 Baroness Smith of Basildon, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 5.

*its merits and whether it is in the public interest.*⁵⁶

Lord Newby goes on to argue, similarly to the position of Baroness Smith, that the Convention does not apply to a minority government, but that ‘the Lords should not reject Bills at Second Reading on a regular basis’.⁵⁷

51. From the evidence from the leaders of the three major parties in the House of Lords given to the Constitution Committee it is clear that, for different reasons, the leaders of the Labour and Liberal Democrat benches question the applicability of the Salisbury-Addison convention. However, they do accept that there are significant limitations on the House of Lords power in relation to the House of Commons.

Primacy of the House of Commons

52. The discussion in the previous section demonstrates that it is not the Salisbury-Addison convention which will guide the actions of Labour and Liberal Democrat peers in relation to the European Union (Withdrawal) Bill. Of far more importance is the convention regarding the primacy of the House of Commons. This is significant as this latter convention is less clear in its expectation than the former and allows more range for the House of Lords in its scrutiny of the Withdrawal Bill. In particular, this latter convention provides little clarity over the extent to which the Lords should amend the bill and insist on its amendments at ping pong. On this there is no consensus.

Three scenarios

53. This report considers there to be three broad scenarios for how the House of Lords will act once it formally considers the European Union (Withdrawal) Bill. These scenarios will be effected by the approach taken by the House of Commons to the Bill and the nature of amendments, if any, passed there. However, as this juncture it is worth considering how the House of Lords is likely to respond to the Bill as it stands. These scenarios, in order of least likely to most likely, are: the House of Lords passes the Bill without amendment; the House of Lords vetoes the Bill or passes ‘wrecking’ amendments; or, the House of Lords passes significant amendments to the Bill.
54. As discussed in Part 3 of this report, committees of the House of Lords have already made clear the areas where there is likely to be the closest scrutiny when the Bill is considered. The areas of most concern over the Withdrawal Bill, are: the powers and competencies of the devolved administrations; the relationship between Parliament and the Executive; and, the degree and method of incorporation of the EU *acquis*. In each of the proceeding sections the likely approach of the Lords to these issues, and their actions, will be considered.

Scenario 1 – The House of Lords passes the Withdrawal Bill without amendment

55. The first scenario is that the House of Lords passes the Withdrawal Bill without amendment. This is the least likely scenario as members of the House of Lords have already expressed serious concerns about the Bill as it currently stands. Whilst the House of Commons may pass amendments before the Bill reaches the Lords dealing with some of these issues, it is most unlikely that all the concerns of the House of Lords will have been addressed.

⁵⁶ Lord Newby, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 7.

⁵⁷ Lord Newby, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 10.

Scenario 2 – The House of Lords vetoes the Withdrawal Bill or passes ‘wrecking’ amendments

56. The next scenario is that the House of Lords vetoes the Withdrawal Bill or passes ‘wrecking amendments’. This is also unlikely. Although the Parliaments Acts 1911 and 1949 will not be able to be used prior to the March 2019 withdrawal from the European Union, this may in fact have a restraining effect on the House of Lords. Self-restraint and the primacy of the Commons are strongly held conventions within the House of Lords, as has been demonstrated in this report. As such there is little chance that the House of Lords would block the Withdrawal Bill if it is passed by the House of Commons.

Scenario 3 – The House of Lords significantly amends the Bill

57. The most likely scenario is that the House of Lords will pass significant amendments to the Withdrawal Bill. These will be related to the areas of main concern, identified earlier in this report. There is likely to be amendments which limit ministers’ powers to make delegated legislation, give Parliament enhanced scrutiny over the passage of delegated legislation⁵⁸ and provide an increased role for the devolved administrations (see para 37).

58. Baroness Smith of Basildon, the leader of the Labour peers in the House of Lords, has made clear the official opposition’s view:

Our view is that the Lords will continue to operate within our clear constitutional limits as we always do: examining and debating legislation – including that on Brexit and the use of Henry VIII powers. Where necessary we will seek amendments for the elected House to consider and, at time, reconsider.⁵⁹

This view has been echoed even more strongly by the Liberal Democrat benches, with Lord Newby stating that:

In considering minority governments, coalitions and confidence and supply arrangements, our approach is that where there is a clearly expressed view in the Commons then the House of Lords should have regard to it, but that the Lords must never shirk from its responsibility to scrutinise thoroughly the legislation that is brought before it, to propose revisions to that legislation and on occasion to insist on amendments.⁶⁰

59. It is clear then that this is the most likely scenario currently facing the government in the House of Lords. As there has already been strong opposition to elements of the Withdrawal Bill in the House of Commons, there is a chance that some of the concerns expressed by peers may be amended prior to the Lords considering the Bill. In the face of opposition from both MPs and peers it seems that the government will need to be prepared for serious amendment of the Bill as it stands.

58 One such proposal is a ‘committee-based sifting system’ for considering the level of scrutiny necessary for statutory instruments. See Patrick, S. (2017) *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union*. London: Constitution Society.

59 Baroness Smith of Basildon, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 7.

60 Lord Newby, in Constitution Committee (2017) *The Salisbury-Addison Convention*, London: House of Lords, page 11.

Conclusion

60. The principal focus of this paper has been on the way in which constitutional conventions may affect the passage of the European Union (Withdrawal) Bill when the Bill reaches the House of Lords, while also considering the scrutiny that has already taken place, particularly by Committees of the upper house. As set out in Part 1 of this paper, conventions are, by their nature, changeable and the history of the relations between the Houses through the ages attests to that inherent flexibility which has been identified as a strength of the British parliamentary system.
61. In Part 4 of this report, statements by official spokespersons in the House of Lords have indicated that there are differing views about the applicability, in particular, of the Salisbury-Addison convention, with reservations on its working expressed by Labour and Liberal Democrat peers. Nevertheless, all parties have acknowledged the principle of the primacy of the House of Commons which predates the Salisbury-Addison convention and was enshrined in the Parliament Act 1911. Recognition of that principle suggests that the likelihood of the Lords rejecting the European Union (Withdrawal) Bill is very low.
62. However, scrutiny carried out by Committees of the Lords has revealed considerable concerns about existing provisions of the European Union (Withdrawal) Bill which are bound to be raised when the Bill is considered by the House as a whole. The most likely conclusion, therefore, about the progress of the Bill in the Lords is that detailed amendments will be offered to meet those and other concerns although, as has already been noted, some may be anticipated by the Government in the House of Commons and moved as amendments there.
63. It will then be for the Government to decide how to tackle the Lords amendments when they are returned to the Commons.ouse of Commons, House of CommonsHH

