HOUSE OF LORDS
Library Note

Divisions on Delegated Legislation in the House of Lords 1950–1999

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Isolde Victory
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1. Introduction

The purpose of this Lords Library Note is to chart developments and practice in relation to divisions on delegated legislation in the House of Lords over the last fifty years.

Delegated legislation, also termed subordinate or secondary legislation, is defined by the *Oxford Companion to Law* (1980) as:

> Legislation made not by Parliament but by persons or bodies on whom Parliament has conferred power to legislate on specified subjects. The practice [was] common under the Tudors, notably under Henry VIII's Statute of Proclamations which gave the King a limited power to issue proclamations having the force of Acts of Parliament, while his Statute of Sewers appointed Commissioners with power to make laws, ordinances, and decrees with statutory effect. Thereafter delegated legislation was frequent, either designed to meet emergencies, or conferring power on local government authorities. There was much less of this in the eighteenth century, but the practice continued.
>
> The practice has developed greatly since 1832, particularly as Parliament has come to interfere more and more in social and economic affairs, and it received great impetus during the two World Wars. It is now recognized as essential that Parliament should define the principles and the details to be settled and amended by the departments of state concerned. But delegated powers are frequently very wide and may include powers to amend statutes, though usually only consequential amendments.
>
> (p 347)

In the later 19th century, delegated legislation was for the first time brought under statutory procedures in the Rules Publication Act of 1893. The 1893 Act was subsequently replaced by the Statutory Instruments Act 1946 which sets out the procedures used today. The 1946 Act, which came into force in 1948, was a response to dealing with more frequent and complex Rules and Orders, chiefly resulting from administrative needs during the two world wars.

The 1946 Statutory Instruments Act established the current tripartite division between affirmative instruments, which must be laid and brought before Parliament, negative instruments, which are laid and may be considered by Parliament if 'prayed against' by peers or MPs, and general instruments which are not usually laid before Parliament. There are also procedures for other rule-making procedures such as codes of practice.

Prior to 1950, delegated legislation was subject to criticism in the House of Lords but there do not appear to have been any divisions. Janet Morgan did remark in *The House of Lords and the Labour Government 1964–70* (1975) that "the last occasion [before 1968] on which the House divided to defeat a Statutory Instrument was in 1911" (p 67). However, her source for this was a speech by Lord Silkin in 1968, where he said "… this House has never since, I think, 1911 successfully prayed against, or even divided against a Statutory Instrument" (HL *Hansard*, 4 April 1968, col 1455)—a statement open to a rather different interpretation. Certainly, the House of Lords *Journals* for 1911 do not list a division on delegated legislation and there does not appear to be any other evidence of a division during the first half of the century.

There were, however, debates on prayers to annul Orders before the 1950s. One occasion on which a division was seriously considered, and which was mentioned in later debates, occurred in 1937. In November that year the Conservative peer,

Lord Saltoun, moved two prayers to annul regulations on agricultural wages in Scotland. After some debate and government promises to discuss alterations, the debate was adjourned. The regulations returned to the House in December 1937 at which point the government undertook to amend the regulations in the light of recent consultations and on this understanding Lord Saltoun withdrew his prayers. During these debates there was no reference to the constitutional propriety or impropriety of the House of Lords objecting to delegated legislation (HL *Hansard*, 24 November 1937, cols 258–94; 14 December 1937, cols 486–96).

Although there were no divisions on delegated legislation in the first half of the 20th century, there were concerns about the growth in the length and complexity of delegated legislation as well as the lack of scrutiny. In 1924 the House of Lords had appointed a select committee to look into the procedure for scrutiny of affirmative instruments made under Acts relating to the utilities (HL 119, 1924–25) and in 1925 the House decided to appoint a sessional committee, the Special Orders Committee, to subject affirmative instruments (then called special orders) to technical scrutiny and petition procedures.

In 1932 the Donoughmore Committee on *Ministers' Powers* (Cmd 4060) made a number of recommendations in relation to the extent and form proper to delegated legislation. The committee suggested revisions to the Rules Publication Act and it proposed standing committees in both Houses to consider delegated powers in each Bill. Scrutiny of delegated legislation has also been considered more recently by the *Joint Committee on Delegated Legislation* (HL 184, HC 475, 1971–72); the *First Report from the Joint Committee on Delegated Legislation* (the Brooke report, HL 188, HC 407, 1972–73) and by the *Select Committee on the Committee Work of the House* (the Jellicoe report, HL 35, 1991–92).

These reports reflect a continuing concern about the lack of pre-legislative scrutiny of delegated legislation and led to the establishment of the current scrutiny bodies—the Joint Committee on Statutory Instruments, the House of Lords Select Committee on Delegated Powers and Deregulation and the House of Commons standing committees on delegated legislation. Considerations in relation to scrutiny constitute a subject in their own right but are mentioned here because they form a backdrop to the debates on delegated legislation in the House of Lords.

This Library Note considers the narrower area of divisions on delegated legislation. The Note focuses on what was said in the House on those occasions when opposition to an Order was sufficiently strong to move to a division. There were 71 divisions in total over the period 1950–1999 (excluding one division for which there was no quorum). Some of these occasions were affected by the political circumstances of the time or the particular Order but there were also certain more general constitutional issues which ran through these debates. The key question was undoubtedly what precedents there were for dividing on delegated legislation and whether there was a convention, or even a practice, that the Lords did not divide. Another significant development was the increasing tendency to register opposition to Orders by dividing on an indirect amendment or motion. Such indirect amendments or motions to Orders are also termed 'non-fatal' (*First Report from the Select Committee of the House of Lords on Procedure of the House, 1990–91* (HL 17, 1990–91). And more recently debates on divisions have considered the additional issue of whether Orders should be subject to amendment in Parliament. The question of amending delegated legislation was also addressed in detail by the House of Lords Delegated Powers and Deregulation Committee in its submission to the Royal Commission on House of Lords Reform (April 1999).

As statistical background to the divisions, Table 1 of this Note provides a snap-shot of divisions in the House of Lords on delegated legislation in each year 1950–1999 inclusive and Table 2 provides details on each of the divisions over this period. The number of participants in each division gives an indication both of levels of activity and the contentiousness of the Order.

The categorisation of the divisions into direct—ie fatal, where the Order would fall if rejected in the division—and indirect—ie non-fatal, with no practical effect on the Order—shows the precedents for divisions directly on an Order and the trend towards indirect motions.

2. 1950–1969

During the 1950s, the House of Lords divided twice on delegated legislation. The first occasion was on the Draft Potato Marketing Scheme 1955 which was debated on 4 May 1955 (HL *Hansard*, cols 717–38). The constitutional issue of whether there was a right to divide was not raised. The second occasion was the Parking Places (Westminster) (No 1) Order 1958, a negative Order, which was debated on 15 May 1958 (HL *Hansard*, cols 399–438). During this debate the Labour peer, Viscount Stansgate, set out what he understood to be the role of the House of Lords in relation to delegated legislation:

> On what I consider to be the correct constitutional practice, it would be quite wrong for this House to negative an Order which has already received the approval of the House of Commons. It is quite true that Statutory Rules and Instruments have to be submitted to both Houses, but in these Orders the powers of your Lordships are exactly equal to the powers of the House of Commons: that is to say, if there were a change of Government and they were to propose such an Order and it was necessary for their legislation, your Lordships, not under any measure of the Parliament Act, with no powers of suggesting Amendments but by a simple phrase, could negative the policy of the Government elected to power in the other House.
>
> Therefore, although constitutionally—or statutorily I suppose is the word—the noble Earl is perfectly right to discuss the matter and move his Motion when I heard him say he was going to a Division I thought it right to put this point before your Lordships. What would happen then? This is not a question of which Party is in power; the Government is a Conservative Government at the moment. But they have passed this Order with the assent of the properly elected Chamber. Yet a number of noble Lords can then come and, without any appeal to any Parliament Act, negative the policy of the Government. I say that constitutionally that is wrong …
>
> Your Lordships may think this is a large issue to raise on what is a very small matter, but it is not small; it will be a very important thing in the future, because a great deal of legislation, especially colonial legislation, is at the present time being passed under the Statutory Instruments Act. Take as an example the question of the Rhodesian Constitution or the constitutional position in East Africa. In all these matters, if changes have to be made they will probably be made by Statutory Order, and it would be quite wrong for the House of Lords to claim in this matter to have a power independent of and contrary to that of the House of Commons.
>
> (HL *Hansard*, 15 May 1958, cols 416–17)

In winding up the debate Lord Mancroft, Minister without Portfolio, replied that:

> I will not be so rash as to cross swords with the noble Viscount, Lord Stansgate, on the constitutional issues but I listened carefully to what he said.
>
> (HL *Hansard*, 15 May 1958, col 434)

Divisions on delegated legislation became more frequent during the 1960s with divisions on ten Orders. With one exception, divisions were all held directly on the Orders, most being on a motion to approve or prayer to annul. A majority of the debates on Orders during this period were confined to the merits and demerits of the Order itself and did not refer to the constitutional rights of the House of Lords. However, the constitutional implications of the right to divide on delegated legislation were elaborated upon during the more contentious debates, in particular those relating to sanctions against Rhodesia.

On 22 December 1965 the House debated a motion to approve the Southern Rhodesia (Petroleum) Order 1965. Lord Carrington, Opposition Leader of the House, acknowledged that the House had the power to divide and defeat delegated legislation but he set it in a context of the party political make-up of the Lords and of discussions to reform the House of Lords:

> We in this House are in a very extraordinary position. Because of our composition, it is more than likely that if the Opposition decided to vote against the Government their vote would be successful. All of us have in the past tried to lay down certain guide lines as to how the House of Lords should conduct itself in situations of deep Party controversy. There is no precedent for the situation in which we find ourselves today. Nevertheless, if this Order were rejected by the House, although it has passed the Commons with a large majority, certain consequences would follow. The decision of the Government, taken in concert with the United States and supported by a number of other European Powers and by the Commonwealth, would seem to be rendered inoperative on a vote taken by this House in defiance, in opposition, to the elected Chamber. Of course, the House is entitled to do that; but, my Lords, surely no Government could passively accept such an adverse vote. Either the powers of the House would be further curtailed or, more likely, there would be a very drastic reform of both the powers and the composition of the House.
>
> Noble Lords who feel strongly on this matter should, I think, make up their minds whether this issue is one on which the House of Lords should decide to use its ultimate power. Will not those who dislike these sanctions have made their opinion abundantly clear by the end of the evening? What can they hope to achieve by a vote? Is this really an issue on which, or is this the right moment, to face a constitutional crisis? To me, my Lords the answer is clearly, “No”; and, if I have carried any of your Lordships on these Benches with me in anything I have said this evening, I would earnestly beg you not to oppose this Order by voting, but to abstain, as I and my colleagues who sit beside me on this Bench propose to do.
>
> (HL *Hansard*, 22 December 1965, cols 1151–2)

Lord Coleraine, a Conservative peer and former minister, argued that this Order in Council was an occasion for the exercise of the ultimate power of the House:

> My noble friend Lord Carrington has given his advice to your Lordships on this side of the House. He has developed the constitutional argument, of which I can

> see the force. It is not for me to advise your Lordships. I can only say what I will do myself. If there is a Division I will vote against this Order. I will vote against it, because I believe it to be leading us down a slope at the end of which there is a precipice. There are some issues, I think, on which one can consider only the merits of the issue itself: one cannot afford to be led away into subsidiary considerations.
>
> (HL *Hansard*, 22 December 1965, col 1192)

Winding up for the Government, the Earl of Longford, Lord Privy Seal and Leader of the House, concurred with the views stated by Lord Carrington on this issue:

> My Lords, there is one aspect of the discussion on which I find it unnecessary to say any more than was said by the noble Lord, Lord Carrington, and this is on what may be called the constitutional aspect… I think that I would simply wish to underline all that he said, and then underline it again.
>
> (HL *Hansard*, 22 December 1965, cols 1203–4)

Brief reference was made to the constitutional position of the House of Lords with regard to delegated legislation during the debate on the 1966 and 1967 Southern Rhodesia (Prohibited Trade and Dealings) Orders on 6 February 1967. Lord Harlech, the Opposition Deputy Leader in the Lords, said:

> I now come to the difficult problem of what we, in this Chamber, should do about these two particular Orders… If we were now to vote against the Orders and succeeded in nullifying them we should be preventing the Government from acting in a manner in which they are compelled to act by the clear provisions of the United Nations Charter.
>
> I do not know how much weight noble Lords would wish to attach to this particular argument, but what seems to me to be the most compelling argument against refusing the Government these Orders is that it would be an unprecedented interference by this, a non-elected Chamber, in the executive actions of a Government supported by a large majority in another place. I cannot feel that this would be a proper exercise of our powers.
>
> (HL *Hansard*, 6 February 1967, col 1157)

The 5th Marquess of Salisbury, the former Leader of the House, did not accept this line of argument:

> I appreciate fully the force of the arguments which were advanced by the noble Lord, Lord Harlech, at the end of his speech, regarding the constitutional position of this House. But that is really, after all, an argument against ever opposing a Labour Government in this House for fear that we might win, and I do not think that a very defensible or noble attitude to take up.
>
> (HL *Hansard*, 6 February 1967, col 1167)

The following year the debate on the Southern Rhodesia (United Nations Sanctions) Order 1968 provided the most detailed arguments yet on the rights of the House of Lords to reject delegated legislation and the only occasion on which a government has been defeated on a vote directly on an Order. The party political background to this debate was a rising tide of opposition to sanctions amongst the Conservative peers and the

prospect of a general election. The Inter-Party Conference on House of Lords Reform, which had been meeting since November 1967, was at a crucial point in its deliberations having drawn up key proposals for reform.

The debate on the Southern Rhodesia (United Nations Sanctions) 1968 Order was opened by the Lord Chancellor, Lord Gardiner. He reminded the House of the arguments put forward by Lord Carrington in 1965 and Lord Harlech in 1967 which acknowledged the right to vote against an Order but warned of the consequences of opposing the elected chamber (HL *Hansard*, 17 June 1968 cols 342–4).

In response, Earl Jellicoe, Opposition Deputy Leader, said that:

> I recognise, of course, that the issue before us to-day is one of unusual difficulty. It would be unusual–more, it would be unprecedented, I believe, for your Lordships to reject this Order. Yet it is equally clear that this House would be within its constitutional rights in so doing and thus affording to public opinion, to the Government, and, if you wish, to the Opposition as well, a period for reflection. After all, that is what a Second Chamber is for. Furthermore, exceptional measures demand exceptional remedies.
>
> (HL *Hansard*, 17 June 1968, col 358)

The Liberal peer, Lord Wade, argued that:

> The constitutional issue in some respects overshadows the debate on the Order itself… It seems to me that the rejection of this Order would be comparable with a case where a treaty had been solemnly entered into by the British Government, had been ratified by the House of Commons, and then is rejected by a non-elected upper House in order to embarrass the Government.
>
> (HL *Hansard*, 17 June 1968, col 361)

Lord Wade also referred to what he thought was the practice of the House on this issue:

> … an Order is not amendable, and the custom has rightly grown up that we in this House do not reject an Order.
>
> (HL *Hansard*, 17 June 1968, cols 361–2)

The Labour peer, Lord Rowley, concurred but ascribed the custom to party considerations:

> For the last sixty years, ever since the days of the Parliament Act controversy, we have had a built-in majority on the Conservative Benches, and a kind of convention has developed that, at any rate regarding Orders, the built-in Conservative majority in your Lordships' House would not vote against an Order put forward by a Labour Government.
>
> (HL *Hansard*, 17 June 1968, col 409)

However, the Marquess of Salisbury argued that this was an occasion on which the views of the electorate might not be reflected in the House of Commons and thus the

second chamber should not feel constrained in voting against the Order:

> An elected House, as we all know, may entirely cease to represent its electors. That is, of course, one of the main reasons why countries—not only our own but other countries, too—have included Second Chambers in their Constitutions. It is just because the Governments of democratic countries which were representative at the time they were elected sometimes become entirely unrepresentative of those who elected them that it is felt that there must be some check on such Governments if the will of the people is to prevail …
>
> This seems to be almost a classic case of a situation in which the functions of a Second Chamber ought to be brought into operation. It is a situation involving vitally important issues of policy on which the views of the British people are not yet known. We on this side of the House believe that the great majority of the British electorate are in favour of an immediate resumption of negotiations between Great Britain and Rhodesia to bring this miserable quarrel between them to an end.
>
> (HL *Hansard*, 18 June 1968, cols 531, 532)

Lord Carrington, the Leader of the Opposition, argued that a second chamber should be able "when seriously troubled on a matter of principle to reject a Statutory Instrument and to enable the Government to have time for reflection and the opportunity for another debate in the House of Commons" (ibid, col 573). He suggested that:

> … we have on occasions made known our views, afforded a period of delay for reflection, and we have believed that that has been our duty. But after the matter has been discussed again by the House of Commons, and passed there once again, we have given way to the elected Chamber. We have—and it is absolutely true what noble Lords opposite have said—on no occasion taken the course of rejecting an Order, because as your Lordships know, owing to an anomaly, a rather curious one, which was left unamended in the Labour Government's Parliament Act 1949, Orders do not come under the provisions of that Act. Nevertheless, even on Orders we have on occasions made it absolutely clear what our attitude is.
>
> ... My Lords, on this occasion we are faced with a very difficult situation, but not, I think, quite so difficult as I made out in the speech I made in December 1965, which the noble and learned Lord on the Woolsack very fairly quoted yesterday. If the House decided to vote against this Order the effect would be this. The Order would remain in force until July 8, when it would be possible, if the Government so wished, to re-lay it; and during the meantime the Order would remain in operation, so that there would be no question of the Order lapsing, unless the Government decided not to re-lay it.
>
> (HL *Hansard*, 18 June 1968, col 572)

He concluded by saying that:

> If, as may be the case, it is quite clear that the people of this country are either in favour of the Government's policy or not interested, or are uncertain; or if it is reflected in another Vote by the elected Chamber, then, so far as I am concerned, I do not think your Lordships should persist any further. You will have performed your proper constitutional function. But what I cannot accept is that we who sit in this House have not a right—not just a legal right, but not a right—and indeed

> almost a duty on occasions of this kind to do what we think is right, to take what we believe is the proper course, a proper course that Members of a Second Chamber should take.
>
> (HL *Hansard*, 18 June 1968, col 576)

The Lord Privy Seal and Leader of the House, Lord Shackleton, rejected the proposition that public opinion was not in support of the government's policy and he questioned the assumption that the Order could be re-laid:

> What the Opposition are proposing to-day will be a breach of self-imposed principle. They propose to reject an Order where public opinion has been given a full opportunity to impress itself on the Government—when there have been considerable discussions over years on this subject; when in fact, public opinion polls support the Government, when the whole of the responsible Press advise the Conservative Party not to vote against this Order… It is no use noble Lords coming along now and saying, "All we are going to do is to ask another place to think again". Nor am I so certain about the consequence of the defeat of this Order. I cannot at this moment say whether this Order in fact can be laid again in the present form. There are legal difficulties.
>
> (HL *Hansard*, 18 June 1968, cols 587–8)

The vote on the Order was 184 contents to 193 not-contents. This was the first ever government defeat in the House of Lords on delegated legislation. Two days later Lord Shackleton repeated a statement by the Prime Minister relating to the vote which said that legislation would be introduced to reduce the powers of the House of Lords, that the inter-party talks would cease and that the sanctions Order would be reintroduced at the earliest time possible (HL *Hansard*, 20 June 1968, cols 863–9).

The Southern Rhodesia (United Nations Sanctions) (No 2) Order 1968 was brought before the House on 18 July 1968 and was agreed to. The second Order was essentially identical to the original Order but was altered sufficiently to conform with the rule that "It is contrary to the practice of the House for a Question once decided to be put again in the same session", which is currently set out in the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (1994) p 89.

3. 1970–1989

The rate of divisions on delegated legislation in the 1970s was similar to the 1960s with a total of thirteen votes, the last three coming together in July 1979 shortly after the Conservative victory in the general election. Again the constitutional issue of whether the Lords should divide on delegated legislation arose only in the more politically contentious of the debates. But a new trend which is discernible by the end of the 1970s is the use of indirect, or non-fatal, motions in order to raise points criticising an Order. Of the thirteen votes, five were of indirect effect. Five of the direct divisions were on Orders relating to sanctions against Rhodesia and the remaining three direct divisions occurred in July 1979. Therefore, up until the general election in 1979 the tendency was to divide directly only on the Orders in Council on Rhodesia.

During the debate on the Southern Rhodesia Act 1965 (Continuation) Order 1972 on 9 November 1972, Lady Tweedsmuir of Belhelvie, Minister of State at the Foreign and

Commonwealth Office, took up the question of re-laying an Order following a defeat in a division:

> The Leader of the House has asked me to say that if your Lordships, after due consideration, at the end of this long debate decide to reject this Order, the Government will introduce, probably tomorrow, a slightly different Order in another place and then in this House. I understand that there might be some doubt as to whether that Order could be framed in such a way as to be sufficiently distinctive in form from the Order which is before us to pass the test of *Erskine May*. This is a matter on which the experts who advise us and who advise another place may not be entirely of one mind. However, if it were decided by another place that a new Order could properly be laid again, I understand that this House might not wish to adopt a different stance, although obviously this would be a matter for the House as a whole to decide.
>
> (HL *Hansard*, 9 November 1972, col 451)

In this instance the Government won the vote by 159 to 43. But the Conservative Government had made clear that they would follow the precedent set by Labour in 1968 for re-laying an Order.

The House of Lords continued to divide on sanctions Orders, twice in 1973, once in 1977 and once in 1978, but there was little further reference to the constitutional position of the House.

There was, however, further discussion of the role of the House of Lords during the debate on a motion to adjourn the Road Traffic (Seat Belts) (Northern Ireland) Order 1978. An important theme in the earlier debates was that the Lords should not reject a measure which had been approved by the elected chamber. In this particular case the Order in Council had not yet been considered by the Commons. Lord Carrington, Opposition Leader in the House, argued that consideration of the provisions should be adjourned until the Commons had discussed the Order and in doing so he outlined what he thought were the limitations on the Lords with regard to delegated legislation:

> It is usually the case that we in this House do not oppose Government orders. It is true that on very rare occasions we have done so, sometimes with rather unexpected results. Generally speaking, orders pass through your Lordships' House with nothing for discussion. The reason for this is that orders do not come under the provisions of the Parliament Act.
>
> ... But, on this occasion, the proposal has not been discussed in another place and, should the order be rejected, there would be no opportunity for the House of Commons to make its views known about this matter and—perhaps rather more importantly in this particular case—there would be no opportunity for the only elected representatives from Northern Ireland in the Westminster Parliament to make plain their position with regard to their own Province.
>
> (HL *Hansard*, 25 July 1978, cols 811–2)

With the change of government in May 1979, the number of divisions on Orders became more frequent. In the first two years of the Conservative Government, from May 1979 to May 1981, there were ten divisions directly on Orders (9 Labour, 1 Liberal) as opposed to ten divisions over each of the previous two decades. The divisions over 1979 to 1981 saw a considerable increase in the number of peers voting although the government won in each case with a comfortable majority. The constitutional aspect of such votes does

not appear to have been addressed in the debates with the exception of the debate on the Agriculture and Horticulture Development (Amendment) Regulations 1980. During the debate on the motion to approve this Order Lord Melchett, former Minister of State at the Northern Ireland Office, returned to the question of practice in relation to Orders which had not yet been considered by the Commons. Unlike the views put forward by Lord Carrington in 1978, Lord Melchett argued that the situation increased the Lords' freedom of action:

> … it is the normal practice—and this has been my understanding for many years, certainly long before I was a Member of this House—that controversial orders are normally taken in this House after they have been considered by another place. I know that various matters—which, no doubt, were not entirely foreseen by the Government—have led to this House considering these orders before they are considered in another place. Nevertheless, that seems to me to lift any obligation which your Lordships might feel to follow the decision of another place, which is the usual practice when orders are debated and divided against here, because we simply do not know what the decision of the other place might be when they come to consider the orders.
>
> (HL *Hansard*, 6 August 1980, cols 1525–6)

From 1982 to 1989 two trends became apparent—divisions on Orders reverted to being an infrequent procedure, with an average of one a year, and the divisions were almost all taken on an amendment or motion which formed an indirect challenge to the Order. With regard to the first of these trends, Donald Shell has surmised that "since 1981 Labour has reverted to the practice of not forcing divisions [on Orders]. To do so could create precedents very unwelcome to any future Labour Government" (D Shell, *The House of Lords*, 1988, p 182). In 1982 there were two divisions directly on Orders but these were not party issues; they were in each case to allow a small diverse group of peers to register concern about a particular issue—planning at Vauxhall Cross and seat belts. In neither case was the right of the Lords to divide on an Order questioned or discussed.

The second trend, towards divisions indirectly on an Order, was explained and justified in 1983. When the Equal Pay (Amendment) Regulations 1983 were brought before the House, Lord McCarthy, Opposition spokesman on Employment, moved an amendment to the motion to approve the regulations. This form of amendment was informally referred to as an 'O'Hagan type' amendment, after the precedent of Lord O'Hagan's amendment to the second reading debate of the Immigration Bill on 24 June 1971. The terms of the amendment meant that it did not constitute a direct challenge to the Order. In concluding the debate on his amendment, Lord McCarthy clarified what he saw as the aim of this indirect procedure:

> So what are we asking the House to do? Let me first say what we are not asking the House to do. This regulation was passed by the Lower House. It is not our policy to invite the House to cancel, defy or reject regulations of this kind which are passed by the Lower House. What we are asking the House to do is something that we understand is quite normal and customary practice—that is, to express a view. The objective of that view, if the House agrees with us, is, I suggest, that the Government should take some notice of that view and that they should take the regulation away.
>
> (HL *Hansard*, 5 December 1983, cols 928–9)

The amendment was agreed to by 108 to 104 votes.

The same indirect approach to challenging an Order was used the following year in the next such division. On 18 December 1984 Baroness Birk, Opposition Spokesman on the Environment and Home Affairs, moved an indirect amendment to the Local Government (Interim Provisions) Act 1984 Order 1985. During the debate Lord Nugent of Guildford, a Conservative peer and a Deputy Speaker in the Lords, questioned the propriety of this kind of amendment:

> The appearance of an amendment of this type is, fortunately, very rare on the Order Paper, and I personally would hope that it would never happen at all. There has been an amended statutory order, I can hear noble Lords opposite murmuring; the noble Lord, Lord McCarthy, successfully moved a similar amendment to a statutory order last year. But I think that is the only one, and I hope that this will be the last one that we shall see. It is not out of order, but it is certainly out of convention …
>
> There is precedent, but I think that there is only one. There have been Motions put down to Second Readings, again to give the Opposition a chance to vote against something which they did not like. However, as regards, in particular, a statutory order, which should be subject to "Aye" or "No", this is a regrettable practice.
>
> (HL *Hansard*, 18 December 1984, cols 568, 569)

The practice of dividing on indirect amendments or motions to Orders was continued in the four further divisions on Orders which occurred in the 1980s.

4. 1990–1999

The decade from 1990 to 1999 saw a very considerable increase in the numbers of divisions relating to Orders—a total of 31. The trend towards divisions on indirect amendments became well established with 17 indirect and 14 direct divisions on Orders.

In 1990, the indirect procedure still was not entirely accepted. In July that year Earl Russell, the Liberal Democrat spokesman on Social Security, moved an indirect amendment relating to the Education (Student Loans) Regulations 1990. The procedure was objected to by the Conservative peer Lord Harmar-Nicholls:

> … I should have thought that the noble Earl more than anyone would have recognised that to amend a regulation is contrary to the understood practice of this House. I do not think that we ought to move down the road of having written rules laid down in the kind of detail that obtains in another place. Our strength lies in our self-discipline. We keep within the powers of our remit. I suggest to the noble Earl that by using this time to move a Motion to amend a regulation he is stepping outside the accepted practice of self-discipline.
>
> **Earl Russell:** My Lords, I had hoped to save the time of the House by not developing that argument. Among many recent examples, this procedure was used in 1977 by Lord Duncan-Sandys on the Town and Country Planning Order to prevent roads being put through national parks. That Motion was pressed to a Division. It was won and the Government did what was asked.
>
> **Lord Harmar-Nicholls:** My Lords, I suggest that Lord Duncan-Sandys was just as wrong as is the noble Earl in the terms of the effect that his Motion could have

> on our procedures—perhaps inadvertently but certainly that would be the result. It cuts across so many principles that make our job in this House bearable.
>
> (HL *Hansard*, 24 July 1990, col 1396)

Lord Carter, an Opposition Whip, supported the procedure:

> My Lords, from these Benches I am very pleased to support this resolution. It has been most carefully drafted. I can assure the noble Lord, Lord Harmar-Nicholls, that considerable work has been done behind the scenes to ensure that it is within the conventions of this House. It has been carefully drafted to ensure that in accepting the Motion the House also accepts the regulations which will be taken formally after this debate.
>
> (HL *Hansard*, 24 July 1990, col 1397)

The Parliamentary Under-Secretary of State at the Department of Social Security, Lord Henley, did not take this view:

> I welcome the support of my noble friend Lord Harmar-Nicholls. I do not believe that this procedure is in keeping with the traditions of the House. I know that the noble Lord, Lord Carter, claimed that it was within the conventions of the House, and he quoted from the *Companion*. It may technically be so, but the noble Lord knows perfectly well that it certainly is not within the spirit of the way in which we conduct our business.
>
> (HL *Hansard*, 24 July 1990, col 1403)

However, the role and form of indirect, or non-fatal, amendments, and motions was clarified by the report of the Select Committee on the Procedure of the House in January 1991 (HL 17, 1990–91). Paragraphs 10 and 11 of the report specify the form in which non-fatal amendments and motions may be moved. The committee's views were incorporated into the *Companion to the Standing Orders* which states that:

> Lords can table amendments or motions expressing criticism of delegated legislation, whether an affirmative or a negative instrument, without challenging it directly.
>
> A motion or amendment may be moved calling upon the Government to take some specific action. In particular, such motions have been used to invite the Government to amend delegated legislation, thereby obviating the need to divide on such legislation itself.
>
> Alternatively, an amendment or a separate motion may be moved regretting some element of the delegated legislation before the House but in no way requiring the Government to take action. This gives an opportunity for critical views to appear on the Order Paper, and be divided upon, which would otherwise merely be voiced in the debate. Even if carried, the motion or amendment has no practical effect. Such motions are used as an invitation to the House to put on record a particular point of view at the same time as the substantive motion on the legislation is moved.
>
> *(Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, 1994, pp 187–8)

Although debates with divisions on delegated legislation over the previous ten years had moved away from consideration of the constitutional right to so divide, the issue came in for fresh consideration in 1993 and 1994.

During a debate on the Salisbury Doctrine in 1993, the retired Law Lord and Cross-Bencher, Lord Simon of Glaisdale said that:

> I place very high in the duties of your Lordships' House the increasing scrutiny of subordinate legislation … The inhibitions of your Lordships' House are largely the following. Your Lordships do not as a matter of practice vote down a statutory instrument. The last occasion when that was done was in 1968 on the Southern Rhodesia order.
>
> In addition, as I have said, your Lordships cannot amend a statutory instrument. I urge your Lordships to do two things. The first is to adopt what has been done by the noble Earl, Lord Russell, on several occasions, and that is to move and support a resolution recommending amendments in a statutory instrument. That has been to a great degree successful. The other course is to adjourn consideration of the measure. That almost always evokes government action.
>
> (HL *Hansard*, 19 May 1993, cols 1782–3)

The following year Lord Simon of Glaisdale initiated a debate on 'Subordinate Legislation: Voting Freedom', on 20 October 1994. This debate formed the most comprehensive discussion of the House of the Lords' powers in relation to delegated legislation. The motion was "that this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration". The central issue of the debate was the definition of a convention and whether there existed a convention that the House did not vote directly on delegated legislation. Lord Simon took as his starting point a brief reference to this question made during the second reading debate on the Deregulation and Contracting Out Bill by Lord Strathclyde, then Government Chief Whip, in June 1994; that "the House need not depart from its convention that it does not divide on secondary legislation" (HL *Hansard*, 6 June 1994, col 956).

Lord Simon began by defining what a convention was:

> … a constitutional convention is a rule of practice on the part of some organ of the constitution which it regards as more or less binding, according to the length of subsistence of that practice, according to its acceptance on behalf of the organ, its general recognition by authorities, such as leading text books, and, above all, by its practical convenience.
>
> (HL *Hansard*, 20 October 1994, col 356)

Lord Simon considered that "on all those criteria there is not such convention as it would seem was sought to be asserted" (ibid, col 356). Furthermore, he argued that even a convention was not binding as a rule of law was binding.

In support of his contention that there was no convention against dividing on delegated legislation, Lord Simon said that during the 1970s both parties when in opposition had voted against statutory instruments, that the leading textbooks made no mention of a convention on this point, that it had not been accepted by peers and that it was inconsistent with Standing Order 55 which made reference to grounds for divisions on subordinate legislation.

Lord Simon added that this question was of considerable importance because of the growth in the scope and substance of subordinate legislation and because the Executive seemed to exercise greater power in the House of Commons. Lord Simon concluded by making clear that he expected divisions on delegated legislation to be infrequent:

> I do not believe that approving the Motion—and I hope your Lordships will do so—will create an open invitation to the House to trammel with every subordinate instrument that is present; on the contrary, it must be quite exceptional.
>
> (HL *Hansard*, 20 October 1994, col 359)

The Lord Privy Seal and Leader of the House, Viscount Cranborne, accepted the motion and stated that:

> The House undoubtedly has a constitutional right to vote on any subordinate legislation. I do not believe that there is any doubt about that fact.
>
> (HL *Hansard*, 20 October 1994, col 360)

However, he reminded the House of why divisions on delegated legislation were rare and the importance of continuing this restraint. He went on to argue that:

> … although noble Lords have the right to do so, they do not vote directly on subordinate legislation.
>
> ... it is indeed another unfettered right which I have noticed has been exercised—very often to this Government's discomfiture—with some abandon in your Lordships' House of late, to cause another place to think again. Yet we and another place have identical powers in respect of subordinate legislation, simply to accept or reject. I would submit to your Lordships that this is a crude, inflexible power, at odds with our role as a revising Chamber. I suspect that the noble and learned Lord, Lord Simon, would agree with that, in view of what he said about the infrequency with which he anticipated this power should be used. Therefore it is clear that exercise of this crude power could result in stalemate between the two Houses with little scope for resolution.
>
> That is why, instead of exercising the power which the House undoubtedly has, your Lordships have chosen rather to develop other means of making known your views on the subordinate legislation submitted for your consideration. The House has chosen to voice its opposition without making an outright challenge to another place, which in almost every case will have already debated the instruments before us.
>
> ... Since 1982 there has been no Division on a Motion to approve an affirmative instrument or on a Prayer to annul a negative instrument. In the 30 years preceding that I think I am right in saying that there were only about two dozen occasions on which such a Division was called. It therefore seems to me that your Lordships have for some time regarded this as an unusual step and chosen instead to seek other ways of recording your views.
>
> (HL *Hansard*, 20 October 1994, cols 361–2)

The Opposition Deputy Leader, Lord McIntosh of Haringey, agreed to the motion although he felt that the question was of greatest importance when there was a Labour Government, given the party political make-up of the House. He argued that scrutiny of

delegated legislation was the crucial issue. If it was thorough, then there would be less need to oppose Orders. Lord McIntosh also raised the related question of providing for amendments to delegated legislation:

> The other issue with which we have to be concerned, and some noble Lords will be, is the power of amendment. I have heard the view expressed on all sides of the House that subordinate legislation should be capable of amendment in the same way as primary legislation. Those who have no prospect of participating in government will find that a very attractive argument. Those who do have a prospect of participating in government will never find it an attractive argument, because in effect it promotes secondary legislation to become primary legislation. We have too much legislation as it is, and to increase the amount of legislation tenfold (there are some 2,000 orders a year which might be capable of amendment) would be to destroy the effectiveness of this House, or of any legislature, as a revising body. Therefore, speaking on behalf of Her Majesty's Loyal Opposition, I am bound to say that the House cannot expect a Labour Government to permit amendments to subordinate legislation.
>
> (HL *Hansard*, 20 October 1994, col 366)

He concluded by saying that:

> This House must continue to preserve the unfettered right. However, the use of that unfettered right must be a last resort. From the point of view of the House as a revising Chamber, it is far preferable that we use all our influence on the Government to control the amount and type of delegation in legislation, the extent to which Ministers are able to use that right to extend policy rather than to implement relatively minor changes in existing policies which have been approved by Parliament, and to a lesser extent the degree to which this House has the ability to express its views on that subordinate legislation. However, above all the issue is the control of delegation.
>
> (HL *Hansard*, 20 October 1994, col 367)

The Liberal Democrat Spokesman on Social Security, Earl Russell, also agreed to the Motion:

> My case for supporting this Motion is, in its essence, very simple. Parliament makes the law: regulations have the force of law. Therefore we must have the right to consent to regulation. The right to consent must include the right to dissent.
>
> (HL *Hansard*, 20 October 1994, cols 379–80)

He saw the key question as being, not so much the issue of a convention, as how the House should respond to the content of delegated legislation:

> The big change here… is the increasing press of business. It is that increasing press of business even more than the arrogance of power which is making governments use regulation for matters which cannot by any stretch of the imagination be described as minor.
>
> ... When regulation is used for matters of major political controversy of this sort it becomes increasingly difficult to sustain a convention that we consent to these things without voting on them.

> ... So as regulation comes to be used for more and more important matters, any convention of not voting against it becomes more difficult to observe.
>
> (HL *Hansard*, 20 October 1994, col 380)

On the question of amending delegated legislation Earl Russell contended that "It is of the essence of a regulation to be unamendable" (ibid, col 381).

The motion was approved and was subsequently included in the *Companion to the Standing Orders*.

The following year there was a division directly on the motion to approve the Broadcasting (Restrictions on the Holding of Licences) (Amendment) Order 1995. The Liberal Democrat Spokesman on Broadcasting and Foreign Affairs, Lord Thomson of Monifieth, spoke against the motion to approve:

> Here we are in the dying days of this particular part of the Session being asked to take this order through both Houses, and in circumstances in which the Government have announced major primary legislation in this field for the Queen's Speech and the next Session.
>
> That situation caused such disagreement in the Standing Committee on Statutory Instruments in the other place, where nobody but the Minister spoke up for this particular order, that at the end of the day it was rejected by the committee in the other place which deals with these matters.
>
> I am not sufficiently experienced in the procedures of your Lordships' House to know whether it is unusual for us to be asked to pass an order after it has been rejected by the appropriate committee of the other place, but it seems an odd procedure. I know that the general convention in your Lordships' House with statutory instruments is that, if they have been accepted by the elected Chamber, they should not be disputed, although they may be debated, here in your Lordships' House. This is an important constitutional issue. We are being asked to pass an order at the tail end of the summer when the other place has voted against it.
>
> (HL *Hansard*, 17 July 1995, col 74)

The Parliamentary Under-Secretary of State at the Department of National Heritage, Lord Inglewood, replied that:

> I have made inquiries to check the position. There is nothing in any way untoward about dealing with this particular order in the manner that we propose tonight. After all, the matter was rejected in Committee in another place, not by the whole House in another place.
>
> (HL *Hansard*, 17 July 1995, col 77)

Other than the brief reference by Lord Thomson of Monifieth, there was no discussion of the Lords' right to divide on delegated legislation. The Government won the vote 70 to 21.

The House voted directly on delegated legislation on six occasions in 1996. Among these were the divisions on the Ipswich Port Authority Transfer Scheme 1996 Confirmation Order 1996, and the Port of Tyne Authority (Transfer of Undertaking) Order

1996. The Ipswich Port Authority Order was debated on 24 June 1996. Speaking against the motion to approve, the Liberal Democrat peer, Lord Avebury, recalled the October 1994 motion reaffirming the unfettered right of the House to vote on delegated legislation (HL *Hansard*, 24 June 1996, col 665).

Viscount Goschen, Parliamentary Under-Secretary of State at the Department of Transport, objected that:

> The noble Lord, Lord Avebury, indicated his intention to vote against secondary legislation, which is not the normal practice of the House.
>
> (HL *Hansard*, 24 June 1996, col 668)

The Opposition Spokesman on Transport, Lord Carmichael of Kelvingrove deemed it against convention:

> The enabling legislation was strongly opposed in the other place, but in this House we have a convention not to vote against secondary legislation.
>
> (HL *Hansard*, 24 June 1996, col 668)

The Government won the vote 72 to 16. No question was raised about the propriety of the division on the related Port of Tyne Authority Order which was debated on 10 December 1996. The Government won the vote 56 to 13.

In 1997 there was a further instance of a division directly on delegated legislation with a prayer to annul the Social Security (Lone Parents) (Amendment) Regulations 1997, which was moved by Earl Russell on 4 November 1997. This was the first division on delegated legislation since the change of government in May 1997. In introducing the motion Earl Russell said:

> At this stage I say nothing about the arguments for and against voting on the Motion. I do not like to take final decisions on a vote before I have heard the Minister's reply. For the moment, I shall mention only the Resolution of this House on 20 October 1994 that this House affirms its unfettered freedom to vote on subordinate legislation.
>
> (HL *Hansard*, 4 November 1997, col 1329)

Baroness Hollis of Heigham, Parliamentary Under-Secretary of State at the Department of Social Security, took up the issue of the right to divide:

> Finally, before I finish, I should like to draw your Lordships' attention to another issue which is perhaps even more important than the measures that I have outlined; that is, the constitutional implications if the House votes on these regulations this afternoon. The noble Earl, Lord Russell, said that he was not sure whether he proposed to push the matter to a vote. However, I wish to remind the House of this. It is essential that we accept the convention of this House—it has been long observed—that we do not vote against statutory instruments.
>
> **Lord Simon of Glaisdale:** My Lords, if the noble Baroness will allow me to intervene, there was an express resolution of this House negativing the proposition that the noble Baroness has just enunciated.

> **Baroness Hollis of Heigham:** My Lords, the House made a distinction between the unfettered paper right, if I may so put it, of this House to exercise its powers in the same way as the elected House: that an unelected, largely hereditary House has the right on paper to overturn an elected House. But we also said that we thought it wise that this House should respect a self-denying ordinance, which it has respected over the past 15 years, and should not exercise that right to thwart the will of an elected House.
>
> We made a distinction between the conventions that this House observes, by which this House runs, which we ask the House to continue to accept, and its theoretical rights, which are wisely in abeyance.
>
> Perhaps I may wind up. We believe that if the issue were pressed to the vote and your Lordships were minded to reject the measure, it would mean that whatever the elected House did would be irrelevant because the instrument could not proceed. Unlike an amendment to a Bill, the Commons could not reject and overturn a decision by your Lordships' House. In the colloquial phrase, there could be no ping-pong. I accept that on paper we may have the unfettered right, but if we did so we should create a situation where the view of this unelected and largely hereditary Chamber would prevail over the elected Chamber. Whatever the elected Chamber wished to do, it could not because we had thwarted it. The effect would be to force the withdrawal of the regulations.
>
> The House of Commons will not debate the regulations until 12 November. We do not believe that it is right to deny the other House the right to determine the outcome of these regulations. This reflects our consistent position in Opposition when we always abstained on such matters.
>
> (HL *Hansard*, 4 November 1997, cols 1338–9)

Earl Russell replied:

> To turn immediately to the noble Baroness's remarks about constitutional conventions, first, the practice of voting on Prayers is not in abeyance. It was done twice during the previous Session: first, by my noble friend Lord Avebury on the regulations on the Port of Ipswich Authority; and secondly, by myself, again on the subject of benefits for single parents. So it has been done twice, and the roof has not fallen in.
>
> (HL *Hansard*, 4 November 1997, cols 1339–40)

He then quoted Lord Simon of Glaisdale to the effect that there was no convention against such divisions mentioned in the principal texts and he returned to the point that regulations had gone beyond legislating for minor matters. He concluded by saying that:

> … if this House does not retain a residual power, to be used rarely and only in relation to points of great importance, then the Executive's will is law. I find that a more unacceptable conclusion than any that the noble Baroness describes.
>
> (HL *Hansard*, 4 November 1997, col 1340)

The Government won the vote 48 to 100.

One of the arguments against directly challenging delegated legislation in divisions, referred to on many occasions from Lord Carrington to Baroness Hollis, was the largely

hereditary composition of the House of Lords. Following the enactment of the House of Lords Bill and the advent of the revised chamber in November 1999, the issue of Lords' powers in relation to delegated legislation was again to the fore.

On 29 November 1999, the Conservative peer, Lord Campbell of Alloway, tabled an oral question on 'whether the Government acknowledged the right of the House to amend or reject secondary legislation'. Lord Falconer of Thoroton, Minister of State at the Cabinet Office, replied that:

> … at present neither House has power to amend delegated legislation unless the parent Act provides for that. Few Acts do so. In relation to the rejection of secondary legislation, the Government consider that the House has powers, but since 1968 has chosen by convention not to exercise them. However, as the *Companion to the Standing Orders* makes clear,
>
> > "Lords can table amendments or motions expressing criticism of delegated legislation, whether an affirmative or a negative instrument, without challenging it directly".
>
> (HL *Hansard*, 29 November 1999, col 655)

When pressed by Lord Pilkington of Oxenford to state whether the Government would regard it as wrong for the House to refuse to accept delegated legislation, Lord Falconer replied:

> My Lords, the right course is that a convention should be followed; namely, that this House should not reject delegated legislation. The underlying reason for that is that if the House rejects delegated legislation, unlike primary legislation, there is no procedure by which the other place can insist, as it can under the Parliament Act, on its will prevailing.
>
> (HL *Hansard*, 29 November 1999, col 656)

On being questioned by Earl Howe about his statement that there was a convention, Lord Falconer said:

> I believe that there is a broad consensus that secondary legislation should not be voted down in an effective manner by this House.
>
> (HL *Hansard*, 29 November 1999, col 657)

The following day the Opposition Leader of the House, Lord Strathclyde, gave a *Politeia* lecture on 'Redefining the Boundaries Between the Two Houses'. In a wide-ranging speech on the constitutional position of the interim House in relation to the House of Commons, Lord Strathclyde declared that he considered the convention in relation to delegated legislation to be dead:

> If the Salisbury Doctrine is in the realms of theology, secondary legislation is the grime of everyday life. Here there has come into being a second convention. It was agreed between the front benches of the major parties 20 years and more ago—but, it is important to note, never accepted by the Liberal Democrats or the Cross-benchers. That is that the Opposition should not vote against the secondary legislation of the Government. I declare this convention dead. And not before time.

> To give an example. In January 1998 the Lords voted overwhelmingly against the ludicrous Beef on the Bone order that has so damaged our beef industry worldwide. Because of the convention it did so in a non-fatal motion. The government ignored it. The new House would have authority to stifle those regulations at birth. Beef farmers would have been spared two years of unnecessary suffering. And Ministers would have been spared the humiliation of arguing our beef was safe abroad while declaring it deadly at home. The Convention on regulations first arose as a political convenience. But it has become a serious obstacle to the liberty of Parliament to protect the interest of the subject. Today the tide of secondary legislation has become a torrent. It is the detail of such regulations that break businesses, close schools, interfere in countless ways in everyday lives …
>
> The morals to be drawn… are clear. First, governments—all governments—are increasingly, and dangerously, insouciant about powers taken under secondary legislation. Second, those powers are often so far-reaching that they must—repeat must—undergo improved Parliamentary scrutiny. Parliament must, in turn, be ready to reject bad regulations. The new House of Lords will certainly assert that right.
>
> (*Politeia* Lecture by the Rt Hon Lord Strathclyde, 'Redefining the Boundaries Between the Two Houses', 30 December 1999, pp 9–10)

Furthermore, Lord Strathclyde proposed that the House should be able to amend delegated legislation:

> But in an ideal world, the new House should do more. Rejecting an Order outright will always be a rough and ready thing. Secondary legislation is now of such importance and complexity that it is surely time for both Houses to consider the case for amending it. This could be done—in all but the most exceptional cases—off the floor, as in the Moses Room procedure for primary legislation. The House might vote first on the principle of an Order. Reject it outright, or pass a motion requesting it be relaid in a substantially amended form, if it needed total rethinking. But then, if the main principle were accepted, it could commit it for consideration and amendment in detail. The Order could then be returned, if amended, to the Commons. If agreement were not forthcoming—perhaps after a reiterated procedure—then the Draft Order would fall, as it does if rejected now.
>
> This would have two effects. The scalpel, as well as the blackjack, could be taken to regulation. And future governments would be forced to think more carefully about the balance between what went into primary and secondary legislation …
>
> Disturbingly, the ideas put forward by the Labour Party in this area would do the reverse; they would further enhance executive power. They argue that the powers of the Lords to reject secondary legislation should be removed and a Parliament Act-style procedure introduced—or else that the right to reject should be replaced by a short delaying power. We would oppose outright such new executive privileges. Our aim is an increase, not reduction, in the authority of the Lords.
>
> (ibid, pp 10–11)

The following week, the issue arose again during the debate on an unstarred question on 'Changing procedures to improve parliamentary scrutiny of delegated legislation'. During

the debate Lord Campbell of Alloway questioned the continuing adherence to conventions:

> The conventions of the old House were devised to ensure orderly government and the avoidance of stalemate when there was a massive Conservative/Whig position in this place in the way of opposition—a situation which does not exist today and is never likely to arise again. In these changed circumstances the new House must surely examine the conventions of the old House and develop new conventions relevant to the due discharge of our functions.
>
> (HL *Hansard*, 7 December 1999, col 1249)

Lord Campbell went on to suggest that:

> Some new conventions should be developed—in the form perhaps of a divisible Motion—to ask another place to relay the statutory instrument in some amended form which, if not so relaid, could be rejected.
>
> (ibid, col 1249)

The point was taken up by the Conservative peer, Lord Norton of Louth, who said:

> What of your Lordships' House? I turn to the two issues that are of particular concern and have been mentioned: should statutory instruments be amendable, and should the House exercise its power to annul delegated legislation? I realise that there are precedents for amending delegated legislation, but as the Procedure Committee in the other place noted in 1986, there are considerable procedural difficulties. I am, however, persuadable that statutory instruments should be amendable, and my noble friend Lord Strathclyde has put forward a proposal, in his recent *Politeia* lecture, that merits serious consideration. Implementing his proposal may well enable this House to fulfil an important and constructive role, similar to that played in primary legislation. Having said that, I recognise that the scope for amending delegated legislation is quite narrow.
>
> The power to say "aye" or "nay" to a statutory instrument is a power at the disposal of both Houses. My view is that your Lordships' House should be prepared, if necessary—I stress that word—to exercise that power. I do not say that because there is a new House. I took the same view when the old House existed. I have never understood—or rather, never accepted—the rationale underpinning the convention that this House does not divide on a Prayer to annul an instrument. The situation is not analogous to that covered by the Salisbury convention. I appreciate that delegated legislation is not subject to the Parliament Acts. However, secondary legislation is not the same as primary legislation, not least because secondary legislation is rarely, if ever, promised in a party's election manifesto and because if a statutory instrument is rejected, another instrument can be laid. As such, the treatment of delegated legislation by this House should be seen as analogous to its treatment of amendments to legislation rather than its treatment of the principle on Second Reading.
>
> The House has previously resolved,
>
> > "That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration".

> To exercise that freedom raises no great constitutional issues; it simply requires a department to take away a statutory instrument and, if necessary, come back with a better one. A self-denying ordinance on the part of the House might kick in at a later stage, or, as my noble friend Lord Strathclyde suggested, the proposal could be embodied in primary legislation and hence be subject to passage under the Parliament Acts. However, having said that, I recognise that the use of a vote is a blunt, negative weapon.
>
> (HL *Hansard*, 7 December 1999, cols 1252–3)

The Labour peer, Lord Prys-Davies, drew attention to the role of the National Assembly for Wales in scrutinising and amending delegated legislation:

> The National Assembly for Wales has taken on the responsibility of the Secretary of State for making subordinate legislation in the devolved fields in Wales. The Assembly is without powers of primary legislation, but the examination and amendment of subordinate legislation is one of its important tasks. The scrutiny is entrusted to a subject committee whose members have a special interest in it. The committee may take evidence and amend the draft order.
>
> (HL *Hansard*, 7 December 1999, col 1251)

Earl Russell reminded the House of some of the recent occasions, since 1994, on which the House had in fact voted directly on an Order. He went on to consider the question of amending Orders:

> I imagine that we would wish not to vote down a regulation on a matter which is covered by the Salisbury convention. But I believe that amendment is more congenial to the spirit of this House than rejection. The noble Viscount, Lord Cranborne, is of course right that in normal circumstances a regulation is unamendable. But, of course, nothing is ever quite that simple.
>
> (HL *Hansard*, 7 December 1999, cols 1254–5)

Earl Russell then discussed existing methods by which delegated legislation might be amended.

The Deputy Leader of the Opposition and Spokesman on Constitutional Affairs, Lord Mackay of Ardbrecknish, declared the convention at an end:

> The convention with regard to secondary legislation has existed only as between the Front Benches of the major parties in this House; that is, the Conservative and Labour Parties. It is fair to say that the Liberal Democrat Benches, especially as represented by the noble Earl, and the Cross Benches, have never accepted it.
>
> ... The passage of the House of Lords Act 1999 has changed things in quite a dramatic manner. Even the Government accept that. In the November edition of the *Parliamentary Monitor*, the noble Baroness the Leader of the House had this to say.
>
> ... The House
>
> > "will be able to speak with more authority… A decision by the House not to support a proposal from the Government will carry more weight because it will

> have to include supporters from a range of political and independent opinions. So the Executive will be better held to account".

I am in complete agreement with what I will call the Jay convention.

So how do we hold the Government to account and do so better? We believe, as I have said, that the Front Bench convention that we should never vote on secondary legislation is now at an end in the new House. How we deal with secondary legislation in the future must be subject to discussions within the House so that we can in fact subject secondary legislation to proper scrutiny.

(HL *Hansard*, 7 December 1999, cols 1261–2)

In winding up the debate, Lord Falconer of Thoroton disputed that the convention could be set aside:

> Before the passage of the House of Lords Act 1999 I think it would be generally accepted, pace the noble Earl, Lord Russell, that there was a convention that the House would not by means of any effective Motion reject secondary legislation. I say that accepting, of course, that in theory the House had the power to vote down such secondary legislation.
>
> ... I believe that the noble Lord, Lord Campbell of Alloway, suggested that, because there is no longer a Conservative hegemony in this House, that somehow changes the basis of the Salisbury convention and, presumably, the convention in relation to delegated legislation. With great respect, that does not for one moment repay examination.
>
> ... The basis of the delegated legislation convention must be the same; indeed, even more strongly so. As the noble Earl, Lord Russell, accepted in his speech, there is plainly no power under the Parliament Act, as there is in relation to primary legislation, to force delegated legislation through …
>
> There is a convention that this House should not take on the elected Chamber. It exists in relation to primary legislation of the kind described in the Salisbury Convention. It exists equally in relation to secondary legislation, as, in effect, the noble Earl, Lord Russell, accepted. Before we break with that convention we would need to make a number of changes.
>
> (HL *Hansard*, 7 December 1999, cols 1263–5)

He concluded by saying that any further deliberations on these issues should await the publication of the report of the Royal Commission on House of Lords Reform.

Table 1: Pattern of Divisions by Year[1]

	Direct	Indirect
1950		
1951		
1952		
1953		
1954		
1955	●	
1956		
1957		
1958	●	
1959		
1960		
1961		
1962		
1963	●	●
1964		
1965	●●	
1966	●●	
1967	●●	
1968	●	
1969	●	
1970		
1971		
1972	●	
1973	●●	●●
1974		
1975		
1976		
1977	●	●●
1978	●	●
1979	●●●	
1980	●●●●●●	
1981	●	
1982	●●	
1983		●
1984		●
1985		●●
1986		●●
1987		
1988		
1989		
1990		●
1991		●
1992	●	●
1993		●●●
1994	●●	●●●
1995	●●●	●●●●
1996	●●●●●●	●●●
1997	●	
1998	●	●
1999		
Total: 71	**42**	**29**

[1] This table excludes two entries listed in Table 2: one division in 1967 where there was no quorum in the Chamber (a second division on the same order was held two days later); and a prayer to annul a set of regulations in 1999 which was negatived on question with no division.

Table 2: Divisions on Delegated Legislation in the House of Lords 1950–1999

Party in Office	Date	Title	Divisions	
			Direct (fatal)	Indirect (non-fatal)
Conservative	4 May 1955	Potato Marketing Scheme 1955 **Motion to approve**	Contents 60; Not Contents 7	
Conservative	15 May 1958	Parking Places (Westminster) (No 1) Order 1958 **Prayer to annul**	Contents 4; Not Contents 38	
Conservative	21 February 1963	Prison Commissioners Dissolution Order 1963 **Motion to approve**	Contents 52; Not Contents 22	
Conservative	26 November 1963	Judicial Offices (Salaries Order) 1963 **Motion to adjourn debate**		Contents 23; Not Contents 70
Labour	16 December 1965	West Midlands Order 1965 **Motion to approve**	Contents 69; Not Contents 12	
Labour	22 December 1965	Southern Rhodesia (Petroleum) Order 1965 **Motion to approve**	Contents 108; Not Contents 19	
Labour	28 February 1966	Weights and Measures (Exemption) (Milk) Order 1966 **Motion to approve**	Contents 43; Not Contents 22	
Labour	25 October 1966	Prices and Incomes Act 1966 (Commencement of Part IV) Order 1966 **Motion to approve**	Contents 29; Not Contents 10	
Labour	6 February 1967	Southern Rhodesia (Prohibited Trade and Dealings) Order 1966 **Motion to approve**	Contents 66; Not Contents 13	
Labour	13 and 15 March 1967	Sheffield Order 1967 **Prayer to annul**	Contents 5; Not Contents 19 – No quorum Contents 6; Not Contents 45	
Labour*	17 and 18 June 1968	Southern Rhodesia (United Nations Sanctions) Order 1968 **Motion to approve**	Contents 184; Not Content 193	
Labour	14 October 1969	Codes of Recommendation for the Welfare of Livestock **Amendment to leave out and decline to approve**	Contents 38; Not Contents 67	

* Government defeat.

Conservative	9 November 1972	Southern Rhodesia Act 1965 (Continuation) Order 1972 **Motion to approve**	Contents 159; Not Contents 43	
Conservative	22 June 1973	Regulation of Prices (Tranquillising Drugs) (No 2) Order 1973 **Amendment to motion to set up a Select Committee on this hybrid order**		Contents 43; Not Contents 23
Conservative	24 October 1973	Southern Rhodesia (Distribution to Creditors) Order 1973 **Motion to approve**	Contents 49; Not Contents 9	
Conservative	8 November 1973	Southern Rhodesia Act 1965 (Continuation) Order 1973 **Motion to approve**	Contents 73; Not Contents 33	
Conservative	17 December 1973	Grenada Termination of Association Order 1973 **Motion to adjourn debate**		Contents 55; Not Contents 80
Labour	14 November 1977	Southern Rhodesia Act 1965 (Continuation) Order 1977 **Motion to approve**	Contents 119; Not Contents 23	
Labour	6 December 1977	Conservation of Wild Creatures and Wild Plants (Otters) Order 1977 **Motion to make a new order**		Contents 37; Not Contents 53
Labour*	8 December 1977	Town & Country Planning General Development (Amendment) Order 1977 **Motion to withdraw and make another order**		Contents 48; Not Contents 21
Labour*	25 July 1978	Road Traffic (Seat Belts) (Northern Ireland) Order **Motion to adjourn further debate**		Contents 114; Not Contents 74
Labour	9 November 1978	Southern Rhodesia Act 1965 (Continuation) Order 1978 **Motion to approve**	Contents 166; Not Contents 65	
Conservative	25 July 1979	Employment Protection (Handling of Redundancies) Variation Order 1979 **Motion to approve**	Contents 162; Not Contents 74	

* Government defeat.

Conservative	25 July 1979	Unfair Dismissal (variation of Qualifying Period) Order 1979 **Motion to approve**	Contents 155; Not Contents 72	
Conservative	26 July 1979	Regional Development Grants (Variation of Prescribed Percentages) Order 1979 **Motion to approve**	Contents; 97; Not Contents 55	
Conservative	20 March 1980	Statement of Changes in Immigration Rules **Motion to disapprove**	Contents 35; Not Contents 103	
Conservative	12 May 1980	Southern Rhodesia (Sanctions) (Amnesty) Order 1980 **Motion to Approve**	Contents 83; Not Contents 33	
Conservative	6 August 1980	Agriculture and Horticulture Development (Amendment) Regulations 1980 **Motion to approve**	Contents 109; Not Contents 70	
Conservative	4 November 1980	Education (Assisted Places) Regulations 1980 **Motion to approve**	Contents 135; Not Contents 79	
Conservative	11 November 1980	Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulation 1980 **Motion to approve**	Contents 125; Not Contents 82	
Conservative	13 November 1980	Picketing: Code of Practice **Motion to approve**	Contents 111; Not Contents 42	
Conservative	5 March 1981	European Communities (Medical, Dental and Nursing Professions) (Linguistic Knowledge) Order 1981 **Motion to approve**	Contents 92; Not Contents 44	
Conservative	22 July 1982	Town & Country Planning (Vauxhall Cross) Special Development Order 1982 **Prayer to annul**	Contents 14; Not Contents 48	
Conservative	30 July 1982	Motor Vehicles (Wearing of Seat Belts) Regulations 1982 **Motion to approve**	Contents 95; Not Contents 13	
Conservative*	5 December 1983	Equal Pay (Amendment) Regulations 1983 **Motion to amend**		Contents 108; Not Contents 104

* Government defeat.

Conservative	18 December 1984	Local Government (Interim Provisions) Act 1984 (Appointed Day) Order 1985 **Motion to amend**		Contents 72; Not Contents 145
Conservative	19 March 1985	National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations 1985 **Amendment to motion to resolve**		Contents 28; Not Contents 51
Conservative*	29 July 1985	Lord Chancellor's Salary Order 1985 **Motion to amend**		Contents 140; Not Contents 136
Conservative	18 March 1986	Legal Aid and Advice **General motion of regret in relation to 4 SIs**		Contents 83; Not Contents 115
Conservative	9 December 1986	European Assembly Elections Regulations 1986 **Motion to amend**		Contents 51; Not Contents 154
Conservative	24 July 1990	Education (Student Loans) Regulations 1990 **Motion to resolve, to amend**		Contents 60; Not Contents 94
Conservative	24 July 1991	Income Support (General) Regulations 1987 **Motion to resolve, to amend**		Contents 44; Not Contents 67
Conservative*	6 July 1992	Income Support (General) Regulations 1987 **Motion to resolve, to amend**		Contents 126; Not Contents 108
Conservative	14 December 1992	Transport and Works (Description of Works Interfering with Navigation) Order 1992 **Motion to withdraw *before* motion to approve**	Contents 20; Not Contents 67	
Conservative	22 February 1993	Licensed Betting Offices (Amendment) Regulations 1993 **Motion to resolve, to revoke**		Contents 56; Not Contents 110
Conservative*	15 July 1993	Hong Kong (British Nationality) (Amendment) Order 1993 **Motion for resolution**		Contents 60; Not Contents 48

* Government defeat.

Conservative*	18 October 1993	Sheep Annual Premium and Suckler Cow Premium Quota Regulations 1993 **Motion for resolution**		Contents 69; Not Contents 52
Conservative	25 January 1994	Education (Mandatory Awards) (No 2) Regulations 1993 & Education (Student Loans) (No 2) Regulations 1993 **Motion for resolution**		Contents 40; Not Contents 110
Conservative	31 January 1994	Health and Personal Social Services (Northern Ireland) Order 1994 **Amendment to Motion to Approve**	Contents 88; Not Contents 111	
Conservative	19 April 1994	Medicines (Veterinary Drugs) (Pharmacy and Merchants' List) (Amendment) Order 1994 **Motion to resolve, to delay**		Contents 34; Not Contents 58
Conservative	3 May 1994	Maternity Allowance and Statutory Maternity Pay Regulations 1994 **Amendment to leave out and insert**	Contents 40; Not Contents 85	
Conservative	20 October 1994	Income-Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994 **Motion for resolution**		Contents 23; Not Contents 64
Conservative	23 January 1995	Cleveland (Structural Change) Order 1994 **Amendment to motion to leave out, withdraw and re-lay**	Contents 20; Not Contents 73	
Conservative	30 January 1995	Education (Mandatory Awards) Regulations 1994 & Education (Mandatory Awards) (Amendment) (No 2) Regulations 1994 **Motion for resolution**		Contents 38; Not Contents 86
Conservative	9 February 1995	Social Security (Incapacity for Work) (General) Regulations 1995 **Motion to resolve, to withdraw**		Contents 49; Not Contents 71

* Government defeat.

Conservative	6 March 1995	North Yorkshire (District of York) (Structural and Boundary Changes) Order 1995 **Amendment to Motion, regret**		Contents 24; Not Contents 28
Conservative	12 June 1995	Conditional Fee Agreements Order 1995 **Motion to leave out and amend**	Contents 100; Not Contents 105	
Conservative	17 July 1995	Broadcasting (Restrictions on the Holding of Licences) (Amendment) Order 1995 **Motion to approve**	Contents 70; Not Contents 21	
Conservative*	5 December 1995	Probation Amendment Rules 1995 **Motion for resolution**		Contents 108; Not Contents 85
Conservative	30 January 1996	Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996 **2 motions for resolution (2 divisions – 1 Labour, 1 Lib Dem)**		Contents 126; Not Contents 175 Contents 126; Not Contents 169
Conservative	14 May 1996	Housing Benefit (General) Amendment Regulations 1996 **Motion for resolution**		Contents 58; Not Contents 122
Conservative	24 June 1996	Ipswich Port Authority Transfer Scheme 1996 Confirmation Order 1996 **Motion to approve**	Contents 72; Not Contents 16	
Conservative	2 July 1996	Child Benefit, Child Support and Social Security (Miscellaneous Amendments) Regulations 1996 **Motion to approve**	Contents 48; Not Contents 10	
Conservative	15 July 1996	Kent (Borough of Gillingham and City of Rochester upon Medway) (Structural Change) Order 1996 **Motion to resolve, to decline to approve, *before* motion to approve**	Contents 33; Not Contents 60	
Conservative	16 July 1996	Berkshire (Structural Change) Order 1996 **Amendment to motion, to leave out and insert**	Contents 90; Not Contents 132	

* Government defeat.

Conservative	22 July 1996	Child Support (Miscellaneous Amendments) Regulations 1996 **Motion to approve**	Contents 53; Not Contents 17	
Conservative	10 December 1996	Port of Tyne Authority (Transfer of Undertaking) Order 1996 **Motion to approve**	Contents 56; Not Contents 13	
Labour	4 November 1997	Social Security (Lone Parents) (Amendments) Regulations 1997 **Prayer to annul**	Contents 48; Not Contents 100	
Labour*	27 January 1998	Beef Bones Regulations 1997 **Motion to resolve, to revoke**		Contents 207; Not Contents 97
Labour	23 July 1998	Conditional Fee Agreements Order 1998 **Amendment to motion to leave out and insert**	Contents 24; Not Contents 55	
Labour	18 February 1999 B. Blatch (Conservative Front Bench)	Education (School Performance Information) (England) (Amendment) Regulations 1998 **Prayer to annul‡**	Motion negatived	

* Government defeat.

‡ B. Blatch tried to withdraw the motion, L. Lucas objected; the motion was then negatived.

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