

Abstract for “*Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*”

In 1992, the Law Lords (the judicial arm of the House of Lords) overruled more than two centuries of precedent when it decided in *Pepper v. Hart* that courts could refer to and rely on legislative history to aid in construing enacted laws. The ensuing fourteen years have witnessed a robust debate among British judges and legal scholars as to the scope and propriety of *Pepper*. This article offers the first empirical and comparative analysis of how Britain’s highest court has used previously excluded legislative history materials in its judicial decisions.

Although the Law Lords opened the door to reliance on legislative history at a time when the U.S. Supreme Court has been clamping down on such usage, the article demonstrates that citation to parliamentary materials by the Law Lords since 1996 does not approach the levels of reliance on congressional materials currently practiced by the Supreme Court. Notwithstanding Justice Scalia’s appreciable influence, Supreme Court justices continue to make use of legislative history in their opinions between three and five times more often than their counterparts in Britain. The article accounts for this divergent pattern of U.S. and British usage based on certain key differences in their respective lawmaking processes and structures—notably the disparate roles played by standing committees, the varying importance of legislative bargains following bill introduction, and the breadth of legislative history sources available under each system.

Still, despite a spirited reaction to *Pepper* by several judges on the Law Lords, references to legislative history have increased since 2000. Moreover, the Law Lords in two very recent decisions have gone beyond *Pepper* in setting forth grounds for relying on parliamentary materials. The article predicts that Britain’s highest court is in the process of consolidating if not augmenting a permanent role for legislative history as an interpretive asset. The article then suggests how this development should invite a different kind of dialogue about legislative history among justices on the U.S. Supreme Court.

Below the Surface: Comparing Legislative History Usage by The House of Lords and the Supreme Court

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INTRODUCTION

[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: what is below the surface of the words and yet fairly a part of them?¹

Our legal community is not alone in debating the use of legislative history as a resource for the interpretation of statutes. In 1992, the House of Lords in *Pepper v. Hart*² overruled more than two centuries of precedent when it decided that courts could refer to and rely on Hansard—the official record of standing committee proceedings and parliamentary debates—to aid in construing enacted laws. The ensuing period has witnessed intense disagreements over the scope and propriety of *Pepper*. As is true in the U.S., the British debate has occurred among legal scholars³ as well as judges, and the judicial exchanges have taken place both in academic settings⁴ and through pronouncements from the bench.⁵

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¹ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

² *Pepper (Inspector of Taxes) v. Hart*, [1993] 1 All Eng. Rep. 42, [1993] A.C. 593.

³ Compare Scott C. Styles, *The Rule of Parliament: Statutory Interpretation After Pepper v. Hart*, 14 OXFORD J. LEG. STUD. 151 (1994) (criticizing the decision) and J. H. Baker, *Case and Comment: Statutory Interpretation and Parliamentary Intention*, 52 CAMB. L. J. 353 (1993) (same) with Stefan Vogenauer, *A Retreat from Pepper v. Hart?: A Reply to Lord Steyn*, 25 OXFORD J. LEG. STUD. 629 (2005) (defending the decision).

⁴ Compare Lord Steyn, *Pepper v. Hart: A Re-Examination*, 21 OXFORD J. LEG. STUD. 59 (2001) (criticizing the decision) and Lord Millett, *Construing Statutes*, 20 STAT. L. REV. 107 (1999) (same) with Lord Hoffman, *The Intolerable Wrestle With Words and Meanings*, 114 S. A. L. J. 656, 669 (1997) (justifying the decision in part).

⁵ Compare, e.g., Reg. (Jackson and others) v. Attorney General [2005] UKHL 56, [2005] 4 All Eng. Rep. 1253, 1285 (Lord Steyn) (criticizing and declining to rely on *Pepper*) and Robinson v. Secretary of State for Northern Ireland and others [2002] UKHL 32, [2002] N. Ir. L. R. 390, 400, 404-05, 413, 420 (opinions of Lords Bingham,

The judicial arm of the House of Lords—known as the Law Lords⁶—has opened the door to the use of legislative history at a time when the Supreme Court has been clamping down on such usage.⁷ Accordingly, one might wonder if the British and American judicial systems are in the process of trading places on this interpretive issue. In fact, however, citation to Hansard by the Law Lords in the past decade does not approach the levels of reliance on legislative history practiced by the Supreme Court. Notwithstanding the appreciable influence of Justice Scalia, Supreme Court justices continue to make use of legislative history in their opinions between three and five times more often than their counterparts in Britain.⁸

On the other hand, despite a spirited reaction to *Pepper* by several members of the Law Lords,⁹ references to Hansard have been increasing in the years since 2000. Moreover, the great majority of judges serving on Britain's highest court over the past decade have invoked legislative history materials in their opinions, many on a repeated basis.¹⁰ Thus, even if the Law Lords are unlikely to value legislative history to the same extent as the Supreme Court, a new era

Hoffman, Hobhouse, Millett) (same) *with* Reg. (Jackson and others) v. Attorney General [2005] UKHL 56, [2005] 4 All Eng. Rep. 1253, 1276-77 (opinion of Lord Nicholls) (defending and relying on *Pepper*), *Mirvahedy v. Henley and another* [2003] UKHL 16, [2003] 2 All Eng. Rep. 401 (opinion of Lord Walker) (same), *and Harding v. Wealands* [2006] UKHL 32, [2006] 3 WLR 83, 93, 104, 106-07 (opinions of Lords Hoffman, Rodger, Carswell) (same).

⁶ The House of Lords as a court consists of the Lord Chancellor plus twelve Lords of Appeal in Ordinary. See Administration of Justice Act 1968, s.1(1)(a), as amended in 1994. See generally Glynn Dymond, *The Appellate Jurisdiction of the House of Lords* 10-11 (House of Lords Library Note, 2006). The Lords of Appeal in Ordinary—usually referred to as the Law Lords—are appointed by the Queen upon recommendation from the Prime Minister, which in turn is based on advice from the Lord Chancellor. The Law Lords, who are made life peers, review appeals in panels that typically consist of five members but may be as few as three and, in relatively rare cases, as many as seven or even nine if the issues presented are viewed as especially difficult or important. See Terence Ingman, *THE ENGLISH LEGAL PROCESS* 4-6 (10th ed. 2004); Michael Zander, *THE LAW-MAKING PROCESS* 339-42 (6th ed. 2004).

⁷ See, e.g. Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. LEGIS. 369, 384-87 (1999); James J. Brudney and Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222-24 (2006).

⁸ See Part II.A. *infra*.

⁹ See Part I.C. *infra*.

¹⁰ See Part II.A. *infra*.

of reliance on that history has been launched, and the debate among British judges is instructive from a comparative standpoint.

This article offers the first empirical examination of how often, and in what ways, Britain's highest court has used previously excluded legislative history materials in its judicial decisions. It also represents the first effort to compare legislative history treatment between the Law Lords and the Supreme Court. The article's comparative inquiry identifies differences in the frequency with which legislative history is invoked in each court's decisions, and offers explanations for the distinct patterns of usage that have emerged.

Several key differences in national lawmaking structures and processes help account for why legislative history usage remains substantially greater in the Supreme Court than in the Law Lords.¹¹ For a start, the committee report—a primary source of reliable legislative history in the American context—is essentially absent from the British setting, where parliamentary standing committees play only a peripheral role in creating and explaining bill language. Further, negotiation and compromise following bill introduction are normal features of Congress's decentralized and discontinuous decisionmaking but are exceptional occurrences under the more efficient methods by which bills are enacted in Parliament. Because legislative history in the U.S. typically addresses the meaning of text that has been modified if not recast during the lawmaking process, the Supreme Court often refers to that history to help understand legislative bargains. Conversely, because legislative compromise is rarely required under Britain's party-controlled parliamentary regime, there is less need to refer to Hansard to explain text that remains substantially unaltered since its introduction. Finally, parliamentary materials approved for citation under the rule of *Pepper* consist almost exclusively of statements by government

¹¹ See Part II.C. *infra*.

ministers.¹² By contrast, our legislative history includes a richer and more diverse set of materials generated at different stages by Congress and its committees, with executive branch representatives cast in supporting roles at Congress's invitation.¹³

Still, accepting that there are institutional reasons to anticipate less frequent use of legislative history by the Law Lords than by the Supreme Court, the British innovation of invoking Hansard as an interpretive aid is alive and well after fourteen years. The Law Lords have recently indicated that parliamentary materials may be used under conditions broader than those set forth in *Pepper*, and Hansard is admissible based on much the same intentionalist and purposive justifications as have been applied by the Supreme Court to value legislative history when construing statutory text. Although it remains early in the Law Lords' venture with this new interpretive asset, the article predicts that reliance on Hansard will continue and may even increase in the future. The article then uses comparative analysis to offer preliminary thoughts as to how each country's highest court might learn from the other in their respective approaches to legislative history usage.

The Law Lords since *Pepper* have framed their disagreements over legislative history in less polarized terms than have been applied in the U.S. setting. British judges have tended to argue over when and to what extent Hansard is probative in assisting courts to interpret Parliament's laws, whereas the current contest on the Supreme Court has been about whether

¹² See *Pepper*, *supra* note 2, [1993] 1 All Eng. Rep. at 64, 69 (Lord Browne-Wilkinson).

¹³ Recent controversy over the proliferation of signing statements by President Bush reflects the novelty of unilateral forays into bill interpretation by the executive branch, forays that would be far less controversial in a system dominated by executive branch commentary. See Amer. Bar Assn. Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Report and Recommendations* 20, 26 (July 24, 2006) (urging that presidents cease using signing statements to state an intention to interpret or enforce a law inconsistent with the will of Congress, and observing that most courts give little or no weight to signing statements as "legislative history"); *The Use of Presidential Signing Statements: Hearing Before the Senate Judiciary Committee*, 109th Cong. __ (June 27, 2006) (Statements by Sen. Specter (Chair) and Sen. Leahy (ranking member) (critical of President Bush's unprecedented use of signing statements)).

legislative history should be admissible in court at all.¹⁴ Our judicial conversations could profit from Britain's more textured approach.

At the same time, legislative history applications adopted by the Law Lords have involved a shifting series of aspirationally objective rules. The search for bright-line answers may reflect an understandable judicial impulse to direct and confine the use of this new and potentially open-ended interpretive resource. Yet the Supreme Court's relatively ad hoc method of applying legislative history, although messier in conceptual terms, arguably does a better job of promoting flexibility in the interpretive enterprise. Such flexibility should be valued more by Britain's judiciary as it gains experience in reviewing and assessing parliamentary materials.

Part I of the Article presents recent developments in Britain, including the basic rule of *Pepper v. Hart* and some key modifications or refinements of the rule announced in subsequent decisions. Part II begins with a quantitative comparison between the Law Lords' invocation of Hansard since 1996 and the Supreme Court's use of legislative history during the same time period. Part II then considers whether there are sound reasons for courts to rely less often on legislative history in Britain than in the United States. The comparison focuses on the nature of the legislative process in the two countries and on separation of powers issues, including the risks of opportunistic behavior by creators of legislative history. Part III examines certain elements of the current debate among British judges, using these elements to predict future uses of Hansard by the Law Lords. Part III also identifies differences between the British and American approaches that may be instructive for the Supreme Court in one respect and for the Law Lords in another.

¹⁴ See generally John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006).

I. CHANGES WROUGHT BY PEPPER V. HART

In the United States, federal courts began relying on legislative history to construe statutes in the latter part of the nineteenth century.¹⁵ The Supreme Court's robust appetite for this interpretive resource dates primarily from the period after 1940, but judicial reliance increased gradually during much of the twentieth century.¹⁶ The absence of a single moment of self-conscious change by our courts contrasts notably with British experience. *Pepper v. Hart* was a watershed decision in constitutional as well as practical terms, and the Law Lords have revisited the ruling and its effects in remarkably frank terms. After fourteen years of soul searching and some second thoughts, Britain's highest court seems unlikely to backtrack on its commitment to the utility of legislative history as an interpretive resource.

A. *The Law Before Pepper*

As far back as 1769, British courts refused to consider parliamentary proceedings as an aid to statutory construction.¹⁷ By the mid nineteenth century, courts had extended the exclusionary rule to bar examination of pre-legislative preparatory materials, such as reports authored by government-appointed commissioners that often formed the basis for the statute under review.¹⁸ The courts relaxed this harsher approach around 1900, allowing judges to refer in their opinions to commission reports and White Papers¹⁹ for the purpose of determining the

¹⁵ For a major decision inaugurating modern practice, see *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 464-65 (1892). For isolated earlier examples, see *Blake v. National Bank*, 90 U.S. 307, 319-20 (1875); *Jennison v. Kirk*, 98 U.S. 453, 459-60 (1879).

¹⁶ See *United States v. American Trucking Assn.*, 310 U.S. 534, 543-49 (1940); Frankfurter, *supra* note 1, at 543; William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392 (1990).

¹⁷ *Millar v. Taylor*, (1769) 2 Burr. 2303, 2332 (Willes J.) (KB). See *Pepper*, [1993] 1 All Eng. Rep. at 60-61 (Lord Browne-Wilkinson).

¹⁸ *Salkeld v. Johnson* (1848) 154 E.R. 487, 495; 2 Exch. 256, 273. See *Pepper*, [1993] 1 All Eng. Rep. at 61 (Lord Browne-Wilkinson).

¹⁹ White Papers (printed on white paper) announce reasonably firm government policy on a particular issue and precede the introduction of a bill. In the words of former Prime Minister Harold Wilson, "A White Paper is essentially a statement of government policy in such terms that withdrawal or major amendment, following consultation or public debate, tends to be regarded as a humiliating withdrawal." HAROLD WILSON, THE LABOUR

“mischief” a statute was intended to address, although *not* for the purpose of construing the words chosen by Parliament to address that mischief.²⁰ Still, as late as 1980, it was technically prohibited for parties to cite in court anything said in the House of Commons without first obtaining consent from the House.²¹

The justifications offered for excluding all references to parliamentary proceedings have been both constitutional and pragmatic. From a constitutional standpoint, Article 9 of the English Bill of Rights safeguards the freedom of parliamentary debates and proceedings against impeachment or questioning in the courts or other locations besides Parliament.²² Some judges and scholars concluded that this provision protects not simply the freedom of parliamentary debate but the debates and proceedings as a whole, maintaining that to review or analyze in court what is said by a bill sponsor or government minister in committee or on the floor of Parliament is to violate Article 9.²³ A second constitutional justification, based on separation of powers, was that allowing floor statements by individual legislators to shed light on the intent or effect of a law would confuse the distinct roles of Parliament as sovereign in the making of laws and courts as sovereign in their interpretation.²⁴

The earliest judicial explanation for refusing to admit parliamentary materials, however, was practical rather than constitutional—House of Commons debates were not fully or

GOVERNMENT 1964-70, 380 (1971). By contrast, Green Papers announce more tentative government proposals, ready for public discussion but with the government remaining uncommitted. *Id.* See generally Gary Slapper & David Kelly, *THE ENGLISH LEGAL SYSTEM* 57 (6th ed. 2003).

²⁰ *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks* [1898] A.C. 571, 575 (Earl of Halsbury, LC). See *Pepper*, [1993] 1 All Eng. Rep. at 61 (Lord Browne-Wilkinson).

²¹ David Miers, *Citing Hansard as an Aid to Interpretation*, 4 STAT. L. REV. 98, 99 (1983). See Zander, *supra* note 6, at 161.

²² Article 9 states Parliament’s resolution “That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.” 1 W.&M., sess. 2, c. 2 (1689).

²³ See Francis Bennion, *Hansard—Help or Hindrance? A Draftman’s View of Pepper v. Hart*, 14 STAT. L. REV. 149, 152 n. 14 (1993) (*citing* William Blackstone, 1 COMMENTARIES 163 (17th ed. 1830)). Hansard’s Official Report includes the edited verbatim proceedings from both Houses and their standing committees. See www.parliament.uk/Hansard.

²⁴ See *Pepper*, [1993] 1 All Eng. Rep. at 63-64 (Lord Browne-Wilkinson) (reciting argument for exclusion propounded by the Government).

accurately reported.²⁵ Even after 1909, when Hansard's Parliamentary Debates offered an authoritative and comprehensive report of proceedings,²⁶ the time and expense involved in reading all potentially relevant debates, and the special burden this would impose on parties with lesser resources, continued to be regarded as serious obstacles.²⁷ In 1969, when the Law Commissions of England and Scotland presented their comprehensive report on statutory interpretation, the commissioners recognized that Hansard was sufficiently relevant to the interpretative task of courts to warrant consideration.²⁸ Nonetheless, the commissioners recommended that the exclusionary rule be retained largely for practical reasons. They pointed to the difficulty of isolating the truly valuable information found in parliamentary debates and the consequent challenge of providing such information in a convenient and accessible form.²⁹

Like many major breaks with legal precedent or tradition, the decision in *Pepper v. Hart* did not simply materialize out of thin air. After the Law Commissions' extended and thoughtful treatment, some appellate judges in the 1970s began voicing doubts as to the ongoing basis for a rigid rule of non-admissibility. A judge in one case advocated reliance on Hansard for the purpose of identifying the mischief at which a law was aimed.³⁰ Lord Denning in the Court of Appeal went further, citing Hansard to help interpret and apply the statutory words under review.³¹ In the course of his opinion, Lord Denning lamented that too often judges "grope about in the dark for the meaning of an Act" because they are denied access to what is said in

²⁵ See *Millar v. Taylor*, *supra* note 17, at 2332 (giving as reason for refusing to consider parliamentary proceedings "That history [of changes a bill underwent in the House where it was first debated and approved] is not known to the other house, or to the sovereign").

²⁶ See *The Official Report* pp. 2-3, Fact Sheet G17, House of Commons Information Office (revised 2003), available at www.parliament.uk/factsheets; Vogenauer *supra* note 3, at 631.

²⁷ See *Beswick v. Beswick* [1968] A.C. 58, 74 (Lord Reid); Bennion, *supra* note 23, at 143.

²⁸ The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes*, Law Commission No. 21 and Scottish Law Commission No. 11, 31-32 (1969).

²⁹ *Id.* at 36.

³⁰ *Race Relations Board v. Dockers' Labour Club & Institute* [1976] A.C. 285, 299 (Lord Simon).

³¹ *Davis v. Johnson*, [1979] A.C. 264, 276-77 (CA) (Lord Denning).

Parliament.³² He added that “[a]lthough it may shock the purists” there was nothing to stop judges from consulting the debates on their own and gleaning guidance from them, something he himself “confessed” to having done on numerous occasions.³³ Upon further appeal, the House of Lords disagreed with Lord Denning’s position and re-affirmed the exclusionary rule,³⁴ but the debate was becoming more open.

In the years immediately preceding *Pepper*, the Law Lords recognized certain limited exceptions to the exclusionary rule. One involved consideration of a government minister’s policy statement to Parliament explaining how the Government proposed to implement its broad statutory authority in a specific setting.³⁵ The parliamentary statement was deemed relevant in determining whether the minister had unlawfully exceeded his powers under the Act.³⁶ Another exception involved interpretation of delegated or secondary legislation—known as statutory instruments—designed to carry out requirements under European Community law.³⁷ The Law Lords relied on the Hansard account of government explanations and member criticisms as an aid to determining Parliament’s intent in approving the regulations,³⁸ although in doing so they observed that such delegated legislation was not subject to the same parliamentary processes of consideration and amendment that a Bill would face.³⁹

These fairly modest inroads were followed, in November 1992, by the sea change of *Pepper v. Hart*, holding that reference to Hansard would henceforth be permitted as an aid to the

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 337 (Viscount Dilhorne), 349-50 (Lord Scarman). *See also* S.G.G. Edgar, CRAIES ON STATUTE LAW 128-29 (Sweet & Maxwell 7th ed. 1971) (summarizing traditional position excluding debates in Parliament).

³⁵ *See* *Brind v. Sec’y of State the Home Dept.* [1991] 1 All Eng. Rep. 720. The decision addressed the Government’s policy directing broadcast media to ban television or radio appearances by persons representing certain proscribed terrorist organizations.

³⁶ *See id.* at 723-24 (Lord Bridge), 729-30 (Lord Ackner).

³⁷ *See* *Pickstone v. Freemans plc* [1988] 2 All Eng. Rep. 803.

³⁸ *See id.* at 806-07 (Lord Keith), 814-15 (Lord Templeman).

³⁹ *See id.* at 807 (Lord Keith), 814 (Lord Templeman).

interpretation of primary legislation. In reaching its decision by a six-to-one majority, the Law Lords disavowed contrary holdings and rationales from a number of earlier decisions.⁴⁰

B. *The Rule of Pepper*

Pepper v. Hart involved a tax statute; the controversy arose over how to measure the taxable fringe benefit received by nine members of the teaching staff at an independent boys' school.⁴¹ Pursuant to a concessionary fee scheme operated by the school, the teachers' sons were educated at a charge of one-fifth the fees paid by members of the public. The school was not filled to capacity, and its marginal costs in educating these additional boys were very low—minimal amounts for food, laundry, school supplies, etc.⁴² The boys' parents argued that they owed no taxes at all, because the value of the fringe benefit they received was less than the one-fifth fees they had paid. The Crown, on behalf of the Inspector of Taxes, maintained that the expense incurred by the school was simply the average cost of its providing for the education of all enrolled children; this average cost well exceeded the one-fifth fees paid by the nine teaching staff, and thus taxes were owed on the difference.⁴³

The Finance Act of 1976 provided that the proper measure of a taxable benefit was the “cash equivalent of the benefit.”⁴⁴ Another section of the Act defined that phrase as “an amount equal to the cost of the benefit,” but its further textual elaborations might plausibly be viewed as meaning either an employer's marginal cost or its average cost.⁴⁵ At the conclusion of oral

⁴⁰ See *Pepper* [1993] 1 All Eng. Rep. at 60-69 (abandoning rule set forth in *Beswick v. Beswick* [1968], *Black-Clawson International* [1975], *Davis v. Johnson* [1979] and *Fothergill v. Monarch Airlines Ltd* [1980]).

⁴¹ See *Pepper* [1993] 1 All Eng. Rep. at 42.

⁴² See *id.* at 54.

⁴³ See *id.* at 54.

⁴⁴ Finance Act, 1976, c. 2, §61.

⁴⁵ Section 63(1) defines “cash equivalent of the benefit chargeable to tax under section 61” as “an amount *equal to the cost of the benefit*” (emphasis added), arguably suggesting the marginal cost to the employer of providing the benefit. Section 63(2) adds that “the cost of a benefit...includes *a proper proportion of any expense* relating partly to the benefit and partly to other matters” (emphasis added), suggesting perhaps more strongly the average cost to the employer of educating each child under its supervision.

argument, the Law Lords by a four-to-one margin determined that the text should be construed in favor of the Government.⁴⁶ They reasoned that “cost of the benefit”—in traditional accountancy terms and as a matter of ordinary meaning—was properly understood in this setting to signify the average cost of providing the same educational benefit to all boys in the school.⁴⁷

Before the decision issued, however, it was brought to the Law Lords’ attention that in the course of debate on the passage of the 1976 Act, the Financial Secretary to the Treasury had responded to questions in the House of Commons on virtually the precise circumstances presented in the pending appeal.⁴⁸ The Law Lords then held a second hearing before an enlarged panel of seven judges, addressed to the question of whether it was appropriate for the court to depart from its exclusionary rule and if so whether Hansard provided any guidance in deciding the instant case.⁴⁹ The court answered yes on both counts.

Lord Browne-Wilkinson authored the leading speech. His primary reason for modifying the rule on Hansard was that to do so would further the court’s “duty...to give effect to the intention of Parliament.”⁵⁰ Recognizing that ambiguities in enacted text were inevitable, Lord Browne-Wilkinson noted that in many if not most cases the parliamentary materials would shed no light on the interpretive matter facing the court. But in those few instances where statements made during debates provide “a clear indication of what Parliament intended in using those

⁴⁶ See *Pepper* [1993] 1 All Eng. Rep. at 42 (listing five Lords of Appeal in Ordinary who heard the initial 1991 appeal); *id.* at 52 (remarks of Lord Griffiths, describing himself as “in a judicial minority of one at the end of the first hearing”); *id.* at 52 (remarks of Lord Oliver, describing majority’s determination to dismiss taxpayers’ appeal at end of first hearing).

⁴⁷ See *id.* at 52 (remarks of Lord Oliver, justifying his initial position); *id.* at 72 (remarks of Lord Browne-Wilkinson, justifying his initial position).

⁴⁸ See *id.* at 54-55 (Lord Browne-Wilkinson).

⁴⁹ See *id.* at 55 (Lord Browne-Wilkinson). See also note 6 *supra* (discussing use of larger panels for especially important issues).

⁵⁰ See *Pepper* [1993] 1 All Eng. Rep. at 64.

words,” it would be wrong for courts to “blind themselves” to such evidence and risk adopting a construction that would thwart rather than enforce Parliament’s true design.⁵¹

In addition to this argument based in effect on strengthening parliamentary supremacy, Lord Browne-Wilkinson relied on more pragmatic considerations as well. One was the illogical nature of current legal distinctions regarding admissibility. Courts had long been permitted to examine White Papers and commission reports to help ascertain the mischief which a law aimed to correct; a ministerial statement made in Parliament was no less authoritative in this regard.⁵² Likewise, the Law Lords had invited courts to rely on ministerial statements made when introducing statutory instruments that could not be amended by Parliament; such statements were not sensibly distinguishable from ministers’ introductory statements explaining primary legislation, much of which is never amended prior to passage.⁵³ A further pragmatic concern was that the rule against admissibility was impeding fairness and transparency in the litigation process. It prevented parties from addressing the courts on parliamentary materials even though many distinguished judges had admitted they were peeking at Hansard and drawing their own inferences as to parliamentary intent.⁵⁴

Lord Browne-Wilkinson went on to consider and discuss the various practical and constitutional objections relied on by courts in the past to justify the exclusionary rule. He concluded that concerns over library access and lack of satisfactory indexing for Hansard were overstated; similar concerns had been voiced with respect to the growing number of statutory instruments, but practitioners were coping with those materials even if at some expense.⁵⁵

⁵¹ *See id.* Relatedly, Lord Browne-Wilkinson also noted the importance of “the purposive approach to construction now [widely] adopted by the courts in order to give effect to the true intentions of the legislature.” *Id.* at 65.

⁵² *See id.* at 65.

⁵³ *Id.* (drawing analogy to *Pickstone v. Freemans*, discussed *supra* at notes 37-39 and accompanying text).

⁵⁴ *Id.* at 66.

⁵⁵ *Id.*

Concerns that lawyers and judges lacked the sophistication to sift and assess the weight of various parliamentary statements also were deemed exaggerated.⁵⁶ Although there would be research costs from combing through Hansard in hopes of finding clear evidence as to what Parliament intended, these costs were easily over-estimated, especially given the limited nature of what would be admissible under the court's new standard.⁵⁷

The majority also made relatively short work of the two leading constitutional defenses for excluding Hansard. With respect to the Article 9 argument, Lord Browne-Wilkinson reasoned that it stretched language and common sense too far to conclude that the use of Hansard for the purpose of construing a statute in a court was a "questioning [of] proceedings in parliament." Moreover, such a conclusion would then have to apply to all media reports reviewing or commenting on what is said in Parliament, an untenable result.⁵⁸ With regard to the separation of powers argument, the majority observed that although statutory words are indeed the law, courts rely on a range of extrinsic sources as aids to construction of those words, including White Papers and official government reports. Reliance on parliamentary materials in some circumstances as a further means of assisting the court to make its own interpretive determination raised no new constitutional question.⁵⁹ It is noteworthy that the one Lord who disagreed with the majority's decision to eliminate the exclusionary rule had no constitutional concerns over this outcome; his reservations were directed only at the cost-related practical arguments.⁶⁰

⁵⁶ *Id.* at 66-67.

⁵⁷ *Id.* at 67. For discussion of court's standard, see *infra* at notes 61-63 and accompanying text. Lord Griffiths, concurring in the result, emphasized that modern technology "greatly facilitates" the retrieval of Hansard materials, adding that based on personal experience "it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said." *Id.* at 50.

⁵⁸ *Id.* at 67-68.

⁵⁹ *Id.* at 69.

⁶⁰ *Id.* at 48 (Lord Mackay of Clashfern).

Having determined to depart from longstanding precedent, the majority made clear that its modification was limited and subject to certain safeguards. Lord Browne-Wilkinson stated that courts should refer to parliamentary materials to aid in statutory construction only if three conditions were met. First, the text in question must be ambiguous or obscure, or its literal meaning must lead to an absurdity.⁶¹ Even then, judicial reliance would be proper only if the parliamentary material was clear either as to the mischief aimed at or the legislative intention lying behind the unclear words.⁶² Finally, in order for such parliamentary statements to be clear, they would have to be made by a government minister or other primary proponent of the bill, perhaps accompanied by questions or replies from members that provided proper context.⁶³

The majority was confident that its three part test would constrain counsel's inclination to invoke Hansard, and thereby limit the costs to parties and courts of having to review and analyze parliamentary materials.⁶⁴ To reinforce these limits, Lord-Browne Wilkinson added that attempts to introduce parliamentary material which failed to satisfy the three factors should trigger an order for costs against the offending party.⁶⁵ In addition, a Practice Direction was issued in 1994, specifying that five working days before a hearing, any party intending to refer to Hansard in court must provide the court and all other parties with copies of the Hansard extract and a summary of the planned argument based on that extract.⁶⁶ This direction to counsel, which

⁶¹ *Id.* at 64 (Lord Browne-Wilkinson).

⁶² *Id.*

⁶³ *Id.* The three factors are restated *id* at 69.

⁶⁴ *Id.* at 66-67.

⁶⁵ *Id.* at 67. In *Melluish (Inspector of Taxes) v. BMI Ltd.*, [1995] 4 All Eng. Rep. 453, 468, (discussed *infra* at notes 88-89 and accompanying text), Lord Browne-Wilkinson invoked the need for "appropriate orders as to costs wasted" in rejecting government counsel's effort to rely on Hansard. It is difficult to know how often the sanction has been imposed by lower courts.

⁶⁶ Practice Note [1995] 1 All Eng. Rep. 234 (Supreme Court). This direction was reiterated in 1999 and 2002. See Practice Direction [1999] 1 WLR 1059-60 (CA, Civil Division); Practice Direction [2002] 1 WLR 2870, 2880, 2894 (Criminal Proceedings).

authorized sanctions for noncompliance, reinforced the judicial view that references to Hansard were not to be undertaken lightly.

The *Pepper* majority applied its new test to the 1976 Finance Act and determined that the parliamentary material was admissible and highly probative. Reasoning that the “cost of the benefit” language in the law was ambiguous as between an employer’s marginal or average cost,⁶⁷ Lord Browne-Wilkinson proceeded to consider the Financial Secretary’s statements in Parliament. The statutory section at issue had sparked concern among members because of its possible impact on concessionary travel benefits regularly bestowed on airline and railway employees. Existing government practice had been *not* to tax such benefits on an average cost basis. The Secretary announced at the start of a standing committee meeting in May 1976 (reported in Hansard) his withdrawal of a proposed subsection that would have taxed in-house benefits at the price paid by the public.⁶⁸ The Secretary offered several policy reasons for this change; he also responded to various member inquiries by explaining that the marginal cost approach would continue to apply for such benefits, and he repeated his determination to leave the status quo unaltered in a government press release issued that day.⁶⁹

The following month at a further committee meeting on the bill, a member asked the Secretary whether the government’s earlier language modification would apply to concessionary fee arrangements for children of staff at private schools. The Secretary responded affirmatively, stating the government’s change meant that “now the [educational] benefit will be assessed on

⁶⁷ *Pepper*, [1993] 1 All Eng. Rep. at 69-70.

⁶⁸ *Id.* at 57-58, 70. See note 23 *supra*, discussing Hansard’s inclusion of all standing committee proceedings.

⁶⁹ *Id.* at 58-59. The policy reasons presented by the Secretary were (i) the injustice to taxpayers given the large difference between the actual cost of providing the additional services and the amount of benefit that would be taxed to the recipients; (ii) the resultant chill on use of such services by employees, to the likely detriment of all parties; and (iii) difficulties of enforcement and administration. *Id.* at 58.

the cost to the employer, which would be very small indeed.”⁷⁰ There was no further relevant debate on the language prior to enactment.

For Lord Browne-Wilkinson, this legislative history was both clear and persuasive. Committee members had repeatedly pressed the government for guidance on the in-house benefits matter following the change in text, the minister’s statements were directly responsive and unambiguous, and the matter was not raised again after the extended committee discussion. Under these circumstances, the majority reasoned that it was proper “to attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary.”⁷¹

The factual setting in *Pepper*, where the government argued in court for an interpretation it had expressly disavowed when promoting the bill in Parliament, might have led the Law Lords to adopt a narrower estoppel-type justification for the relevance of materials found in Hansard. Under this approach, courts would have been given access to Hansard only in cases where the government’s denial in court of a prior officially endorsed position amounted to fundamental unfairness. Counsel for the taxpayers at one point came close to embracing such a rationale,⁷² and some Law Lords have subsequently tried to limit *Pepper*’s scope based on this theory.⁷³ Lord Browne-Wilkinson’s opinion, however, does not rely on the injustice of the government’s reversing its position. His rationale for imputing collective intent is broader than that: irrespective of the equities involved, “what is persuasive in this case is a consistent series of answers given by the minister, after opportunities for taking advice from his officials, all of

⁷⁰ *Id.* at 60.

⁷¹ *Id.* at 71.

⁷² *Pepper* [1993] A.C. at 598 (reciting argument of appellant’s counsel at second hearing, referring to the Financial Secretary’s special expertise on complex tax measures and the public’s right to rely on his explicit and official representations as to a bill’s meaning when arranging their financial affairs).

⁷³ See notes 102-106, *infra*, and accompanying text.

which point the same way and which were not withdrawn or varied prior to the enactment of the bill.”⁷⁴

C. *Developments Since Pepper*

In the years following *Pepper*, the Law Lords have expressed a range of reactions in considering how and how often to make use of parliamentary materials. The responses by the court as a whole may be divided into three periods. An initial interval of fairly frequent references to Hansard was followed by a more muted span in which doubts surfaced as to the benefits of the *Pepper* approach. The third and current period involves more open disagreement among the Law Lords themselves. Although several Law Lords have expressed regrets about the door that *Pepper* opened, most appear to remain convinced of its wisdom and the court’s references to Hansard have increased in the years since 2000.

1. *Initial Enthusiasm*

Within the first fifteen months after *Pepper* came down, nine House of Lords decisions invoked parliamentary materials to help explain the meaning of text.⁷⁵ Given that the Law Lords decided between forty and fifty cases per year in this period,⁷⁶ and that some cases did not involve matters of statutory construction, the nine instances qualified as a surge of interest in legislative history. Certain decisions reflected tangential use of Hansard,⁷⁷ but often the judges

⁷⁴ *Pepper*, [1993] 1 All Eng. Rep. at 66. Lord Bridge in his brief concurring opinion did raise the estoppel issue, referring to the “acute question as to whether it could possibly be right to give effect to taxing legislation which the Financial Secretary...had, in effect, assured the House of Commons it was not intended to impose.” *Id.* at 49. The importance of this alternative rationale is further addressed *infra* in Part IC.

⁷⁵ The nine decisions were issued between November 1992 and February 1994. All cases invoking Hansard from 1992 to 2006 were identified by using the following search strategy on Lexis: “Hansard” or “HC debates” or “HL debates” or “Pepper” or “HC official report” or “HL official report.”

⁷⁶ The House of Lords webpage includes a complete list of Law Lords decisions starting in November 1996. A Lexis search indicates that the Law Lords issued forty-five decisions in 1993 and fifty-one in 1994.

⁷⁷ See, e.g., *Reg. v. Preston*, [1993] 4 All Eng. Rep. 638, 650; *Scher v. Policyholders Prot. Bd.*, [1993] 4 All Eng. Rep. 840, 852; *Attorney General v. Assoc. Newspapers Ltd.*, [1994] 1 All Eng. Rep. 556, 566.

found the previously forbidden fruit to be influential in resolving an interpretive controversy.⁷⁸

For instance, Lord Griffiths in one decision invoked Hansard to establish that an earlier court had misapprehended Parliament's true intent with respect to a statute of limitations provision.⁷⁹ And Lord Bridge, faced with a language gap regarding appellate courts' authority to order payment of attorneys' costs, remarked that "Happily our new freedom to refer to Hansard solves the mystery."⁸⁰

During this initial period, the Law Lords were less than rigorous in applying *Pepper's* three-part test. On a number of occasions, the judges invoked parliamentary material as admissible and relevant without discussing at all the basis for concluding that the *Pepper* factors had been met.⁸¹ Further, the court's analysis often indicated that Hansard was being referenced or relied on even though the *Pepper* factors had not been fulfilled. Thus, the judges invoked Hansard as support for what they independently understood to be the meaning of the text.⁸² Such confirmatory references may be perfectly reasonable, but *Pepper* had declared there could be no usage at all unless the text was found to be truly ambiguous or obscure.⁸³

2. *The Bloom Fades*

From early 1994 through 1999, the court's usage of Hansard in statutory interpretation cases notably diminished. Over a period of close to six years in which the Law Lords decided

⁷⁸ See, e.g., *Stubbings v. Webb*, [1993] 1 All Eng. Rep. 322, 329; *Reg. v. Warwickshire C.C. Ex p. Johnson*, [1993] A.C. 583, 588, 591; *Holden & Co. v. C.P.S.*, [1994] 1 A.C. 22, 37; *Chief Adjudication Officer v. Foster*, [1993] 1 All Eng. Rep. 705, 715-17.

⁷⁹ See *Stubbings* [1993] 1 All Eng. Rep. at 329.

⁸⁰ See *Holden* [1994] 1 A.C. at 37.

⁸¹ See, e.g., *Warwickshire*, [1993] A.C. at 587-88, 591-92 (Lord Roskill); *Stubbings*, [1993] 1 All Eng. Rep. at 329, (Lord Griffiths). See also *Associated Newspapers Ltd.*, [1994] 1 All Eng. Rep. at 566 (Lord Lowry) (giving no reason for decision *not* to admit parliamentary materials under *Pepper*).

⁸² See *Warwickshire*, [1993] A.C. at 592 (Lord Roskill), *Stubbings* [1993] 1 All Eng. Rep. at 329 (Lord Griffiths); *Chief Adjudication Officer* [1993] 1 All Eng. Rep. at 717 (Lord Bridge); *Scher* [1993] 4 All Eng. Rep. at 852 (Lord Mustill). See generally David Miers, *Taxing Perks and Interpreting Statutes: Pepper v. Hart*, 56 MOD. L. REV. 695, 705-06 (1993).

⁸³ The Law Lords also referenced Hansard statements from ordinary members without explaining whether or how these legislators were serving in a leadership role comparable to a government minister. See *Stubbings* [1993] 1 All Eng. Rep. at 329 (Lord Griffiths); *Chief Adjudication Officer*, [1993] 1 All Eng. Rep. at 715-17 (Lord Bridge).

roughly fifty cases per year, the judges invoked parliamentary materials in their opinions in a mere thirteen decisions, barely more than twice each calendar year. Apart from the decline in citations to Hansard, there are further indications that the Law Lords had become somewhat less enamored of the new interpretive resource.

On a number of occasions, attorneys' legal contentions relying on parliamentary materials were simply ignored in the opinions of the court.⁸⁴ Counsel may well have been encouraged to include Hansard materials in their argument by the Law Lords' initial burst of enthusiasm, and the court's silence would not alone be sufficient to establish judicial misgivings. In some instances, however, the Law Lords went further than silence, voicing concern at what they regarded as excessive efforts to promote Hansard. Thus, Lord Hobhouse in his concurring opinions referred briefly to counsel's unsuccessful attempt at reliance on Hansard, "purportedly under *Pepper*"⁸⁵ and also criticized a lower court judge by name for taking account of parliamentary debates when *Pepper* gave "no warrant for such an approach."⁸⁶

More frequently in this period, the Law Lords considered but dismissed arguments relying on Hansard because one or more of *Pepper's* three factors had not been met. In particular, the court several times determined that the legislative history being cited was itself unclear or not sufficiently definitive.⁸⁷ In 1995, Lord Browne-Wilkinson—the author of *Pepper*—complained about counsel overreaching in their introduction of Hansard. He criticized the government in a tax case for relying on parliamentary materials directed to a separate tax provision than the one under judicial review, adding that to seek guidance from a wholly distinct

⁸⁴ See, e.g., *Deposit Prot. Bd. v. Dalia*, [1994] 2 A.C. 367, 372-73 (summarizing arguments of counsel); *In Re C (a Minor)*, [1997] A.C. 489, 492 (same); *O'Rourke v. Camden London Borough Council*, [1998] A.C. 188, 190 (same); *Reg. v. Home Secretary Ex p. Stafford*, [1999] 2 A.C. 38, 41 (same).

⁸⁵ *R. v. Director of Public Prosecutions Ex p. Kebiline*, [1999] 4 All Eng. Rep. 801, 851.

⁸⁶ *Fitzpatrick v. Sterling Housing Assoc. Ltd.* [1994] 4 All Eng. Rep. 705, 745.

⁸⁷ See *Melluish (Inspector of Taxes) v. BMI Ltd.*, [1995] 4 All Eng. Rep. 453, 468 (Lord Browne-Wilkinson); *Sec'y of State v. Remilien*, [1998] 1 All Eng. Rep. 129, 146-47 (Lord Hoffman); *Reg. v. Bow Street Magistrate Ex p. Pinochet*, [1998] 4 All Eng. Rep. 897, 931 (Lord Lloyd).

legislative proceeding was “an improper use of the relaxed rule introduced by *Pepper*.”⁸⁸ Noting that such efforts to widen the permissible category of parliamentary materials offered no assistance but risked considerable expense and delay, Lord Browne-Wilkinson invited an appropriate order as to costs wasted in such settings.⁸⁹

Notwithstanding their concerns that counsel were at times pushing the “relaxed rule” of *Pepper* too far, the Law Lords continued to rely on Hansard materials to help them resolve disputes over statutory meaning.⁹⁰ Moreover, the court on occasion sent mixed signals even when formally disavowing reliance on Hansard. In a 1997 decision, the leading speech observed that certain parliamentary materials were not admissible because the text itself was unambiguous, but then proceeded to refer to them for informational background purposes.⁹¹

Within the academic community, the Law Lords’ decision to admit parliamentary materials, which had been greeted with skepticism from the start,⁹² continued to generate negative reactions. Academic critics in the late 1990s reiterated that separation of powers principles should preclude judicial reliance on statements by members of the executive or legislative branches interpreting the law they were enacting.⁹³ These critics also challenged the

⁸⁸ *Melluish*, [1995] 4 All Eng. Rep. at 468.

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, *Reg. v. Preddy*, [1996] 3 All Eng. Rep. 481, 487-88 (Lord Goff); *Lowsley v. Forbes*, [1998] 3 All Eng. Rep. 897, 905-06 (Lord Lloyd); *Reg. v. Oxfordshire C.C., Ex p. Sunningwell P.C.*, [1999] 3 All Eng. Rep. 384, 393 (Lord Hoffman).

⁹¹ *Inland Revenue Comm’rs v. Willoughby*, [1997] 4 All Eng. Rep. 65, 69-71 (Lord Nolan).

⁹² *See Styles, supra* note 3; *Baker, supra* note 3; *Miers, supra* note 82.

⁹³ *See, e.g.*, Geoffrey Marshall, *Hansard and the Interpretation of Statutes*, in *THE LAW IN PARLIAMENT* 139, 153-54 (Dawn Oliver and Gavin Drewry eds. 1998); Robert Summers, *Interpreting Statutes in Great Britain and the United States: Should Courts Consider Materials of Legislative History?* in *THE LAW, POLITICS, AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL* 222, 231-32 (David Butler et al. eds. 1998). *See also* David Robertson, *JUDICIAL DISCRETION IN THE HOUSE OF LORDS* 183 (1999) (expressing concern that *Pepper* allows courts to rely on ministerial statements undermining civil liberties when the text being “explained” would not be viewed as accomplishing such a result). Academic criticism on constitutional grounds has not yet abated. *See generally* Aileen Kavanaugh, *Pepper v. Hart and Matters of Constitutional Principle*, 121 L.Q. REV. 98 (2005).

notion that statements by government ministers could reflect the intention of Parliament, insisting that collective intent was derivable only from the words of the text.⁹⁴

By the late 1990s, some Law Lords were publicly questioning the benefits of the new interpretive approach. In a 1997 lecture, Lord Hoffman expressed sympathy in principle for judicial use of Hansard both because it could estop the executive from abandoning interpretive representations made before Parliament and because a high profile ministerial statement from which no member dissented was at times the best evidence of what Parliament must have understood it was approving.⁹⁵ Yet Lord Hoffman was doubtful whether the time and money spent on Hansard research was justified given how seldom it yielded truly probative results.⁹⁶ In a 1999 address, Lord Millett was more blunt, referring to *Pepper* as a “regrettable decision” in practical terms and also as a matter of constitutional principle. He discussed the impropriety of relying on unenacted intentions as well as the largely unproductive costs of Hansard-related research.⁹⁷ Lord Millett added, however, that while he objected to judicial references to the course of proceedings in Parliament, he endorsed “the practice of the American Congress of publishing detailed explanatory memoranda” that were not “made in the heat of debate”⁹⁸; this presumably refers to our committee reports.

Beginning in 2000, the concerns that had been voiced extrajudicially became part of an at times heated dialogue aired through the judicial opinions of the Law Lords.

3. *Full-scale Debate*

⁹⁴ See Marshall, *supra* note 93, at 151-53, Summers, *supra* note 93, at 232-33, 235-36.

⁹⁵ Lord Hoffman, *supra* note 4, at 669.

⁹⁶ *Id.* at 668. See also Lord Steyn, *Interpretation: Legal Texts and Their Landscape*, in THE CLIFFORD CHANCE MILLENNIUM LECTURES: THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW 79, 87-88 (Basil Markesinis ed. 2000).

⁹⁷ Lord Millett, *supra* note 4, at 110.

⁹⁸ *Id.*

An opening salvo from Lord Steyn, a member of the Law Lords since 1994, focused the terms of the debate. In his Hart Lecture delivered at Oxford in May 2000, Lord Steyn assumed a lead critic's role comparable to Justice Scalia. He acknowledged that he initially had supported the court's majority opinion but declared that he had come to regard its current application as indefensible primarily on separation of powers grounds.⁹⁹

Lord Steyn did *not* propose to overrule *Pepper*, but instead to limit its scope. He believed Hansard could be cited by a court to identify the mischief at which a law was aimed, for the reasons given by Lord Browne-Wilkinson in *Pepper*.¹⁰⁰ He also believed Hansard should be relied on by courts to prevent the executive from repudiating prior representations made to Parliament as to the meaning of statutory text—developing the estoppel argument suggested earlier by Lord Hoffman.¹⁰¹ What he renounced, however, was the broader rationale for citing to Hansard: it was “constitutionally unacceptable...to treat the intentions of the government as revealed in debates as reflecting the will of Parliament.”¹⁰² Lord Steyn has presented his proposed limitations on *Pepper* in a number of judicial opinions. He has invoked parliamentary materials to help determine the mischief that the statute is intended to correct,¹⁰³ while maintaining that ministerial statements in Hansard should be used only to identify such mischief or as an estoppel against the executive, *not* as evidence reflecting what Parliament meant by particular statutory words or phrases.¹⁰⁴

⁹⁹ See *id.* at 62-68. Lord Steyn dismissed the Article 9 constitutional argument invoked by some academics (see *supra* notes 22-23 and accompanying text) as “transparently weak.” He repeated his previously expressed pragmatic concern that resort to Hansard was an “expensive luxury in our legal system,” and also restated the by-now familiar arguments against there being any discernible “intention” of Parliament outside of the text.

¹⁰⁰ See *id.* at 68, 70 referring to analogy between Hansard and White Papers or commission reports in this regard.

¹⁰¹ See *id.* at 67, 70. Cf. text accompanying note 95 *supra*.

¹⁰² *Id.* at 68.

¹⁰³ See *Reg. v. Soneji* [2005] UKHL 49, [2005] 4 All Eng. Rep. 321, 324-25; *Lesotho Highlands Dev. Auth. v. Impreglio* [2005] UKHL 43, [2006] 1 A.C. 221, ____.

¹⁰⁴ See *McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All Eng. Rep. 641, 655-56 (concurring opinion); *Jackson v. Attorney General* [2005] UKHL 56, [2005] 4 All Eng. Rep. 1253, 1285 (concurring

In the years since 2000, a number of Law Lords have expressed disappointment over what they view as the scant benefits and considerable costs associated with the use of Hansard. The court has been regularly attentive to *Pepper's* three factors, often finding Hansard materials inappropriate because ministerial statements were inconclusive¹⁰⁵ and sometimes rejecting Hansard because the text itself was clear.¹⁰⁶ Lord Hoffman in 2002 was more outspoken, declaring that based on ten years of experience under *Pepper*, the dissenting judge in that decision “has turned out to be the better prophet” with respect to how rarely Hansard is helpful as against how heavily counsel invest in mining the “large spoil heap of [parliamentary] material.”¹⁰⁷

Apart from giving vent to practical frustrations, the Law Lords have identified some additional limits on the scope of *Pepper*. In *Reg. v. Secretary of State for the Environment Ex p. Spath Holme*,¹⁰⁸ decided in December 2000, the issue was whether a statutory power to restrict rent increases could be exercised by the Secretary solely in order to control inflation; if so, then controlling rents for a different reason (to mitigate hardship for a class of tenants) was *ultra vires*.¹⁰⁹ The Court of Appeal had consulted Hansard to help determine that the rent-restricting powers had been enacted as part of government counterinflationary policy and therefore the

opinion). While Lord Steyn tendered his estoppel argument as a preferred modification of *Pepper*, Lord Hope has adopted the same argument as embodying the proper understanding of that decision itself. *See Reg. v. Sec’y of State for the Environment Ex p. Spath Holme* [2000] UKHL ____, [2001] 1 All Eng. Rep. 195, 226-27 (concurring opinion); *Wilson v. First County Trust Ltd.* [2003] UKHL 40, [2003] 4 All Eng. Rep. 97, 130-31 (concurring opinion). This seems manifestly incorrect as a reading of the majority opinion in *Pepper* (*see text accompanying notes 72-74 supra*), although Lord Hope’s position has not been explicitly rejected in subsequent decisions.

¹⁰⁵ *See, e.g., Ex p. Spath Holme*, [2001] 1 All Eng. Rep. at 211-12 (Lord Bingham), 219 (Lord Nicholls); *Robinson v. Sec’y of State for Northern Ireland* [2002] N. Ir. L. R. 390, 400 (Lord Bingham), 404 (Lord Hoffmann); *Reg. (Quintavalle) v. Human Fertilisation and Embryology Auth.*, [2005] 2 All Eng. Rep. 555, 564 (Lord Hoffmann).

¹⁰⁶ *See, e.g., Aston Cantlow v. Wallbank* [2003] UKHL 37, [2003] 3 All Eng. Rep. 1213, 1225 (Lord Hope); *Ex p. Spath Holme*, [2001] 1 All Eng. Rep. at 212 (Lord Bingham).

¹⁰⁷ *Robinson*, [2002] N. Ir. L. R. at 405. *See also P v. Nat’l Assn. of Schoolmasters* [2003] UKHL 8, [2003] 1 All Eng. Rep. 993, 1004 (Lord Hoffmann) (referring to “the usual hopeless attempt to obtain guidance from Parliamentary debates under the rule in *Pepper*”).

¹⁰⁸ [2000] UKHL ____, [2001] 1 All Eng. Rep. 195.

¹⁰⁹ *Id.* at 198.

Secretary's use of them for another reason was unlawful.¹¹⁰ The Law Lords reversed, construing the relevant text to hold that there were no inflation-related limitations on the Secretary's authority to impose a rent ceiling.¹¹¹

More important for Hansard purposes, the lead opinion went on to distinguish *Pepper*, which had turned on the meaning of a particular statutory phrase, from the instant case which involved the scope of the government's discretionary powers conferred by statute. Lord Bingham, who delivered the leading speech, reasoned that because such powers are inevitably open-ended, a minister's contribution in Parliament is very unlikely to resolve doubts about all or even most future uses of these powers.¹¹² He concluded—echoing to some extent Lord Steyn's estoppel rationale—that unless a ministerial statement or response gave “a categorical assurance to Parliament that a power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis,” ministerial statements addressed to the scope of a discretionary power were inadmissible.¹¹³

The Law Lords announced a further restraint on judicial use of Hansard in *Wilson v. First County Trust Ltd.*,¹¹⁴ issued in July 2003. That case involved whether a 1974 consumer credit statute was compatible with the European Convention of Human Rights, which had been integrated into British law pursuant to the 1998 Human Rights Act.¹¹⁵ As part of its review, the

¹¹⁰ [2000] 1 All Eng. Rep. 884, 899-900.

¹¹¹ See note 108 *supra* at 219 (Lord Nicholls), 211-12 (Lord Bingham), 226-27 (Lord Hope), 219-23 (Lord Cooke), 233 (Lord Hutton).

¹¹² See *id.* at 211-12 (Lord Bingham).

¹¹³ See *id.* at 212. See also *id.* at 227 (Lord Hope) (contending that *Pepper* should be understood to admit Hansard materials only on an estoppel rationale, and endorsing Lord Bingham's use of that rationale here). But see *id.* at 218-19 (Lord Nicholls), 219-23 (Lord Cooke) (contending that ministerial statements addressed to scope of a discretionary power are admissible with varying degrees of persuasive weight).

¹¹⁴ [2003] 4 All Eng. Rep. 97.

¹¹⁵ See *id.* at 109 (Lord Nicholls). Section 3 of the Human Rights Act provides that “*so far as it is possible to do so*...[all domestic] legislation must be read and given effect in a way which is compatible with Convention rights” (emphasis added). This parliamentary mandate, akin in some respects to our constitutional avoidance canon, has generated disagreement among the Law Lords; it has been interpreted by some members to apply even if there is no

court considered whether Hansard materials could be consulted in order to help determine compatibility.

Lord Nicholls, authoring the leading speech, concluded that courts were allowed to invoke parliamentary materials in this setting but only to a limited extent. He noted that evaluating the effect of domestic legislation to ascertain whether British law was incompatible with European Convention rights is a different enterprise from directly interpreting and applying such legislation.¹¹⁶ If the domestic law infringes on a convention right, a court must determine whether the law's policy objective presumptively justifies such an infringement given the nature of the convention right, and also whether the means employed by the domestic law to achieve its policy objective are proportionate in terms of the adverse effect.¹¹⁷ Lord Nicholls concluded that when identifying a law's policy objective or assessing its proportionality, a court is permitted to consult Hansard to seek "enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed," but not to explore statutory meaning in further respects.¹¹⁸

Lord Nicholls likened this approved use of Hansard "as a source of background information" to other "innocuous" uses previously countenanced under *Pepper*; he referred specifically to the use of ministerial statements that help identify the background when construing domestic statutes or that assist a court in understanding government policy when

ambiguity in the text being construed. See, e.g. R. v. A. [2001] UKHL 25, [2001] 3 All Eng. Rep. 1, 17 (Lord Steyn).

¹¹⁶ *Wilson*, [2003] 4 All Eng. Rep. at 112.

¹¹⁷ *Id.* The Human Rights Act allows British courts to make declarations of incompatibility but not to set aside Acts of Parliament that are inconsistent with Convention rights. For discussion of legal developments on compatibility under the 1998 Act, which became effective in October 2000, see Ingman, *supra* note 6, at 306-312; Zander, *supra* note 6, at 184-189; Nicholas Bamforth, *Courts in a Multi-Layered Constitution* in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 277, 290-301 (Nicholas Bamforth & Peter Leyland eds. 2003).

¹¹⁸ *Wilson*, [2003] 4 All Eng. Rep. at 118-19.

reviewing contested agency decisions.¹¹⁹ But Lord Nicholls added that beyond such reliance for background information purposes, Hansard was not relevant to the issues a court must resolve in compatibility cases. In particular, a statute's proportionality was to be addressed based on its text, not the quality of reasons advanced by its proponents or the state of mind of ministers debating its merits.¹²⁰

The decisions since 2000 thus disclose a range of practical and conceptual misgivings associated with reliance on Hansard. Judges have complained about the disproportionate burdens on clients, counsel, and courts from having to sift through parliamentary materials. Individual opinions also have articulated several possible grounds for limiting Hansard's admissibility when construing the meaning of statutory text. These include refusing to consider ministerial statements that address the scope of a discretionary government power, or that bear on incompatibility under the Human Rights Acts, or that extend beyond estopping the government from contradicting in court what it previously said in Parliament.

Notwithstanding such doubts, however, the Law Lords have by no means abandoned the basic rule of *Pepper*. In the years from 2002 through 2005, Hansard materials were discussed by one or more panel members in forty out of some 250 decided cases—an average of ten per

¹¹⁹ *Id.* at 117. On the second “routine” use of Hansard, the court cited its earlier decision in *Brind* as an apt example; see discussion *supra* at text accompany notes 35-36.

¹²⁰ *Id.* at 119. As part of his analysis, Lord Nicholls cited with approval Lord Steyn's Hart lecture, focusing on the “conceptual and constitutional difficulties” of treating the government's intentions revealed in debate as reflecting the will of Parliament. *Id.* at 117.

A third possible limitation on the use of Hansard was raised by Lord Bingham in another case decided in 2003. See *McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All Eng. Rep. 641, 653. In considering the meaning of a 1963 statute setting limitation periods for various claims, the Law Lords were referred to Hansard materials that had been off limits at the time (prior to 1992) the court originally had construed the provision at issue. Lord Bingham opined that absent exceptional circumstances it would be inappropriate for the Law Lords to invoke Hansard in order to depart from any authoritative statutory ruling rendered prior to *Pepper*. See *id.* at 653. This statement, however, seems unpersuasive given that the Law Lords in a unanimous 1993 decision had relied on Hansard to overrule an authoritative 1964 ruling by the Court of Appeal. See *Stubbings*, [1993] 1 All Eng. at 328-29 (Lord Griffiths). Despite his reservation as to the admissibility of Hansard in the *McDonnell* case, Lord Bingham went on to consider Hansard in his opinion, finding the parliamentary materials inconclusive on the issue presented. See also, Vogenauer, *supra* note 3, at 651-52 (expressing doubts that Lord Bingham's view carries any authority).

calendar year and roughly one-sixth of the court's decisions. There are a number of occasions where Hansard was invoked for one of the purposes labeled "innocuous" in *Wilson*: to understand agency implementations of government policy that are subject to judicial review¹²¹ or to identify the background mischief at which a statute is aimed.¹²² Still the largest single number of decisions involve reference to Hansard to shed light on the meaning of possibly inconclusive statutory words or phrases.¹²³

A recent broad-based discussion of *Pepper* and its applications took place in *Reg. (Jackson) v. Attorney General*,¹²⁴ decided in October 2005, in which nine Lords of Appeal in Ordinary participated. This case indicates that some Law Lords remain willing to apply *Pepper* in its more controversial sense, although certainly not Lord Steyn. *Jackson* involved a challenge to the validity of the Hunting Act of 2004. The statute, which prohibited fox-hunting, had been enacted without approval from the House of Lords, consistent with a special procedure for bypassing the upper chamber that had been enacted in 1911 and modified in 1949.¹²⁵ The real question presented was whether this special procedure, enacted as section 2(1) of the 1911 law,

¹²¹ See, e.g., *Reg. (Anderson) v. Home Sec'y* [2002] UKHL 46, [2002] 4 All Eng. Rep. 1089, 1104-05 (Lord Steyn); *Reg. (Saadi) v. Home Sec'y* [2002] UKHL 41, [2002] 4 All Eng. Rep. 785, 789 (Lord Slynn); *A. v. Home Sec'y* [2004] UKHL 56, [2005] 3 All Eng. Rep. 169, 187 (Lord Bingham), 226 (Lord Hope).

¹²² See, e.g., *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 3 All Eng. Rep. 411, 426-27 (Lord Steyn); *Reg. v. Soneji* [2005] 4 All Eng. Rep. 321; *Lesotho Highlands Dev. Auth. v. Impreglio* [2005] UKHL 43, [2005] 3 All Eng. Rep. 789.

¹²³ See, e.g., *Reg. (Morgan Grenfell Ltd.) v. Special Comm'r* [2002] UKHL 21, [2002] 3 All Eng. Rep. 1, 10; *Mirvahedy*, *supra* note 5, 2 All Eng. Rep. at 438; *Jindal Iron & Steel Co. Ltd. v. Islamic Solidarity Shipping Co.* [2004] UKHL 49, [2005] 1 All Eng. Rep. 175, 187-88; *ReR., (a child)* [2005] UKHL 33, [2005] 4 All Eng. Rep. 433, 437-38; *Reg. (Hooper) v. Work and Pensions Sec'y* [2005] UKHL 29, [2006] 1 All Eng. Rep. 487, 503. From 2002 to 2005, there are eighteen cases in which Hansard is referenced primarily with respect to the meaning of statutory words, as opposed to nine cases where the principal focus of Hansard discussion is on identifying the background mischief, and fourteen cases where Hansard is primarily invoked to help clarify government policy being subjected to judicial review. A similar distribution applies for cases invoking parliamentary materials in the period from 1996 through 2001. Of the seventeen cases in which Hansard is referenced in one or more judicial opinions, nine instances involve primarily the meaning of statutory words, two relate primarily to identifying the background mischief, and six involve clarifying government policy subject to judicial review. These three different uses of Hansard are discussed further in Part II.A. and Part III.B., *infra*.

¹²⁴ [2005] 4 All Eng. Rep. 1253.

¹²⁵ See *id.* at 1256-57.

authorized its own further modification by the Commons alone, as had occurred in 1949.¹²⁶ The Court of Appeal had concluded that the 1911 Act was inconclusive on its face, and had relied extensively on parliamentary materials from 1911 to determine that the special procedure could lawfully be used to amend itself, and therefore the 1949 Act modifications (as applied in 2004) were valid.¹²⁷

The Law Lords unanimously upheld the validity of the Hunting Act, dismissing the legal challenge to the 1949 law's enactment. With respect to reliance on Hansard, Lord Bingham's leading speech concluded that reference to the parliamentary debates and explanatory statements from ministers was unnecessary because the 1911 text, properly understood, was neither ambiguous nor obscure.¹²⁸ Lord Bingham did invoke Hansard, however, to establish how the record of amendments to section 2(1) considered by the Commons majority helped illuminate the meaning of key words in that section. Specifically, section 2(1) as initially drafted had applied its special procedure to "*any Public Bill other than a Money Bill.*"¹²⁹ Over a period of four months, the Commons considered at least nine amendments proposing to enlarge the class of bills to which the new special procedure would *not* apply.¹³⁰ Observing that one of these amendments was accepted but eight were "uniformly rejected" by the Commons, Lord Bingham concluded: "it is clear from the historical background that Parliament did intend the word "any," subject to the noted exceptions [in text], to mean exactly what it said."¹³¹

¹²⁶ See *id.* at 1256-67. The 1911 Act, approved by both houses, permitted the House of Commons to bypass the House of Lords and enact into law a bill approved by the Commons in three successive sessions, provided the period of time between second reading in the first session and passage in the third session was at least two years. *Id.* at 1262-63. The 1949 Act reduced the number of required Commons sessions approving the bill from three to two and the total elapsed time for all considerations from two years to one. Importantly, the 1949 Act was enacted without approval from the House of Lords. *Id.* at 1256-57.

¹²⁷ See *R (Jackson) v. Attorney General* [2005] 2 WLR 866, 889-92 (CA).

¹²⁸ See note 124 *supra* at 1271.

¹²⁹ See *id.* at 1264 (emphasis added).

¹³⁰ See *id.* at 1263-64

¹³¹ See *id.* at 1268.

Thus, although Lord Bingham’s lead speech made a point of eschewing reliance on ministerial statements offered in the course of parliamentary debate, it relied directly on the statute’s drafting history—recorded in Hansard but hardly obvious from the face of the text as finally enacted—to help explain the meaning of statutory words. Lord Nicholls in a concurring speech was prepared to go further with Hansard. He concluded that section 2(1) was sufficiently clear, but he also believed the ministerial statements made during parliamentary passage of the 1911 Act were valuable to confirm the apparent meaning of the text.¹³² Citing to statements by the Prime Minister among others, Lord Nicholls urged open recognition of their relevance in the interests of transparency.¹³³

On the other side, Lord Steyn (also concurring in the result) restated his preference for limiting *Pepper* to situations of estoppel against the government whenever Hansard is being invoked to discover the intended meaning of enacted text.¹³⁴ He was content here, however, to rely on *Pepper*’s three-part test and exclude Hansard references because the text itself was clear.¹³⁵ Lord Walker, Lord Carswell, and Lord Brown opined more briefly that resort to Hansard was unnecessary in this case.¹³⁶

The latest indication of *Pepper*’s continuing vitality occurred in July 2006, when three members of the Law Lords made a point of observing that reliance on Hansard remains valuable as an aid to the construction of text, including text that is not ambiguous or obscure. In *Harding*

¹³² *See id.* at 1276.

¹³³ *Id.* at 1276-77.

¹³⁴ *Id.* at 1285.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1297 (Lord Walker), 1304 (Lord Carswell), 1310 (Lord Brown). Even brevity could not conceal some differences: Lord Walker acknowledged disagreement among his colleagues on the application of *Pepper* but “preferr[ed] to express no view” on the matter, while Lord Carswell discounted Lord Bingham’s use of parliamentary materials by declaring he had taken no account of defeated or withdrawn amendments, the history of which was recorded in Hansard. The three remaining panel members, Lord Hope, Lord Rodger of Earlsferry, and Baroness Hale of Richmond, delivered separate opinions but did not comment on the Hansard issues.

v. Wealands,¹³⁷ Lord Hoffmann—who had voiced misgivings about *Pepper* in some prior opinions—delivered a leading speech in which he relied at length on parliamentary proceedings to help explain what was meant in a private international law statute by “procedure,” even though he regarded the term as clear without resorting to Hansard.¹³⁸ Lord Rodger applied a similar analysis, noting that available Hansard materials not only confirmed but strengthened the textual construction he would have offered anyway.¹³⁹ Lord Carswell added a hopeful gloss on the court’s extended travails regarding legislative history. He characterized *Pepper* as having been “out of judicial favour” in recent years, but expressed regret over this development, adding that ministerial statements were at times useful as an interpretive resource, “*perhaps especially as a confirmatory aid.*”¹⁴⁰

To sum up, the Law Lords in 2006 continue to rely on Hansard materials as an aid to statutory interpretation, albeit less enthusiastically than they did in the first fifteen months after *Pepper* was decided. There is reason to believe that lower courts are referring to Hansard with some regularity as well, although such usage is beyond the scope of this article.¹⁴¹ Lord Steyn’s proposal to restrict judicial uses of Hansard to estoppel situations remains on the table, but it seems doubtful that most current Lords of Appeal would endorse it.¹⁴² Practical concerns based

¹³⁷ [2006] UKHL 32, [2006] 3 WLR 83.

¹³⁸ See [2006] 3 WLR at 92-93.

¹³⁹ See *id.* at 104.

¹⁴⁰ *Id.* at 106 (emphasis added). A fourth panel member, Lord Woolf, also embraced the utility of *Pepper* to illuminate the meaning of statutory language if the text is unclear. See *id.* at 86.

¹⁴¹ See generally Vogenauer, *supra* note 3, at 635, 639-42; Kenny Mullan, *The Impact of Pepper v. Hart*, in THE HOUSE OF LORDS: ITS PARLIAMENTARY AND JUDICIAL ROLES 213, 216-17, 229-33 (Paul Carmichael and Brice Dickson eds. 1999).

¹⁴² As discussed in this Part, Lord Steyn and Lord Hope have embraced the notion that Hansard should be invoked to aid in construing statutory words or phrases only if warranted to estop the executive from abandoning prior representations, while Lord Nicholls and Lord Bingham have effectively rejected this position. Lord Steyn has stepped down as a Lord of Appeal in Ordinary, and as of August 2007 he will be mandatorily retired from participating in judicial business. See www.parliament.uk/about_lords/the_law_lords.cfm (visited Aug. 15, 2006). Meanwhile, Lords Hoffmann, Rodger, Carswell, and Woolf also have eschewed the proposed estoppel restriction, declaring as a general matter that Hansard remains a valuable aid to construing statutory text. See also Philip Sales,

on cost-benefit calculations have arisen with some frequency in various judicial opinions. At the same time, one member of the Law Lords has derided the “traditionalists” for acting “as if to be seen openly to read Hansard is akin to being caught with pornography,”¹⁴³ and it is well known that judges privately acknowledge looking at Hansard considerably more often than they cite to it in their opinions.¹⁴⁴

II. WHY LEGISLATIVE HISTORY USAGE REMAINS GREATER IN THE U.S.

At this point, it is appropriate to ask what, if any, lessons for American statutory interpretation can be gleaned from the intricate yet somewhat muddled state of affairs in Britain. Does the Supreme Court rely on legislative history more often or less frequently than its British counterpart? Do the two legal cultures share certain approaches to the value of legislative history or the basic justifications for its use? Are there differences in the two law-making systems that can help explain why judicial reliance is greater in one country than the other? In an effort to answer these and related questions, I turn to the perspective afforded by comparative analysis.

A. *Empirical Observations*

For quantitative purposes, I have chosen to compare the Law Lords’ legislative history references from 1996 through 2005 with legislative history treatment by the Supreme Court during the same ten year period. The comparisons are less than perfect because the universes of cases being reviewed are not identical. On the British side, I have included all decisions with

Pepper v. Hart, *A Footnote to Professor Vogenauer’s Reply to Lord Steyn*, 26 OXFORD J. LEG. STUD. 585, 585-86 (2006) (contending that estoppel rationale has never been adopted as binding by the Law Lords).

¹⁴³ Robin Cooke, *The Road Ahead for the Common Law*, 53 INT’L & COMP. L. Q. 273, 282 (2004). Lord Cooke, formerly President of the New Zealand Court of Appeals, participated on Law Lords panels in 2001 and 2002.

¹⁴⁴ See generally note 54, *supra* and accompanying text.

opinions by the Law Lords from January 1996 through December 2005—a total of 591 cases. On the U.S. side, I have focused on two subsets of Supreme Court decisions from 1996 through 2005 on which I had readily obtainable data—cases that directly addressed some aspect of the employment relationship (labor and employment decisions),¹⁴⁵ and cases that involved interpretation of a federal tax statute (tax decisions).¹⁴⁶

These two subsets of the Supreme Court’s overall decision docket comprise 145 decisions or roughly one-fifth of all decisions with published opinions during the ten-year period.¹⁴⁷ The tax decisions consist only of cases that involve the interpretation of a federal tax statute and thus are more likely to include references to legislative history than datasets that feature common law and constitutional decisions as well.¹⁴⁸ Still, the two subsets of Supreme Court decisions, relating to separate areas of federal law, offer useful benchmarks for assessing whether recent British judicial interest in legislative history equals or approaches U.S. judicial investment in this interpretive resource.

¹⁴⁵ The ten years of labor and employment law cases are part of a dataset compiled by the author that consists of more than 650 cases decided between November 1969 and June 2006. The dataset has been discussed in recent articles analyzing judicial reasoning. *See e.g.*, Brudney and Ditslear, *supra* note 7; James J. Brudney and Corey Distlear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND L. REV. 1 (2005). For discussion of how the dataset was assembled, see *Canons of Construction*, *supra* at 15-16.

¹⁴⁶ The ten years of tax law cases are part of a dataset consisting of some 300 cases decided between November 1953 and December 2005 that has been compiled by a team of law professors and social scientists. *See* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909 (2005); Lee Epstein et al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J. L. & POL’Y 305 (2003). For discussion of how the dataset was assembled, see Staudt et al., *supra*, at 1926-27.

¹⁴⁷ The Supreme Court decided some 750 cases with published opinions in the ten terms from 1996 through 2005. *See* Lee Epstein et al. THE SUPREME COURT COMPENDIUM, tbl. 2-11 (3d ed. 2003); *Statistics for the Supreme Court’s October Term 2005*, 75 U.S. L.W. 3029 (July 18, 2006). Between January 1996 and December 2005, the Supreme Court issued 127 labor and employment decisions and 24 tax decisions. Six of these cases appear in both datasets: they are decisions directly involving employees or their interests that also involve interpretation of a federal tax statute. The six have been included in the tax decisions dataset only, in order to avoid duplication.

¹⁴⁸ The Law Lords decisions include such non-statutory cases, as does the Supreme Court labor and employment dataset. Law Lords decisions that do not raise statutory issues typically involve matters of common law; these were roughly 13% of the 591 cases decided from 1996 through 2005. Supreme Court labor and employment cases that do not raise issues of federal statutory law almost always involve constitutional questions; these were about 10% of the 127 cases decided during the same ten years. In addition, unlike the tax law dataset, the labor and employment decisions also include cases that focus on jurisdictional questions, evidentiary matters, and issues of state law—which in the aggregate may be less likely to implicate legislative history than traditionally doctrinal matters of federal statutory interpretation.

For the two U.S. datasets, I report not only the numbers of cases in which legislative history is referenced or discussed by one or more of the justices, but also the numbers of cases where this resource is affirmatively relied on as a probative or determining factor in the majority’s reasoning process. Use of legislative history as an asset to justify or buttress the Court’s holding is more powerful—and less frequent—than the total of all legislative history references. Instances of reliance on legislative history do not include cases in which legislative history is referenced descriptively in the course of discussion, or is invoked in a “deflecting” manner to dismiss the value ascribed to it by a litigant, a lower court, or a dissenting justice.¹⁴⁹ Both reliance and overall reference are important and worth noting, and reporting them separately allows for a more nuanced appreciation of legislative history usage by the Supreme Court.

I did not include a similar distinction for the Law Lords, however, because it was impracticable to do so. The Law Lords do not issue formally designated majority opinions.¹⁵⁰ The leading speech may announce a result that is endorsed in speeches by other panel members, but in many instances these additional speeches do not include cross-references to the Hansard-related reasoning of speeches delivered by colleagues, even the leading speech in the case.¹⁵¹ Accordingly, it is simply too precarious to assume on any regular basis that one Lord of Appeal’s

¹⁴⁹For further discussion of this distinction between reliance on and reference to legislative history, see *Canons of Construction*, *supra* note 145, at 24-26.

¹⁵⁰ The Law Lords’ more individualistic style of judicial opinions stems in part from their structure of decisionmaking. Sitting typically in panels of five judges, the twelve Lords of Appeal in Ordinary are unlikely to express either methodological or doctrinal positions with the coherence of our Supreme Court, which decides all cases en banc. See generally Robertson, *supra* note 93, at 24-26.

¹⁵¹ See, e.g., Soneji, *supra* note 103, [2005] 4 All Eng. Rep. at 334-42 (opinions of Lord Rodger and Lord Cullen, reaching same result as Lord Steyn but without endorsing his reasoning or discussion of Hansard); *Kuddus v. Chief Constable of Leicestershire* [2001] UKHL 29, [2001] 3 All Eng. Rep. 193 (opinions by Lords Slynn, MacKay, Nicholls, Hutton, and Scott all reach same result, and Lords Slynn, Mackay, and Nicholls invoke Hansard, but no opinion endorses the reasoning of any other). See generally John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 489 (2001).

reliance on, dismissal of, or citation to Hansard materials is endorsed by others who approve the same outcome.

Finally, in making the comparison between British and U.S. treatment, I have divided the ten year period into two equal intervals. Legislative history references are identified for each five year interval as well as for the entire ten years. Table One reports all results for the 1996-2005 period.

**Table One—Legislative History Treatment 1996-2005:
Percentage of Decisions* Invoking Legislative History¹⁵²**

	1996-2000	2001-2005	Total
Law Lords Usage	5.6% (15)	13.4% (43)	9.8% (58)
Supreme Court: Lab & Emp Reference	37% (25)	54% (29)	45% (54)
Lab & Emp Reliance	25% (17)	30% (16)	27% (33)
Tax Reference	64% (7)	69% (9)	67% (16)
Tax Reliance	55% (6)	23% (3)	37.5% (9)

*Actual numbers of decisions using (Law Lords) or referring to/relying on (Supreme Court) legislative history for each time period are in parenthesis.

As Table One indicates, the Law Lords made use of Hansard materials in at least one judicial opinion in 9.8 percent of the decisions issued between 1996 and 2005—58 of 591 cases. Usage has been fairly pervasive rather than being confined to a handful of individual judges. Over the ten year period, the 58 identified cases include 94 judicial opinions expressly invoking legislative history. Of the 24 Lords of Appeal in Ordinary who served on more than fifteen panels during this period, 18 Lords referred to Hansard in at least one judicial opinion.¹⁵³ Some

¹⁵² “Law Lords usage” includes any decision in which at least one judicial opinion addresses or relies upon Hansard materials. Similarly, “Supreme Court reference” includes any decision in which at least one justice’s opinion addresses legislative history in substantive terms. “Supreme Court reliance” includes only those decisions in which the Court’s majority opinion relies on legislative history to help explain or justify the holding.

¹⁵³ Five of the six who did not refer to Hansard had two years or less of active service during this decade, and one of those (Lord Mustill, who retired in March 1997) had invoked Hansard in four opinions authored prior to 1996. In addition, two other distinguished jurists (Lord Cooke and Lord Mackay of Clashfern) who participated on Law Lords panels during this period also invoked Hansard in their opinions. Law Lords membership for the 1996-2005 period was compiled from the respective volumes of All England Reports, which list Lords of Appeal in Ordinary

members of the court made greater use of parliamentary materials than others—four Lords of Appeal (Bingham, Hoffmann, Hope, and Steyn) discussed Hansard in at least nine of their opinions, and another five (Goff, Hobhouse, Hutton, Nicholls, and Slynn) referred to Hansard materials on either four or five separate occasions. In 2005, the last year covered by Table One, six of the twelve sitting Lords of Appeal invoked legislative history materials in two or more opinions.

The figures in Table One also reveal an intriguing tension between, on the one hand, the tenor of legislative history debates in the U.S. and Britain and, on the other hand, the reality of legislative history practice in the two countries. In the United States, Justice Scalia has consistently criticized the use of legislative history as an aid to interpretation,¹⁵⁴ and he has been joined by some other prominent jurists¹⁵⁵ and legal academics.¹⁵⁶ There is considerable evidence that the Supreme Court has been influenced by Justice Scalia's position: the Court's reliance on legislative history has noticeably declined in the years since his arrival in 1986.¹⁵⁷ In Britain, *Pepper v. Hart* opened the door to legislative history usage starting in the early 1990s. Legal academics and some jurists have bemoaned the new propensity to refer to Hansard,¹⁵⁸ but as

(and other Lords who have held high judicial office and are eligible to hear appeals) at the front of each volume. *See also* email from Helen McMurdo, Law Lords' Office to Chad Eggspuehler, Sept. 26, 2006, copy on file with author.

¹⁵⁴ *See, e.g.*, Antonia Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring); Hirschey v. FERC, 777 F. 2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J. concurring).

¹⁵⁵ *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia and Thomas J., concurring); *In re Sinclair*, 870 F. 2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); *Wallace v. Christensen*, 802 F. 2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J. concurring).

¹⁵⁶ *See, e.g.*, Adrian Vermeule, JUDGING UNDER UNCERTAINTY _____ (2005); John F. Manning, *Textualism as a Non-delegation Doctrine*, 97 COLUM. L. REV. 673, 696-706 (1997); John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 N.W. L. REV. 1445, 1468-69 (2000).

¹⁵⁷ *See* Brudney and Distlear, *supra* note 7, at 222-24 (reporting decline in labor and employment cases since 1985, including in opinions authored by some liberal justices); Koby, *supra* note 7, at 384-95 (reporting decline since 1980s, especially in opinions authored by more conservative justices); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212-20 (2000) (reporting decline from 1987 to 1994). *See generally* Manning, *supra* note 14.

¹⁵⁸ *See, e.g.*, Marshall, *supra* note 93; Summers, *supra* note 93; Baker, *supra* note 3; McDonnell v. Congregation of Christian Brothers Trustees, [2004] 1 All E.R. 641, 655-56 (Lord Steyn); Wilson v. First County Trust Ltd., [2003]

Table One indicates, citations to and discussion of parliamentary materials by the Law Lords have increased over the past five years.

The bottom line, however, is that legislative history continues to be invoked by the Supreme Court far more often than by the Law Lords, although the American dialogue has highlighted diminished usage and the British debate has focused on excessive references. From 1996 to 2005, Hansard materials were considered by at least one panel member in 9.8 percent of the 591 Law Lords decisions, whereas legislative history materials were discussed by at least one Supreme Court justice in 48.3 percent of the 145 reviewed cases. Even when comparing the Supreme Court's *reliance on* legislative history by majority authors to help justify a result as against the Law Lords' *references to* legislative history as part of an individual judicial speech, Supreme Court reliance over the past decade—29.0 percent of the 145 reviewed majority opinions—is roughly three times greater than the Law Lords' record of references. When the comparison is closer to apples and apples—between references to legislative history by judges on the two highest courts—that history is invoked about five times more often by the Supreme Court.

One must be careful to keep these rather dramatic differences in perspective. The overall caseload for the Law Lords is not as heavily statutory as the tax law and workplace law decisions examined for the Supreme Court.¹⁵⁹ Accordingly, the Supreme Court cases reviewed here are somewhat more likely to trigger references to legislative history. At the same time, the 9.8 percent figure includes instances in which Hansard is referenced not for traditional statutory interpretation reasons but rather because parliamentary statements by ministers help the court to

4 All E.R. 97, 130-31 (Lord Hope); *Robinson v. Secretary of State for Northern Ireland*, [2002] N. Ir. L. R. 390, 404-05 (Lord Hoffmann).

¹⁵⁹ The “non-statutory” component, however, is less substantial in recent times than some might suppose. *See supra* at note 148 (reporting that only about 13% of the 591 Law Lords decisions from 1996 through 2005 do not raise statutory issues).

understand agency policies that are being challenged as arbitrary or fundamentally unfair.¹⁶⁰

When those references are omitted, the remaining uses of Hansard—to assist the court in construing the particular words or general purpose of the statute itself—arise in only 6.4 percent of the 591 decisions.¹⁶¹

It is also relevant that the Law Lords continue to cite to pre-legislative historical materials such as White Papers and commission reports as helpful in identifying the mischief behind a statute. In the United States, the primary source for such purpose-related background information is legislative history, especially committee reports.

Because White Papers and commission reports are invoked with some frequency, it seemed appropriate to calculate the Law Lords references to these pre-legislative materials over the same ten year period. From 1996 through 2005, 69 additional Law Lords decisions—11.7 percent of the total—include a judicial opinion that refers to White Papers and/or commission reports.¹⁶² My summary review of these references suggests that a fair number involved merely *de minimis* mention, something that was rarely true for references to Hansard during the ten year period.¹⁶³ But assuming *arguendo* that all such references are to be treated identically, the combined number of cases in which either Hansard or pre-legislative historical materials are

¹⁶⁰ See *supra* at note 121 and accompanying text, and *infra* at notes 284-285 and accompanying text.

¹⁶¹ Of the thirty-eight cases in which one or more panel members invoke Hansard for the traditional statutory interpretation reasons, twenty-seven cases involve references primarily related to the specific meaning of statutory words, while in eleven cases the principal focus is on the more general purpose or mischief at which the statute is aimed. See note 123, *supra*. (Reporting this breakdown for two subperiods from 1996 to 2005).

¹⁶² Cases invoking White Papers or Commission Reports were identified by following the Lexis search ((White Paper!) or (Commission w/s Report!)). After removing duplicates and false positives, the search identified 101 decisions, 32 of which also included one or more opinions invoking Hansard.

¹⁶³ See, e.g., *Ward v. Commissioner of Police* [2005] UKHL 32, [2005] 3 All Eng. Rep. 1013, 1017 (Baroness Hale); *Transco v. Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 1 All Eng. Rep. 589, 593 (Lord Bingham). The references that are more than *de minimis* were made to assist in identifying the mischief or purpose at which the statute is aimed. See, e.g., *Reg. v. Sec'y of State for Home Dept.* [2005] UKHL 14 [2005] 2 All Eng. Rep. 240, 253-54 (Lord Bingham, referring to White Paper); *Mark v. Mark* [2005] UKHL 42, [2005] 3 All Eng. Rep. 912, 925-26 (Baroness Hale, referring to Law Commission Report).

invoked comes to 21.3 percent of the total—still less than one-half the level of Supreme Court references to legislative history.

One interesting feature of the Law Lords use of White Papers and commission reports is that these references virtually doubled during the second half of the ten year period—from 7.8 percent in 1996-2000 to 14.9 percent in 2001-2005.¹⁶⁴ Given that the proportion of decisions with Hansard references more than doubled during this same decade—from 5.6 percent in 1996-2000 to 13.4 percent in 2001-2005—it would appear that the Law Lords are investing more time and thought generally in the interpretive potential of historical materials related to the legislative process.

I explore some implications of this apparent trend in Part III. Meanwhile, however, the gap between current legislative history usage by the Supreme Court and the Law Lords remains substantial and warrants some attempt at explanation.

B. Similar Rationales for Valuing Legislative History

Before suggesting factors that account for the sharp differences between the Law Lords and the Supreme Court, it is worth noting that there are important similarities in approach as well. Legislative history advocates on the two courts have adopted much the same basic justifications for valuing that history as an interpretive asset. As part of this support, legislative history proponents have responded in analogous terms to certain practical and conceptual objections voiced by critics in both countries.

In *Pepper v. Hart*, Lord Browne-Wilkinson reasoned that allowing courts to rely on parliamentary materials as an aid to construing ambiguous text would help enforce Parliament's

¹⁶⁴ If one includes the 32 decisions in which both Hansard and pre-legislative materials were invoked, there is a parallel increase for the larger group of 101 cases—from 11.2 percent in 1996-2000 to 22.0 percent in 2001-2005.

true intent and thereby strengthen legislative supremacy.¹⁶⁵ Applying the new rule of *Pepper* to the facts at hand, he further concluded that the exchanges between minister and members were sufficiently prominent, clearly articulated, and contextually persuasive to justify attributing to Parliament as a whole the understanding and intent expressed by the minister.¹⁶⁶

The principle of reasonably imputed institutional approval is also central to judicial rationales for relying on legislative history in the Supreme Court setting. Justice Stevens, referring to Congress's committee-based system of drafting and commenting on bills, has concluded that busy representatives and senators may appropriately be deemed to have relied on committee reports and the explanations contained therein to help capture the meaning or implications of the text on which they voted.¹⁶⁷ Justice Stevens has further observed that a failure by the Court to infer congressional approval from suitably prominent and well-reasoned legislative history ignores persuasive evidence of congressional intent and disrespects the lawmaking supremacy accorded to the legislative branch.¹⁶⁸

Similarly, Justice Breyer and Justice Souter each have maintained that identifying a statute's underlying purpose—very often with the help of legislative history—can provide essential guidance as to the meaning of enacted text.¹⁶⁹ That purpose too is imputed on the basis of what a reasonable member of Congress would have had in mind.¹⁷⁰ The purposive approach to statutory interpretation has long been embraced by British courts as well,¹⁷¹ and the court in

¹⁶⁵ See text accompanying notes 50-51 *supra*.

¹⁶⁶ See text accompanying notes 67-70 *supra*.

¹⁶⁷ See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring). This has been referred to as the “busy Congress” rationale. See Tiefer, *supra* note 157, at 209, 252-53 (2000).

¹⁶⁸ See *West Virginia Univ. Hospitals v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J. dissenting).

¹⁶⁹ See Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85-88 (2005), *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 n.8 (1992) (Souter, J.).

¹⁷⁰ See Breyer, *supra* note 169, at 88, 93-94.

¹⁷¹ See, e.g., *R v. Z* [2005] 3 All Eng. Rep. 95, 109 (Lord Woolf); *Pepper* [1993] 1 All Eng. Rep. at 64-65, 71 (Lord Browne-Wilkinson). See generally Zenon Bankowski and D. Neil MacCormack, *Statutory Interpretation in the United Kingdom* in D. Neil MacCormack and Robert S. Summers, INTERPRETING STATUTES: A COMPARATIVE

Pepper relied on Hansard's role in discerning legislative purpose as part of its justification for admitting parliamentary materials.¹⁷²

One additional dimension of each court's rationale for using legislative history is that this resource is regarded by its supporters as clarifying or probative rather than conclusive.

Proponents acknowledge there are risks of misuse, and that legislative history is not binding on a court reviewing the meaning of text. At the same time, incidents of misuse are viewed as anecdotal rather than systemic; accordingly, reservations about reliance on legislative history are properly understood as going to the weight ascribed to such history in a given setting, not its admissibility in some larger sense.¹⁷³

Apart from sharing basic rationales, legislative history proponents in Britain and the U.S. have had to respond to similar concerns about the utility and legitimacy of this resource. A major practical objection voiced on both sides of the Atlantic involves difficulties of access for practicing attorneys and others seeking to understand and comply with the law. The court in *Pepper* acknowledged this concern but concluded it would have minimal impact, asserting that projected research costs were exaggerated and observing that attorneys and their clients were

STUDY 359, 367 (1991); Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 26-28 (1996).

¹⁷² See text accompanying note 52 *supra*. For a thoughtful discussion of how intent is imputed to legislatures and other group actors on philosophical and linguistic grounds, see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L. J. 427, 437-53 (2005). See also Vaughn, *supra* note 171, at 40-41 (contending that legislative history reliance to help identify purpose constrains judicial discretion by inhibiting judges from letting their own preferences masquerade as those of Parliament); Stephen F. Ross & Daniel Tranan, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1988) (contending that extrinsic evidence will mitigate, not aggravate, judicial bias in area of contract interpretation).

¹⁷³ See, e.g., *Spath Holme*, [2001] 1 All Eng. Rep. at 218 (Lord Nicholls), 223 (Lord Cooke); *National Fed'n of Fed. Employees v. Department of the Interior*, 526 U.S. 86, 96 (1999) (Breyer, J.). See generally Vogenauer, *supra* note 3, at 658-65; James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 49-56, 58-59 (1994).

adequately managing the analogous logistical and financial challenge of gaining access to often obscure agency regulations.¹⁷⁴

In the U.S., concerns about lack of access to legislative history were expressed over half a century ago by Justice Jackson.¹⁷⁵ They appear to have been overstated even then, at least with regard to congressional committee reports and floor debates,¹⁷⁶ and access to legislative history is less problematic today given online capabilities available through Westlaw and Lexis, and also non-fee services.¹⁷⁷ Cost remains a relevant factor, but as with Hansard the expenses involved in securing access to legislative history are perceived as not materially different from the costs associated with reviewing or monitoring agency regulations.¹⁷⁸

Admittedly, electronic access may be somewhat more problematic with respect to Hansard than for core legislative history materials in the United States. Parliamentary debates and proceedings are not available online as far back, nor can they be searched as efficiently as is the case for House and Senate committee reports and the Congressional Record.¹⁷⁹ On the other

¹⁷⁴ See *supra* text accompanying notes 54-56.

¹⁷⁵ See *United States v. Public Utilities Commission*, 345 U.S. 295, 319-21 (1953) (Jackson, J. concurring).

¹⁷⁶ See Henry M. Hart, Jr. & Albert M. Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1247-52 (William N. Eskridge Jr. and Philip P. Frickey eds. 1994) (noting that at the time there were three or more depository libraries for U.S. government documents in every state, and that committee reports as well as the Congressional Record were routinely collected in these libraries.)

¹⁷⁷ For example, committee reports are available from 1995 and the Congressional Record from 1989 through the Library of Congress website, Thomas-Legislation, at <http://thomas.loc.gov/>. Reports and floor debates from 1994-1995 onward also are available through the U.S. Government Printing Office website, at www.gpoaccess.gov/.

¹⁷⁸ See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 868-69 (1992). Related to concerns about access, critics in both countries have expressed concern that judges would not be sophisticated enough to sift through legislative history and discern accurately the implications of various statements or exchanges. See, *supra* text accompanying note 56 (referring to British concern); *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 21-22 (1990) (hereinafter *Stat. Interp. Hrg.*) (statement of Judge James L. Buckley) (presenting American concern). Legislative history advocates have basically dismissed these concerns as overstated, again noting that judges must separate wheat from chaff with respect to other contextual resources as well. See, e.g., *Pepper* [1993] 1 All Eng. Rep. at 66; RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1995).

¹⁷⁹ Hansard is available at www.parliament.uk/hansard/hansard.cfm back to the 1988-89 session. The site has a search feature and makes the Daily and Bound Volume Index available for particular sessions. Relevant debates may be located by searching for the speaker (if known) or subject terms. In the U.S., Westlaw provides U.S. Code Congressional & Administrative News (USCCAN) online back to 1948, allowing for access to key committee

hand, Britain is roughly one-fortieth the size of the U.S.,¹⁸⁰ and attorneys in Britain generally will not have to travel as far as their American counterparts to locate basic legislative history materials in hard copy form.

An often-voiced conceptual criticism of reliance on legislative history is that it wrongly presumes the existence of a coherent legislative intent. The concern is both that collective entities such as Parliament and Congress are not capable of having a single or uniform intention, and that even if such an intention could be hypothesized it cannot sensibly be extrapolated from isolated fragments of the legislative record.¹⁸¹ For present purposes, it is not necessary to evaluate these criticisms of intentionalism other than to note that they have essentially been responded to in the same ways by legislative history advocates in both countries.

Proponents on the Supreme Court and the Law Lords have endorsed the view that the legislative process possesses a baseline measure of coherence. They accept at least implicitly that legislators who agree a certain text should become law are able to reach a broadly shared understanding of the purpose(s) leading to a bill's introduction and enactment, and they are further willing to infer that these same legislators may at times adopt a common perspective on the meaning and implications of certain specific provisions.¹⁸² As to the challenge of deriving

reports and congressional record references accompanying enacted bills. In addition, the Congressional Record is available on Westlaw and LEXIS from 1985 forward, all committee reports from 1990 forward, and committee hearings from 1993-94 forward. Using the CIS index, a comprehensive list of legislative history documents can be generated by using the bill number. The CIS index also can be searched by key word and speaker.

¹⁸⁰ See THE WORLD ALMANAC AND BOOK OF FACTS 2005, at 841, 843 (2006 ed.) (reporting that Britain comprises 94, 525 square miles and the United States comprises 3, 718, 709 square miles).

¹⁸¹ For some discussion of the argument against intentionalism in the British setting see Vogenauer, *supra* note 3, at 632-33, 655 and sources cited therein. For discussion of the same argument in the American context, see Manning, *supra* note 156, at 684-89 and sources cited therein.

¹⁸² See, e.g., *Pepper*, [1993] 1 All Eng. Rep. at 71 (Lord Browne-Wilkinson), *Spath Holme*, [2001] 1 All Eng. Rep. at 219-23 (Lord Cooke); statements of Justices Stevens, Breyer, and Souter *supra* at notes 167-170. For commentary from scholars in both countries supporting the view that legislation is a fundamentally purposive or intentional enterprise, see, e.g., Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195-96 (1986); Cass R. Sunstein, *Must Formalism be Defended Empirically?* 66 U. CHI. L. REV. 636, 649 (1999); Stefan Vogenauer, *What is the Proper Role of*

persuasive evidence of intent from various pieces of the legislative history record, this is regarded as a practical problem, not a conceptual one. Whether statements found in Hansard or congressional materials should sensibly be construed as part of a broader understanding among legislators depends on the identity of the speaker, the nature and visibility of his presentation, the reasoned elaboration contained in his remarks, and other factors that will vary from one statutory setting to the next, and hence go to the weight of this legislative evidence rather than its admissibility.

Finally, there is a persistent separation of powers objection to legislative history that is found in both legal cultures: it is illegitimate to allow the unenacted intentions of legislators to trump the authority of enacted text or to usurp the interpretive role of courts.¹⁸³ Once again, the responses given by the court in *Pepper* parallel those propounded in the United States. Legislative history, like other contextual resources, plays a supplemental role in that it helps attribute meaning to the actual statutory language. A court's reliance on this history to understand what Congress or Parliament has enacted is no more a usurpation of the judicial role than is reliance on canons of construction, or the dictionary, or prior agency interpretive practice.¹⁸⁴

C. *Key Differences in Legislative Process and Structure*

The similarities in certain basic rationales and responses summarized above contribute to an understanding of why legislative history is valued as an interpretive resource by the highest court in each country. There are, however, a number of important differences between the

Legislative Intention in Judicial Interpretation? 18 STAT. L. REV. 235, 237-41 (1997); Joseph Raz, *Intention in Interpretation* in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 257-68 (Robert P. George ed. 1996).

¹⁸³ See, e.g., discussion of *Pepper* in text accompanying note 24, *supra*; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (Scalia J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L. J. 371, 375-76.

¹⁸⁴ See, e.g., *Pepper*, [1993] 1 All Eng. Rep. at 69; *Stat. Interp. Hrg.*, *supra* note 178, at 6-7, 18-19 (statement of Judge Patricia Wald).

United States and Britain in terms of legislative processes and structures. Notably, in contrast to Britain's parliamentary system the congressional lawmaking enterprise confers a central role on standing committees, it regularly requires negotiation and compromise to achieve success, and it includes multiple decisional moments captured by distinct forms of internal commentary. These differences—separately explored below—help account for why Supreme Court reliance on legislative history is more robust than is the case for the Law Lords.

1. *Standing Committees and Committee Reports*

Among legislative history proponents in the United States, committee reports are regarded as especially useful in shedding light on the meaning or implications of inconclusive text. Most legislation is written in standing committees whose members remain affiliated from one Congress to the next and develop a level of expertise over subject areas within their ongoing jurisdictional ambit. Through formal hearings and executive sessions, and informal discussions and negotiations, committee members and their staffs devote substantial time and energy to considering the problems the proposed law is supposed to address and how best to address them. Committee reports tend to reflect this level of consideration, offering both an overview of the policy need or “general purpose” behind the legislation and also an analysis of how various sections or provisions would implement the statute’s “specific intent” in different factual and legal settings.¹⁸⁵

In addition to being well-informed, committee reports also are regarded as highly accessible due to a format that is orderly and understandable to other members, to the courts, and to the broader legal community. Reports typically set forth a policy or problem that has given rise to the need for new legislation and then describe the solution proposed by the new law,

¹⁸⁵ See William N. Eskridge Jr., Philip Frickey, & Elizabeth Garrett, *LEGISLATION AND STATUTORY INTERPRETATION* 311 (2d ed. 2006); William D. Popkin, *MATERIALS ON LEGISLATION* 479 (4th ed. 2005).

highlighting features that respond to particular issues or concerns. They also frequently include additional or minority views, enabling committee members who oppose all or part of the proposed solution to present their competing concerns in some depth.¹⁸⁶

Senators and congresspersons have extolled the educative virtues of committee reports both as members of the majority party and the opposition. These legislators have analogized the report to the road map or “bone structure” of a statute, praising the report’s “central explanatory function” and its role in helping to address ambiguities.¹⁸⁷ Even members of the minority have often looked to committee report explanations to understand what they were voting on,¹⁸⁸ to help focus generally worded statutory text, or to prevent slippage from agreements reached among key legislators.¹⁸⁹

Although committee reports as aids to statutory interpretation have certain limits,¹⁹⁰ their status as the best informed and most accessible category of legislative history has meant that federal courts turn to them first and foremost for guidance. Thus it is not surprising that of the 42 Supreme Court decisions in tax law or labor/employment law that actually relied on legislative history between 1996 and 2005, the legislative history deemed persuasive included committee reports some three-fourths of the time.¹⁹¹

¹⁸⁶ See, e.g., S. REP. NO. 101-263, at 1 (1990) (presenting table of contents for Senate committee report accompanying Older Workers Benefit Protection Act of 1990); Popkin, *supra* note 185, at 479 (describing standard, readily identifiable features of committee reports).

¹⁸⁷ Abner Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986). See also *Stat. Interp. Hrg.* *supra* note 178, at 2 (statement of Representative Kastenmeier, asserting on behalf of “most” members that committee reports can explain and amplify legislative language in ways that are instructive to the courts).

¹⁸⁸ *Stat. Interp. Hrg.*, *supra* note 178, at 21 (statement of Judge James L. Buckley).

¹⁸⁹ See generally Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. L. & PUB. POL’Y 43, 46-48 (1998); *Stat. Interp. Hrg.*, *supra* note 178, at 65 (statement of Representative Moorhead).

¹⁹⁰ Sometimes a report is irrelevant, as when a key provision has been added on the floor following committee deliberations. Other times the report is as ambiguous or incomplete as the statutory text.

¹⁹¹ See Table One *supra* (reporting Supreme Court reliance in 33 labor and employment decisions and 9 tax decisions). The Court’s majority opinion relied on committee reports to help explain or justify the holding in twenty-five of thirty-three labor and employment cases that relied on legislative history and six of nine tax cases. By contrast, the Court relied on hearings or floor debates in roughly one-third of these decisions: fourteen of thirty-three labor and employment, and one of nine tax. See also Jorge Carro & Andrew Brann, *The U.S. Supreme Court*

Committee reporting does not play the same role at all in the British legislative process. Standing committees in the House of Commons examine bills on a clause-by-clause basis, but this occurs after full House debate on the bill as a whole on Second Reading.¹⁹² Importantly, committee review of bill sections or clauses takes place only once the bill has received approval in principle from the House, whereas in Congress committee review and approval are presumptive preconditions to endorsement by the full chamber. In addition, British standing committees are identified simply by a letter designation (*e.g.* A to H): they are not assigned particular subject matter jurisdictions, and members are selected to serve for each new bill.¹⁹³ Accordingly, British committees lack the collective continuity and substantive competence that characterize standing committees in Congress.¹⁹⁴

Consistent with the differences between committees in terms of their cohesiveness, subject matter expertise, and basic function, the work products of parliamentary standing committees bear little resemblance to House and Senate committee reports. British standing committees do not issue a detailed report that sets forth the bill's purpose, summarizes the legal implications of various provisions, or recounts policy disagreements between bill supporters and opponents. Instead, the committee work product is typically a transcript of the meetings at which clause-by-clause review occurred, reporting particular amendments that were moved, accepted, or withdrawn.¹⁹⁵ This recounting of bill modifications, along with question-and-

and the Use of Legislative Histories: A Statistical Analysis, 22 JURIMETRICS J. 294, 302 (1982) (reporting for an earlier period that one half of all Supreme Court references to legislative history were to committee reports.)

¹⁹² See Zander, *supra* note 6, at 53-54.

¹⁹³ See *id.* at 54 & n.6; *Parliamentary Stages of a Government Bill*, 4, Factsheet L1, House of Commons Information Office (revised 2003) available at www.parliament.uk/factsheets.

¹⁹⁴ See generally *Standing Committees*, 3-5, Factsheet L6, House of Commons Information Office (revised 2006), available at www.parliament.uk/factsheets. The 1969 report of the Law Commissions recognized that congressional committee reports provide a richer deliberative perspective than is available under Britain's committee report proceedings. See *The Interpretation of Statutes*, *supra* note 28, at 34, 38.

¹⁹⁵ See Factsheet L6, *supra* note 194, at 5. See, *e.g.*, House of Commons Standing Committee A 2005-06, Animal Welfare Bill Report of Proceedings, 8th Sitting, Jan. 26, 2006, afternoon; House of Commons Standing Committee A

answer exchanges between individual committee members and the government's designated representative, can sometimes shed light on the meaning of a word or phrase in text, in much the same way as the similar record of amendments and exchanges that occurred in the House as a whole.¹⁹⁶ But the record of committee proceedings does not offer a coherent explanation for the bill or an analysis of its key provisions and their policy implications. Nor is this committee document made available to other legislators and their staffs prior to the initial decision to approve, modify, or reject the bill as written.

As noted earlier, one member of the Law Lords who harbors grave reservations about judicial use of Hansard has urged that each bill be accompanied by detailed explanatory memoranda patterned on congressional committee reports, and he intimated that courts could properly rely on such legislative materials.¹⁹⁷ Since 1999, most public bills have been accompanied upon introduction by brief explanatory notes drafted by the government department responsible for the legislation.¹⁹⁸ Unlike congressional committee reports, explanatory notes are neither prepared nor promoted from within the legislature. Largely for this reason, the leading judicial critic of Hansard regards the new explanatory notes in the same way he assesses other ministerial statements.¹⁹⁹ Meanwhile, in light of the considerable differences in standing committee work products, a primary source of reliable legislative history in the American context is simply missing from the British setting.

2. *Compromise and Change During the Legislative Process*

2005-06, National Lottery Bill Report of Proceedings, 8th Sitting, Nov. 3, 2005, afternoon, *both available at* <http://www.publications.parliament.uk/pa/cm/cmstand.htm>.

¹⁹⁶ Indeed, *Pepper* itself involved cites to the Financial Secretary's exchanges with Standing Committee members that were reproduced in Hansard. See text accompanying notes 67-69, *supra*.

¹⁹⁷ See text accompanying note 99 *supra* (discussing recommendation by Lord Millett).

¹⁹⁸ See *Reg. v. National Asylum Support Service*, [2002] 4 All Eng. Rep. 654, 656-57 (Lord Steyn, describing new practice).

¹⁹⁹ See *id.*, discussing explanatory notes as useful for identifying the mischief and in exceptional cases for estoppel against the executive, but never as reflecting the will of Parliament with regard to the meaning or scope of statutory language.

The committee report distinctions just described are part of a larger difference between Britain and the United States in terms of how statutes are produced. In Britain, the lawmaking process is basically linear and efficient. The government exercises control throughout, and participation by legislators on the floor or in standing committee generally has little substantive impact.²⁰⁰ The government conceives of and introduces virtually all public bills.²⁰¹ A considerable amount of government legislation is accepted at Second Reading by the opposition party.²⁰² There may then be amendments offered seeking to clarify or refine particular bill clauses or sections, but these are extremely unlikely to be approved by Parliament if offered by opposition members or even government backbenchers.²⁰³

Because the government enjoys majority support in Parliament for its legislative program and traditionally imposes tight party discipline, there is rarely a need for it to negotiate or modify its original position. In the House of Commons, the government as bill manager is most concerned to push through to enactment and is likely to resist merits-based changes due to time constraints and related concerns about legislative derailment.²⁰⁴ Government-drafted amendments are accepted, but these usually result from subsequent thinking or planning by civil servants (perhaps stimulated by interest groups) rather than compromises or changes proposed by legislators.²⁰⁵

²⁰⁰ See, e.g., R.H.S. Crossman, *THE DIARIES OF A CABINET MINISTER* 628-29 (1975); Douglas Hurd, *The Present Usefulness of the House of Commons*, 3 J. LEGIS. STAT. 1, 2-3 (1997).

²⁰¹ See generally Slapper & Kelly, *supra* note 19, at 56-57; Martin Partington, *AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEM* 40 (3d ed. 2006).

²⁰² See Zander, *supra* note 6, at 81 (reporting bipartisan support for half the government's bills and vote by division on Second Reading in only 20 percent of government bills during 1970-74 period). See also Catherine Elliott & Frances Quinn, *ENGLISH LEGAL SYSTEM* 35-36 (7th ed. 2006) (discussing how whip system virtually ensures that government with a reasonable majority will get its legislation through at Second Reading).

²⁰³ See Zander, *supra* note 6, at 82 (reporting 11 percent success rate for backbencher amendments and 5 percent for opposition members; 95 percent of amendments moved successfully in House of Commons were moved by ministers).

²⁰⁴ See Hurd, *supra* note 200, at 2.

²⁰⁵ See Zander, *supra* note 6, at 82. See generally Partington, *supra* note 201, at 45.

The controlled and efficient process by which bills are introduced and enacted in Parliament has repercussions for the utility of legislative history. Bills that become public laws generally originate from within government departments or derive from recommendations made by independent commissions or advisory committees.²⁰⁶ The purpose behind these bills—the mischief at which they are aimed—is typically set forth in some depth through government consultative documents such as White Papers or through commission reports. The presence of such abundant pre-legislative materials means that a minister’s statement in committee or on the floor, explaining the bill’s purpose or the underlying mischief, is less likely to add substantial information or policy analysis that is new or otherwise unavailable.

Parliamentary debate about proposed or accepted amendments does produce information that is more apt to illuminate textual meaning in ways not expressed elsewhere. Major substantive amendments are not, however, a regular part of the parliamentary enterprise. The government, which is the only legislative player likely to have such major amendments accepted, has little incentive to offer them. Ministers steering a bill through Parliament seldom view themselves as having to compromise or make significant textual modifications in order to prevail, and the record of parliamentary debates and proceedings therefore contains relatively few instances in which legislative history can illuminate the meaning of substantially revised or newly forged statutory text.

Parliamentary exchanges can shed light on the understandings or implications surrounding more minor textual adjustments.²⁰⁷ This indeed was the situation in *Pepper*, where the Finance Minister explained a government decision—made under pressure from

²⁰⁶ See Zander, *supra* note 6, at 3; Donald Gifford & John Salter, UNDERSTANDING THE ENGLISH SYSTEM 17-18 (1997). A smaller number of public laws stem from the ruling party’s election manifesto commitments or are in response to unexpected events in the public arena. See Zander, *supra* at 3; Gifford & Salter, *supra* at 18.

²⁰⁷ See, e.g., *Re.R (a child)* [2005] UKHL 33, [2005] 4 All Eng. Rep. 433, 437 (Lord Hope); *Reg. v. Preddy*, [1996] 3 All Eng. Rep. 481, 487-88 (Lord Goff).

backbenchers—to withdraw an amendment that would have taxed in-house benefits at higher rates.²⁰⁸ Moreover, even in an efficient legislative environment, the ambiguities inevitably associated with complex statutory language often drafted under time pressures allow for legislative history to play some clarifying role.²⁰⁹ Still, the dearth of large scale bargaining or compromise as part of the legislative process diminishes the explanatory value of parliamentary narrative accompanying that process.

In the United States, by contrast, due to formal divisions in power between the executive and legislative branches as well as relatively lax party discipline and various procedural obstacles within Congress, most major bills that become public laws undergo substantial changes from introduction to final enactment. For a start, bill introduction in Congress is not part of an organized or systemic government program. The executive branch plays an important role in the development of many bills, but it is far from the exclusive initiating actor and may not even be the primary influence during periods when Congress and the presidency are controlled by different parties.²¹⁰

Both bill introduction and legislative agenda formulation are highly decentralized, shaped by committee chairs who function as independent policy entrepreneurs, by private interest groups that invest heavily in the re-election campaigns of individual members, and by state and local governments that exert special influence associated with their separate sovereign status.²¹¹ Party leadership in both chambers labors with some success to classify and channel the cascade of bills that are introduced and emerge from committee. Nonetheless, decisionmaking in the

²⁰⁸ See *Pepper*, [1993] 1 All Eng. Rep. at 70.

²⁰⁹ See *id.* at 64; Zander *supra* note 6, at 21-24; Hurd *supra* note 200, at 1-2.

²¹⁰ Between 1968 and 2006, Congress (at least one chamber) and the Presidency were controlled by different parties for more than two-thirds of the time—27 of 38 years.

²¹¹ See *generally* Alan Grant, *THE AMERICAN POLITICAL PROCESS* 45-52, 65-66, 302 (5th ed. 1994); James MacGregor Burns et al., *GOVERNMENT BY THE PEOPLE* 229, 353-61 (16th ed. 1995).

American legislative process is best viewed as dynamic and discontinuous rather than static or linear: a leading observer's depiction of Congress as "organized anarchy"²¹² aptly captures this reality.

The value attached to inefficiency in the congressional lawmaking model is further attributable to the range of procedural constraints that allow a determined minority to delay or obstruct legislation. Some of these constraints are constitutionally explicit although many are not.²¹³ When combined with the tumultuous nature of agenda-setting and the finite amount of time available, procedural obstacles effectively invite the formation of majority coalitions that can negotiate compromises in text at various stages of the process. Many bills—especially if complex or controversial—are substantially modified or recast from their original form to accommodate the priorities of wavering colleagues or to coopt segments of the opposition. Alterations often take place in one or both chambers through the committee process or on the floor during full debate; they also occur in conference when substantive differences must be reconciled.

The baseline inefficiencies of Congress's lawmaking process generate an added dimension to the value of legislative history in the U.S. setting. Because substantial adjustment and compromise in text following a bill's introduction is the rule more than the exception, committee or floor commentaries that accompany the particular stages of language modification are capable of shedding light on whatever qualitative changes have taken place. Legislative deals and bargains are a well-recognized feature of American lawmaking, and in the face of text that is ambiguous or incomplete, legislative history may illuminate the existence of a

²¹² John W. Kingdon, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 84-86 (2d ed. 1995).

²¹³ Examples of procedural constraints not specified in the Constitution include committee referral and markup, floor debate and amendment, Rules Committee control in the House, filibusters in the Senate, and reconciliation between two versions through conference.

compromise or help to explain certain subtle aspects of the bargain. Several examples from relatively recent Supreme Court case law indicate the Court's appreciation for how legislative history plays these roles.

In a 1985 decision addressing whether the fiduciary to an employee benefit plan could be held liable for extra-contractual damages under ERISA,²¹⁴ the Court relied in part on legislative history to hold that Congress had not intended to authorize any remedies other than through the plan itself.²¹⁵ Justice Stevens for the majority emphasized that the broad statutory relief described in the Senate committee report differed from the bill version passed by the House, and that the compromise reached in conference followed the House approach.²¹⁶

A similar instance of invoking legislative history to help establish the existence of a compromise occurred in a 1985 decision reviewing whether the Environmental Protection Agency was prohibited from issuing certain pollutant discharge waivers under the Clean Water Act.²¹⁷ Justice White for the majority noted that an early version of the bill had proposed banning the waivers and that the House-Senate negotiated version of text was inconclusive. The majority then relied on the House manager's explanation of the negotiated Conference version to his colleagues on the House floor, in determining that Congress had not meant to include the waivers as part of the final statutory deal.²¹⁸

The Court also uses legislative history to help discern subtle dimensions of a legislative bargain. A 1994 decision construing Title VII of the Civil Rights Act relied on legislative

²¹⁴ ERISA is the Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. §§ 1001 et seq.

²¹⁵ *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145-46 (1985).

²¹⁶ *Id.* For another ERISA example, see *Laborers Health Trust v. Advanced Lightweight Concrete*, 484 U.S. 539, 549 (1988) (relying on floor debate to help establish that Congress did not legislate as protectively as employees contended).

²¹⁷ See *Chemical Mfrs. Ass'n v. Natural Resources Defense Council Inc.*, 470 U.S. 116 (1985).

²¹⁸ See *id.* at 126-27. For another Clean Water Act example, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315-20 (1982) (relying on committee report to help clarify that Congress established a permit system as middle ground solution given "the impracticality of any effort to halt all pollution immediately").

history to establish that supporters and opponents had in effect agreed to disagree on whether the highly contentious 1991 amendments to Title VII should be applied retroactively.²¹⁹ Based on an elaborate review of earlier bill versions and Senate floor debates—indicating that no deal had been reached on the controversial retroactivity issue—Justice Stevens for the Court went on to hold in favor of the traditional presumption against retroactivity, noting the absence of a congressional intent to overcome that presumption.²²⁰

The examples reviewed here are not meant to suggest that legislative history commentary is essential to identifying the existence or contours of compromises reached during lawmaking. Negotiated final arrangements are at times discernible from textual analysis,²²¹ and in any event not all legislative history accurately captures the essence or fine points of these arrangements. What matters for comparative purposes is that substantial textual change is a regular feature of the congressional lawmaking process in a way that differs fundamentally from the British parliamentary experience, and that this difference has consequences for the utility of legislative history.

To be sure, compromise on basic policy choices and implementation strategies does occur in Britain, but differences typically are resolved before bill language is made public—through debate within a law reform commission, the upper levels of a government ministry, or the Prime Minister’s inner circle. Given the emphasis on pre-legislative negotiation, it is entirely rational for British courts to refer regularly to commission reports and White Papers, as noted in Part II.A above. By contrast, our system relies far more heavily on compromise following bill

²¹⁹ See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

²²⁰ See *id.* at 250-63. For another example under Federal anti-discrimination law, see *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 178-80 (relying on legislative history of 1967 Age Discrimination in Employment Act to construe an employer exemption that reflected a compromise among competing congressional goals).

²²¹ See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 71, 76-79 (2006).

introduction. Divisions of power between Congress and the President, and between the House and Senate, encourage negotiations at various stages of a bill's progression, and legislative history associated with these different stages may well capture important dimensions of any deals that are struck. Accordingly, it is not surprising that the Supreme Court recognizes and relies on such history to help understand post-introduction legislative bargains, something that is far less likely to occur for the Law Lords.

3. *Singular versus Diverse Sources of Legislative History*

The dominant role played by the executive branch in the British lawmaking process has additional implications with respect to judicial use of legislative history. Prior to *Pepper*, some opponents of legislative history voiced the concern that if interpretive resources were to include parliamentary statements by ministers, courts would in effect be redistributing power from the legislative branch to the executive by allowing ministerial commentary to influence the meaning of enacted text.²²² The court in *Pepper* did not explicitly address this particular separation of powers concern.²²³ The decision to admit ministerial statements, however, effectively implies that any risks of executive branch interference with parliamentary sovereignty were outweighed by the benefits of having access to potentially enlightening explanatory materials. Deferring for the moment whether the executive branch is likely to misuse these new powers,²²⁴ it is worth noting that the test set forth in *Pepper* restricts judicial access to legislative history by making ministerial participation virtually an essential component of what is admissible.

²²² See Bankowski and MacCormack, note 171 *supra*, at 381. See also Styles, *supra* note 3, at 155-57 (raising same concern in immediate aftermath of *Pepper*).

²²³ Lord Browne-Wilkinson addressed a different separation of powers concern, namely that admitting parliamentary commentary in court would impinge on the interpretive powers of the judiciary. See text accompanying note 58 *supra*.

²²⁴ See Part II.C.4. *infra*.

With respect to the different uses of legislative history sanctioned by *Pepper* and subsequent decisions, ministerial presentations are necessary when seeking a clearer understanding of the government's own policy that is being subjected to judicial review.²²⁵ Ministerial statements are obviously important in other judicial review contexts as well, such as identifying the mischief at which the statute is aimed and shedding light on the meaning of particular words or phrases in text. It is conceivable, however, that exchanges among backbenchers or opposition members could offer probative evidence in these latter settings even without participation by a government representative.

The Law Lords on rare occasions have referred to non-ministerial exchanges during parliamentary debate as aids to construing the meaning of text.²²⁶ Still, the expectation in light of *Pepper* is that ministerial statements are centrally important,²²⁷ and the Law Lords invoke such statements in almost all instances, usually with little or no reference to contextual remarks by ordinary legislators.²²⁸ This limitation on the sources of validly admissible legislative history means that only a subset of parliamentary debates and proceedings is available for judicial reference.

By contrast, the universe of legislative history sources to which courts have access in the U.S. setting is considerably broader. The executive branch regularly contributes to the creation of legislative history as part of its role in the lawmaking process. Contributions occur primarily through testimony at committee hearings but also through memoranda or statements placed in the Congressional Record as attachments to floor remarks by a leading bill advocate or

²²⁵ See notes 35-36 and note 119 *supra* and accompanying text (discussing opinions in *Brind* and *Wilson*).

²²⁶ See, e.g., *Stubbings* [1993] 1 All Eng. Rep. at 329 (opinion of Lord Griffiths, relying on statements from proposer of bill, a backbencher); *R and Preddy* [1996] 3 All Eng. Rep. at 487-88 (opinion of Lord Goff, relying on statements from two members of House of Lords).

²²⁷ See *Pepper* [1993] 1 All Eng. Reg. at 64, 67.

²²⁸ See, e.g., *Anderson*, [2002] 4 All Eng. Rep. 1089, 1093-96; *Reg. v. Ministry of Def. Ex. p. Walker*, [2000] 2 All Eng. Rep. 917, 920-21.

opponent.²²⁹ As previously discussed, however, the executive branch often is not the most influential actor in legislative proceedings; multiple members of Congress typically play important roles in the various stages of moving a bill to final enactment.

There are innumerable occasions on which legislative history sources unrelated to executive branch participation are deemed to help clarify the meaning of enacted text. For instance, when a congressional committee has eliminated bill language that would have supported one party's claims, the Supreme Court may well invoke this change based on its presumption that Congress does not intend to enact language it has earlier deleted.²³⁰ Similarly, when bill sponsors and supporters describe a provision's principal aim during floor debate, such evidence of purpose may lead the Court to conclude that a permissible reading of text is also the correct reading.²³¹

Even if a bill changes very little from introduction to passage, there are distinct decisional moments when legislative history can help narrate or explain what has occurred. Committee reports, floor colloquies reflecting shared understandings, floor statements from managers on both sides of the aisle, and conference reports all can shed light on the meaning of text. Given this range of sources, the Supreme Court simply has more types of legislative history material to consider relying on than does its British counterpart.

4. *Opportunism in the Creation of Legislative History*

A final structural issue is the possibility that legislative history will be generated for opportunistic reasons, especially by key participants. Courts are prepared to rely on legislative history as an aid to construing text, and pivotal actors in the legislative process are aware of this

²²⁹ See, e.g., *Bank America Corp. v. United States*, 462 U.S. 122, 134-35 (1983) (analyzing executive branch testimony at House committee hearing); *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994) (discussing "interpretive memorandum" prepared with executive branch input and introduced on floor by bill sponsors).

²³⁰ See *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

²³¹ See *West v. Gibson*, 527 U.S. 212, 218-20 (1999).

reliance. The risk therefore arises that legislative history will include explanations or assertions about the text refashioning or deviating from the presumptively shared understanding of what that text means.²³² To the extent that courts have good reason to worry about such abuses, their willingness to rely on legislative history may be chilled. Accordingly, it is worth considering the likelihood that legislative history in the British and American settings will be manipulated by its creators.

In Britain, the concern is over manipulation by the executive branch. The executive is ultimately in charge of drafting virtually all statutory text, and it is also the central player in creating relevant legislative history. The bright line test set forth in *Pepper* can be viewed as allowing if not inviting strategic behavior, by conferring probative value on clear ministerial statements so long as a court decides that text itself is sufficiently ambiguous. Thus, a minister worried about the politics of a vote on some controversial issue could avoid a tough public choice by fudging the relevant text and packing the parliamentary record to slant the ambiguous provision in terms the government would prefer.²³³ Alternatively, ministers can infuse the record with statements purporting to spell out the meaning of statutory sections, anticipating that courts will tend to defer to such statements instead of launching a more rigorous examination of the underlying text.²³⁴

²³² Concern over opportunism in the creation of legislative history is distinct from the concern that honestly produced legislative history will at times be unreliable. Even responsible and well prepared participants (such as congressional committee chairs or parliamentary ministers) are not always able to deliver precise statements or complete responses in the harried atmosphere of legislative debate. Committee chairs are more likely to offer comprehensive and well-considered explanations in committee reports than in the pressured setting of an exchange on the floor. Similarly, a minister who is thoroughly briefed by her staff is less likely to miscommunicate the meaning of a textual provision than one who responds to questions from members without consulting with her department. Courts in both countries must assess the reliability of legislative history based on a range of factors, just as they do when confronted with arguments from counsel about the reliability of particular dictionary definitions or canons of construction.

²³³ See generally Miers, *supra* note 82, at 706.

²³⁴ See generally Styles, *supra* note 3, at 156-57.

There is no indication in the Law Lords opinions applying *Pepper* that the court has found ministers engaging in such strategic behavior. Although the conduct may be occurring without judicial awareness, ministers will be constrained to some degree by the civil servants and parliamentary counsel who prepare advice for them regarding the meaning of statutory provisions, and also by the interest groups and media representatives that pay attention to parliamentary proceedings on important or controversial bills. If a minister in her explanation to Parliament departs from or distorts the professional advice she has received, such conduct could be leaked by presumptively neutral officials or attentive lobbyists to interested legislators as well as the media.²³⁵ It is, however, difficult to gauge at this point whether the prospect of informal oversight—especially with respect to civil servants in the minister’s own department—is having a substantial deterrent effect.

In the United States, the main concern about manipulation of legislative history stems from the plethora of record materials being produced by actors within Congress.²³⁶ Executive branch personnel, interested parties outside of government, and members and their legislative staffs all may be players on a particular bill, and all have a stake in leaving their mark on the statutory product. Lengthy committee reports, as well as floor colloquies or statements by bill managers that are inserted unspoken into the Congressional Record, provide ample opportunities for strategic behavior.

²³⁵ See generally, Miers, *supra* 82 note, at 706-07.

²³⁶ In contrast to Britain’s parliamentary structure, the executive branch has no privileged role in generating legislative history as part of the congressional enactment process although it often makes important contributions. See note 229 *supra* and accompanying text. Beginning in the Reagan era, presidential signing statements—delivered after bicameral approval and presentment—have been used with some frequency as part of an effort to influence the way a statute is interpreted by the courts. See ABA Task Force Report, *supra* note 13, at 10. Recently, President Bush has used signing statements more extensively to declare that he will not enforce portions of the text that he is signing into law, based on his interpretation of what the enacted language means or his desire to avoid a perceived constitutional problem. This qualitative change in the use of signing statements has been met with criticism by members of Congress from both parties and by leaders in the legal profession. See e.g., *Senate Judiciary Committee Hearing*, *supra* note 13; ABA Task Force Report, *supra* note 13. The legal and policy implications of post-enactment Presidential Signing Statements are beyond the scope of this article.

There are constraints on such behavior by legislative actors—notably certain incentives within the legislative process that operate to encourage accuracy and probity, especially by committee leaders (who tend to function as bill managers) and their staffs.²³⁷ In the short term, members know they must rely on colleagues’ representations at the committee stage as to what a bill means, because Congress operates heavily through its committees and members depend upon the accuracy of committee-based information in moving the agenda. More generally, members as repeat players typically aspire in the long-term to a positive relationship with their colleagues and with the institution. The desire to be viewed as honest and fair even during fierce partisan disputes thus creates an impetus for committee leaders and floor managers not to overstate or understate a bill’s general or specific objectives.²³⁸

The content and format of committee reports also are visible enough to help offset the risk of manipulation. Minority views in a report can point out a failure to present adequately or accurately the position of the majority, or highlight areas of disagreement among committee members. This provides notice to other legislators, their staffs, and the leadership about the need to consider controversial matters when the bill reaches the floor.²³⁹

In the end, it is difficult to compare the frequency with which legislative history is opportunistically created in British as opposed to American settings. Risks of abuse arise from different factors, related to distinct aspects of the respective legislative processes. The main protection against such abuse involves whistleblowing and its related reputational consequences.

²³⁷ This and the following paragraph in text rely on positions previously presented by the author. *See* Brudney, *supra* note 173, at 54, 59.

²³⁸ Moreover, congressional staff are not likely to act strategically without their boss’s approval given their status as agents more dedicated to their principal than would be true elsewhere in the labor market. Staff are recruited to work for committees based in part on loyalty to the chair or hiring members. Members are also sensitive to conduct that might threaten their own job security, and staff performance is often effectively monitored by the media as well as the hiring member. Finally, unlike many government personnel, congressional committee and personal office staff are at-will employees. *See generally* Brudney, *supra* note 173, at 50.

²³⁹ *See* note 186 *supra* and accompanying text, discussing how presence of minority or additional views is readily apparent from table of contents.

Both lawmaking systems include actors with ample reasons to sound an alarm against legislative commentary that overstates or undermines the agreed-upon meaning of text. These reasons may more likely stem from political or partisan factors in the U.S., and from professional or civil service considerations in Britain. Nonetheless, whistleblowing constraints operate in each lawmaking system that would seem to render the incidence of abuse anecdotal rather than systemic.

Underlying these constraints is a belief that the primary audience for legislative history is other members and not judges. Commentary in standing committees or on the floor can be attributed to Parliament or Congress as a whole because (or insofar as) the prominence, amplified reasoning, and persuasive context of the commentary suggests what a reasonable legislator would have had in mind when voting on the text. By relying on the principle of reasonably imputed institutional approval, both the Supreme Court and Law Lords have implicitly endorsed that belief.²⁴⁰

Still, even if it is impracticable to determine which legislative history setting is more susceptible to manipulation, the three prior factors examined in this part help explain why legislative history usage is higher in the Supreme Court than the Law Lords.²⁴¹ Standing committees in the American setting generate more cohesive and substantively competent indications of statutory meaning than their British counterparts. Further, because legislative bargaining and compromise are more frequent in the American context, the accompanying commentary is more likely to include reliable insights as to how the legislative process has

²⁴⁰ See text accompanying notes 165-172 *supra*.

²⁴¹ My focus has been on factors directly related to the availability and reliability of legislative history. Certain more extrinsic factors also may play a role—for instance, the relative propensity of American and British courts to prefer canons of construction to legislative history when seeking to resolve textual ambiguity or confirm textual meaning. For a discussion of how the Supreme Court uses the canons in this regard, see *Canons of Construction*, *supra* note 145, at 29-36, 77-95. Consideration of the Law Lords' use of canons, and comparative analysis on this point, are deferred to a future article.

shaped the intent underlying enacted text. Finally, the breadth of legislative history sources available in connection with congressional lawmaking offers courts more materials from which to glean what the legislature meant when enacting certain inconclusive words or phrases.

III. PREDICTIVE AND NORMATIVE REFLECTIONS

Notwithstanding lower levels of legislative history use by the Law Lords than the Supreme Court, the Lords of Appeal have now had fourteen years of exposure to parliamentary materials since *Pepper*. The initial ebb and flow of their participation, described in Part I, featured expressions of judicial frustration as well as enthusiasm, but certain signals have begun to emerge. Recapping key recent developments, Part III.A predicts that the Law Lords are likely to build on the foundation of *Pepper* and may well expand upon current patterns of use. Assuming that there will be no British retreat to the pre-1992 position, Part III.B offers preliminary normative thoughts based on comparisons of how the two high courts currently debate and apply this interpretive resource. It proposes that the Supreme Court might wish to move beyond what has become a somewhat stilted debate between legislative history advocates and opponents by borrowing from the British approach. It also suggests that the Law Lords' early efforts to categorize different kinds of parliamentary exchanges as either admissible or disqualified should yield to the more ad hoc flexible approach followed by Supreme Court justices who make use of legislative history.

A. *The Next Stage of Post-Pepper Development*

Quantitative data presented earlier suggests that the Law Lords are in the process of consolidating if not augmenting a permanent role for legislative history as an interpretive asset.

The proportion of Law Lords decisions in which at least one judge discusses Hansard materials was more than twice as high in 2001-2005 as in 1996-2000.²⁴² In addition, the proportion of decisions referencing White Papers or commission reports increased substantially in the 2001-2005 period.²⁴³ Those pre-legislative materials were deemed admissible in court long before *Pepper*. Still, it seems plausible to regard the Law Lords' increased propensity to refer to them as part of a growing appreciation for how the intentions underlying enacted text can be identified and applied based on historical evidence as well as linguistic analysis.

Perhaps more revealing than aggregate trends are two recent decisions in which the Law Lords stretched their initial rule in setting forth grounds for relying on Hansard. Although *Pepper's* three part test credited only explanatory statements by a minister or other prominent bill supporter,²⁴⁴ Lord Bingham's leading speech in the 2005 case of *Reg. (Jackson) v. Attorney General* relied on the Hansard-recorded history of approved and defeated amendments to illuminate the meaning of text.²⁴⁵ Lord Bingham and his colleagues understood that he was not consulting Hansard materials strictly as authorized under *Pepper*, because in their view the text was sufficiently clear without such consultation.²⁴⁶ Lord Bingham's reliance on drafting history during the legislative process—reviewed and analyzed through reference to Hansard—represents a notable if unacknowledged extension of the court's earlier approach.

²⁴² See Table One, *supra* at text accompanying note 152. This latest five year average, comprising roughly one-seventh of the court's decision docket, includes many non-controversial uses of Hansard addressing agency policy that is under judicial review or the background mischief at which a statute is aimed. But there also are a substantial number of judicial opinions using parliamentary materials for the more controversial primary objective established in *Pepper*—to help determine the meaning of text that is ambiguous or obscure. See notes 121-123 *supra* and accompanying text.

²⁴³ See note 164, *supra* and accompanying text.

²⁴⁴ See *Pepper*, [1993] 1 All Eng. Rep. at 69, discussed *supra* at notes 61-63 and accompanying text.

²⁴⁵ See *Jackson* [1995] 4 All Eng. Rep. at 1263-64, 1268.

²⁴⁶ See *id.* at 1271 (Lord Bingham), 1276-77 (Lord Nicholls), 1285 (Lord Steyn). The Hansard-related reasoning in these three opinions is discussed *supra* at notes 128-135 and accompanying text. Lord Nicholls announced his view that ministerial statements were valuable to confirm the apparent meaning of text, setting forth a position subsequently endorsed by Lords Hoffmann, Rodger, and Carswell. See *infra* at text accompanying notes 248-250.

Similarly expansive is the court's self-conscious valuing of Hansard for confirmatory purposes in the 2006 case of *Harding v. Wealand*.²⁴⁷ Although *Pepper* permitted the use of ministerial statements only if text was ambiguous or obscure, Lord Hoffman and Lord Rodger each relied on a parliamentary statement by the Lord Chancellor—offered to defuse a possible amendment—in order to strengthen their reading of language they regarded in any event as neither ambiguous nor obscure.²⁴⁸ Lord Carswell, implicitly recognizing this enlargement of *Pepper*'s conceptual domain, declared that ministerial statements may be most valuable in practice to confirm that the text means what it seems to say.²⁴⁹

The conclusion that Hansard may be invoked for such supportive or reinforcing purposes is noteworthy because it brings the legitimization of legislative history use more in line with decades of somewhat covert judicial practice—from Lord Denning's 1979 confession that he often peeked at Hansard (presumably to see if he had missed anything)²⁵⁰ to recent extrajudicial statements that the Law Lords look to Hansard (presumably for reassurance) far more often than they actually cite to the parliamentary record.²⁵¹ This use of legislative history to confirm plain meaning also brings British justifications more in line with our own.²⁵² Ironically, legislative history reliance for confirmatory purposes may be declining in the Supreme Court, as justices comfortable with such uses decide, even if subconsciously, not to risk losing the allegiance of

²⁴⁷ See *Harding*, [2006] 3 WLR 83.

²⁴⁸ See *id.* at 93 (Lord Hoffmann), 104 (Lord Rodger).

²⁴⁹ See *id.* at 106-07 (Lord Carswell). The Hansard-related reasoning in the three *Harding* opinions is discussed *supra* at notes 137-140 and accompanying text. The Law Lords had ignored the first of the three *Pepper* factors (that the text must be ambiguous or obscure) in some early decisions—see note 82 *supra* and accompanying text—but they had not previously embraced in such open and deliberative terms the legitimacy of using Hansard for confirmatory purposes.

²⁵⁰ See note 33, *supra* and accompanying text.

²⁵¹ See note 54 and accompanying text (discussing Lord Browne-Wilkinson's observation in *Pepper* that many distinguished judges acknowledged they already were looking at Hansard to discern the intention of Parliament).

²⁵² See, e.g., *Stat. Interp. Hrg.*, *supra* note 178, at 5-6, 14-15 (statement of Chief Judge Patricia Wald) (reviewing Court's decisions from 1989 Term that use legislative history to confirm apparent textual meaning); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 Term: Scalia Rails But Legislative History Remains on Track*, 23 SW. U. L. REV. 47, 50-53 (analyzing five decisions from 1992 Term that used legislative history to support or confirm a conclusion reached after determining that text was not ambiguous).

Justice Scalia or Justice Thomas by invoking the resource when it performs a supportive rather than essential function.²⁵³

The quantitative and doctrinal evidence highlighted here does not mean that the Law Lords will now proceed to expand steadily their use of Hansard. The fourteen years since *Pepper* was decided contrasts with U.S. experience of 114 years since the Supreme Court decided *Holy Trinity Church*,²⁵⁴ the case that in retrospect is viewed as ushering in our modern legislative history era.²⁵⁵ It was several decades after *Holy Trinity Church* before judicial reliance on legislative history became a relatively consistent practice.²⁵⁶ British judges and academics continue to express some second thoughts about the rule of *Pepper* and its consequences, and the Law Lords may well endure a period of uneven development with respect to Hansard references for the near future.

Nonetheless, the Law Lords since 1992 have come to rely on legislative history for a range of theoretical reasons that are familiar to American judges and legal academics. As evidenced in *Pepper*, parliamentary debates are on occasion important in traditional rule-of-law terms to help resolve the meaning of ambiguous text. As demonstrated in *Jackson* and *Harding*, both drafting history and ministerial exchanges may be valuable from an intentionalist standpoint to reinforce or confirm that the apparent meaning of certain statutory words or phrases is also the meaning that members of Parliament most probably had in mind. Finally, as indicated in a series

²⁵³ See Brudney & Ditslear, *supra* note 7, at 222-24 (reporting and discussing their finding that three justices who served for substantial periods before and after Justice Scalia's arrival in 1986 relied on legislative history significantly less often in their majority opinions written since 1986); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994) (attributing majority decline in legislative history use to realities of building majority coalitions among justices in face of uncompromising stance by Justices Scalia and Thomas).

²⁵⁴ *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

²⁵⁵ See William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION 680-81 (3d. ed. 2001). For two comprehensive and thoughtful yet conflicting analyses of *Holy Trinity Church*, see Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

²⁵⁶ See generally Eskridge, *supra* note 16, at 392; Frankfurter, *supra* note 1, at 543.

of decisions,²⁵⁷ the parliamentary record is relevant in a purposivist context for describing certain background policy rationales that help inform the interpretive enterprise. In short, the Law Lords appear to be broadening their insights as to how reference to Hansard sheds light on the existence of legislative intent and also helps clarify the context in which Parliament chose to enact certain language as statutory text.²⁵⁸

B. *Possible Lessons From Comparative Experience*

It seems likely that legislative history references will remain a feature of statutory interpretation by British courts even as reservations continue to be expressed. With that prospect in mind, I offer some preliminary thoughts on what the Supreme Court and Law Lords might learn from one another in terms of how each currently approaches the use of legislative history.

1. *Judicial Debate Between Advocates and Skeptics—A Lesson for the Supreme Court?*

When the Law Lords in *Pepper* abandoned prior precedent and authorized consideration of parliamentary proceedings, they made clear that their new interpretive approach would require judges to assess just how helpful Hansard might be on a case-by-case basis. Although the legislative history at issue in *Pepper* was deemed highly persuasive by the majority,²⁵⁹ Lord Browne-Wilkinson repeatedly observed that as a general proposition parliamentary materials contain simply an *indication* of what mischief was aimed at or what cure intended by the use of certain words.²⁶⁰ The opinions in *Pepper* regarded Hansard as one among many aids to the construction of ambiguous text, one that can assist the court to varying degrees depending on the

²⁵⁷ See, e.g. cases identified at note 122, *supra* and accompanying text.

²⁵⁸ Cf. Chomsky, *supra* note 255, at 951-52 (suggesting reasons why American judges should consult legislative history based on lessons from *Holy Trinity Church*).

²⁵⁹ See text accompanying notes 44-47 and 67-70 *supra* (recounting how majority shifted from pro-government to pro-taxpayer outcome largely due to legislative history).

²⁶⁰ See *Pepper*, [1993] 1 All Eng. Rep. at 64, 67.

factual circumstances.²⁶¹ In subsequent decisions, the strongest advocates for invoking legislative history have reiterated that even when *Pepper*'s three-part test for admissibility was satisfied, a court still must assign weight to the ministerial statements in light of all relevant considerations.²⁶²

Legislative history skeptics on the highest court have effectively adopted the same basic approach in a post-*Pepper* world. Admissibility of Hansard as a judicial aid is settled, and the primary issues that trigger debate are whether courts should accord weight to parliamentary proceedings in varying contexts. Thus for Lord Steyn—the leading judicial critic of *Pepper*—Hansard is potentially valuable to courts in order to estop the executive from abandoning its prior representations in Parliament as to the meaning of particular words or phrases in text.²⁶³ Just how valuable Hansard is for this purpose will vary depending on the circumstances in which an estoppel argument arises.²⁶⁴

Similarly, Lord Steyn and other legislative history skeptics recognize that Hansard may be of assistance in identifying the mischief at which a textual provision is aimed, and that such a role will at times shed light on the meaning of the text under review.²⁶⁵ Judges with reservations

²⁶¹ See *id.* at 69 (Lord Browne-Wilkinson); at 51 (Lord Griffiths); at 52 (Lord Oliver of Aylmerton). Professor Vogenauer persuasively argues that the opinions in *Pepper* accord probative but scarcely binding weight to Hansard, preserving for the courts the ultimate constitutional authority to determine the meaning of statutory text. See Vogenauer, note 3 *supra* at 661-63.

²⁶² Lord Nicholls in his *Spath Holme* opinion observed that to say parliamentary materials qualified as an external aid meant simply that such materials “*are a factor the court will take into account*” along with other interpretive resources that may assist in construing ambiguous or obscure text. *Spath Holme*, [2001] 1 All Eng. Rep. at 218 (emphasis added). See also *id.* at 223 (Lord Cooke) (stating that courts “can in the end derive real help from Hansard, *even if it is not necessarily decisive help.*” (emphasis added); *Harding*, [2005] 3 WLR at 107 (Lord Carswell) (opining that references to Hansard as a confirmatory aid will be helpful on some occasions but not others).

²⁶³ See Steyn, *supra* note 4, at 67, 70; *McDonnell*, [2004] 1 All Eng. Rep. at 655-56.

²⁶⁴ Compare, e.g., *Spath Holme*, [2001] 1 All Eng. Rep. at 227 (Lord Hope) (contending that estoppel rationale was properly invoked in *Pepper*) with *Reg. v. A.* [2001] UKHL 25, [2001] 3 All Eng. Rep. 1, 28 (Lord Hope) (concluding that estoppel rationale carries no persuasive weight under facts of case).

²⁶⁵ See, e.g., *Lesotho Highlands Dev. Auth. v. Impreglio* [2005] UKHL 43, [2006] 1 A.C. 221, ____ (Lord Steyn); *Reg. v. Soneji* [2005] UKHL 49, [2005] 4 All Eng. Rep. 321, 324-25 (Lord Steyn); *Reg. v. A.* [2001] 3 All Eng. Rep. at 47-48 (Lord Hutton).

about some uses of legislative history also are prepared—in suitable circumstances—to rely on the record of a statute’s drafting history to aid in understanding statutory language.²⁶⁶

The debate within the Law Lords between legislative history advocates and skeptics is thus about weight more than admissibility. Some judges contend that Hansard should never be used to help identify parliamentary intent as to the meaning of enacted words or phrases, but even they agree that Hansard can be valuable in a range of other interpretive settings.

Disagreements on the high court since *Pepper* suggest the judges are searching for an appropriate balance in terms of how often to use legislative history, not whether it should be relied on at all. These disagreements, informed by concern over possible costs imposed on parties and their counsel who comb through Hansard and on lower court judges who must evaluate the results of such searches, have produced a lively and at times nuanced set of exchanges.

By contrast, recent debate on the Supreme Court between legislative history advocates and skeptics has generally been cast in all-or-nothing form. Justice Scalia has shaped the terms of this debate, insisting that judges ought never to consult, much less rely on, legislative history when construing statutes.²⁶⁷ In support of his position, Justice Scalia has advanced constitutional and practical arguments for why courts should eschew all reference to legislative history.²⁶⁸ He has been joined in this blanket rule approach on some occasions by Justice Thomas, but after

²⁶⁶ See Reg. (Jackson) v. Attorney General [2005] UKHL 56, [2005] 4 All Eng. Rep. 1253, 1263-64 (Lord Bingham).

²⁶⁷ See e.g., Scalia, *supra* note 154, at 31-37; Conroy v. Aniskoff, 507 U.S. 511, 518-28 (1993) (Scalia J., concurring in judgment); Zedner v. United States, 126 S. Ct. 1976, 1990-91 (2006) (Scalia J., concurring in judgment).

²⁶⁸ For constitutional arguments, see, e.g., Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J. concurring in judgment) (invoking separation of powers considerations); INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia J., concurring in judgment) (invoking legislative supremacy considerations). For practical arguments, see, e.g., Conroy v. Aniskoff, *supra* note 267, 507 U.S. at 519 (invoking litigation costs to parties); Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia J., concurring in judgment) (invoking likelihood of opportunistic behavior in creation of legislative history).

twenty years by no one else on the Court.²⁶⁹ Several justices have responded to the Scalia critique, defending or justifying the basic utility of legislative history, albeit with relatively spare arguments.²⁷⁰ The first term of the Roberts Court suggests there will be no new converts to the Scalia position—indeed Justice Alito in one of his first majority opinions drew a sharp rebuke for invoking legislative history to help confirm the Court’s construction of language in a criminal statute.²⁷¹

Justice Scalia’s deeply skeptical views were manifested most recently in *Hamdan v. Rumsfeld*.²⁷² An important issue in that case was whether the 2005 Detainee Treatment Act (DTA) deprived the federal courts of jurisdiction over a habeas corpus petition, pending at the time of DTA enactment, that was brought by an alien who had been detained by the Department of Defense at an American prison in Guantanamo Bay, Cuba.²⁷³

Justice Stevens for the majority concluded that both the DTA text and its legislative history reflected Congress’s determination *not* to remove habeas jurisdiction for cases pending at the time of enactment.²⁷⁴ In his reliance on the legislative record, Justice Stevens invoked the DTA’s drafting history, noting that Congress had rejected earlier proposed versions of the statute

²⁶⁹ See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia and Thomas, JJ., concurring); *Reves v. Ernst & Young*, 507 U.S. 170, 172 n.1 (1993) (reflecting views of JJ. Scalia and Thomas). Justice Scalia is supported by members of the academic community who share his belief that legislative history should never be consulted. See, e.g., Vermeule, *supra* note 156, Manning, *supra* note 156, Nagle, *supra* note 156.

²⁷⁰ For examples of abbreviated defenses, see e.g. *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993) (Stevens, J.); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 n.8 (1992) (Souter, J.); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 611-12 n.4 (1991) (White, J.). For a more detailed justification, see *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 254, 276-78 (1996) (Stevens, J., concurring).

²⁷¹ See *Zedner v. United States*, 126 S. Ct. at 1985-86 (2006) (Alito, J. relying on Senate and House committee reports); *id.* at 1990-91 (Scalia, J. concurring in judgment, criticizing majority’s reliance on legislative history as predicated on a “naïve belief” in the imputation of collective intent from a committee report statement, and as “especially...ill-advised” in this case). See also *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the Senate Committee on the Judiciary*, 109th Cong. 318-19 (2005) (statement by then-nominee Roberts that “I have quoted and looked to legislative history in the past [as an appellate judge] to help determine the meaning of ambiguous terms, and I would expect to follow the same approach on the Supreme Court.”).

²⁷² 126 S. Ct. 2749, 2815-17 (2006) (Scalia, J., dissenting).

²⁷³ See 126 S. Ct. at 2259, 2762-69 (majority opinion).

²⁷⁴ See *id.* at 2765-69 (setting forth majority conclusions based on text and legislative history).

that would have removed the jurisdiction at issue.²⁷⁵ Justice Stevens also pointed to the floor statement of a leading Senate co-sponsor, delivered during debate preceding the Senate vote, while discounting contrary statements by two other Senate co-sponsors because they had been inserted into the Congressional Record after the Senate debate and vote had taken place.²⁷⁶

Justice Scalia in dissent took aim at both prongs of the majority's legislative history position. He insisted that the timing of floor statements by Senate sponsors was entirely irrelevant because such statements by individual members lacked any probative significance.²⁷⁷ Similarly, Justice Scalia reaffirmed his view that there was no reason ever to rely on the drafting history accompanying a bill's enactment.²⁷⁸

Supreme Court justices who are prepared to rely on legislative history in at least some circumstances regularly attach weight to distinctions such as those between pre-enactment and post-enactment statements, or between live floor debate and inserted remarks; they also regularly regard drafting history as probative under certain conditions. Even British judges who have voiced serious reservations about legislative history have accorded weight in some circumstances both to live parliamentary exchanges and to drafting history.²⁷⁹ They do so because they subscribe implicitly if not expressly to the principle of reasonably imputed institutional approval—that the value accorded to legislative history in a given case is linked to whether congressional or parliamentary materials can persuasively be deemed to have been noticed, understood, and endorsed by a presumptively reasonable legislator.²⁸⁰ This is not the place to address the relative merits of conceptual and practical disagreements between Justice Scalia and

²⁷⁵ *See id.* at 2766.

²⁷⁶ *See id.* at 2766-67 n.10.

²⁷⁷ *Id.* at 2815-16.

²⁷⁸ *See id.* at 2817.

²⁷⁹ *See, e.g. Ghaidan*, [2004] 3 All Eng. Rep. at 426-27 (Lord Steyn, crediting live parliamentary exchange); *Jackson*, [2005] 4 All Eng. Rep. at 1263-64, 1268 (Lord Bingham, crediting drafting history).

²⁸⁰ *See* text accompanying notes 167-170 *supra* (discussing this principle as evidenced in writings of Justice Stevens, Breyer, and Souter). *See generally* Brudney, *supra* note 173, at 75-80.

his colleagues regarding the status of legislative history. What matters for present purposes is that because of Justice Scalia's committed opposition to any form of legislative history usage, conceptual disagreements among the justices are almost inevitably cast in terms of admissibility rather than weight.²⁸¹

A less noticed side effect of this conceptual debate has been the relatively impoverished nature of the dialogue on the Court regarding how to approach legislative history as an interpretive asset. While members of the Law Lords grapple with different ways in which Hansard might or might not assist in illuminating the meaning of enacted text, members of the Supreme Court have focused on the threshold issue of admissibility. One could imagine a more enlightening set of judicial exchanges addressed to the relative utility of legislative history in diverse settings. There would be ample scope for such exchanges given that sources of legislative history evidence generated by Congress are at once richer and potentially more perplexing than what is produced within Parliament.

For instance, should legislative history be regarded as presumptively more valuable to help resolve textual ambiguities that stem from lack of foresight rather than lack of political consensus? Is legislative history accompanying omnibus bills generally less suitable for judicial

²⁸¹ Justice Scalia does on occasion engage legislative history advocates on their own terms, arguing that the legislative history evidence is contextually unpersuasive even indulging the assumption it is admissible. *See, e.g., Hamdan, supra*, 126 S. Ct. at 2816 (arguing that majority exaggerates the one-sidedness of pre-enactment floor debate); *Babbitt v. Sweet Home* 515 U.S. 687, 726-30 (1995) (Scalia, J., dissenting) (arguing that majority overvalues committee report evidence while undervaluing certain floor statement evidence). Moreover, Justice Scalia has carved out at least one exception to his blanket rule: courts may consult legislative history in the rare instances when such history would enable them to avoid an absurd result apparently dictated by text. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment). Nonetheless, Justice Scalia has expressed his fundamental objections to any use of legislative history with conviction and perseverance, and his position has become the singular focus for debate and interchange among the justices as to the methodological value of this resource.

Justice Scalia's skepticism regarding legislative history is an integral part of his larger jurisprudential campaign to restrict judicial choice or discretion in the interpretation of statutes. *See generally*, Scalia, *supra* note 154; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHIC. L. REV. 1175 (1989); Jonathan Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 370-71 (2005). The view that use of legislative history promotes judicial discretion and textualism confines such discretion is seriously contested, but is beyond the scope of this article.

use because congressional deals on such a grand scale are simply indecipherable? Should legislative history in certain subject areas be presumed to have less weight where the law is administered primarily by a federal agency rather than private parties, or where the statutory text tends to be detailed and technical rather than open-ended and of more general public interest? There are no ready answers to such questions, and legal scholars are contributing to the conversation.²⁸² But in light of the current Court's fault line focused on the threshold admissibility of legislative history, the justices have played little role in exploring prospects for how legislative history can or should be valued differently in varying circumstances, an exploration that is thriving among the Law Lords.

2. *Applying Legislative History—A Lesson for the Law Lords?*

It is still early in Britain's post-*Pepper* period, but the Law Lords have created a series of putative bright-line classifications to channel how legislative history may be invoked as an interpretive asset. There is some question as to whether these distinctions among multiple categories can withstand prolonged scrutiny, but the court's approach seems in part an effort to impose order in a new and unfamiliar area of responsibility.

As described more generally in Part I.C above, the Law Lords have recognized two categories of Hansard usage as unproblematic and as having the potential for general application. First, Hansard may be consulted by a court to identify the mischief at which a law is aimed, with the court then applying the mischief-avoidance purpose to assist in construing text. Thus, for instance, the Law Lords invoked a ministerial discussion of the philosophy behind the 1996

²⁸² See e.g., William Eskridge, Jr. *Book Review: No Frills Textualism*, 119 HARV. L. REV. 2041, 2074-75 (2006); Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretive to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art. 1 at 6-15, <http://www.bepress.com/ils/iss3/art1>; Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Merrill, *supra* note 253.

Arbitration Act when deciding that an arbitrator's error of law, standing alone, could not be challenged in Court as "the tribunal exceeding its powers" under the statute.²⁸³

The second broadly applicable unproblematic category draws on legislative history materials to assist in understanding what the government's policy is when the court reviews agency decisions for basic fairness or rationality. In this context, the Law Lords have relied on ministerial explanations in Parliament to help understand government sentencing procedures that allegedly abridged the right to a fair tribunal²⁸⁴ and government policies for compensating miscarriages of justice when those policies were alleged to be inadequate.²⁸⁵

Apart from these two categories, described as "innocuous" in a leading 2003 decision,²⁸⁶ some Law Lords have identified a third assertedly noncontroversial use of Hansard, premised on a rationale of estoppel against the government. This category is meant to prohibit the government from abandoning in court a clear representation previously made in Parliament with respect to the meaning of certain statutory words or phrases, or with regard to a government commitment not to exercise its power in a given situation.²⁸⁷ The estoppel rationale for limiting

²⁸³ See *Lesotho Highlands Dev. Auth. v. Impreglio*, [2005] 3 All Eng. Rep. 789, 798-99 (Lord Steyn). See also *Reg. v. Soneji and another*, [2005] 4 All Eng. Rep. 321, 324-25 (Lord Steyn) (relying on parliamentary statements identifying a need to avoid quashing confiscation orders "merely because some procedural error has taken place" when upholding a trial court's belated confiscation order under the 1995 Proceeds of Crime Act).

²⁸⁴ See *Reg. (Anderson) v. Sec'y of State for Home Dept.* [2002] UKHL 46, [2002] 4 All Eng. Rep. 1089, 1093, 1095 (Lord Bingham), 1104-05 (Lord Steyn).

²⁸⁵ See *Reg. (Mullen) v. Sec'y of State for Home Dept.* [2004] UKHL 18, [2004] 3 All Eng. Rep. 65, 72 (Lord Bingham), 79-82 (Lord Steyn).

²⁸⁶ *Wilson v. First County Trust Ltd.*, [2003] 4 All Eng. Rep. 97, 117 (Lord Nicholls).

²⁸⁷ See *Wilson supra* at 122 (Lord Hope) (discussing estoppel rationale with respect to meaning of certain words); *Ex p. Spath Holme*, [2001] 1 All Eng. Rep. 195, 212 (Lord Bingham) (discussing estoppel rationale with respect to scope of government powers).

Hansard use has recently been questioned on conceptual grounds,²⁸⁸ but in any event this category can be expected to have a very narrow application.²⁸⁹

In addition to certain agreed-upon roles for legislative history, the Law Lords have identified several distinct areas as contentious. A fourth category of Hansard usage that has become controversial is the one at the core of the *Pepper* decision. Lord Browne-Wilkinson's determination—that courts may and at times should rely on statements during parliamentary debates as an aid to the construction of enacted words or phrases—continues to be endorsed by many members of the high court but has been renounced by some others.²⁹⁰ The Law Lords also have declared Hansard references off limits in a fifth and sixth setting regarded as suspect. In *Spath Holme*, the court announced that (subject to the improbable government estoppel exception) ministerial statements addressed to the scope of a government's statutory powers were inadmissible in court.²⁹¹ In *Wilson*, the Law Lords further concluded that in reviewing domestic legislation challenged as incompatible with European convention law under the 1998 Human Rights Act, courts could not consult Hansard to aid in resolving issues of compatibility.²⁹²

The distinctions among these various categories may at a minimum require some adjustment as new controversies arise. For example, the *Spath Holme* decision involved a challenge to the government's exercise of its statutory authority to “provide for...restricting or

²⁸⁸ See *Sales*, *supra* note 142, at 589-90 (contending that insofar as a statute is enacted to bind citizens as well as the government, it makes little sense to conclude—under an estoppel rationale—that the text should have one meaning when applied to the government and another meaning when applied to private citizens).

²⁸⁹ The Law Lords have described the prospect of a minister assuring Parliament that certain discretionary powers would never be used as “improbable[e]” and “most unlikely,” (*Ex p. Spath Holme*, [2001] 1 All Eng. Rep. at 216). The court's discussion of estoppel in the meaning-of-words context has focused almost exclusively on whether this rationale confines the scope of the holding in *Pepper* itself. See, e.g., *McDonnell*, [2004] 1 All Eng. Rep. at 655-56 (Lord Steyn); *Wilson*, [2003] 4 All Eng. Rep. at 130-31 (Lord Hope).

²⁹⁰ See text accompanying notes 124-142 *supra*.

²⁹¹ See *Ex p. Spath Holme*, discussed *supra* at text accompanying notes 112-113.

²⁹² See *Wilson*, discussed *supra* at text accompanying notes 116-120.

preventing increases of rent.”²⁹³ Assuming *arguendo* that a minister’s parliamentary statement clearly set forth the justification behind the creation of this power to “restrict[] or prevent[] increases,” it is not obvious why such legislative history should be excluded as bearing on the scope of government power rather than taken seriously as relating to the meaning of an enacted phrase.²⁹⁴ Similarly, when considering the proportionality of a statutory provision under the Human Rights Act, it is puzzling that the court may find Hansard materials inadmissible to help determine matters of compatibility, yet useful because related to the background mischief at which the provision is aimed.²⁹⁵

Whether the particular lines drawn by the Law Lords when applying legislative history are sustainable in practical and conceptual terms is beyond the scope of this article. For present comparative law purposes, what stands out is that the judges on the highest court have created as many as six presumptively strict categories in the course of determining that judicial reliance on Hansard may in different settings be innocuously helpful, controversial yet beneficial, or troubling and unwelcome. As for why the court has adopted this somewhat rigid approach, it may be that such linedrawing is regarded by the judges, even if subconsciously, as the best way of giving shape to a dramatic new set of responsibilities.

Rules are often favored as legal directives because they are perceived as providing a level of certainty or predictability.²⁹⁶ The Law Lords may well regard their efforts at classification as

²⁹³ 1985 Landlord and Tenant Act, §31(1), quoted in *Spath Holme*, [2001] 1 All Eng. Rep. at 200.

²⁹⁴ Compare, *id.* at 212 (Lord Bingham) (regarding Hansard as inadmissible) with *id.* at 215, 218-19 (Lord Nicholls) (regarding Hansard as admissible but not persuasive in this instance) and *id.* at 219-23 (Lord Cooke) (regarding Hansard as admissible and helpful in this instance).

²⁹⁵ See *Reg. (Williamson) v. Sec’y for Educ. and Empl.* [2005] UKHL 15, [2005] 2 All Eng. Rep. 1, 10, 16-17 (Lord Nicholls) (recognizing that proportionality of provision prohibiting parent-supported corporal punishment by teachers at a religious school “is to be judged objectively and not by the quality of the reasons advanced... in the course of parliamentary debate” while also noting with approval that the debate featured consideration of whether to override parental choice and specifically discussed the Convention rights of parents).

²⁹⁶ See generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992).

furnishing important guidance to lower courts that have entered an interpretive domain deemed off limits for centuries. Such guidance may be especially apt because early evidence indicates fairly substantial Hansard usage by lower courts.²⁹⁷ Further, such a rule-based approach may be part of a judicial effort to channel if not confine attorney appetites for this new asset.²⁹⁸ Attorneys' interest in parliamentary materials creates additional burdens for judges, because the required submission of Hansard extracts accompanied by a written summary of argument imposes an extra obligation on courts that rely heavily on oral presentations and that lack law clerks to aid in the review and analysis of such pre-hearing submissions.²⁹⁹ Finally, the Law Lords themselves seem somewhat wary of what they have wrought,³⁰⁰ and a series of ostensibly sharp lines may lend structure to what is for them a rather open-ended enterprise.

In contrast to the Law Lords' sudden exposure to Hansard, the Supreme Court has been invoking committee reports, floor statements, and drafting history to assist in construing statutes on a fairly regular basis for more than half a century.³⁰¹ Over this period, the Court has not articulated bright line rules or even a terribly structured approach for legislative history usage. Instead, the Justices have applied a rather amorphous standard based on reliability, an approach that tends to take account of the totality of circumstances in a given case.

To be sure, there is a broadly recognized hierarchy of reliable legislative history sources. Conference reports, standing committee reports, and explanatory floor statements by bill

²⁹⁷ See sources cited in note 141, *supra*.

²⁹⁸ In this regard, see also text accompanying notes 64-66 *supra* (setting forth procedural hurdles to use of Hansard by counsel, including sanctions for noncompliance).

²⁹⁹ See note 66, *supra* and accompanying text (discussing special pre-hearing submission requirements for use of Hansard). See generally House of Lords, *Practice Directions Applicable to Civil Appeals* 21-25 (2006), available at www.publications.parliament.uk. (describing components of skeletal argument to be submitted by counsel in advance of hearing, and noting that oral arguments may last more than 17.5 hours (four sitting days)).

³⁰⁰ See, e.g., *Robinson, supra*, [2002] N. Ir. L. R. 390, 405 (Lord Hoffman); *Reg. (Jackson) v. Attorney General*, [2005] 4 All Eng. Rep. 1253, 1285 (Lord Steyn).

³⁰¹ See sources at note 16, *supra*.

sponsors or managers are clustered near the top,³⁰² while legislative inaction, statements by nonlegislative drafters, and post-enactment history are arrayed close to the bottom.³⁰³ Nonetheless, the Supreme Court often finds committee report evidence to be unhelpful or legislative inaction to be highly probative based on the factors at hand, and the justices do not appear especially dedicated to assigning any given source a predictable place within the hierarchy.³⁰⁴ In addition, legislative history sources of all kinds are often regarded as more valuable or useful to help address the meaning of inconclusive text than to confirm, question, or supplant the meaning of text that is clear.³⁰⁵ Yet the Court continues to consult legislative history even when the text itself is unambiguous,³⁰⁶ and it justifies this practice in the face of other decisions that seem bent on prohibiting it.³⁰⁷

The Supreme Court's approach when applying legislative history is open to criticism for being overly vague, and the concept of reliability is not easy to pin down. Professors Eskridge, Frickey, and Garrett have referred generally to whether a given committee report or floor manager's statement constitutes "reliable evidence of consensus within the legislature that can be routinely discerned by interpreters,"³⁰⁸ and I discussed earlier whether legislative record evidence "can persuasively be deemed to have been noticed, understood, and endorsed by a

³⁰² See Eskridge et al., *supra* note 185, at 311-12; Kent Greenawalt, STATUTORY INTERPRETATION: 20 QUESTIONS 173 (1999).

³⁰³ See Eskridge et al., *supra* at 315-17; Greenawalt, *supra* at 174-75.

³⁰⁴ For example, on the issue of whether courts should rely on the *silence* of legislative history as evidence that a statutory amendment effecting a potentially substantial change in policy has not done so, compare e.g., *Harrison v. PPG Industries* 446 U.S. 578, 592 (1980) (stating that "in ascertaining the meaning of a statute, a court *cannot*, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark") (emphasis added) with *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (relying on legislative history silence as probative that Congress lacked an intent to make a major policy change, likening "Congress's silence in this regard...to the dog that didn't bark"). See generally Siegel, *supra* note 281, at 385-89.

³⁰⁵ See generally Breyer, *supra* note 178, at 848.

³⁰⁶ See, e.g., *Zedner v. United States*, *supra* note 271, *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 586-89 (2004).

³⁰⁷ See, e.g., *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citation omitted). See generally Siegel *supra* note 281, at 386.

³⁰⁸ See Eskridge et al., *supra* note 185, at 304 (emphasis on "reliable" omitted).

presumptively reasonable legislator.”³⁰⁹ Although each of these formulations leaves ample—some would say excessive—room for the exercise of judicial discretion, there are certain advantages to the use of such an interpretive approach.

One benefit is that the reliability standard is flexible enough for judges to adapt its application as relevant factors change over time.³¹⁰ For example, because of advances in technology such as electronic voting and live telecasts of floor proceedings, members spend considerably less time than they used to on the floor of the House or Senate, either debating and listening to one another or discussing privately how they expect to vote.³¹¹ It seems reasonable to infer from this change that floor statements, even those delivered by bill managers, should less readily be deemed to have been noticed and endorsed by presumptively reasonable legislators when those legislators’ presence on the floor has become principally associated with the ringing of a bell to announce a timed vote.³¹² There is some evidence that in the aggregate the Court’s reliance on floor statements as a proportion of its overall legislative history reliance has declined substantially since the late 1980s.³¹³ This decline warrants further investigation, but it seems plausible that the justices, and litigants who appear before them, may be adjusting their sense of

³⁰⁹ See text accompanying note 280 *supra*.

³¹⁰ See generally Sullivan, *supra* note 296, at 66.

³¹¹ See, e.g., RENEWING CONGRESS: A SECOND REPORT 57 (The American Enterprise Institute and The Brookings Institution 1993); George E. Connor & Bruce I. Oppenheimer, *Deliberation: An Untimed Value in a Timed Game*, in CONGRESS RECONSIDERED 315, 324-25 (Lawrence C. Dodd & Bruce I. Oppenheimer eds. 5th ed. 1993); Joseph M. Bessette, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 151-53 (1994). Members also come to the chamber floor less often due to other factors, such as the need to spend considerable time raising money for re-election campaigns.

³¹² See Greenawalt, *supra* note 302, at 175-76 (contending that because fewer members are present or paying attention to floor debates today, reliance on those floor debates to reflect collective legislative intent is less persuasive).

³¹³ Preliminary findings are derived from the dataset of 650 Supreme Court decisions on workplace law compiled by the author. See note 145 *supra*. Brudney and Ditslear have looked at the Court’s reliance on different legislative history sources, measured in five-year intervals starting with 1969-73 and ending with 1999-2003. They found that reliance on House floor statements dropped from more than 40 percent of all majority opinions using legislative history during the early and mid 1980s to well below 20 percent of such cases after 1988. Reliance on Senate floor statements as a percentage of all cases relying on legislative history declined from more than 50 percent in the 1980s to roughly 15 percent in the period since 1993. A copy of these preliminary results is on file with the author; Brudney and Ditslear are pursuing further research in this area.

what constitutes reliable legislative history in response to changing realities of the lawmaking process.

Another possible advantage of a less rule-oriented focus is that it forces judges to acknowledge that they *are* exercising discretion when invoking some legislative history sources and not others, or relying on that history for some reasons and not others. In this regard, the Supreme Court's ad hoc approach to applying legislative history may reflect the increased sense of assurance that accompanies a more mature or settled stage of jurisprudence on this topic. The Court has been making use of legislative history for several generations, and the current justices have been exposed in their education if not their experience to various complexities of the lawmaking process.³¹⁴ It is therefore not surprising that those who make regular use of legislative history seem comfortable separating wheat from chaff on an individual case basis in much the same way they do when applying other interpretive resources.³¹⁵

Over time, British judges—educated and experienced in common law traditions and practice—may come to adapt their initial approach to the dynamic realities of European as well as domestic events. The recent opinions in *Jackson* and *Harding* suggest an evolving awareness of how *Pepper* read literally may unduly confine the court's ability to make constructive use of Hansard. Given these developments, it seems possible and perhaps desirable that the Law Lords

³¹⁴ To be sure, fewer justices today have first-hand legislative experience than was the case in the decades preceding 1970. See James J. Brudney, *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. L. REV. 1015, 1049 (2005). Still, all have been exposed to the legislative process in college and/or law school, most have had years of experience sifting the products of that process as appellate judges, and presumably many if not all follow congressional developments and disagreements as intelligent consumers of the Washington media.

³¹⁵ A proponent of legislative history in the U.S. might well respond that Britain's rule-based approach would do a better job of limiting the discretion available to Supreme Court justices, and that limiting judicial choice in this area is especially desirable given the volume and diversity of legislative history sources typically available in the American context. Whether the Court's reliability standard would be enhanced if the justices were to endorse and adhere to one or more subsidiary guidelines presumptively constraining the uses of legislative history warrants further consideration in another setting.

consider a more flexible and less rule-bound approach when determining how best to rely on parliamentary materials.

CONCLUSION

Fourteen years after *Pepper v. Hart*, the Law Lords remain in the initial stages of a fruitful debate concerning the appropriate uses of legislative history. This article suggests that the British court's applications and refinements of *Pepper*, when viewed from a comparative perspective, can contribute to a deeper understanding of certain interpretive challenges facing our own federal judiciary.

Both the Law Lords and the Supreme Court rely on legislative record evidence to help clarify the meaning of statutory text. Some of the judicial rhetoric in Britain reflects concern that Pandora's Box has been opened, while discussion regarding recent Supreme Court practice has focused on the trend toward limiting judicial usage. Notwithstanding these perceptions, the comparative reality is that over the past decade, Supreme Court use of legislative history well exceeds Law Lords references to Hansard. An analysis of factors related to the legislative process within each country helps account for why this substantial difference exists and is likely to remain in place for the foreseeable future.

At the same time, the article's examination of aggregate data and doctrinal developments since 1992 suggests that the Law Lords will continue to rely on parliamentary materials and may well extend the permissible scope of Hansard references. From a comparative standpoint, it is intriguing that British legal culture, which shares our basic approach to judicial review of statutory meaning, now finds enhanced interpretive value in the historical materials that help fuel the legislative process. By endorsing the legitimacy and utility of Hansard, the Law Lords may in effect be exerting subtle normative pressure on those who would reject legislative history

altogether in the U.S. setting. In contrast to Britain, our legislative record features an especially informative resource—committee reports—and explanatory materials that regularly shed light on the bargains endemic to our lawmaking enterprise. Those distinctive assets would seem to argue for our becoming more attentive to the nuances of positive reliance on legislative history, rather than simply continuing to debate the merits of its wholesale exclusion.

Finally, the comparative explanations and analyses presented here should be viewed as a first step in the development of an ongoing research agenda. It is important to examine, for instance, how British lower courts have used Hansard under the rule of *Pepper*, and how they respond to the Law Lords' most recent signals in *Jackson* and *Harding*. In addition, British courts have long made use of traditional textualist resources such as dictionaries and language canons when interpreting statutes.³¹⁶ It would be worth exploring how the admissibility of parliamentary materials is affecting previously settled judicial practices in this regard. As legislative history becomes a more established element in Britain's approach to statutory interpretation, there will doubtless be other ways to pursue how courts in that country consider what is below the surface and yet fairly understood to be part of enacted text.

³¹⁶ See, e.g., *Mandla v. Dowell Lee*, [1983] 1 All Eng. Rep. 1062, 1065-66 (invoking several dictionary definitions of contested statutory phrase); *Queens Univ. of Belfast v. Comm'r of Valuation*, [2002] RA 189, ___ (Land Tribunal for N. Ire.) (invoking language canon of *eiusdem generis*).