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That's Not What I Bargained For: Legislative Materials, Comparative Intent, and the Nature of Statutory Bargains*

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Abstract

Statutory interpretation is quickly becoming the primary function of our courts. Ambiguity, unexpected scenarios, and drafting errors in legislation compound this challenging task, obliging many judges to turn to debate transcripts and other legislative materials in search of our elected representatives' intent.

Legislatures are intrinsically the products of the societies that create them, however, with each possessing a diverging structure and rules of procedure. These institutional differences affect bills' drafting, consideration, and passage, and represent the mechanical process of how legislative bargains are translated into binding statutory text.

Through the lenses of the United Kingdom Parliament and the United States Congress, the fundamental logic behind these institutions' legislative bargains will be explored, assessing the impact of procedure and the interests that shape the enacting process. Parliamentary tradition emphasizes the foundational role of Her Majesty's Government in managing virtually all legislation, maintaining a unity of purpose without compromise, amendment, or purposefully ambiguous provisions. Conversely, unique procedures and the multiplicity of veto players within Congress necessitates that compromise is a de facto requirement for passage. The diverging logic behind these legislative bargains offers powerful evidence that institutional characteristics have a dispositive impact on the utility of legislative materials in statutory interpretation.

Keywords: Legislative procedure, statutory interpretation, Congress, Parliament, legislative intent.

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A Introduction

> They have provided in their Legislat[ure], for the ending of all differences … in having one Will, the Legislat[ure], when once established by the Majority, has the declaring, and as it were keeping of that Will.[1]

A great many appellate judges would sigh wistfully after reading this observation. "If only…," they lament under their breath. Judges are tasked today with the increasingly burdensome and multifaceted task of interpreting statutes.[2] Tasked with parsing ambiguous provisions, our magistrates must dust off their dictionaries to discover the 'common' meaning of words and comb through voluminous debate transcripts in an often fruitless search for manifested signals of intent.[3] This task is made ever more complicated by the differing methodologies advanced as the 'right' process of statutory interpretation and the uniquely dispositive effect that process has on results in this arena.

Innately, this struggle exemplifies a judicial desire for the Lockean perfect world in which legislators jointly express a singular will in their enactments. However, this statutory Eden is exceedingly rare, and as a result, many judges feel obliged to consult debate transcripts and other extrinsic legislative materials in their pursuit of decisive statutory interpretation.[4]

We must never make the mistake of viewing legislative materials as a be-all, end-all, 'silver bullet', however. Each legislative institution has a different composition, varying procedures, and a divergent heritage. These variations must be assessed before relying upon legislative materials for true indicia of policy intent. In this way, institutional differences represent the true silver bullet, for hidden inextricably within them stands the legislative bargain – the mechanical logic behind representatives' agreement on an enacted text.[5]

The United Kingdom Parliament's legislative bargain is straightforward – acceptance or rejection of government proposals, with few exceptions.[6] Conversely, the United States Congress' legislative bargain is perhaps the most complex imaginable, with individual members empowered to initiate legislation, negotiate with colleagues, and adapt provisions based on varying interests and an understanding of what is likely to garner sufficient support to pass.[7] Consequently, fundamental differences in the nature of the Parliamentary and Congressional legislative bargains underscore the fundamental impact that procedural

1 J. Locke, *Two Treatises of Government*, Dent 1924, p. 225.

2 G.S. Crespi, 'The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis', *SMU Law Review*, Vol. 53, No. 1, 2000, p. 10.

3 C. Simmons, 'Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise', *Emory Law Journal*, Vol. 44, No. 1, 1995, p. 129.

4 S. Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, Knopf 2005, p. 6.

5 *Alaska Airlines v. Brock* (1987) 480 U.S. 678, p. 685.

6 J. Waldron, 'Representative Lawmaking', *Boston University Law Review*, Vol. 89, No. 2, 2009, p. 341.

7 L.L. Outzs, 'A Principled Use of Congressional Floor Speeches in Statutory Interpretation', *Columbia Journal of Law and Social Problems*, Vol. 28, No. 2, 1995, p. 300.

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and institutional forces have on the utility of legislative materials in statutory interpretation.

First, a brief note on how this essay will proceed. Part B will offer contextual information that expounds the role of legislative materials and methods of statutory interpretation. Understanding that criteria are vital in comparative legal research as reference points to ensure a uniform analysis,[8] McKay and Johnson's factors that account for the origins of legislation in their work *Parliament & Congress* will be adopted in part C.[9] Bill introduction and amending power in these institutions will be compared broadly in order to define the mechanical assumptions that underlie each legislative process.[10] These observations will then be used to sketch the fundamental characteristics of a legislative bargain.

Parts D-G will then rely on this synthesis in both the Parliamentary and Congressional contexts to assess whether intent is truly ascertainable, and evaluate consequences for legislative materials in statutory interpretation. This work contends that the diverging nature of the Parliamentary and Congressional legislative bargains provides powerful evidence that institutional characteristics have a dispositive impact on the utility of legislative materials in statutory interpretation.

B The Legislative Context

I Legislative Materials

Legislative materials are documents prepared by representatives and staff to describe policy objectives and reasoning, assess procedural requirements, and transcribe committee or chamber debates during enactment.[11] These documents are frequently relied upon in the future by judges in an attempt to resolve the meaning of vague provisions in statutory interpretation or to extend a policy to account for unexpected scenarios.[12] Legislative materials in the United Kingdom include *Hansard*, the non-verbatim summary of Parliamentary proceedings, green papers, white papers, and explanatory notes.[13] Green papers are consultations prepared by government departments defining issues under consideration and soliciting opinions from stakeholders, while white papers are the next step in the process – officially proposing the courses of action the Government intends to

8 R. Rose, 'Comparing Forms of Comparative Analysis', *Political Studies*, Vol. 39, No. 3, 1991, p. 446.

9 W. McKay & C. Johnson, *Parliament & Congress*, Oxford 2012, p. 383.

10 *Ibid*.

11 S. Beaulac, 'Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?', *McGill Law Journal*, Vol. 43, No. 2, 1998, p. 289.

12 J.R. Siegel, 'The Use of Legislative History in a System of Separated Powers', *Vanderbilt Law Review*, Vol. 53, No. 5, 2000, p. 1458.

13 *Pepper (Inspector of Taxes) v. Hart* (1992) UKHL 3; S.C. Styles, 'The Rule of Parliament: Statutory Interpretation after *Pepper v. Hart*', *Oxford Journal of Legal Studies*, Vol. 14, No. 1, 1994, pp. 151, 155.

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legislate.[14] Explanatory Notes accompany a bill through Parliament, broadly outlining policy implications and providing technical background.[15]

The scope of legislative materials is much narrower in the Congressional setting. The *Congressional Record* is a collection of documents that includes a largely verbatim transcript of legislators' remarks, a summary of procedural activity, and 'Extensions of Remarks,' extraneous material placed in the *Record* at the request of individual legislators that includes vote justifications, newspaper articles, and revisions to speeches given on the floor.[16] Legislative materials also include committee reports, documents formally adopted by issue-based panels following the consideration of legislation. These reports describe the provisions of their parent bill in greater depth, justify the need for legislative action, assess regulatory and budgetary impacts, and recommend favorable/unfavorable action by the full body.[17] If a minority of the committee votes against a particular bill, they also have the opportunity to explain their dissenting views and criticize the majority's reasoning at the conclusion of the committee report.[18]

II Methods of Statutory Interpretation

Statutory interpretation is the process by which judges resolve statutory meaning.[19] Two primary methodologies exist,[20] with both the bench and academia broadly favoring textual or purposive construction.

Textualism focuses on the facial meaning and linguistic context of enactments, often mandating the use of dictionaries or similar statutes (*in pari materia*).[21] Textualist scholars generally reject the use legislative materials unless an absurd result is indicated after a search for plain meaning and place added reliance on canons of interpretation, *e.g.*, *ejusdem generis* or the rule against surplus-

14 U.K. Parliament, 'Green Paper' & 'White Paper', <http://www.parliament.uk/site-information/glossary>/, accessed 16 November 2015.

15 U.K. Parliament, 'Explanatory Notes', <http://www.parliament.uk/site-information/glossary/>, accessed 16 November 2015.

16 Library of Congress, 'About the *Congressional Record*', <http://thomas.loc.gov/home/abt.cong.rec.html>, accessed 16 November 2015.

17 J.F. Manning, 'Putting Legislative History to a Vote: A Response to Professor Siegel', *Vanderbilt Law Review*, Vol. 53, No. 5, 2000, p. 1529.

18 *Report of the Committee on Ways and Means on H.R. 3200, America's Affordable Health Choices Act of 2009*, United States House of Representatives, 111th Congress, p. 796, <https://www.congress.gov/111/crpt/hrpt299/CRPT-111hrpt299-pt2.pdf> accessed 15 November 2015; Amanda Frost, 'Congress in Court', *UCLA Law Review*, Vol. 59, No. 4, 2012, p. 960 (outlining the impact of the minority on committee reports).

19 A.R. Gluck, 'The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism', *Yale Law Journal*, Vol. 119, No. 8, 2008, pp. 1761-1764.

20 Within these two distinct schools, various sects also exist favoring one kind of legislative history over another or the extent to which certain canons of interpretation are relied upon. V.F. Nourse, 'The Constitution and Legislative History', *University of Pennsylvania Journal of Constitutional Law*, Vol. 17, No. 2, 2014, p. 313; J.F. Manning, 'Clear Statement Rules and the Constitution', *Columbia Law Review*, Vol. 100, No. 2, 2010, p. 399.

21 A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton 1997, p. vii.

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age.[22] This technique, at its core, emphasizes that "a government of laws, not of men, means that the unexpressed intent of legislators must not bind citizens" – focusing heavily on the validity given to the enacted text by constitutional procedures.[23]

Purposivism, a competing scheme, concentrates on furthering the democratic process through searching for legislative intent not expressed in statutes, promoting adaptability and the rule of law.[24] This doctrine highly values the use of legislative materials to expand or contract the scope of an enacted policy in order to resolve ambiguities or address unexpected scenarios.[25] With the ascendancy of Justices Stephen Breyer and Antonin Scalia to the United States Supreme Court in the early 1990s, vigorous debate between these perspectives has enlivened scholarly focus on statutory interpretation.[26]

Before *Pepper v. Hart*, the United Kingdom's method of interpretation was heavily textual, with little to no reliance on legislative materials,[27] although reference to *Hansard* was permitted in a limited number of cases to determine a statute's purpose.[28] Since *Pepper*, however, construction has become largely purposive, beginning with 'the language of the act,' but also simultaneously "attaching significance not only to what Parliament has said but also, on occasion, to what it has not said ... eschewing an overly literal construction, taking account of the purpose of the statute, the mischief sought to be remedied, and other circumstances relevant to interpretation."[29]

C Sources of Legislation

I The Parliament of the United Kingdom

The United Kingdom does not have a single, enumerated constitutional document, but instead relies on convention and a number of statutes as the founda-

22 E. Bell, 'Judicial Perspectives on Statutory Interpretation', *Commonwealth Law Bulletin*, Vol. 39, No. 2, 2013, p. 245; K. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed', *Vanderbilt Law Review*, Vol. 3, No. 3, 1950, pp. 401-406. *Ejusdem generis* refers to a list of specific objects and followed by a broader term and the presumption that the broader term must be of the same kind or class as the enumerated objects.

23 F.M. Brookfield, 'Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach', *Otago Law Review*, Vol. 5, No. 4, 1984, p. 609; E.A. Posner & Adrian Vermuele, 'Interring the Nondelegation Doctrine', *University of Chicago Law Review*, Vol. 69, No. 4, 2002, p. 1750.

24 S. Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, Knopf 2005, p. 6; *see also Pepper* (n. 13) (holding that statutory interpretation must focus on a statute's object and purpose).

25 *Ibid*.

26 A search of the Hein Online database in November 2015 yielded over 13,000 articles written on this topic since 1990.

27 *Pepper* (n. 13).

28 *Sagnata Investments Ltd. v. Norwich Corp.* (1971) 2 All E.R. 1441 (holding that *Hansard* was permissible to determine the purpose of legislation, but was not to be used as an interpretive aid).

29 A. Geddis & B. Fenton, 'Which Is to Be Master?', *Arizona Journal of International and Comparative Law*, Vol. 25, No. 3, 2008, p. 755; *Heydon's Case* (1584) 3 Co. Rep. 7a.

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tion of legislative authority.[30] The Westminster-model parliamentary government operates on the convention that the business of the House of Commons, and to a lesser extent, the House of Lords, will be dominated by Her Majesty's Government (the executive).[31] Based on this legislative-executive fusion, "the vast majority of bills which successfully become Acts are Government Bills," and these vehicles are drafted, introduced, and shepherded through the process by Government ministers and civil servants.[32] A procedure does exist for Members of Parliament to introduce legislation – known as private member's bills – but this legislation often faces a difficult road because of procedural constraints, limited time in the debating chamber, and the near-universal absence of Government support.[33]

Following initial consultation via White and Green Papers and approval by the relevant Cabinet committees, Government departmental lawyers provide written policy instructions to Parliamentary Counsel for translation into a draft bill.[34] These Government drafters follow departmental instructions and work individually or in pairs to compose legislation and Explanatory Notes.[35]

Following introduction in the Commons,[36] a Government minister manages the legislation through the second reading, committee, and report stages, with final passage on third reading.[37] Rigorous voting discipline, enforced by Government whips, means that only amendments supported by the executive generally become part of the bill in the House of Commons.[38] Party discipline is effective in this context because whips carry the authority to expel Members of Parliament from their party for insubordination on major votes, making re-election difficult.[39] This discipline also ensures that virtually all Government bills are passed and submitted to 'the other place,' where a similar procedure takes place.

30 *Inter alia*, Bill of Rights 1689, Parliament Acts 1911 & 1949, the Salisbury Convention, origination of money bills in the House of Commons. *See* A. McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law', *Modern Law Review*, Vol. 71, No. 6, 2008, pp. 855-861.

31 *Standing Orders of the House of Commons*, 2012, p. 18, <http://www.publications.parliament.uk/pa/cm201314/cmstords/900/900.pdf> accessed 15 November 2015; *Standing Orders of the House of Lords Relating to Public Business*, 2013, p. 17, <http://www.publications.parliament.uk/pa/ld/ldstords/105/105.pdf> accessed 15 November 2015. The House of Lords has more procedural freedom than the Commons, but still devotes a significant share of time to Government business. Recent evolutions in the Commons, such as the Backbench Business Committee, indicate a loosening of Government control over the legislative agenda.

32 Styles 1994, p. 153.

33 *Private Members' Bills: Purposes and Problems*, House of Commons Select Committee on Procedure, 2013, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmproced/188/18805.htm> accessed 15 November 2015.

34 R. Brazier, *Ministers of the Crown*, Oxford 1997, p. 189.

35 *Working with Parliamentary Counsel*, Office of the Parliamentary Counsel 2011, p. 7; Parliamentary Counsel aid statutory interpretation by ensuring that legislation fits into the broader context of the statute book.

36 Generally, high-profile legislation will begin in the Commons; routine bills or those with cross-party support can be considered by peers first.

37 *Standing Orders of the House of Commons*, pp. 52-59; *Standing Orders of the House of Lords*, p. 17.

38 McKay & Johnson 2012, p. 174.

39 U.K. Parliament, 'Whips', <http://www.parliament.uk/about/mps-and-lords/principal/whips>, accessed 16 November 2015.

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The House of Lords, much like the United States Senate, is a collegial body that emphasizes debate and amendment and has weaker party adhesion, which can result in policies opposed by the Government becoming part of legislation before return to the Commons.[40] The procedural customs of the Lords make it particularly difficult to conclude debate if a distinct minority is committed to making a point.[41] If time is short or political costs increase, extended debate in the Lords often forces Her Majesty's Government into making concessions, without asserting the primacy of the Commons through 'ping-pong' or the Parliament Acts 1911/1947.[42] After the houses agree on an identical text, *pro forma* Royal Assent is the final hurdle to the statute book.[43]

II The United States Congress

The United States Constitution assigns legislative power in enumerated areas to Congress, with plenary regulatory authority reserved to individual state assemblies.[44] The separation of powers framework ensures that government authority is divided amongst many institutional actors, presumably to ensure that no faction can gain influence over the broader constitutional apparatus.[45] As a result of this diffusion, Members of Congress may introduce, amend, and guide legislation through the process largely on their own initiative, usually with one or more co-sponsors, understanding that committee chairpersons generally sponsor high-profile legislation.[46]

Individual members are responsible for drafting legislation and can either seek the non-partisan services of the House/Senate Offices of Legislative Counsel, but also frequently rely on staff and lobbyists.[47] After introduction, a bill is referred to the appropriate standing committee for hearings, scrutiny, and 'mark-up.'[48] Detailed reports are prepared by each committee on the impact and imple-

40 R.Y. Hasan, *Cohesion and Discipline in Legislatures*, Routledge 2006, p. 58; *see* generally *Standing Orders of the House of Lords*, *supra* note 31.

41 *Standing Orders of the House of Lords*, *supra* note 31; N. Watt, 'Voting Reform Deadlock Ends after House of Lords Deal', *The Guardian* (London, 31 January 2011), <http://www.theguardian.com/politics/2011/jan/31/voting-reform-lords-deadlock-eased> accessed 16 November 2015.

42 J.A.G. Griffith, *Parliamentary Scrutiny of Government Bills*, London, Allen & Unwin 1974.

43 K.W. Starr, 'Here and There: A Brief Reflection on U.S. and British Constitutionalism', *Cumberland Law Review*, Vol. 23, No. 1, 1992, p. 194; McKay & Johnson 2012, p. 466.

44 U.S. Const., art. I, § 8.

45 L.D. Jellum, '"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers', *UCLA Law Review*, Vol. 56, No. 4, 2009, p. 879.

46 McKay & Johnson 2012, p. 387; Legislation can be introduced 'by request', *i.e.*, if the President asks a member to sponsor legislation, but this is less common.

47 V.F. Nourse, 'The Politics of Legislative Drafting: A Congressional Case Study', *New York University Law Review*, Vol. 77, No. 3, 2002, p. 584.

48 McKay & Johnson 2012, p. 395; 'Mark-up' refers to the committee process of scrutinizing the provisions of a bill and offering amendments.

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mentation of the legislation and the scope of the intended policy.[49] The bill is then considered on the floor of either the House or Senate, and the process is repeated in the opposite body.

Even though strict procedural rules in the House limit the number of amendments and length of debate,[50] party discipline in Congress is particularly weak, making final approval far from the certainty normally experienced in Parliament.[51] In 2008, with capital markets near collapse in the white heat of the global financial crisis, Congressional leadership, President George W. Bush, and the Federal Reserve Board of Governors went to great lengths to lobby Members of Congress to support the Emergency Economic Stabilization Act 2008 – *i.e.*, 'the bank bailout.'[52] Nevertheless, many backbench Republicans in the House of Representatives defied the calls of their party leadership, resulting in a 205-228 defeat.[53] While procedural unpredictability is the exception rather than the rule in the House, the opposite is the norm in the Senate, where relaxed procedures encourage the proliferation of debate, amendments, and attempts to scuttle legislation.[54]

Until the early 20th century, no mechanism existed in the Senate to end debate whatsoever, and while limited today, the spirit of this tradition endures as a mechanism to force consensus or permit a minority to obstruct legislation.[55] Through the 'filibuster' process, forty-one of the Senate's one-hundred member body can indefinitely block a motion to 'invoke cloture' – *i.e.*, ending debate on a bill, officer nomination, or treaty ratification.[56] Additionally, unlimited amendments may be offered until cloture has been invoked, sometimes leading in the budget process to dozens of sequential votes in a procedure known as a 'vote-o-

49 For examples, *see Report of the Committee on Education and Labor on H.R. 3200, America's Affordable Health Choices Act of 2009*, United States House of Representatives 2009, <https://www.congress.gov/111/crpt/hrpt299/CRPT-111hrpt299-pt1.pdf> accessed 15 November 2015; *Report of the Committee on the Judiciary on S. 1151, Personal Data Privacy and Security Act of 2011*, United States Senate 2011, <https://www.congress.gov/112/crpt/srpt91/CRPT-112srpt91.pdf> accessed 15 November 2015.

50 *Rules of the United States House of Representatives*, 2013, pp. 30-35, <http://clerk.house.gov/legislative/house-rules.pdf>, accessed 16 November 2015.

51 G.K. Wilson, 'Congress in Comparative Perspective', *Boston University Law Review*, Vol. 89, No. 2, 2009, p. 835.

52 A. Vekshin & L. Litvan, 'U.S. House Rejects $700 Billion Financial Rescue Plan', *Bloomberg* (Washington D.C., 29 September 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFgacvSSsAVM>, accessed 16 November 2015.

53 *Ibid*. The legislation subsequently passed in a different form on 3 October.

54 *Senate Rule XV: Amendments and Motions*, United States Senate, 2013, <http://www.rules.senate.gov/public/index.cfm?p=RuleXV>, accessed 16 November 2015; *Rules of the House of Representatives*, *supra* note 50, pp. 27, 29.

55 *The Senate and the League of Nations*, United States Senate 2014, <http://www.senate.gov/reference/reference_item/Versailles.htm>, accessed 16 November 2015.

56 S.T. Udall, 'The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock', *Harvard Law & Policy Review*, Vol. 5, No. 1, 2011, p. 121.

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rama.'[57] Further demanding consensus, much of the Senate's business proceeds by 'unanimous consent agreements' negotiated by the majority and minority leaders and senior party members, naturally giving great license for senators to ensure their individual preferences are accommodated or giving them the ability to dramatically slow down the process of enactment.[58] If legislation survives this arduous process, it is then presented to the President for signature, veto, or self-execution without signature.[59]

D The Legislative Bargain

A legislative bargain is the logic behind the process of enactment.[60] Much like contract law, this concept rests upon a mechanical examination of how conflict, negotiation, and diverse interests are resolved into a binding legal instrument.[61] The 'deal,' articulated by the policy choices memorialized in statutory text, is "the vector sum of political forces expressed" from start to finish in the legislative process.[62] In that way, grasping the intrinsic nature of a piece of legislation requires keen insight into the interests and authority of the legislative actors who have the opportunity to influence policy and the relative weight of their power.[63] Much of the current debate surrounding statutory interpretation ignores this fundamental truism, with many professors and judges alike unable to sketch more than a rudimentary outline of the legislative process in their research and judicial decision-making.[64]

Chief among these actors are the 'veto players' – legislative members who can use procedure or influence to block agreement unless their preferences are

57 M.R. Wilson, 'Republicans Target Regulations in Budget "Vote-O-Rama"', *The Hill* (Washington D.C., 21 March 2013), <http://thehill.com/regulation/legislation/289729-republicans-target-regulations-in-budget-vote-o-rama>, accessed 16 November 2015. Portable beds are a common sight during 'vote-o-ramas.'

58 M.B. Gold & D. Gupta, 'The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster', *Harvard Journal of Law and Policy*, Vol. 28, No. 1, 2004, p. 212. For example, the *Standing Rules of the Senate* provide mandatory waiting periods, such as thirty hours of post- cloture debate or committee reference requirements. *Senate Rule XXII: Precedence of Motions* and *Senate Rule XVII: Reference to Committees*, United States Senate 2015, <www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>, accessed 16 November 2015.

59 U.S. Const., art. I, § 7, cl. 2.

60 D.A. Farber, 'Legislative Deals and Statutory Bequests', *Minnesota Law Review*, Vol. 75, No. 3, 1990, p. 689.

61 McNollgast, 'Positive Canons: The Role of Legislative Bargains in Statutory Interpretation', *Georgetown Law Journal*, Vol. 80, No. 3, 1991, p. 708.

62 Simmons 1995, p. 131.

63 Scholarly writing on the topic of legislative bargains has not yet received a great deal of attention outside the United States. For an overview, *see* N. Foster, 'The Merits of the Civil Action for Breach of Statutory Duty', *Sydney Law Review*, Vol. 33, No. 1, 2011, p. 67; S.F. Ross, 'Statutory Interpretation in the Courtroom, the Classroom, and Canadian Legal Literature', *Ottawa Law Review*, Vol. 31, No. 1, 1999, p. 39.

64 *General Motors v. Romein* (1992) 503 U.S. 181; *Bowen v. Owens* (1992) 476 U.S. 340; Simmons 1995, p. 122.

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accommodated.[65] Some examples of veto players in Parliament are Government ministers, whips, and from a procedural perspective, the Speaker and Clerk of the House. In Congress, this list is much broader and includes the Speaker,[66] as well as committee chairpersons, party leadership, and of course, the President. Understanding that all legislators have "individual lists of desires, priorities, and preferences," the broad range of policy inclinations expressed by these players and backbench members must be consolidated in a logical manner, usually via rules of procedure or standing orders adopted by the full body at the opening of a legislative session.[67] As a result, the nature of these procedures have an essential connection to the discernibility of legislative intent. These rules and actors fundamentally constrain the policies that are to be debated as draft statutes before the full legislature can even act.

Legislative intent is held as "the meaning of a provision as conveyed by the text, its object, and purpose," understanding that "a particular determinate underlay a general determinable" in the statutory "expression of legal relationships."[68] Consider this concept in the context of a legislative bargain. Does the nature of the legislative body and its procedures allow a multiplicity of interests to be present, each with an equal opportunity to influence the genesis of the legislation, use procedural maneuvers, or demand accommodation of individual or minority group preferences[69] as the price for passage? Or is legislation proposed and channelled through an entity that has an organic unity of purpose, with influence and amendment tempered by rigid party discipline, and forthrightly accepted or rejected by legislators? These diverging structural relationships emphasize that the fundamental question underlying the presence of intent is whether an '*it*' or a '*they*' controls the legislative bargain.[70]

E 'It' Has One Purpose: The United Kingdom Parliament

As discussed *supra*, the executive has near-total control of the legislative process in both houses of Parliament.[71] This is made possible by the Standing Orders of the House of Commons and the Lords, convention, and rigidly enforced party dis-

65 Wilson 2009, p. 707.

66 Unlike the United Kingdom and other Commonwealth countries, the Speaker of the United States House of Representatives is the leader of the largest party and a partisan official. M.S. Shockley, '"Cannonizing" under Newt Gingrich: The Speaker's Consolidation of Power in the House of Representatives', *Stanford Law & Policy Review*, Vol. 9, No. 1, 1998, pp. 165-188.

67 F.H. Easterbrook, 'Statutes' Domains', *University of Chicago Law Review*, Vol. 50, No. 2, 1983, p. 547.

68 *Pepper*, *supra* note 13; J.M. Landis, 'A Note on Statutory Interpretation', *Harvard Law Review*, Vol. 43, No. 6, 1929, p. 887.

69 Majority group preferences would arguably be accommodated in the text of the bill itself.

70 K.A. Shepsle, 'Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron', *International Review of Law and Economics*, Vol. 12, No. 2, 1992, pp. 239-256.

71 *See* notes 31-33.

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cipline.[72] Considering this, where does the 'sum of political forces' that shape the legislative bargain originate?[73] *It* is Her Majesty's Government.

Ministers and civil servants formulate, draft, and control legislation from consultation to the statute book. Considering the discipline enforced by government whips on behalf of the Treasury Bench, no outside amendment is generally likely to attain a majority in the House of Commons.[74] Though the whipping system is marginally weaker in the Lords, sometimes resulting in unwanted adjustments, an amended bill must still return to the Commons to face the Government majority, where the original version can be insisted on or the amendment molded effectively into the policy scheme.[75] Understanding that the heritage of the Commons is inextricably linked to control of the public fisc,[76] the House of Lords also cannot generally amend or reject revenue or appropriations legislation.[77] Consequently, Parliament's constitutional role is simply to scrutinize the choices of the cabinet and approve or reject them, not to formulate policy. In this way, there is a unity of purpose throughout the process – a clear thread of intent that can be derived from statutes and supporting legislative materials.

Her Majesty's Government, from initial Cabinet presentations, through drafting and consideration of the bill, forthrightly expresses its policy goals, demonstrating the existing statutory 'mischief' and the remedial method favored through clear expressions of intent in published documents, draft legislation, and ministerial statements.[78] Much like the 'chain of custody' required by police to ensure the integrity of evidence in a criminal prosecution, it is this control of the legislative process from start to finish that allows a coherent intent to be uncovered in judicial use of legislative materials.

Before *Pepper*, many judges regarded being 'seen openly' reading *Hansard* and other legislative materials as "akin to being caught with pornography."[79] In the two decades since this watershed case, however, judges in the United Kingdom have established a measure of comfort with the executive monopoly of the legislative bargain, and the manifested intent found in legislative history and related reports.

72 *See* notes 31, 38; E. Crowe, 'Consensus and Structure in Legislative Norms: Party Discipline in the House of Commons', *Journal of Politics*, Vol. 45, No. 4, 1983, p. 907.

73 Udall 2011.

74 McKay & Johnson 2012, p. 174.

75 *See House of Lords: Conventions*, 2007, House of Commons No. SN-PC-4016, <http://researchbriefings.files.parliament.uk/documents/SN04016/SN04016.pdf>, accessed 15 November 2015; Parliament Act 1911, § 2; Parliament Act 1949. The exchange of amendments between the houses, known as 'ping-pong', may *see* H.M. Government insist on the original form of a bill based on the Salisbury Convention and the Parliament Acts. Negotiations between Government whips in the Lords and other peers takes place in the shadow of this authority.

76 From 1401-present, the House of Commons has claimed sole authority to levy taxes and issue appropriations because of their popular mandate. *A Brief Chronology of the House of Commons*, 2010, House of Commons Factsheet G3, <www.parliament.uk/documents/commons-information-office/g03.pdf>, accessed 16 November 2015.

77 Parliament Act 1911, § 1.

78 *Heydon's Case*, *supra* note 29.

79 L.R. Cooke, 'The Road Ahead for the Common Law', *International and Comparative Law Quarterly*, Vol. 53, No. 2, 2004, p. 284.

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A ministerial statement made at the Despatch Box during the consideration of a bill is central to this utility. A minister from the responsible government department must introduce and close debate on each bill, speaking to the purpose of every clause and schedule,[80] and answering members/peers' questions about ambiguities, context, and effect.[81] Nicholas Lyell, Attorney General in the Major Government, noted shortly after *Pepper* that he believed that courts recognized that "once a Minister expresses an opinion on the meaning of a particular provision and that provision is enacted, Parliament … must have accepted his opinion."[82]

In *R v. Humber Bridge*, the House of Lords – in its former judicial role – moved beyond a clearly drafted, but nonsensical provision, and placed decisive weight on a ministerial statement that raised the inference of a drafting error.[83] Building on this trend, the use of legislative materials has continued to expand recently, with appellate approval of White Papers, Law Commission Reports, and draft legislation given in 2001, and extended to Explanatory Notes in 2002.[84] The extent to which the government initiates, formulates, and executes the policymaking process – reflected by the number of government bills that become law and rigid party discipline[85] – signifies the important interpretive role that legislative materials can serve in a parliamentary system. Consequently, with the United Kingdom's legislative bargain centered in the Prime Minister and Cabinet, Parliament's subsequent simple approval or rejection of government purpose should lead judges to view legislative materials as a valuable resource that may better enable them to faithfully interpret[86] statutes.

F 'They' Are Congress

Factors that influence the Congressional legislative bargain are, in the best tradition of American separation of powers, as numerous as the Federal Government's

80 S.J. Gibb, 'Parliamentary Materials as Extrinsic Aids to Statutory Interpretation', *Statute Law Review*, Vol. 1984, No. 1, 1984, p. 37.

81 *Standing Orders of the House of Commons*, *supra* note 31, pp. 39-42; *Standing Orders of the House of Lords*, *supra* note 31, p. 20.

82 N. Lyell, '*Pepper v. Hart*: The Government Perspective', *Statute Law Review*, Vol. 15, No. 1, 1994, p. 2.

83 *R (Confederation of Passenger Transport (U.K.)) v. Humber Bridge Board* (2003) EWCA Civ. 842.

84 *R v. Secretary of State for the Environment* (2001) 2 A.C. 349; *Westminster City Council v. NASS* (2002) UKHL 38; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenberg AG* (1975) UKHL 2.

85 Styles 1994, p. 153.

86 This role has become ever more important since the House of Lords has transferred its former role as the final court of appeal to the new U.K. Supreme Court. In tandem with the growing treatment of the Human Rights Act 1998 and other entrenched statutes as de facto constitutional law, these recent growth in the ability has only enhanced the role of the British judiciary in statutory interpretation.

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537 elected officials.[87] Legislation is introduced by individual members, and they are responsible, along with staff and lobbyists, for the negotiation and drafting of bill provisions.[88] Lobbyists not involved in the initial compilation of the bill can also make an impact on the final statutory text by encouraging friendly members to offer amendments in committee or during floor consideration that accommodate their clients' interests.[89] This influence, combined with weak party discipline and multiple veto players, means that it is easy for legislation to fall victim to procedural hurdles.

Dozens of influential leaders, including committee chairmen, party leadership, the President, and even individual senators may have dispositive procedural authority to delay or obstruct legislation. In this way, each of these veto players – as well as their staff and supporting interest groups – must be regularly consulted and accommodated if a bill is to navigate the process. This multiplicity of interests means that unlike the United Kingdom, there are not "two parties, but hundreds" involved in the legislative bargain, each with discrete objectives and a divergent understanding of the meaning of statutory text.[90]

This diffusion of interests and influence often requires the passing of a provision, which is broadly related to an urgent reform, but is purposely nebulous, intentionally punting a politically sensitive decision to the courts following a lack of consensus.[91] With most of these interests in direct conflict – even among those members voting for the bill – uncovering a single coherent legislative intent beyond that reflected by the enacted text becomes uncommonly difficult.

This multifaceted level of influence extends to the *Congressional Record*, committee reports, and other related legislative materials. The nature of the *Record* means that not only are floor speeches included verbatim, but congressmen and senators also have the opportunity to add documents in the 'Extensions of Remarks' section.[92] In this way, congressmen and senators voting for legislation but unhappy with an individual provision will purposely read into the *Record* speeches or other extraneous material interpreting a provision in their preferred manner, knowing well that courts may one day consider their words to be decisive[93] – especially if committee reports failed to squarely address the issue. Based on these factors, even if a coherent strand of intent could be said to exist among the enacting coalition, this can be defeated by a single member offering additional

87 T. Campbell, 'Severability of Statutes', *Hastings Law Journal*, Vol. 62, No. 6, 2011, p. 1514; This includes four hundred thirty-five members of the House of Representatives, one hundred senators, and the President and Vice-President. The latter individuals have dispositive authority, accounting for their roles in approving legislation and presiding over the Senate.

88 McKay & Johnson 2012, p. 387.

89 For an overview of lobbyists' role in the legislative process, *see* M.C. Stephenson & H.E. Jackson, 'Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System', *Harvard Journal on Legislation*, Vol. 47, No. 1, 2010, pp. 1-20; Nourse 2002.

90 M.L. Movsesian, 'Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation', *North Carolina Law Review*, Vol. 76, No. 4, 1998, p. 1185; *Alaska Airlines*, *supra* note 5, p. 685.

91 *Landagraf v. USI Film Products* (1991) 511 U.S. 244, pp. 262, 284, 287.

92 *See supra* note 16.

93 Outzs 1995, p. 318.

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evidence into accompanying legislative materials without consideration or adoption by the full body.

Lobbyists also keenly understand that "what Congress says about legislation" is important to the courts.[94] One publication, *The Lobbying Handbook*, encouraged lobbyists to "recommend report language" to Members of Congress and staff informally after committee hearings, emphasizing that they are 'derelict' in their fiduciary duty to their clients if they fail to do so.[95] As early as the 1930s, lobbyists advocated for the inclusion of interpretive language in legislative materials and then later relied on their Congressionally-approved interpretive dicta in subsequent litigation.[96] Even the United States Department of Justice has questioned the usefulness of legislative materials in statutory interpretation, noting the confusing maze of interests present.[97] Based on this multiplicity of interests, a coherent thread of intent cannot therefore be reliably identified among the infinitely complex aggregation of member preferences and procedural demands found in Congress.

G Conclusion

The fundamental difference in the logic of the Parliamentary and Congressional legislative bargains exemplifies the diverging nature of intent in statutory interpretation. As a fresh perspective on traditional textualist and purposivist theories of statutory interpretation, the concept of legislative bargains also assumes that some level of separation of powers exists between the legislature and judiciary.

Fundamentally, this logic entails reconstructing the actions of key legislators, committees, and procedural devices in molding legislation.[98] Though these actions will occur independently during the legislative process anyway whether or not a strong separation of powers exists, this theory will likely not succeed at a high level without a division between the policymaking and interpretive functions of government.[99]

In a sense, reconstructing legislative bargains requires that the judiciary inwardly views itself as an actor committed to being the 'faithful agent' of the legislature. Otherwise, courts will not develop the knowledge needed to reconstruct procedural actions in the same manner that they were carried out by the legisla-

94 J.L. Zorack, *The Lobbying Handbook*, Washington D.C. 1990, p. 319.

95 *Ibid*.

96 *United States v. Borden Milk Co.* (1939) 308 U.S. 108; N.R. Parillo, 'Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950', *Yale Law Journal*, Vol. 123, No. 2, 2013, pp. 359-360.

97 *Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation*, United States Department of Justice, 1989, pp. 104-116.

98 T.W. Merrill, 'Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary', *Northwestern University Law Review*, Vol. 88, No. 1, 1993, p. 396.

99 J.F. Manning, 'Textualism and Legislative Intent', *Virginia Law Review*, Vol. 91, No. 2, 2005, p. 449.

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tors themselves, arriving at a fundamentally different version of the enacted legislation than that intended.[100]

In the Parliamentary context, Her Majesty's Government introduces and controls all legislation, allowing it to maintain the integrity of its policy objectives. Having clearly stated its intent in legislative materials, Parliament in the end has the dispositive choice to expressly ratify or reject the discrete ideas of the executive. Conversely, Congressional legislation, introduced and managed by individual members, must run a gauntlet of gatekeepers and competing interests, with each legislative actor tendering unique views about the exact nature of the policy objectives that have been achieved. The presence of multiple veto players, especially in the Senate, means that accommodation, compromise, and amendment are de facto requirements for passage. In addition, legislative materials in Congress are also subject to modification by individual members, staff, and lobbyists in order to emphasize policy preferences that may have failed to achieve critical mass in the enactment process, in hopes of one day being consummated via judicial statutory interpretation.

As a result, with legislative materials at best inaccurate and at worst misleading, Congressional purpose must be viewed as nothing more than the language employed in the statute itself. The basic premise of the legislature as a corporate body underscores the fundamental import of this idea. Instead of merely debating issues and passing broad calls to action, leaving policy boundaries to the executive,[101] legislative enactments bind conduct in a detailed way because they are grounded in the approval of a majority of our popularly elected representatives. If courts cannot successfully resolve the meaning of a particular statutory provision after several attempts in our judicial hierarchy, our high courts should have the authority to enjoin enforcement of the provision at issue and remand it to the legislature for clarification under certain conditions – much like our courts' existing ability to stay legal consequences in individual controversies and remand them to lower courts for detailed consideration.

The mechanical logic of Congress' legislative bargain exists to reconcile diverging interests, yielding significant authority to individual members and committees to draft legislation or assure the defeat of a provision, in the best tradition of the American separation of powers. Parliament's role is innately different. While the ultimate institutional actor responsible for the enactment of statutes, the idea of actual 'Parliamentary' legislation is a rarity. The government of the day drafts and manages proposed legislation from the beginning, ensuring a unity of purpose that Parliament forthrightly approves or rejects. Drawn from these mechanics, the procedural contexts of Parliament and Congress underscore how institutional frameworks may account for the success or failure of statutory interpretation. Consequently, our jurisprudential view of legislative intent must turn from the narrow question of *where intent can be uncovered*, towards appreciating

100 *Ibid.*, p. 399.

101 The modern proliferation of administrative law and statutory instruments, though sometimes necessary in complex areas of policy, is a regrettable step in this direction.

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whether it can actually be expressed at all in light of the nature of legislative bargains.

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