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I. INTRODUCTION

Statutory interpretation is the process of discerning the meaning of legislation, and U.S. law has permitted courts to find meaning through a variety of often contradictory interpretive approaches. As a result, U.S. litigants often are uncertain about the interpretive approach a court will apply to a statute, even though the choice of the interpretive approach may determine the outcome of the litigation.[1] Until the recent decision in *Pepper (Inspector of Taxes) v. Hart*,[2] English approaches to statutory interpretation were more circumscribed because English courts foreclosed the intentionalist approach. This Article considers the impact that *Pepper* has had on statutory interpretation in England.

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[1] Because the stakes are often high, U.S. courts and commentators take full advantage of the numerous opportunities to debate and chide adherents of different approaches to statutory interpretation. For example, see the opinions criticizing the majority's approach to statutory interpretation in Public Citizen v. United States Department of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment); United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 228–29 (1979) (Rehnquist, J., dissenting); United States v. Marshall, 908 F.2d 1312, 1335 (7th Cir. 1990) (en banc) (Posner, C.J., dissenting), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453, 468 (1991). For examples of the scholarly debate over statutory interpretation, see sources cited in WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 751 n.3 (2d ed. 1995).

[2] [1993] 1 All E.R. 42 (H.L.).

The second Part of the Article briefly describes the broad range of conflicting approaches to statutory interpretation that jurists now commonly employ in U.S. courts. It then contrasts the interpretive rules of U.S. law with those of English law. Part three of the Article discusses the House of Lords decision in *Pepper*, which abandoned the bar against intentionalist interpretation. This part shows how the House of Lords endeavored to protect English statutory interpretation from being Americanized by adopting several threshold requirements intended to ensure that courts would pursue intentionalist interpretations only in rare cases. Part four considers whether the House of Lords succeeded in placing principled limits on intentionalist interpretations of English statutes.

The Article concludes that English rules of statutory interpretation have become much more like U.S. rules and that *Pepper* itself shows how English law can be transformed, notwithstanding the House of Lords' effort to place principled, clear, and significant limits on intentionalist interpretation.

II. CONTRASTING U.S. AND ENGLISH RULES OF STATUTORY INTERPRETATION

A. U.S. Rules of Statutory Interpretation

U.S. rules long have been quite untidy with respect to the permitted approaches to statutory interpretation. At present, there are at least three distinct approaches courts may employ to determine the meaning of a statutory text: textualism, intentionalism, and purposivism (also called modified intentionalism).[3] Followers of each defend their preferred approach as being consistent with the principle of legislative supremacy. This claim can be made because each approach purports to follow the directives of the legislature in assigning meaning to the statute enacted by it. The approaches differ in where and how the courts will discern the legislative directives.

The textualist approach has undergone a recent renaissance following the appointment of many politically conservative judges by Presidents Reagan and Bush.[4] Most prominent among these jurists are Supreme Court Justices Scalia and Thomas[5] and Seventh Circuit Court

[3] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990).

[4] *See* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1991); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

[5] *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351, 363 (1994) (remarking that Justice Scalia's insistence on the "virtues of textualism" and the "evils of legislative history" seems to have influenced Justice Thomas' approach to statutory interpretation). Justice Scalia has been characterized as "the most prominent textualist on the contemporary Supreme Court." WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 337 (1993).

of Appeals Judge Easterbrook.[6] The avowed goal of textualism is objectivity, and the general rule of this approach is that courts must rely solely on the words of the statute to determine its meaning.[7] In the view of textualists, this objectivity reinforces separation of powers principles and rule of law values.[8] Textualists are particularly wary about using legislative history to discern the meaning of statutes.[9]

A second approach is the intentionalist approach, which seeks to interpret legislation based on legislative intent. Intentionalists discern legislative intent from statutory text and legislative history.[10] Critics of intentionalism argue that it erroneously imputes a singular intent to a large group of legislators.[11] Moreover, the willingness of intentionalists to inquire beyond the statutory text contrasts starkly with textualism and

6 *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing that a court has no authority to construe statutes on the basis of legislative history indicative of either Congressional intent or purpose).

7 *See* Merrill, *supra* note 5, at 352 ("The critical assumption [of textualism] is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislature were." (footnote omitted)); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 175 (2d ed. 1997) (Textualists "prefer an image of the text as an independently observable fact on which judges can rely.").

8 *See* POPKIN, *supra* note 7, at 174–75.

9 *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court."); *see also* Pierce, *supra* note 4, at 777–78.

10 The use of legislative history to construe legislative intent first occurred in the U.S. Supreme Court more than one hundred years ago. *See* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1079 (1991) (describing Dubuque & Pac. R.R. v. Litchfield, 64 U.S. (23 How.) 66 (1860), as the case in which "the Supreme Court first resorted to legislative history in aid of statutory construction." (footnote omitted)); *see also* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 302 (1982) (explaining that, since 1938, there has been, in general, a continual increase in usage of legislative historical documents on the part of the Supreme Court").

11 *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 68–79 (1975) (summarizing scholarly critiques of intentionalism); *see also* RONALD DWORKIN, A MATTER OF PRINCIPLE 319–26 (1985) (critiquing Justice Rehnquist's reliance on intentionalism in his dissent in *Weber*, 443 U.S. at 219). Critics of the House of Lords decision in *Pepper* have relied prominently on this theoretical criticism of intentionalism. *See* Scott C. Styles, *The Rule of Parliament: Statutory Interpretation after* Pepper v. Hart, 14 OXFORD J. OF LEGAL STUD. 151, 154 (1994) ("Parliament is made up of two Houses, each with hundreds of members, [thus,] it is impossible for any one individual to claim to speak on behalf of Parliament, to convey the intentions of Parliament. . . . [I]t therefore followed that the intention of the Parliament, in so far as the phrase had any utility at all, was confined to the words of the statutes themselves.").

> It is submitted that evidence of ministerial statements is not relevant evidence because, allowing that statutes should be interpreted according to the intention of Parliament, no individual member of Parliament is in a position to state what that intention is or to speak for the silent majority. Parliament acts as a corporate body and the only expression of its common intention is the text to which the Queen and both Houses have given their unqualified assent.

J.H. Baker, *Case and Comment: Statutory Interpretation and Parliamentary Intention*, 52 CAMBRIDGE L.J. 353, 354 (1993); *id.* at 357 ("It is surely an unwarranted assumption that a minister's interpretation of an ambiguous Bill indicated the intention even of the House of Commons, let alone of Parliament."). Professor Baker faults the decision in *Pepper* for failing to address this criticism of intentionalism. *See id.* at 356 ("It is remarkable that these well-known principles were not properly discussed in *Pepper v. Hart*.").

leaves the intentionalist approach subject to the criticism that it gives too much interpretive discretion to courts:[12]

> Historically, reference by the courts to legislative intent was the subject of intense critical analysis. Such criticism argued that judges frequently used legislative intent to trump statutory language that the judges disfavor. In other words, if they did not like the outcome effected by the statutory language, they would declare that a favored outcome was required by legislative intent.[13]

Textualists are foundationalists who will, at least initially, refer only to text for meaning.[14] They will consider external sources only if the statutory text is ambiguous[15] or leads to an apparently absurd result.[16] Intentionalists, however, are typically nonfoundationalists;[17] they will consider any evidence of legislative intent, including both text and legislative history, to find the meaning of apparently clear statutes.[18] The difference between a foundationalist and a nonfoundationalist approach appears at its core to be a question of whether meaning must be determined by text or context.[19] Intentionalists are typically contextualists, while textualists are, well, textualists.[20]

12 *See* POPKIN, *supra* note 7, at 174–75; *see also* Felix Frankfurter, *Foreword—A Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366–67 (1950) ("In one of those felicitous sentences which Mr. Justice Holmes tossed off in a letter, he characterized intention as 'a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary.'" (citation omitted)).

13 ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 7 (1997).

14 In *Caminetti v. United States*, 242 U.S. 470, 490 (1917), a textualist U.S. Supreme Court explained:

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impractical consequences, it is the sole evidence of the ultimate legislative intent.

15 *See* JAMES WILLARD HURST, DEALING WITH STATUTES 55 (1982) (discussing standard textualist rule that "before [judges] will consider evidence of legislative intent outside the words of the statute they must be persuaded that the words taken in themselves are of uncertain meaning").

16 *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (recognizing that when clear language of a statute leads to an absurd result, the Court may look beyond the statutory text for meaning); Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (stating that the Court may "consult all public materials, including . . . legislative history" when the plain meaning of a statutory text is absurd in order to ascertain whether Congress actually intended that meaning).

17 Another commentator on *Pepper* has distinguished between textualism's exclusive approach to the source of statutory meaning (the statutory text) and intentionalism's "inclusivist" approach, which allows the use of legislative history as well as text to fix meaning. *See* Styles, *supra* note 11, at 152.

18 *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940) (stating that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'") (footnotes omitted).

19 Professor Hurst has concluded that American jurists are typically nonfoundationalists who do not believe that they are bound by a determinate and nonabsurd text:

The third common approach to interpretation in the United States is purposivism. This approach seeks to interpret statutes so as to serve the purpose for which they were created. Purposivism is closely associated in the United States with Professors Hart and Sacks and their Legal Process approach to law,[21] but its roots lie in the Mischief Rule stated by Lord Coke in *Heydon's Case*.[22] Like intentionalism, purposivism is nonfoundationalist because it, too, permits courts to look beyond the statutory text. Meaning is found in external sources, like legislative history, that illuminate a statute's purpose.[23] In the United States, both intentionalists and textualists criticize this approach. Their criticisms include concerns that purposivism is based on unrealistically optimistic assumptions about the legislative process,[24] and that it provides courts with too much discretionary power.[25]

These three approaches do not exhaust the interpretive methods of U.S. lawyers.[26] For example, prominent U.S. legal scholars have urged a practical reasoning approach to interpretation. This approach would

> Time and again, having found the statutory text plain on its face, opinions nonetheless consider evidence outside the text. In practice judges are likely to examine text and extrinsic materials together, treating use of extrinsic evidence relative to the text as presenting a question of credibility and not of competence. Justice Holmes states the working reality: "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

HURST, *supra* note 15, at 56 (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)).

[20] The difference between a strictly textual and a contextual approach to interpretation was the subject of strong debate within the Seventh Circuit Court of Appeals in *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff'd sub nom., Chapman v. United States*, 500 U.S. 453 (1991). Judge Easterbrook, writing for the majority, stated that no applicable rule of statutory construction "justifies disregarding unambiguous [statutory] language." *Id.* at 1318. Judge Posner dissented and urged "a pragmatist's view" in which judges may "enrich positive law with the moral values and practical concerns of civilized society." *Id.* at 1335.

[21] *See* Eskridge & Frickey, *supra* note 3, at 332–33.

[22] 3 Co. Rep. 7a (1584) (*reprinted in* 76 E.R. 637).

[23] In a leading purposivist decision, Justice Brennan relied on legislative history, principally floor debates, to identify the purpose of Title VII of the Civil Rights Act of 1964. United Steelworkers of Am. v. Weber, 443 U.S. 193, 201–04 (1979).

[24] *See* Eskridge & Frickey, *supra* note 3, at 334–35; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 137–38 (1990).

[25] For a particularly strong critique of purposivism, see the dissenting opinion of Justice Rehnquist in *United Steelworkers*, 443 U.S. at 254 (criticizing the majority for refusing to recognize the intent of Congress as demonstrated by the traditional sources of statutory text and legislative history, and relying instead on the "'spirit' of the Act").

[26] For example, another approach has been labelled dynamic interpretationism. This approach is controversial because in certain circumstances it would abandon the principle of legislative supremacy and permit judicial updating of statutes. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322 (1989), where Professor Eskridge states:

> Dynamic interpretation is most often appropriate in three situations: when there has been a material change in circumstances between the date of enactment and the date of application, when the legislature has compromised its original policy in subsequent statutes, or when new meta-policies have overtaken original legislative expectations.

For examples of dynamic interpretations by courts, which ignored the directives and expectations of the enacting legislatures and gave meanings to statutes strongly grounded in legal developments that occurred long after enactment, see *United States v. Florida E. Coast Railway*, 410 U.S. 224 (1973) (defining the type of rulemaking hearing required by the Interstate Commerce Act), and *National Petroleum Refiners Ass'n v. Fed. Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973) (broadly construing the rulemaking authority delegated by the Trade Commission Act).

employ all three interpretive methods in an effort to discern the best legal answer to each interpretive question.[27] U.S. statutory interpretation is remarkably untidy because litigants cannot be sure whether courts will pursue one interpretive approach or another in a particular case. Even a court that seems committed to pursuing a particular interpretive approach in one case may be willing to adopt, without notice, a competing approach for the next case.[28]

B. English Rules of Statutory Interpretation

The varied U.S. approaches to statutory interpretation are often contrasted with English rules of statutory interpretation.[29] The conventional U.S. view has been that English statutory interpretation is far clearer than U.S. statutory interpretation because English legal tradition prohibited courts from using legislative history to interpret statutes.[30] *Pepper* restates the old rule in this manner: "Under present law, there is a general rule that references to parliamentary material as an aid to statutory construction is [sic] not permissible (the exclusionary rule)."[31]

However, *Pepper* recognized that even the traditional rule of exclusion did have an important and longstanding exception. This exception permitted the use of legislative materials only for identifying "the mischief which the statute intended to cure," and not for "discovering the meaning of the words used by Parliament to effect such cure."[32] Thus,

27 *See* Eskridge & Frickey, *supra* note 3, at 353; *see also* POPKIN, *supra* note 7, at 126, 175–77 (describing interpretive approach of late twentieth century pragmatists).

28 For example, see *Caminetti v. United States*, 242 U.S. 470 (1917), and *United States v. American. Trucking Ass'ns*, 310 U.S. 534 (1940), which support contrary approaches to statutory interpretation. Professor Jordan has presented a similar criticism of English approaches to statutory interpretation, contending that courts may decide to pursue any of three other, different approaches to interpretation: the literal rule, the golden rule, or the mischief rule. *See* William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 6 (1994) ("There is no overarching rule to determine which of these three [approaches] is to be followed in a particular case." (footnote omitted)).

29 *See* HURST, *supra* note 15, at 54 ("To one accustomed to the pragmatic flexibility with which courts in the United States use materials extrinsic to the statute books the English rule seems at first rigid, doctrinaire, and possibly a cloak for judges' distaste for acknowledging the supremacy of Parliament.").

30 See, for example, Baade, *supra* note 10, at 1084, who presents what had been the American understanding of the English rule: "The English no-recourse [to legislative history] rule had ceased to prevail in the United States in the last quarter of the nineteenth century." *See also* Baker, *supra* note 11, at 353 ("Reference to Hansard for the purpose of ascertaining the intention of Parliament has been firmly forbidden, both by common law and by rulings of the House of Commons, for over two centuries."); Gordon Bale, *Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process*, 74 CANADIAN B. REV. 1, 3 (1995) ("This decision [in *Pepper*] finally modified the exclusionary rule which prohibited recourse to parliamentary debates in interpreting a statute, a rule which had held sway, with several notable lapses, for more than two hundred years."); Jordan, *supra* note 28, at 12 (explaining that legal practitioners and commentators in the United States have an inaccurate "impression that English courts prohibit consideration of *all* materials that are comparable to American legislative history").

31 [1993] 1 All E.R. at 60.

32 *Id.* at 61. Professor Hurst explains this exception as follows: English courts "will take account of facts of history properly subject to judicial notice, to show what general circumstances existed to bring about a statute." HURST, *supra* note 15, at 54; *see also* Jordan, *supra* note 28, at 13 (summarizing scope of the exception to England's exclusionary rule).

for almost a century, English courts had allowed the use of legislative history, in the forms of reports of commissioners and white papers,[33] to determine the purpose of legislation[34] but not the intended meaning of the statutory text.[35] English commentators have suggested that, by carving out this exception to the English exclusionary rule, purposivism laid the groundwork for the intentionalist interpretive approach adopted in *Pepper*.[36] Indeed, the English law of statutory interpretation changed dramatically when the House of Lords decided *Pepper*.[37]

This exception to the exclusionary rule had its source in the mischief rule established by *Heydon's Case*. *See* Bale, *supra* note 30, at 5 ("*Heydon's Case* does not condone a mere contextual analysis of the words of a statute to infer its meaning; rather it commands a purposive approach with the use of extrinsic aids to determine the true intent of the makers of the statute."). See also Styles, *supra* note 11, at 152, describing how the English approach to the mischief rule has evolved:

> Since the war however, and in particular following on the recommendations of the Law Commission's report, *The Interpretation of Statutes* in 1969, the 'purposive' approach has been increasingly favored by the British courts. Under the purposive approach, which is really a development of the old mischief rule, the courts construe statutes in the light of the overall purpose of the legislation rather than relying solely on the mere text of the statute.

Heydon's Case was, of course, the source of the American approach to purposivism. *See supra* text accompanying note 22.

33 One commentator has compared these parliamentary sources to congressional committee reports. *See* Jordan, *supra* note 28, at 13.

34 One commentator has suggested that English courts need not have looked to materials beyond the statutory text to discern the purpose of legislation. *See* Baker, *supra* note 11, at 356 ("The question is not whether the approach to interpretation is or should be purposive, which is not disputed, but how the purpose behind a document may properly and logically be established.").

35 Traditional English law of interpretation thus accepted in a fundamental way the distinction between purposivism and intentionalism, and made the application of an important rule of interpretation turn on that distinction. Professor Dickerson also made this distinction in his writing on statutory interpretation. *See* DICKERSON, *supra* note 11, at 88 ("[I]n general legal usage the word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish."). *But cf.* MIKVA & LANE, *supra* note 13, at 8 ("Whether or not a real distinction exists between legislative *intent* or *purpose*, other than that made in the historical context, courts have basically ignored this debate in the search for statutory meaning.").

36 *See* Bale, *supra* note 30, at 17 ("A number of reasons combined to bring about the demise of the exclusionary rule. Perhaps the most important is the move toward a purposive approach to statutory interpretation that has gained momentum in Britain in the last four decades."); *id.* at 17–18 ("Admitting these extrinsic aids [Reports of Royal Commissions, Law Commission Reports and White Papers] while excluding the sometimes more relevant parliamentary debates became logically indefensible."); Styles, *supra* note 11, at 152 ("[A] purposive approach seems to assume that the purpose of a statute can be ascertained in some way *independent of the text of the Act itself*, and therefore implies that courts should consult extra-statutory materials in order to discover the purpose of the legislation in question.").

37 [1993] 1 All E.R. at 42. Because of its significance, *Pepper* was selected as a lead case for the second edition of a principal casebook on statutory interpretation. *See* Eskridge & Frickey, *supra* note 3, at 758.

III. THE *PEPPER V. HART* DECISION AND THE LIMITED ADOPTION OF INTENTIONALISM IN STATUTORY INTERPRETATION

A. Pepper (Inspector of Taxes) v. Hart

Pepper involved a dispute over how to calculate the value of an in-house fringe benefit to taxpayers. The issue was whether the statutory text, which required that the value of the benefit be equal to the "amount of any expense incurred in or in connection with"[38] providing the fringe benefit, meant "the marginal cost caused by the provision of the benefit in question or a proportion of the total cost incurred in providing the service both for the public and for the employee (the average cost)."[39] Resolution of the issue was important to the taxpayers because they had received the fringe benefit of free tuition for their children, who were occupying surplus places at the school.[40] The marginal cost of educating these students was minimal, while the average cost was considerable.[41]

Initially, the House of Lords decided that the statutory text dictated the use of average cost valuation.[42] Following rehearing, however, the House of Lords decided that the relevant statutory text was ambiguous and obscure and, accordingly, permitted reference to legislative history to ascertain the text's meaning.[43] Having considered the legislative history, the House of Lords decided that the value of the fringe benefit must be based on the marginal cost to the employer.[44] By using the legislative history in this way, the House of Lords rejected its longstanding exclusionary rule. Lord Browne-Wilkinson stated that the new rule would be the following:

> [R]eference to parliamentary materials should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary materials should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria.[45]

38 Finance Act, 1976, § 63(2) (Eng.).

39 *Pepper*, [1993] 1 All E.R. at 69.

40 *See id.* at 53.

41 *See id.*

42 *See id.* at 52 (referring to rehearing and fact that three Lord Justices agreed with the Revenue Department's reading of the statute).

43 *See id.* at 54–55.

44 *See id.* at 71.

45 *Id.* at 64.

This change in the exclusionary rule presents a clear acceptance of the intentionalist approach to interpretation in some circumstances.[46] Lord Browne-Wilkinson sought to limit those circumstances by requiring that two tests be met before legislative history could be considered.[47] The first test requires the statutory text to be either ambiguous, obscure, or absurd, and therefore faulty. The second requires the legislative history to be from a reliable and knowledgeable source and that it clearly demonstrate legislative intent. Lord Browne-Wilkinson prescribed these limitations expressly to avoid the significant problems he perceived in U.S. statutory interpretation. He stated: "Experience in the United States of America, where legislative history has for many years been much more generally admissible than I am now suggesting, shows how important it is to maintain strict control over the use of such material."[48]

B. Pepper *and the Strength of the Threshold Requirements*

Pepper itself provides important insights into the significance of each threshold requirement and its likelihood of ensuring "strict control over the use of" legislative history.[49] The faulty text requirement assumes that courts will be foundationalist in interpreting statutes and that opportunities for resort to legislative history will be limited.[50] Because, in the House of Lords' view, "Parliament never intends to enact an ambiguity,"[51] the statutory text is likely to be faulty in only "a few cases,"[52] and

46 See Styles, *supra* note 11, at 153, arguing that:

> This approach [in *Pepper*] takes the courts beyond a purposive approach, in the sense of discovering what mischief the measure is aimed at, towards an 'intentionalist' approach where the 'intention' of Parliament, and hence the construction of a statute, is determined simply by referring to the appropriate authoritative statement laid down by the Act's promoter....

Id.

47 One commentator has argued that, in view of the broad rationale that the House of Lords presented to support reference to Hansard, the limitations identified by House of Lords were "arbitrary." Dawn Oliver, Comment, Pepper v. Hart: *A suitable case for reference to* Hansard?, 1993 PUB. L. 5, 9 ("The limits set are, it is suggested, arbitrary. If the principle of purposive construction on which the relaxation of the rule is based were to be applied generally, reference to *Hansard* would be far more widely permitted.").

48 *Pepper*, [1993] 1 All E.R. at 67. Lord Browne-Wilkinson believed that the experience of New Zealand and Australia, which had previously abandoned the English exclusionary rule, showed that intentionalist interpretations could be limited to rare cases. *See id.* at 66–67. A brief history of the abandonment of the exclusionary rule in these nations is presented in Bale, *supra* note 30, at 23–24. As that history shows, Lord Browne-Wilkinson may have exaggerated the narrow scope of the exception to the exclusionary rule in New Zealand and Australia. *See id.* at 23 ("In 1984, Australia modified the exclusionary rule by statute for Commonwealth legislation. Any extrinsic material capable of ascertaining the meaning of a provision may now be considered to confirm the ordinary meaning or to determine the meaning where the provision is ambiguous, obscure or leads to an absurdity."); *id.* ("New Zealand has apparently achieved a similar result to that in Australia but through judicial rather than legislative reform."); *see also* Francis Bennion, *Hansard—Help or Hindrance? A Draftsman's View of* Pepper v. Hart, 14 STATUTE L. REV. 149, 156–59 (1993) (reviewing the history of the exclusionary rule in Australia, New Zealand and Canada).

49 *Pepper*, [1993] 1 All E.R. at 67.

50 This foundationalism would be the same as the foundationalism of the United States's textualist approach described *supra* notes 14–16 and accompanying text.

51 *Pepper*, [1993] 1 All E.R. at 64.

resort to legislative history accordingly will be rare. Judges in the United States would likely disagree with Lord Browne-Wilkinson's opinion that faulty texts are likely to be encountered in only a few cases. The Supreme Court remarked recently that "most statutes are ambiguous to some degree."[53] Indeed, Lord Justice Griffiths made a similar point in his separate opinion in *Pepper*: "The ever-increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted."[54] Professor Jordan has presented the provocative view that, because of differences between the legislative processes in the two nations, "the irreducible minimum [of ambiguity] in American legislation is far higher than the irreducible minimum in England."[55] In sum, although Lord Browne-Wilkinson may have been naïve about the precision of statutory text, many saw his faulty text requirement was therefore seen as important in limiting extra litigation costs—costs that might result from a nonfoundationalist, U.S. approach to legislation that permits legislative history to trump a clear meaning of statutory text.

Such a concern about the impact of nonfoundationalism in the United States undoubtedly is well grounded. In many instances, the U.S. Supreme Court has declined to give effect to clear statutory text because it was convinced that the clear text did not reflect Congress's plain intent or purpose, as shown by the legislative history. In *Train v. Colorado Public Interest Research Group*,[56] the Supreme Court held that a court may rely on legislative history to construe a statute even when the statute's language is clear on its face.[57] The Court then relied on the legislative history to conclude that the statutory term "radioactive materials," which was included in the Clean Water Act as a specific example of a type of "pollutant,"[58] did not include radioactive materials regulated by the Atomic Energy Commission. This reading of the statute was supported by the relevant congressional committee reports.[59] The Court rejected the textualist approach, which would have found any radioactive materials to be pollutants within the meaning of the Clean Water Act:

> [R]eliance on the "plain meaning" of the words "radioactive materials" contained in the definition of "pollutant" in the [Clean

52 *Id.*

53 Muscarello v. United States, 118 S. Ct. 1911, 1919 (1998). *See also* Richard Posner, *Statutory Interpretationin the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983), arguing that:

> The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect application for the problems that will be encountered in, its application.

54 *Pepper*, [1993] 1 All E.R. at 49–50.

55 Jordan, *supra* note 28, at 32; *see also id.* at 39–41 (describing social differences between the American and English judiciary that "may reduce perceived ambiguity in England").

56 426 U.S. 1 (1976).

57 *See id.* at 10 (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940)).

58 33 U.S.C. § 1362(6) (1970 ed. Supp. IV).

59 *See* 426 U.S. at 11–23.

> Water Act] contributes little to our understanding of whether Congress intended the Act to encompass the regulation of source, byproduct, and special nuclear materials. To have included these materials under the [Act] would have marked a significant alteration of the pervasive regulatory scheme embodied in the [Atomic Energy Act]. Far from containing the clear indication of legislative intent that we might expect before recognizing such a change in policy, the legislative history reflects, on balance, an intention to preserve the pre-existing regulatory plan.[60]

An even more frequently mentioned example of the Supreme Court's willingness to ignore the clear meaning of a statutory text is *Church of the Holy Trinity v. United States*.[61] There, the Court ignored the broad scope of a statutory prohibition that had several specific, well-defined exceptions and concluded that the statutory prohibition on employment contracts did not apply to the employment contract of a clergyman. Even though none of the statutory exceptions applied, the Court decided that the purpose of the statute, as shown by the legislative history, was to prohibit only certain types of employment contracts, and a contract with a clergyman was outside of that purpose.[62] Neither of these interpretations would have been possible if U.S. statutory interpretation had precluded the Court from considering the legislative history when the statutory text was clear.

Because legislative history can be decisive in U.S. courts, U.S. lawyers seek to make the strongest nonfoundational argument possible based on intent or purpose whenever the statutory text is adverse to the position of their client. Moreover, the careful litigator, unsure of the interpretive approach the court will take in deciding any case, must make the strongest possible argument based on text *and* intent *and* purpose in order to give clients the best possible representation. This approach to litigating statutory cases greatly increases the cost of representation, because lawyers must research not only the relevant statutory text, but also its legislative history, to develop the best case for their client.[63]

[60] *Id.* at 23–24 (citation and footnote omitted); *see also* Blanchard v. Bergeron, 109 S. Ct. 939 (1989) (concluding that reviewing courts are bound to follow interpretations of statutory text made in lower court attorneys fees decisions because those decisions were cited in congressional committee reports).

[61] 143 U.S. 457 (1892).

[62] *Id.* at 463–65.

[63] Dickerson states:

> [A] court should be careful not to use [legislative history sources] so as to make them an element in predicting the outcome of specific litigation. Otherwise, the resulting responsibility of the lawyer to his clients to make a relatively unproductive search among these materials would continue to make statutory interpretation a disproportionately costly and time-consuming operation.

DICKERSON, *supra* note 11, at 195–96.

Furthermore, Hurst states:

> [C]osts in time and money preclude lawyers from looking past the text to search transcripts of committee hearings or committee reports every time they must advise clients of their rights or duties under a statute. Ready resort to legislative history may increase

The U.S. experience demonstrates that, if limiting litigation costs is a desirable goal, there is good reason to define a threshold requirement limiting the use of legislative history. *Pepper*, however, demonstrates the difficulty of defining meaningful requirements. Its first requirement is that the statutory text be faulty—that is, ambiguous, absurd, or obscure—before a court can consider legislative history.[64] A leading American textualist has suggested that courts have a great deal of latitude in deciding whether language is ambiguous.[65] This same point was made by Lord Justice Oliver in *Pepper*: "Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact."[66] It appears that this is exactly what happened in *Pepper*.

The *Pepper* opinions, in the Court of Appeal and in the House of Lords, show that the judges initially found the statutory text to have a clear meaning. The House of Lords viewed the statutory text as faulty only after the proffer of legislative history showing that Parliament had not intended what the judges had previously understood to be the plain and clear meaning of the text. Recall that the interpretive issue in *Pepper* was how to value an in-house fringe benefit. The parties disputed whether the statutory text, which stated that the value of the benefit was equal to the "amount of any expense incurred in or in connection with" providing the fringe benefit,[67] meant "the marginal cost caused by the provision of the benefit in question or a proportion of the total cost incurred in providing the service both for the public and for the employee (the average cost)."[68]

The Court of Appeal decision, which included lengthy opinions by two judges, presented the textualist interpretation of the definition. Lord Justice Nicholls concluded that the statutory text required that the tax benefit be based on "the amount of the expense incurred by the employer in providing the benefit," rather than on the marginal cost to the employer of filling seats that otherwise would have been vacant.[69] Lord Justice Slade agreed with the lower court's opinion that the "interpretation of [the text's] effect is inescapable."[70] Both of these opinions present the text as having a clear, determinate, indeed "inescapable" meaning.

When the House of Lords initially considered *Pepper*, it, too, viewed the text as unambiguous. Three of the five panel members of the House

> the effects of unequal resources among contending parties; wealthy clients can better afford to pay for lawyers' time in searching beyond the statute books . . . .

HURST, *supra* note 15, at 54–55 (footnote omitted).

64 *Pepper*, [1993] 1 All E.R. at 64.

65 *See* Easterbrook, *supra* note 9, at 62 ("[T]he court may choose when to declare the language of the statute 'ambiguous.' There is no metric for clarity.").

66 *Pepper*, [1993] 1 All E.R. at 52.

67 Finance Act, 1976, § 63(2) (Eng.).

68 *Pepper*, [1993] 1 All E.R. at 69.

69 Pepper (Inspector of Taxes) v. Hart, [1991] 2 All E.R. 824, 829 (Eng. C.A.).

70 *Id.* at 833. Lord Justice Slade reached this conclusion notwithstanding his expressed "misgivings" about the impact the interpretation would have on taxpayers receiving in-house benefits. *Id.*

of Lords concurred with the Court of Appeal's view that the text dictated an average cost approach to determining the value of in-house fringe benefits. Lord Justices Bridge,[71] Oliver,[72] and Browne-Wilkinson reached this conclusion.[73] These Lord Justices must have viewed the text as unambiguous because, in the case of ambiguity, they presumably would have taken the same approach as Lord Justice Mackay in the rehearing and applied the substantive canon favoring taxpayers when a revenue statute is ambiguous.[74]

Pepper itself thus illustrates how the faulty text requirement may be manipulated by judges wishing to follow what they believe to be the intent of Parliament rather than the meaning of the text. Although the House of Lords asserted that it insists upon a foundationalist approach—that is, only the text may be considered when deciding whether the statute is faulty—the court rejected its initial view that the text was determinative only after it was informed of the contradictory legislative history. This is not the approach of a foundationalist, who would condemn an interpretive approach that rejected the determinate meaning of text in favor of another meaning discernible only in the legislative history.

The House of Lords nevertheless indicated that it would not wholly abandon the foundationalist primacy of text. Two Lord Justices indicated that they would decline to hold that a statute had a meaning that conflicted with its text, regardless of the Parliamentary materials supporting such an interpretation.[75] Lord Justice Bridge, while acknowledging that the text required the tax benefit to be determined based on average cost if "construed by conventional criteria,"[76] rejected that "technical rule of construction requiring me to ignore the very material which in this case indicates unequivocally which of *two possible interpretations* . . . was intended by Parliament."[77] Meanwhile, Lord Justice Griffiths set down his basic interpretive rule as follows: "The object of the court in interpreting legislation is to give effect *so far as the language permits* to the intention of the legislature."[78] For these Lord Justices, the intentionalist approach is permitted only when the resulting interpretation conforms to some possible reading of the text.[79] This failsafe rule closely

71 *See Pepper*, [1993] 1 All E.R., at 49 (stating that he agreed with the Court of Appeals interpretation, if the statute were "construed by conventional criteria").

72 *See id.* at 52.

73 *See id.* at 53.

74 *See id.* at 47.

75 This quasifoundationalism would presumably have foreclosed the interpretations of the U. S. Supreme Court in the cases discussed *supra* notes 56–62 and accompanying text.

76 *Pepper*, [1993] 1 All E.R. at 49.

77 *Id.* (emphasis added).

78 *Id.* at 50 (emphasis added).

79 Compare the following statement by Bale:

> Finally, counsel by wisely arguing for only limited modification of the exclusionary rule finessed the rule of law requirement that the statute book must remain a reliable guide to the citizen. Hansard will only be consulted when legislation is ambiguous, obscure or leads to an absurdity. The courts as interpreters will still be confined *by* the text but

resembles the Hart and Sacks rules of purposivist interpretation, which bar any interpretation that the words of the statute could not bear.[80] That limitation may be ignored by U.S. courts when they engage in purposivist interpretations.[81]

The second threshold requirement prescribed in *Pepper* is that the legislative history must demonstrate the clearly signified intent of Parliament. The language must be unambiguous and presented by a source with a reliable pedigree. The application of the latter requirement, at least, should be straightforward in England because of its parliamentary form of government and reliance on the party whip.[82] "[T]he fusion at the top between the executive and legislative branches that exists in England" should result in legislative materials which reveal the intent of the governing party.[83]

The House of Lords decided that the legislative history in *Pepper* met the clearly signified intent requirement because, in presenting the legislation, a Ministry official had informed Parliament that the bill had been amended to ensure that in-house fringe benefits would be taxed based on their marginal costs to the employer rather than on the basis of the average cost.[84]

The legislative history relied upon in *Pepper* plainly met the reliability requirement. Therefore, the case does not yield much insight into the problems that may arise in ensuring that the legislative history is reliable. The U.S. experience with intentionalist interpretation provides grounds for real concerns about reliability. U.S. courts consider all varieties of legislative history but apply a sliding scale to test the reliability of such materials.[85] Advocates in U.S. courts often will include all sorts of

> in the case of ambiguity they will not be confined *to* it. The appropriate separation of powers between parliament and the courts will be preserved.

Bale, *supra* note 30, at 18 (suggesting that this limitation on intentionalism "finessed" the rule of law concerns that would otherwise have confronted the House of Lords) (citation omitted).

80 *See* Eskridge & Frickey, *supra* note 3, at 332 (summarizing the rules of Hart and Sacks purposivism).

81 *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (narrowly construing definition of organizations eligible for tax exempt status under 26 U.S.C. § 501(c)(3)); Holy Trinity Church v. United States, 143 U.S. 457 (1892) (discussed *supra* note 61 and accompanying text).

82 *See* Baker, *supra* note 11, at 356 ("It is, of course, a notorious fact that while a government remains in power it may whip in a majority of members of the House of Commons to vote in favor of its Bills."). *See generally* Jordan, *supra* note 28, at 21–28 (describing differences between Parliament and Congress, particularly that, "[i]n England, the Executive has virtually complete control of the legislature" through leadership of the House of Commons and strong party discipline).

83 DICKERSON, *supra* note 11, at 172; *see* Styles, *supra* note 11, at 157 ("All commentators are agreed that the control of Parliament by the government of the day, through the party whip system, patronage and the uses of the Royal prerogatives, has resulted in the overwhelming subservience of the legislature to the executive in this country."). See also discussion *infra* notes 91–96 and accompanying text regarding the difference in governmental forms and the implications of that difference.

84 *See Pepper*, [1993] 1 All E.R. at 57–60.

85 *Compare* Commissioner v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting) ("The most authoritative form of such [contemporaneous legislative] explanation is a congressional report defining the scope and meaning of proposed legislation. The most authoritative report is a Conference Report acted upon by both Houses...."), *and* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201–04 (1979) (relying on floor debate statements to discern pur-

supportive legislative history to argue their preferred interpretation of a statute. The effect of this approach is, in the view of one distinguished U.S. judge, largely equivalent to "looking over a crowd and picking out your friends" (i.e., the favorable legislative history), and then inferring that the crowd is friendly (i.e., construing the statute in accordance with that select history).[86] However, because the English and U.S. political systems differ significantly and because *Pepper* imposed its reliability requirement, English courts are unlikely to consider the range of sources of legislative history that U.S. courts review to discern legislative intent. The strong executive leadership of Parliament produces less variety of legislative materials, and the *Pepper* pedigree requirement drastically limits the admissibility of these sources.

C. Pepper *and Legislative Supremacy*

Perhaps the strongest argument articulated in *Pepper* to justify intentionalist interpretations in limited cases is that the decision promotes legislative supremacy.[87] The House of Lords decided that intentionalism is proper in certain cases because it enables the court to interpret the law as the legislature intended.[88] Intentionalists in the United States present this same argument.[89] However, a different group of U.S. commentators would likely predict that the willingness of the House of Lords to permit intentionalist interpretations will shift power to the judiciary at the expense of the legislature because intentionalism allows courts to avoid the meaning of clear text.[90]

Differences between the ways laws are made in Congress and in Parliament have given rise to a criticism of intentionalism not heard in the United States. Because the government (that is, the majority party) has control over reliable legislative history in the English system,[91] critics

pose and intent of legislation); Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 29 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents.").

86 *See* ESKRIDGE & FRICKEY, *supra* note 1, at 733–34 (quoting report of the comments of Court of Appeals Judge Harold Leventhal).

87 *See Pepper*, [1993] 1 All E.R. at 73–74; *see also* HURST, *supra* note 29 (quoting Professor Hurst's view that the traditional English exclusionary rule may conflict with legislative supremacy); Bale, *supra* note 30, at 12 ("[The traditional exclusionary] rule enhanced the ability of the court to check the power of parliament and that of a cabinet which dominates parliament through party discipline."); *id.* at 28 ("[I]f after earnest study of a statute ambiguity remains, resort to Hansard would seem to be not merely appropriate but mandatory because parliamentary supremacy, except as modified by the *Charter*, is the grundnorm of our system of government."); *cf.* Styles, *supra* note 11, at 155 ("Henceforth any judge who disregards an authoritative statement will be open to the accusation that he is thwarting the democratic will of Parliament.").

88 *See Pepper*, [1993] 1 All E.R. at 64.

89 *See, e.g.*, *Weber*, 443 U.S. at 253 (Rehnquist, J., dissenting) ("Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress."); *id.* at 231 (Rehnquist, J., dissenting) ("[N]othing short of a thorough examination of the congressional debates will fully expose the magnitude of the Court's misinterpretation of Congress' intent.").

90 *See supra* notes 12–13; *cf.* Jordan, *supra* note 28, at 28 ("American courts have the power to emphasize one aspect of legislative history over another in reaching their decisions.").

91 One commentator has challenged *Pepper*'s requirement that legislative history have a reliable pedigree before it can form the basis for an intentionalist interpretation, because that requirement is "unduly pro-government":

have claimed that *Pepper* will shift power to the government and away from the Parliament, as a legislative, deliberative body that enacts written law.[92] Putting a distinctly American construction on this English criticism, one could claim that the use of legislative history in England results in a *Chevron*-type deference to the government's pre-enactment interpretation of a statutory text. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that a court must defer to a reasonable, post-enactment interpretation of a statute by an administrative agency when the statute explicitly or implicitly (through ambiguity) delegated to the agency the role of interpreter.[93] This deference to governmental interpretations of ambiguous statutes replaced the previous interpretive rule, which required court centered decision based solely on the court's interpretation of the meaning of the statutory text.[94] Continuing with the analogy to *Chevron*, the previous interpretive rule might be analogized to a requirement that courts go no further than applying the first part of the *Chevron* analysis. In that step, a court determines whether Congress has identified a clear meaning in the statute and, if so, requires that such a meaning apply.[95] In sum, unlike the U.S. cases employing an intentionalist approach, *Pepper* has been criticized

> By confining the permissible parliamentary material to statements by a minister or other promoter of the Bill, the Law Lords appeared to give an unduly pro-governmental twist to their law making. It might have been advisable to have held that Hansard can be resorted to when the legislation is ambiguous or obscure, or leads to an absurdity—leaving the weight accorded the material to the wisdom and judgment of the judicial interpreter.

Bale, *supra* note 30, at 26.

92 *See* Styles, *supra* note 11, at 157 ("The likely long term effect of *Pepper* is that the power of the Government will be increased at the expense of the powers of the courts."); Baker, *supra* note 11, at 357 ("It took many centuries of constitutional struggle to eliminate the notion that the policy of the government should have the force of law; now, it seems, something very like it is slipping through the back door."); David Miers, *Taxing Perks and Interpreting Statutes:* Pepper v. Hart, 56 MODERN L. REV. 695, 708 (1993) ("[T]here is surely a real danger here of the courts becoming too close to the executive's intentions. It is one thing to give effect to what Parliament has enacted as law, but quite another to give effect to ministerial statements about what the law is...."); Oliver, *supra* note 47, at 13 (asserting that *Pepper*'s abandonment of the exclusionary rule "may well reinforce the dominance of the government in the constitution and reduce the power of the courts to act as checks against the dominant executive"); *see also* Jordan, *supra* note 28, at 35 ("Since most legislation [in England] is sponsored by the government, much legislative history, such as ministerial statements or arguments of proponents of legislation, is controlled by the government. The judicial refusal to consider this sort of material has served, to some extent, as a check on excessive government power.").

93 467 U.S. 837, 843–44 (1984).

94 *See* Miers, *supra* note 92, at 702 ("[T]he corollary... that what Parliament says (at least in the form of primary legislation) goes, is that it is only the judiciary and no other person, who has the authority, finally and compellingly, to say what those laws mean."); Jordan, *supra* note 28, at 27–28 ("[The pre-*Pepper* English approach] arguably grants more power to the courts by freeing them to make decisions without regard to what might be drawn from relatively unclear legislative history."); Styles, *supra* note 11, at 158 (arguing that, as a result of the *Pepper* decision, "[t]he courts will have surrendered their power of *interpreting* statutes and substituted it with the mere power of *applying* statutes").

95 467 U.S. at 842–43. Members of the Supreme Court have, of course, differed on the question of whether this first-step determination should be based only on text or on legislative intent, including consideration of legislative history. *See id.* at 843 & n.9 (requiring court to "give effect to the unambiguously expressed intent of Congress," with intent to be "ascertain[ed]" by "employing traditional tools of statutory construction"); INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (arguing that *Chevron*'s first-step analysis should be based only on statutory text).

because it shifts lawmaking power away from both court and legislature and toward the government, that is, the executive.[96]

Several later cases applied the new rules that *Pepper* prescribed for the use of legislative history in interpreting statutes. These cases show that *Pepper* has had more than the limited impact on statutory interpretation in England than the House of Lords had anticipated.[97]

IV. THE EFFECT OF *PEPPER V. HART*: HAS STATUTORY INTERPRETATION IN ENGLAND BEEN AMERICANIZED?[98]

A. The Threshold Requirement of a Faulty Text

According to Lord Browne-Wilkinson's opinion, one may reference parliamentary materials only when the statutory text is faulty as a result of ambiguity, obscurity, or absurdity. As a threshold matter, the faulty text requirement has provided the basis for the Supreme Court's promulgation of a practice direction.[99] The direction requires that any party "intend[ing] to refer to the reports of parliamentary proceedings" (the Hansard reports) must "serve upon all other parties and the court copies of any . . . extract together with a brief summary of the argument intended to be based upon such extract."[100] Service of the Hansard extract and summary of the argument must be made at least five working days before the hearing.[101] At the very least, this practice direction indicates that English courts view the use of Hansard in statutory interpretation as reserved for special cases.

96 See Miers, *supra* note 92, at 706, stating that:

> As *Pepper v. Hart* gives the government the opportunity to say in other words what the legal effect of a clause is to be, there will be an incentive to use the opportunity whenever some particularly difficult piece of legislation is to be debated, as a way of increasing the chances that the courts will interpret the section as the government wishes.

See also Styles, *supra* note 11, at 157 ("Indeed it is likely that ministers will start as a matter of policy to spell out the meaning of legislation as it comes before Parliament in order to ensure that the courts interpret the legislation in a manner approved by the Government.").

97 Commentators predicted that *Pepper* would have a much broader effect on statutory interpretation than the House of Lords expected. *See* Oliver, *supra* note 47, at 10 ("Despite Lord Browne-Wilkinson's tightly drawn limitations on reference to *Hansard*, it is probable that the courts will experience difficulties in holding the line against pressures to extend the circumstances in which *Hansard* may be called in aid, because the case legitimates reliance on the principal [sic] of purposive construction."); Styles, *supra* note 11, at 156 ("[Lord Browne-Wilkinson] may underestimate the number of authoritative statements which can be found in *Hansard*.").

98 Several courts in England have concluded that the three threshold requirements identified in *Pepper* before resort to legislative history is permitted simply have no applicability when the court is interpreting the meaning of European Community directives. These courts have held that the traditional exclusionary rule never applied to such cases. *See* Three Rivers Dist. Council v. Bank of England (No. 2), [1996] 2 All E.R. 363 (Q.B.) (holding that *Pepper*'s rules on admissibility do not apply when the issue relates to the broad statutory purpose rather than the meaning of a particular provision or when the legislation involved is intended to implement a European directive.); *see also* British Sugar, plc. v. James Robertson & Sons Ltd., [1996] R.P.C. 281 (Ch.); U v. W, [1996] Transcript: V Wason & Assoc. (Fam.).

99 Practice Note, [1995] 1 All E.R. 234 (S. Ct.).

100 *Id.*

101 *Id.* at 235.

With regard to the application of the faulty text requirement, we have already discussed the fundamental problem with *Pepper*'s threshold requirement—there is no generally accepted standard for clarity; therefore, determining whether a text is ambiguous or obscure often is controversial.[102] This problem is illustrated by the House of Lords decision in *Melluish (Inspector of Taxes) v. B.M.I. (No. 3) Ltd.*[103] There, Lord Browne-Wilkinson, through a process of close reading and reasoning, concluded that the statutory text had a determinate meaning. The issue was whether, for purposes of capital allowances for fixtures, "the machinery or plant belongs" to the taxpayer.[104] Lord Browne-Wilkinson concluded that the meaning was forced by the "clear words" of the text and that "an anomalous result" would follow from a contrary interpretation that the equipment at issue belonged to the taxpayer.[105] Nevertheless, in the very next paragraph of his opinion, Lord Browne-Wilkinson stated that he "accept[s] that the language of [the statute] is ambiguous and obscure" and that the court may therefore refer to legislative history to discern its true intent.[106] If that history had demonstrated that the legislature had intended something other than the meaning of the "clear words" of the text, Lord Browne-Wilkinson presumably would have followed that nontextual intent. This is hardly the interpetive method of a foundationalist court.

Several other cases also have undercut the foundationalism of English statutory interpretation. In these cases, the courts considered the legislative history proffered to them, even though these courts found the statutory text clear on its face and unambiguous.[107] However, the significance of these cases should not be overstated because the courts decided that the legislative history was either inconclusive or confirmed the plain meaning of the text.

Several cases illustrate this approach.[108] In *Regina v. Warwickshire County Council*,[109] the House of Lords considered the meaning of section 20(1) of the Consumer Protection Act 1987. The issue was whether that provision, which made it unlawful to provide consumers with misleading information about prices "in the course of business," applied to an employee of a retailer.[110] Lord Roskill, who wrote the decision, focused on the statutory text, concluding "that the words 'in the course of any busi-

102 *See supra* notes 65–66 and accompanying text.

103 [1995] 3 W.L.R. 630 (H.L.).

104 Finance Act, 1971, § 44(1) (Eng.).

105 [1995] 3 W.L.R. at 645.

106 *Id.*

107 *See* Miers, *supra* note 92, at 705–06 (summarizing House of Lords decisions where Hansard was used to confirm plain meaning of the text).

108 Other examples of this approach include National Rivers Authority v. Yorkshire Water Services Ltd., [1995] 1 All E.R. 225, 233 (H.L.); McDonald v. Graham, [1994] R.P.C. 407, 433–35 (Eng. C.A.); Avon County Council v. Hooper, [1997] 1 All E.R. 532 (Eng. C.A.); and Busby v. Cooperative Insurance Society Ltd., [1994] 1 E.G.L.R. 136, 138 (County Court). *Cf.* Regina v. Human Fertilisation and Embryology Auth. *ex parte* Blood, [1996] 3 W.L.R. 1176, 1190 (Q.B.) (reviewing legislative history "put before the court with the consent of both parties").

109 [1993] 2 W.L.R. 1 (H.L.).

110 *Id.* at 5.

ness of his must mean any business of which the defendant is either the owner or in which he has a controlling interest."[111] Notwithstanding this determinate meaning, Lord Roskill proceeded to discuss the legislative history of this provision, which included a statement by the minister that the statute was drafted to ensure that only the employer would be subject to liability.[112] This use of legislative history to confirm that the text means what it says closely resembles the United States' nonfoundationalist approach to interpretation.[113] Indeed, the court's willingness to consider the legislative history in this case is notable because the rule of leniency to criminal defendants should have given the defendant the benefit of any statutory doubt.

Other courts have taken this approach as well. In *British & Commonwealth Holdings, plc v. Barclays Bank, plc*,[114] the Court of Appeal decided that the relevant text of the Companies Act of 1985 was unambiguous.[115] Nevertheless, it discussed the legislative history as "coincid[ing] with" the meaning of the text.[116] Finally, in *Building Societies Commission v. Halifax Building Society*,[117] Judge Chadwick of the Chancery Division had to interpret the meaning of Section 100(8) of the Building Societies Act 1986. Judge Chadwick was "satisfied that the words 'in priority to other subscribers' can be given an intelligible meaning . . . ."[118] The judge nevertheless included a lengthy discussion of the parliamentary debate that yielded the statutory text,[119] and opined that "there is nothing in the parliamentary material or in the consultative paper which points to any other meaning for those words."[120] In more recent cases, several courts have considered legislative materials despite their view that the statutory text did not meet *Pepper*'s faulty text requirement.[121] The interpretive approach taken in these cases indicates that the first requirement of *Pepper* has been weakened. That is, in the event reliable parliamentary materials were to demonstrate an intent that conflicted with the "intelligible

111 *Id.* at 7.

112 *Id.* at 7–8.

113 For example, see Chief Justice Burger's use of legislative history to confirm the meaning of determinate text in *Bankamerica Corp. v. United States*, 462 U.S. 122, 133–40 (1983), and *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 177 & n.29 (1978). *See also supra* note 19 (quoting Professor Hurst's description of this American approach to interpretation).

114 [1996] 1 All E.R. 381 (Eng. C.A.).

115 *See id.* at 392.

116 *Id.* at 393.

117 [1995] 3 All E.R. 193 (Ch.).

118 *Id.* at 210.

119 *See id.* at 207–09.

120 *Id.* at 210. For other cases that take this interpretive approach, see *Caglar v. Billingham (Inspector of Taxes)*, [1996] S.T.C. 150 (Special Commissioner's Decision) and *Regina v. Dudley Magistrate's Court ex parte Hollis*, [1998] 1 All E.R. 759 (Q.B.).

121 *See* Regina v. Social Fund Inspector *ex parte* Harper, CO/1904/96 (Q.B. 1997), *in* The Times (London), Mar. 31, 1997; Regina v. Secretary of State for the Home Dep't *ex parte* Owalabi, CO/1342/95 (Q.B. 1995), *in* The Times (London), Jan. 3, 1996; Ametalco UK v. Inland Revenue Commissioners, [1996] S.T.C. 399 (Special Commissioner's Decision); Holdings Ltd. v. Money (Inspector of Taxes), [1996] S.T.C. 347 (Special Commissioner's Decision).

meaning" of the statutory text, English courts would interpret the statute to conform to the actual intent of Parliament.[122]

When the legislative history contradicts the text's meaning, disagreement about whether the statutory text is actually faulty is more likely to arise.[123] In *Associated Newspapers Ltd. v. Wilson*,[124] a majority of the House of Lords concluded that the statutory text was ambiguous and then relied on parliamentary materials to infer the statute's meaning.[125] Lord Lloyd, dissenting, contended that the meaning of the text was clear and that the reference to legislative history accordingly was improper.[126] Interestingly, Lord Browne-Wilkinson did not specifically address the faulty text requirement in his opinion; instead, he may have applied the failsafe rule of *Pepper*.[127] Because he believed that the legislative history defined the legislature's intent so clearly, he seemed concerned only that the statutory text was capable of bearing that meaning.[128] He was not content to give the text its determinate meaning simply because that meaning was not absurd.

In sum, the failure of foundationalism in English courts, evidenced by the application of the faulty text requirement in *Pepper* itself,[129] is apparent in cases that have followed *Pepper*. English courts have become more intentionalist in their interpretive approach and appear willing to rely on legislative history to support interpretations that may conflict with the determinate meaning of the statutory text.

B. The Requirement that the Legislative History Be Sufficiently Reliable to Demonstrate Intention

Before considering how the reliability requirement has fared since *Pepper* was decided, it should be noted that this requirement is unlikely to limit significantly the costs of litigation that result from employing the

122 See Styles, *supra* note 11, at 155, noting that:

> If, however, as is now the case, the courts concede that it is legitimate to ascertain the intention of Parliament by recourse to ministerial statement, then it becomes difficult to foresee circumstances in which a court could refuse to follow the interpretation laid down by the minister. To fail to do so is blatantly to 'disobey' the 'intention' of Parliament.

123 Such disagreements are common in American law. In *Bankamerica Corp. v. United States*, 462 U.S. 122, 141–50 (1983), the dissenters, unlike the majority, viewed the text as ambiguous and therefore urged that resort to legislative history was necessary to discern the intended meaning. *See also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 205 (1978) (Powell, J., dissenting) (concluding that the term "actions" is ambiguous because it may refer only to actions being considered by an agency); *cf.* New Jersey v. New York, 118 S. Ct. 1726, 1759–61 (1998) (Scalia, J., dissenting) (viewing the terms of nineteenth century interstate compact as ambiguous, while the majority held that the compact has a clear meaning).

124 [1995] 2 All E.R. 100 (H.L.).

125 *See id.* at 105–09.

126 *See id.* at 120.

127 This rule is discussed *supra* note 45 and accompanying text.

128 Lord Browne-Wilkinson stated that "[t]he statutory history makes it impossible to hold that the 'omission' to offer to employees who did not accept the proffered new contracts constituted 'action' against such employees." [1995] 2 All E.R. at 112.

129 *See supra* notes 64–75 and accompanying text.

intentionalist approach. The reason for this is straightforward: If litigants gain confidence that courts will consider their arguments based on legislative history—confidence that must in fact be growing based on the decisions sampled in the previous section—litigators will have to research the legislative history of statutes to determine whether reliable legislative history that conflicts with the statute's apparent meaning exists.[130] The reliability requirement relates to the court's confidence in reaching conclusions about the legislature's true intent, but does not have much bearing on the need to consider the legislative history in the first instance. That need already is apparent given the English courts' new nonfoundationalist approach.[131]

Given that *Pepper*'s threshold faulty text requirement appears to be ineffective in limiting judicial consideration of legislative history, *Pepper*'s reliability requirement may become more important in defining the situations in which courts may employ nontextual indicia of intent to justify an intentionalist interpretation. Under *Pepper*, legislative history is reliable only if it meets two requirements: First, the legislative history must have a clearly signified intent—that is, clarity. Second, the legislative history must have sufficiently reliable pedigree. This latter requirement has not yet been the subject of significant judicial analysis. Thus far, courts appear willing to consider only the statements of ministers or the proponents of the enacted bill.

The clearly signified intent requirement has, however, been the subject of recent decisions by the House of Lords and other courts. In *Melluish*[132] the House of Lords sought to bolster the clarity requirement by stating that "the only materials which can properly be introduced [as legislative history] are clear statements made by a minister or other promoter of the Bill directed to the very point in question in the litigation."[133] The only acceptable legislative materials were those "directed to the specific statutory provision under consideration [and] to the problem raised by the litigation."[134] The House of Lords accordingly declined to consider the statements that ministers had made about other portions of the statute at issue, stating that a court should not be involved in "the interpretation of the ministerial statement and the question whether anything said in relation to the other provision can have

130 Baker, *supra* note 11, at 354, explains that, after *Pepper*:

> Every legal adviser, not to mention teachers of law, will be forced when interpreting statutes to grapple not only with expensive technology but with the troublesome metaphysical problem of assessing in each particular case whether a statement in Hansard would or would not be admitted in court were the matter to become contentious.

131 For English litigants that initially fail to consider relevant materials in Hansard in all statutory interpretation cases, the other side's notice of the intent to refer to Hansard will trigger the inquiry into legislative history. *See supra* notes 99–101 and accompanying text (discussing special notice rules when a party seeks to rely on Hansard).

132 [1995] 3 W.L.R. at 630.

133 *Id.* at 645.

134 *Id. See also* Regina v. Wandsworth London Borough Council *ex parte* Mansoor, [1996] 3 W.L.R. 282, 293 (Eng. C.A.) (rejecting use of legislative history that was not "directed to the intended meaning of the provisions which the court is being asked to construe").

any bearing on the provision before the court."[135] Although the House of Lords opined that by foreclosing consideration of such statements it was preventing "much expense and delay,"[136] the loosening of the faulty text requirement has increased expenses, and a stricter reliability requirement will not relieve litigants of the additional expenses caused by the need to research legislative history.

In addition to strengthening the clarity requirement in *Melluish*, the House of Lords also included words of stern warning to litigants who present courts with legislative history that is unreliable because it lacks any clearly signified intent. The House of Lords stated that "[j]udges should be astute to check such misuse of the new rule [in *Pepper*] by making appropriate orders as to costs wasted."[137] This admonition, which was clearly foreshadowed in the *Pepper* decision,[138] puts litigants in the position of having to decide whether relevant legislative history has sufficient clarity, and thus reliability, to present to a court in support of an intentionalist construction. Given how English courts have been willing to view clear statutory texts as faulty so that they may consider the legislative histories, litigants may have to risk censure and costs by providing courts with legislative materials that the courts may or may not find to be sufficiently clear. This burden rests unfairly on litigants: English courts appear willing to abandon the foundationalism of textualism, and yet nevertheless desire to have litigants decide at their peril whether the legislative history is sufficiently clear to support a particular intentionalist interpretation. This is very unlike the situation in the United States where lawyers typically write briefs that present the best possible textualist, intentionalist, and purposivist arguments in favor of their preferred interpretation of the statute and then leave the court with the responsibility of determining what the statute really means.[139]

Other post-*Pepper* cases also have declined to give intentionalist interpretations because the legislative history did not meet the clearly signified intent requirement. In *Hillsdown Holdings, plc v. Pensions Ombudsman*, for example, the Queen's Bench Division held that it was barred from considering post-enactment legislative history because such materials could not clearly signify legislative intent.[140] The court accordingly declined to consider a minister's statements, which were made after a bill's enactment, because it believed the statement could not show the intent behind legislation previously considered by Parliament.[141] In

135 *Melluish*, [1995] 3 W.L.R. at 645.

136 *Id.*

137 *Id.*

138 *See Pepper*, [1993] 1 All E.R. at 67.

139 In his Article comparing the use of legislative history in the United States and England, Professor Jordan points out that the English litigation system differs markedly from the American system because, in England, "there is nothing approaching the extensive nature of the American brief." Jordan, *supra* note 28, at 37.

140 [1997] 1 All E.R. 862 (Q.B.). Post-enactment legislative history is viewed skeptically, but is not categorically rejected, by U.S. courts. *See generally* ESKRIDGE & FRICKEY, *supra* note 1, at 806–13.

141 *See* [1997] 1 All E.R. at 898–899.

other cases, courts have rejected reliance on legislative history when the ministers' statements were viewed as no clearer than the statutory text itself.[142]

V. CONCLUSION

U.S. courts have, for many years, utilized contrasting approaches to statutory interpretation. These varied approaches to the interpretation of statutes cause uncertainty for litigants and doctrinal inconsistency. Perhaps the most controversial interpretive approach in the United States has been intentionalism, which relies on the intent of Congress to determine the meaning of a statute, even if that inferred intent is inconsistent with the meaning of clear statutory text. Uncertainty and inconsistency are likely to continue to characterize the U.S. law of interpretation because courts are unlikely to mandate a uniform interpretive approach for their decision making and because the contextual approaches of both intentionalism and purposivism reduce the predictability of interpretations because context may lead to a conclusion that the legislature did not mean what the statutory text says. Indeed, in the unlikely event that the law of interpretation would evolve to yield greater consistency in interpretive method, it should abandon textualism and accept the uncertainty of context: "A good interpretive approach requires that courts consider more than mere text; they must carefully consider context as well."[143]

The law of statutory interpretation in England has traditionally been more certain and consistent than in the United States because English courts foreclosed the intentionalist approach to interpretation by barring the use of legislative history to discern what the legislature meant by particular statutory text. In *Pepper v. Hart*, the House of Lords abandoned this exclusionary rule and accepted the use of the intentionalist approach to statutory interpretation. To be sure, the House of Lords insisted that the statutory text be faulty before a court would be permitted to consult legislative history. As *Pepper* itself and later decisions show, however, the faulty text requirement is unlikely to preclude the use of apparently definitive and authoritative legislative history to trump a determinate statutory text. Now that English courts have accepted that the meaning of particular statutory language is based on context as well as text, they will rely on determinate context to fix statutory meaning. To that extent, *Pepper* has had the effect of Americanizing the English law of statutory interpretation, notwithstanding the desires and concerns that

142 *See* Regina v. Deegan, [1998] 2 Crim. App. 121 (Eng. C.A.); Avon County Council v. Hooper, [1997] 1 All E.R. 532 (Eng. C.A.); Van Dyck v. Secretary of State for the Env't, [1993] 1 E.G.L.R. 186 (Eng. C.A.); Bank of Credit and Commerce Int'l Ltd. v. Price Waterhouse, [1997] 4 All E.R. 781 (Ch.).

143 Michael P. Healy, *The Attraction and Limits of Textualism: The Supreme Court Decision in* PUD No.1 of Jefferson County v. Washington Dep't of Ecology, 5 N.Y.U. Envtl. L.J. 382, 442 (1996).

Lord Browne-Wilkinson articulated when he abandoned the traditional English exclusionary rule.[144]

144 These desires and concerns are quoted in the text accompanying *supra* notes 45–48.