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An American Lawyer's Reflections on *Pepper v. Hart*

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An American lawyer's reflections on Pepper v. Hart

I. Introduction

American law has long been quite untidy with respect to its permitted approaches to statutory interpretation. There are, at present, at least three distinct approaches to interpretation, which courts may employ in a case to determine the meaning of a statutory text.¹

The textualist approach has undergone a recent renaissance following the appointment of many politically conservative jurists by Presidents Reagan and Bush.² Most prominent among these jurists are Supreme Court Justices Scalia and Thomas³ and Court of Appeals Judge Easterbrook.⁴ 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.⁵ Textualists are particularly wary about using legislative history to discern the meaning of statutes.⁶

A second approach - common in America but skeptically received in Britain - is the intentionalist approach, which seeks to interpret legislation based on legislative intent.⁷ Intentionalists discern legislative intent from statutory text and legislative history. This willingness to inquire beyond the statutory text in any case contrasts starkly with the textualist approach and leaves this second approach subject to the criticism that it gives too much interpretive discretion to courts.⁸ Textualists are foundationalists, who will refer, at least initially, only to text to infer meaning,⁹ while intentionalists are typically nonfoundationalists, who will look at any evidence of legislative intent, including both text and legislative history, to find the meaning of even the otherwise clear text of statutes.¹⁰ The question whether interpretation should be foundationalist or nonfoundationalist appears at its core to be the question whether interpretation should be based on text or context. Intentionalists are typically contextualists, while textualists are, well, textualists.

The third common approach to interpretation in the United States is purposivism, which seeks to give statutes the meaning that will allow the statute to meet its purpose.¹¹ This approach, which is closely associated in the United States with Professors Hart and Sacks and their Legal Process approach to law,¹² has its roots in the Mischief Rule stated by Lord Coke in Heydon's Case.¹³ The purposivist approach in America is quite close to the accepted purposivist approach in England, which allows judges to infer the statute's purpose from the statutory text as well as from legislative history. This approach, though, is criticized in the United States both by intentionalists and by textualists alike.¹⁴

These three approaches do not exhaust the interpretive methods of American lawyers.¹⁵ Moreover, prominent American legal scholars have urged a practical reasoning approach to interpretation, which would employ, inter alia, the use of all three of these interpretive methods in an effort to discern the best legal answer to each interpretive question.¹⁶ Indeed, the American law of statutory interpretation is
remarkably untidy both because litigants cannot be sure whether courts will pursue one interpretive approach or another in a particular case and because a jurist who seems quite committed to pursuing a particular interpretive approach in one case may be willing to adopt without notice a competing approach when deciding the next case.17

When I began teaching law in 1990, the conventional American view was that English law was far tidier because courts were prohibited from using legislative history to interpret statutes.18 I would likely still have that view today, if I had not seen scholarly references to the House of Lords’ decision in *Pepper (Inspector of Taxes) v Hart*.19 Moreover, the decision was reproduced as a leading case in the second edition of the text that I use to teach a course on legislation in the United States.20 *Pepper v Hart*, then, presented many academic and other lawyers in America with an opportunity to reflect about English approaches to statutory interpretation and how those approaches compared to our dishevelled American law.

II. The *Pepper v Hart* Decision and the Limited Abandonment of the Exclusionary Rule

*Pepper v Hart* gave American lawyers a number of insights into the English law of statutory interpretation. For example, English law as described by the case was not as tidy as had been thought. To be sure, the case does state what Americans had believed was true about English law: “[u]nder present law, there is a general rule that references to parliamentary material as an aid to statutory construction is not permissible (the exclusionary rule).”21 Notwithstanding that rule, however, *Pepper* recognized that the rule of exclusion had an important and long-standing exception. This exception applies when the legislative materials identify the mischief the statute was intended to cure, rather than the “meaning of the words used by Parliament to effect such cure.”22

For an American lawyer who teaches statutory interpretation, *Pepper* is thus quite interesting because it accepts in a fundamental way the distinction between purposivism and intentionalism - a distinction that my students often have great difficulty discerning - and makes the application of an important rule of interpretation turn on that distinction.23 For almost a century, English courts have allowed legislative history in the form of reports of commissioners and white papers to be construed to infer the mischief the statute was intended to cure, in other words the purpose of legislation, but not the intended meaning of the statutory text.

Having defined this more equivocal bar against the consideration of legislative history, the House of Lords in *Pepper* decided to modify that rule of exclusion. Lord Browne-Wilkinson stated that the new rule would be the following:

“reference 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

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This change in the exclusionary rule presents a clear acceptance of the intentionalist approach to interpretation in some circumstances. Lord Browne-Wilkinson sought to limit those circumstances clearly by requiring that three tests be met before legislative history could be considered. The first such requirement is that the statutory text be garbled, because it is either ambiguous, obscure, or absurd. Lord Browne-Wilkinson then required that the legislative history demonstrate a clearly signified intent, with clear signification being inferred from both an unambiguous meaning with respect to the issue in controversy and a trustworthy pedigree, that is, the source of the history must be reliable and knowledgeable.

Pepper v Hart itself provides important insights into the significance of the first of these requirements. The garbled text requirement indicates that the House of Lords intends that courts be foundationalist in interpreting statutes and that opportunities for resort to legislative history will thereby be limited. Because, in the court’s view, “Parliament never intends to enact an ambiguity,” the statutory text is likely to be garbled in only a rare case and resort to legislative history will accordingly be rare. The garbled text requirement was therefore seen as important in limiting the extra costs of litigation that might result from a nonfoundationalist, American approach to interpretation that would permit legislative history to trump the otherwise clear meaning of statutory text.

There are many United States Supreme Court cases in which that Court has declined to give effect to clear statutory text because it was convinced that the clear text did not reflect either Congress’s plain intent or purpose, as shown by the legislative history. In Train v Colorado Public Interest Research Group, 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. 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,” did not include radioactive materials regulated by the Atomic Energy Commission. This reading of the statute was supported by the relevant congressional committee reports. The Court rejected the textualist approach, which would have found any radioactive materials to be pollutants within the meaning of the Clean Water Act:

“reliance on the ‘plain meaning’ of the words ‘radioactive materials’ contained in the definition of ‘pollutant’ in the [Clean 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.”
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.* 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. The Court reached this conclusion, even though none of the statutory exceptions applied, because 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 the purpose. Neither of these interpretations could have been defended if the Court had been foreclosed from considering the legislative history when the statutory text was clear.

Because legislative history can have this decisive impact in American courts, American lawyers seek to make the strongest nonfoundational argument possible based on intent or purpose when 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, does, of course, greatly increase the cost of representation, because lawyers in all cases must research not only the statutory text, but also the legislative history, to develop the best case for their client.

To be sure, therefore, the American experience demonstrates that, if limiting litigation costs is a desirable goal, there is good reason to define a threshold requirement that will limit resort to legislative history. *Pepper v Hart,* however, demonstrates the difficulty of defining a meaningful requirement. Recall that the interpretive issue in *Pepper* was how the value to taxpayers of an in-house fringe benefit should be calculated. The parties disputed whether the statutory text, which required that the value of the benefit was equal to the “amount of any expense incurred in or in connection with” 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).” The House of Lords decided that the text was ambiguous and obscure and accordingly permitted reference to legislative history.

A leading American textualist has suggested that courts have much latitude in deciding whether language is ambiguous. This same point was made by Lord Justice Oliver, who recognized in his opinion in *Pepper v Hart* that “[i]ngenuity can sometimes suggest ambiguity or obscurity where none exists in fact.” Indeed, the series of decisions in *Pepper v Hart* shows that judges had found that the relevant statutory text had a determinate meaning prior to the proffer of legislative history to the House of Lords showing that Parliament had not intended what judges had previously understood as the plain meaning of the text.

That textualist interpretation had been presented in the Court of Appeal’s decision, which included lengthy opinions by two judges. Lord Justice Nicholls concluded that the statutory text required that the tax benefit be valued 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 would otherwise have been vacant.
Lord Justice Slade agreed that the Nicholls "interpretation of [the text's] effect is inescapable." Both of these opinions present the text as having a clear, determinate, indeed an "inescapable" meaning.

When the House of Lords itself initially considered Pepper v Hart, it too viewed the text as unambiguous. A majority of the panel of five members of the House of Lords concurred with the view of the Court of Appeal that the text dictated an average-cost approach to determining the value of an in-house fringe benefit. This conclusion had been reached by Lords Bridge, Oliver, and Browne-Wilkinson. These three Lords must have viewed the text as unambiguous, because, in the case of ambiguity, they would presumably have taken the same approach as Lord Mackay in the rehearing and have applied the substantive canon favoring taxpayers when a revenue statute is ambiguous.

Pepper itself thus illustrates how the garbled text requirement may be manipulated by judges wishing to follow what they infer to be the intent of Parliament. Although the House of Lords asserts that it insists upon a foundationalist approach - that is, only the text may be considered when deciding whether the statute is garbled - the court rejected its own reading of the text only after it was informed about 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 in the legislative history.

Nevertheless, the House of Lords indicated that it would not abandon wholly the foundationalist primacy of text, when two Lords 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. Lord Bridge, while acknowledging that the text required the tax benefit to be determined based on average cost if "construed by conventional criteria," 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." Meanwhile, Lord 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." For both these Lords, therefore, the intentionalist approach is permitted only when the resulting interpretation conforms to some possible reading of the text. This fail-safe rule closely resembles the Hart and Sacks rules of purposivist interpretation, which barred any interpretation that the words of the statute could not bear.

The second critical threshold requirement prescribed in Pepper is that the legislative history must demonstrate the clearly signified intent of Parliament. That is, the language must be unambiguous and be presented by a source with a reliable pedigree. The House of Lords decided that these requirements had been met in Pepper 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. The legislative history relied upon in Pepper thus plainly met these requirements and the case therefore does not yield much insight into the problems that may arise in ensuring that the legislative history is reliable. That the underlying concern about
reliability is a real one can be recognized when the American experience with intentionalist interpretation is considered. American courts will consider all varieties of legislative history, with courts indicating that there is a sliding scale of the reliability of such materials. Advocates in American courts will often include all sorts of supportive legislative history in trying to advocate their preferred interpretation of a statute. The effect of this approach is, in the view of one distinguished American judge, largely equivalent to picking out friends in a crowd (i.e., the favorable legislative history) and then inferring that the crowd is therefore friendly (i.e., construing the statute in accordance with that select history).

Having defined the new rules that Pepper prescribed for the use of legislative history in interpreting statutory provisions, we now consider several later cases applying these new rules to evaluate the impact that Pepper has had on statutory interpretation in England.

III. The Effect of Pepper v Hart: Has the Use of Legislative History Been Limited or Has English Interpretation Been Americanized

A. The Threshold Requirement of a Garbled Text

Lord Browne-Wilkinson's opinion stated that reference may be made to parliamentary materials only when the statutory text is garbled due to ambiguity, obscurity or absurdity. We have already discussed the fundamental problem with Pepper's threshold requirement of a garbled text - there is no generally accepted standard for clarity so that whether a text is ambiguous or obscure is often controversial. This problem may be illustrated by the House of Lords decision in Melluish (Inspector of Taxes) v BMI (No 3) Ltd. There, Lord Browne-Wilkinson, through a process of close reading and reasoning, concluded that the statutory text had a determinate meaning. That meaning, he stated, was "force[d]" by "the clear words" of the text and "an anomalous result" that would follow from a contrary interpretation. 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. 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 would presumably have followed that nontextual intent. This is hardly the interpretive method of a foundationalist court.

The foundationalism of English statutory interpretation has been undercut also by decisions in several other cases. In these cases, the courts have considered the legislative history proffered to them, even though these courts have found that the statutory text is clear on its face and unambiguous. To be sure, 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 will illustrate this approach. In Regina v Warwickshire County Council, 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 [a] business of his,” applied to an employee of a retailer. Lord Roskill
gave the decision and he first focused on the statutory text and concluded “that the
words ‘in the course of any business of his’ must mean any business of which the
defendant is either the owner or in which he has a controlling interest.”
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.
This use of legislative history to confirm that the text means what it says closely
resembles the nonfoundationalist, American approach to interpretation. Indeed, the
court’s willingness to consider the legislative history in this case is notable because
the rule of lenity to criminal defendants should have given the defendant the benefit of
any statutory doubt in any event.

Other courts have taken this approach as well. In British and Commonwealth
Holdings plc v Barclays Bank plc, the Court of Appeal decided that the relevant text
of the Companies Act 1985 was unambiguous, and still discussed the legislative
history, which was viewed as “coincid[ing] with” the meaning of the text. Finally,
in Building Societies Commission v Halifax Building Society, Chadwick J in the
Chancery Division had to interpret the meaning of Section 100(8) of the Building
Societies Act 1986. Chadwick J was “satisfied that the words ‘in priority to other
subscribers’ can be given an intelligible meaning.” Nevertheless, the judge
included a lengthy discussion of the parliamentary debate that yielded the statutory
text and opined that “there is nothing in the parliamentary material or in the
consultative paper which points to any other meaning for those words.” The
interpretive approach taken in each of these cases indicates that the first requirement
of Pepper has been weakened and that, in the event reliable parliamentary materials
were to demonstrate an intent that conflicted with the “intelligible meaning” of the
statutory text, English courts would interpret the statute to conform to the true intent
of Parliament.

If, indeed, the legislative history were to contradict the text’s meaning, disagreement
about whether the statutory text was actually garbled would more likely arise. Thus,
in Associated Newspapers Ltd v Wilson, 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. Lord Lloyd, in a dissent, contended that the meaning of
the text was clear and that the reference to legislative history was accordingly
improper. Interestingly, Lord Browne-Wilkinson did not specifically address the
garbled text requirement in his opinion and he may instead have applied the fail safe
rule of Pepper. 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. He was not content to give the text its determinate
meaning as long as that meaning was not absurd.

In sum, the failure of foundationalism, which could be glimpsed in the application of
the garbled-text requirement in Pepper, is apparent in cases that have followed
Pepper. English courts have became 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 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 permitting intentionalist arguments to and decisions by courts. 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 find that they will have to research the legislative history of statutes to determine whether reliable legislative history exists that conflicts with the statute's apparent meaning. 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 has become apparent based on the English courts' new nonfoundationalist approach.

Given that Pepper's threshold requirement of a garbled text appears to be ineffective in limiting judicial consideration of legislative history, Pepper's requirements about the reliability of legislative history may, however, become more important in defining the situations in which courts may employ nontextual indicia of intent to justify an intentionalist interpretation. As defined in Pepper, the reliability of legislative history depended both on clearly signified intent and on sufficient pedigree. The latter requirement has not yet been the subject of significant analysis and courts appear to be 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 new decisions by the House of Lords and other courts. In Melluish (Inspector of Taxes) v BMI (No 3) Ltd,72 the House of Lords sought to tighten 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,"73 The only acceptable legislative materials were those "directed to the specific statutory provision under consideration [and] to the problem raised by the litigation."74 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 any bearing on the provision before the court".75 Although the House of Lords opined that by foreclosing consideration of such statements it was preventing "much expense and delay,"76 the loosening of the garbled text requirement has resulted in those expenses and a stricter reliability requirement will not relieve litigants of the need to research adequately the legislative history.

In addition to strengthening the clarity requirement in Melluish, the House of Lords also included words of stern warning to litigants who presented courts with legislative history that failed to meet the sufficient clarity requirement. The House of Lords stated that "Judges should be astute to check such misuse of the new rule [in Pepper] by making appropriate orders as to costs wasted."77 This admonition puts litigants in the position of having to decide whether legislative history is sufficiently clear to present to a court in support of an intentionalist construction. Given how English courts have been willing to view clear statutory texts as ambiguous 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 present the best possible textualist, intentionalist, and purposivist case in favor of their preferred interpretation of the statute and then leave the court with the responsibility to determine what the statute really means.

Other post-Pepper cases also have relied on the sufficient clarity requirement to decline intentionalist interpretations.\textsuperscript{78} In Hillsdown Holdings plc v Pensions Ombudsman and others,\textsuperscript{79} for example, the Queen's Bench Division held that the sufficient clarity requirement barred the court from considering post-enactment legislative history. The court declined to consider a minister's statements, which were made after a bill's enactment, because the statement could not be seen as showing the intent behind legislation being considered by Parliament.\textsuperscript{80} In other cases courts have rejected reliance on legislative history when the minister's statements were viewed as no clearer than the statutory text itself.\textsuperscript{81}

IV. Conclusion

When Lord Browne-Wilkinson announced that the House of Lords was changing the rule excluding the use of legislative history to discern what Parliament meant by the words of the statute, he sought to prescribe new rules of interpretation that would avoid the significant problems he perceived in the American law of statutory interpretation.\textsuperscript{82} Cases that have applied Pepper's exclusionary rule suggest that English law has been Americanized, notwithstanding the desires and concerns of Lord Browne-Wilkinson. The prevention of further Americanization is far more likely to follow from a stricter judicial application of the garbled-text requirement, than from forcing litigants to bear extra costs when they have sought judicial consideration of legislative history that is found to be insufficiently clear by the judiciary.

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FOOTNOTES

1 See William N Eskridge, Jr & Philip P Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan L Rev 321, 324 (1990) (categorizing the three principal modern theories of statutory interpretation as intentionalism, purposivism or modified intentionalism, and textualism).


3 See Thomas W Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash ULQ 351, 351, 363 (1994). 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).


5 See Merrill, supra note 3, 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)).


7 The use of legislative history to construe legislative intent first occurred in the United States Supreme Court more than one hundred years ago. See Baade, "Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex L Rev 1001, 1079 (1991) (describing Dubuque & Pac R R v Litchfield, 64 US (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 Carro & Brann, The US Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 Jurimetrics J 294 (1982) (documenting the fact that the Court has increasingly cited legislative history since the late 1930's).
8  Supra note 6. 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 aids there may be to interpretation beside the particular words and the dictionary." (citation omitted)).

9  For an example of this approach in the United States Supreme Court, see Caminetti v United States, 242 US 470, 490 (1917), where the Court stated that:

   "when words [of the text] 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 ... The language being plain, and not leading to absurd or wholly impractical consequences, it is the sole evidence of the ultimate legislative intent."

10 For an example of this approach in the United States Supreme Court, see United States v American Trucking Ass'n, 310 US 534, 543-44 (1940) (footnotes omitted), where the Court stated 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'."

11 Followers of each of these three approaches to interpretation defend their preferred approach as 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 differences among the approaches are in where and how the courts will discern the legislative directives.

12 See Eskridge & Frickey, supra note 1, at 332-33.

13 3 Co Rep 7a (1584).

14 Criticisms of purposivism include the concerns that it is based on unrealistically optimistic assumptions about the legislative process, see Eskridge & Frickey, supra note 1, at 334-35, and that it provides courts with too much discretionary power. See Cass Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 137-38 (1990). For a particularly strong critique of purposivism, see the dissenting opinion of then-Justice Rehnquist in United Steelworkers of Am v Weber, 443 US 193 (1979).

15 Another approach, for example, has been labelled dynamic interpretation. 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 LJ 319, 322 (1989), where Professor Eskridge states that:

"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."

See Eskridge & Frickey, supra note 1, at 353.

For example, the United States Supreme Court cases cited supra at notes 9 and 10 support contrary approaches to statutory interpretation. See also Micheal 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, 4 NIU Envtl LJ 382 (1996) (analyzing a decision in which several Justices changed their usual interpretive approaches).

See, e.g., Baade, supra note 7, 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."

[1993] 1 All ER 42.


[1993] 1 All ER, at 60.

ibid at 61.

Professor Dickerson also made this distinction in his writing on statutory interpretation. See Reed Dickerson, The Interpretation and Application of Statutes 88 (1975) ("in 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.").

[1993] 1 All ER, at 64.

ibid

A leading American judge would expect that even unintended ambiguity is likely to be encountered by courts more frequently than Lord Browne-Wilkinson may expect. See Richard Posner, Statutory Interpretation - in the Classroom and in the Courtroom, 50 U Chi L Rev 800, 811 (1983), where he states 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."

Lord Griffiths made a similar point in his 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 drafted." [1993] 1 All ER, at 49-50.

28 See *ibid* at 10.
29 33 USC section 1362(6).
30 See 436 US at 15-17.
31 *ibid* at 23-24 (citation and footnote omitted). See also *Blanchard v Bergeron*, 109 S Ct 939 (1989) (Court concluded that it was bound to follow interpretations of statutory text made in lower court attorneys fees decisions because those decisions were cited in congressional committee report).
32 143 US 457 (1892).
33 Section 63(2) of the Finance Act 1976.
34 *Pepper (Inspector of Taxes) v Hart*, [1993] 1 All ER 42, 69.
35 See Easterbrook, *supra* note 6, at 62 ("the court may choose when to declare the language of the statute 'ambiguous.' There is no metric for clarity.").
36 [1993] 1 All ER, at 52.
38 *ibid* 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.
39 See [1993] 1 All ER, at 49, where Lord Bridge stated that he agreed with the Court of Appeal interpretation, if the statute were "construed by conventional criteria."
40 *ibid* at 52.
41 ibid

42 ibid at 47.

43 This quasi-foundationalism would presumably have foreclosed the interpretations of the United States Supreme Court in the cases discussed supra at notes 27-32 and accompanying text.

44 [1993] 1 All ER, at 49.

45 ibid (emphasis added).

46 ibid at 50 (emphasis added).

47 See Eskridge & Frickey, supra note 20 (summarizing the rules of Hart and Sacks purposivism). This limitation on purposivist interpretation in the United States has been long ignored.

48 [1993] 1 All ER, at 57-60.

49 Compare Commissioner of Internal Revenue v Acker, 361 US 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 ..."), with Shell Oil Co v Iowa Dept of Revenue, 488 US 19, 29 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents." (citation omitted)).

50 See Eskridge & Frickey, supra note 20 (summarizing comments of Court of Appeals Judge Harold Leventhal).

51 Supra notes 35-36 and accompanying text.

52 [1995] 3 WLR 630.

53 ibid at 645.

54 ibid

55 Other examples of this approach include National Rivers Authority v Yorkshire Water Services Ltd, [1995] 1 All ER 225, 233 (House of Lords); McDonald v Graham, [1994] RPC 407, 433-35; Avon County Council v Hooper, [1997] 1 All ER 532 (Court of Appeal, Civil Div.); and Busby v Co-operative Insurance Society Ltd, [1994] 1 EGLR 136, 138 (County Court). Cf. Regina v Human Fertilisation and Embryology Authority, ex parte Blood, [1996] 3 WLR 1176, 1190 (Queen's Bench Div.) (reviewing legislative history "put before the court with the consent of both parties").

56 [1993] 2 WLR 1.
57 ibid at 4.
58 ibid at 7.
59 ibid at 7-8.
60 [1996] 1 All ER 381.
61 ibid at 392.
62 ibid at 393.
63 [1995] 3 All ER 193.
64 ibid at 210.
65 ibid at 207-09.
66 ibid at 210.
67 [1995] 2 All ER 100.
68 ibid at 105-09.
69 ibid at 120.
70 This rule is discussed at supra notes 43-47 and accompanying text.
71 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 ER 100, at 112.
72 [1995] 3 WLR 630.
73 ibid at 645.
74 ibid. See also Regina v Wandsworth London Borough Council, ex parte Mansoor, [1996] 3 WLR 282, 293 (Court of Appeal) (rejecting use of legislative history that was not “directed to the intended meaning of the provisions which the court is being asked to construe”).
75 [1995] 3 WLR at 645.
76 ibid
77 ibid
But see *Three Rivers District Council and others v Bank of England (No 2)*, [1996] 2 All ER 363 (Queen’s Bench Div.) (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).

[1997] 1 All ER 862.

*ibid* at 898-99.

See *Avon County Council v Hooper and another*, [1997] 1 All ER 532 (Court of Appeal, Civil Div.); *Van Dyck and another v Secretary of State for the Environment and another*, [1993] 1 EGLR 186 (Court of Appeal).

*Pepper (Inspector of Taxes) v Hart*, [1993] 1 All ER 42, 67 (“Experience in the United States of America, where legislative history has for many years been much more generally admissible than what I am now suggesting, shows how important it is to maintain strict control over the use of such material.”)