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Sylvia Costelloe

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Cover Page Footnote

*J.D., Notre Dame Law School. The author would like to thank Professor Anthony J. Bellia for his helpful comments on this Note.

THE NEED FOR CONDITIONS LIMITING THE USE OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION: LESSONS FROM THE BRITISH COURTS

SYLVIA COSTELLOE*

I. INTRODUCTION

A. *The Place of Legislative History Within the Debate on Statutory Interpretation*

Statutory interpretation is of crucial importance for both lawyers and judges.¹ A notably fertile source of debate is the use of legislative history for purposes of statutory interpretation, which gained particular momentum in the past century.² Proponents of the use of legislative history in statutory interpretation argue that it is a valuable tool for interpreting ambiguous statutes.³ On the other hand, opponents such as Justice Scalia have argued that the only law that should govern is that which has been passed by a majority of the House and the Senate.⁴ The debate among American judges and scholars has largely centered around whether or not the courts should be allowed recourse to the legislative record at all,⁵ though it has been suggested that we develop a more nuanced approach to the issue.⁶ In order to foster debate sur-

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1. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14 (Amy Gutmann et al. eds., 6th ed. 1998) (noting that “[T]he subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers.”).

2. *Id.* at 30.

3. See James M. Landis, *A Note on “Statutory Interpretation”*, 43 HARV. L. REV. 886, 889 (1930) (“Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. Successive drafts of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice.”).

4. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1844)) (emphasis omitted) (“We are governed by laws, not by the intentions of legislators. . . . The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.”).

5. See SCALIA, *supra* note 1, at 29–30 (“My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”).

6. James J. Brudney, *Below The Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 71 (2007) (arguing that we should become “more attentive to the nuances of positive reliance on legislative history, rather than simply continuing to debate the merits of its wholesale exclusion”).

rounding the use of legislative history, it is instructive to look to the experience in other common law countries. This Note will focus on the experience of British courts and their use of legislative history, using the House of Lords case *Pepper v. Hart*⁷ as a focal point.

B. *The Need for Conditions Limiting Recourse to Legislative History*

This Note will argue that American courts should be guided by conditions limiting when recourse to legislative history may be had. In order to make that argument, this Note will proceed in the following way: first, Section II will discuss the value of a comparative approach to the use of legislative history. It will then discuss in Section III the arguments that have been made in favor and against considering legislative history for purposes of statutory interpretation, making particular note of the constitutional objections. Section IV will consider whether it is possible to draw any principles regarding the place of legislative history from recent Supreme Court case law. A model for laying down limiting conditions in this area will be discussed in Section V through the example of the British case, *Pepper v. Hart*. The section will also consider the criticisms leveled against the case and the impact that it has had on subsequent cases. The final section will consider why the conditions in *Pepper* would be unworkable in American courts, and what concerns would have to be addressed in laying down conditions regarding the use of legislative history in the American context. This Note will conclude by addressing the areas in which future research would be required, namely whether it would be possible for Congress to lay down limiting conditions that address all the concerns regarding use of legislative history, and whether such conditions could also be binding on state courts.

II. A COMPARATIVE APPROACH

This section will address the value of a comparative approach to the use of legislative history for statutory interpretation. It will briefly outline the development regarding the use of legislative history in British courts prior and after *Pepper v. Hart*. It will consider the differences between the British and American lawmaking process and how these differences might affect the value of the comparative analysis. Finally, it will show how the experience in British courts reveals that there are three possible approaches to the issue of legislative history—prohibiting such consultation altogether (as was the case in British courts before *Pepper*), allowing unfettered consultation, or allowing consultation subject to certain limiting conditions (as is the practice of British courts after *Pepper*). The object of this Note is to demonstrate why it is desirable to lay down limiting conditions, even though the precise conditions laid down in *Pepper* would not be workable in American courts.

7. *Pepper v. Hart*, [1993] A.C. 593 (H.L.).

A. *The Exclusionary Rule*

Unlike American courts, which never adopted an explicit rule allowing or disallowing use of legislative history in statutory interpretation, the British courts were long governed by a strict exclusionary rule. This rule prohibited British judges from consulting legislative history for purposes of statutory interpretation.⁸ It was significantly relaxed in the 1992 House of Lords case *Pepper v. Hart*, where Lord Browne-Wilkinson determined that consideration of legislative history should be allowed, provided three conditions were met: “(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.”⁹ The decision to relax the exclusionary rule is thus a relatively recent one in British jurisprudence. This is a primary reason why consideration of the British approach is instructive for American courts. An examination of cases decided in the years since *Pepper* reveals that if legislative history is to be consulted at all, it is desirable to set limitations on when such recourse may be had. The value of *Pepper* and subsequent cases for purposes of this Note lies in the fact that it provides a model of how consultation of legislative history might be strictly circumscribed. The object of the limitations in *Pepper* is to limit the amount and type of legislative history that may be consulted, and to signal to lawyers how much work they should put into examining the legislative history of any given statute in order to put the best case forward for their clients. In Section V, this Note will consider the criticism of *Pepper* and the effect that the decision had on subsequent British cases.

B. *Differences Between the British and American Lawmaking Process*

A comparative analysis requires an examination of the differences between the British and American lawmaking processes. These differences have an effect on how courts in the respective countries approach statutory interpretation and elements of legislative history. Though these differences are not insignificant, we can nonetheless use the British courts’ approach as a model for a more restrictive use of legislative history in statutory interpretation.

The British structure of government is characterized by the party-controlled parliamentary system, which results in the executive having significant influence over the statutes passed in Parliament.¹⁰ The British Parliament consists of three elements—the House of Commons (with approximately 650 elected members), the House of Lords (with approximately 800 unelected members) and the monarch.¹¹ As the

8. Nicholas M. McLean, Comment, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 309 (2012).

9. [1993] A.C. at 640.

10. GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 40 (13th ed. 2012).

11. *Id.* at 82.

only democratically elected body, the House of Commons is the ultimate location of power.¹² Most notably, the government is drawn from the majority governing the House of Commons.¹³ The result of this party-controlled parliamentary regime is that it is questionable whether a clear demarcation between the executive and the legislature is possible.¹⁴ The most important consequence of this system of government is that the executive, which dominates Parliament, can essentially determine which policies it wishes to implement in Parliament.¹⁵ Prior to 2005 the Appellate Committee of the House of Lords acted as the final court of appeal. The Constitutional Reform Act of 2005 abolished the Appellate Committee of the House of Lords and created an entirely separate Supreme Court.

In order for a proposed bill to become an enacted statute, it must pass through and be approved by both Houses of Parliament and receive Royal Assent.¹⁶ A bill introduced in the House of Commons goes through two readings before being considered by a standing committee, which considers the bill clause by clause, and may make amendments.¹⁷ The bill is then reported back to the House of Commons, to enable consideration of any amendments made by the standing committee, and to allow for further debates to take place at a third reading.¹⁸ The standing committee reports play only a peripheral role in creating and explaining bill language.¹⁹ A further consequence of Britain's party-controlled parliamentary system is that the legislative text is rarely changed after introduction. As a result, there might be less of a need to consult Hansard (the official record of standing committee proceedings and parliamentary debates) to explain the legislative text.²⁰

The status of standing committee reports in British legislative history stands in contrast to the committee report in Congress, which is considered a primary source of reliable legislative history in the American context.²¹ American legislative history includes a diverse set of materials, generated at different stages by Congress and its committees.²² In further contrast to the United Kingdom, the American structure of government provides for a clear demarcation between the executive, legislature, and judiciary.²³ The Constitution provides that in order for a bill to become law, it must pass through the House and the Senate and receive the President's assent.²⁴ Legislation is often a

12. *Id.*

13. *Id.* at 38.

14. *Id.*

15. *Id.* at 80.

16. *Id.* at 86–87.

17. *Id.* at 82–83.

18. *Id.* at 83.

19. *See* Brudney, *supra* note 6, at 4.

20. *Id.*

21. *Id.*

22. *Id.* at 4–5.

23. U.S. CONST. arts. I–III.

24. The Constitution states that,

product of compromise in Congress, and the Supreme Court often refers to legislative history to understand those bargains.²⁵

Despite these differences, however, there is much to be gained from looking at the British approach to statutory interpretation. While the line between the executive and legislature is somewhat blurred in the British system, the Constitutional Reform Act of 2005 made the judiciary wholly separate, tasked with interpreting the law just as American judges are. Though the amount of legislative history that British judges can rely on is more limited, it nevertheless constitutes valuable interpretive material that has not gone through the legislative process. Finally, a look at the British approach is most instructive because the British courts' relatively recent relaxation of the exclusionary rule is a model for how the adoption of conditions regarding the use of legislative history may affect how courts treat legislative history in statutory interpretation.

C. *Three Possibilities for Dealing with Legislative History*

The experience in Britain reveals three possibilities for deciding whether or not to consult legislative history for purposes of statutory interpretation. First, one could maintain the current status quo in American courts, which is to allow unfettered consultation of legislative history depending on the individual judge's discretion. Second, one might allow consultation of legislative history provided that certain conditions have been met. This is the approach taken by the British courts following *Pepper v. Hart*. Third, one could ban consultation of legislative history altogether. This was the approach taken by the British courts prior to *Pepper v. Hart*. An examination of past and current American case law reveals that the current status quo in American courts is undesirable because it creates uncertainty for litigants, who will not know beforehand whether or not the interpretation of the statute at issue will be influenced by legislative history. At the other end of the spectrum, experience in American courts and the reasons given in *Pepper* for relaxation of the exclusionary rule in Britain show that it is

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the objections to that House in which it shall have originated, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2.

25. See Brudney, *supra* note 6, at 5.

unrealistic to forbid a court to consult legislative history when faced with an ambiguous statute. This leaves the approach adopted in *Pepper* as the most workable one, laying down strict limitations on when legislative history may be consulted. An examination of the conditions laid down in *Pepper* reveals that while conditions are desirable, the ones laid down in *Pepper* would be unworkable in the American context. Such limiting conditions would probably have to be laid down by Congress, instead of the Supreme Court. The next section will consider arguments in favor and against consulting legislative history for purposes of statutory interpretation.

III. ARGUMENTS IN FAVOR AND AGAINST CONSULTING LEGISLATIVE HISTORY

The decision whether or not to consult legislative history in American courts has largely been a matter of the discretion of individual judges, though such consultation only really picked up in the last century. According to Justice Scalia, it was not until the 1940s that courts began to extensively use legislative history in statutory interpretation.²⁶

Since there has never been a definitive case determining whether or not use of legislative history in American courts should be allowed, the debate in U.S. courts has centered mainly around whether or not legislative history should be consulted in the first place.²⁷ This section will consider an initial question, namely whether there are strong arguments in favor of consulting legislative history at all. It will also address the constitutional concerns regarding the use of legislative history.

A. *Is There Any Value in Considering Legislative History When Interpreting a Statute?*

Legislative history is often a valuable tool for statutory interpretation. Many statutes are ambiguous on their face and require some aid in interpretation. There are many reasons why a statute may be unclear—notably, ambiguities might allow legislators to make different claims to different constituents.²⁸ Another reason might be the need for a statute to respond to changing times.²⁹ As Saul Levmore notes, “[a]mbiguity can be intentional or unintentional; it can derive from misunderstandings about language, from simple mistakes, from a failure to plan ahead, or from the impossibility of seeing very far ahead.”³⁰ All these reasons suggest that it will often be the case that a statute is found to be ambiguous.

In light of the many reasons why a statute may be intentionally or unintentionally found ambiguous, there may be many instances in

26. SCALIA, *supra* note 1, at 30.

27. Brudney, *supra* note 6, at 60 (“[R]ecent debate[s] on the Supreme Court between legislative history advocates and skeptics [have] generally been cast in an all-or-nothing form.”).

28. Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1082 (2010).

29. *Id.* at 1083.

30. *Id.* at 1077.

which a court might find it useful to consult legislative history for purposes of interpretation. The strongest case in favor of consulting legislative history is the situation where the meaning of a statute was elaborated in legislative proceedings but the legislature had failed to make this meaning clear in the enacted text. Arguably, consulting legislative history in such situations would allow for the courts to give effect to Congress's true intent. In particular, there may be a statement in a statute's legislative history that addresses the particular issue faced by the court in a given case. If it could be discerned that this statement exhibited Congress's true intent, then it would seem unobjectionable to refer to this statement for purposes of interpreting the statute. If legislative history is considered one of many tools of statutory interpretation, just as purposivist, textualist, and intentionalist approaches are considered valuable tools, then it is hard to object to its use as one of a number of tools of statutory interpretation. Opponents, however, would argue that there is a great risk in giving a particular statement of legislative history authoritative value, allowing it to trump the enacted statutory text and other methods of statutory interpretation.

B. *Objections to Use of Legislative History*

The objections to use of legislative history are best illustrated by the Supreme Court case of *Rector of Holy Trinity Church v. United States*,³¹ which has often been cited as proof of the questionable consequences that consultation of legislative history might have. The case involved the interpretation of the Alien Contract Labor Act, which forbade the "importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States"³²

In reaching the conclusion that the Alien Contract Labor Act did not cover the minister who had been hired by the Church of the Holy Trinity, Justice Brewer referred to the title of the act, the evil which the act intended to remedy, as well as committee reports. The case is perhaps most famous for Justice Brewer's suggestion of "the familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."³³ This statement has led critics to state that *Holy Trinity Church* is "the prototypical case involving the triumph of supposed 'legislative intent' (a handy cover for judicial intent) over the text of the law."³⁴

31. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892) [hereinafter *Holy Trinity Church*]; see Brudney, *supra* note 6, at 57 ("The fifteen year period since the *Pepper* decision contrasts with U.S. experience of 115 years since the Supreme Court's decision in *Holy Trinity Church*, the case that in retrospect is viewed as ushering in our modern legislative history era.") (citations omitted).

32. Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332, *superseded by* Act of Mar. 3, 1903, ch. 1012, § 4, 32 Stat. 1213, 1214.

33. *Holy Trinity Church*, 143 U.S. at 459.

34. SCALIA, *supra* note 1, at 18.

As a result of the Supreme Court's reliance on legislative history, this case has frequently been cited as having changed the rules on the use of legislative history in statutory interpretation.³⁵ It has also been criticized for having wrongly interpreted the statute at hand. Adrian Vermeule has argued that a close look at the legislative history reveals that Congress intended precisely what it said, namely to bar the importation of persons to perform "labor or service of any kind."³⁶

Though the Justices in *Holy Trinity Church* consulted legislative history to reach their conclusion, the case did not lay down any principled limitations on when such history should be consulted. Indeed, as noted above, American judges did not begin to consistently consult legislative history in statutory interpretation until decades after the case.³⁷

The decision in *Church of the Holy Trinity* reveals a number of objections that may be raised against consultation of legislative history. Justice Brewer's statement that a "thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers"³⁸ demonstrates the risk that consultation of legislative history might lead to complete disregard of the statutory text itself. This is an objection that has been raised by Justice Scalia, one of the most ardent critics of the use of legislative history in statutory interpretation. He has argued that the enacted text always trumps "unenacted legislative intent."³⁹ In addition, he has noted that the best evidence of a statute's purpose is the text adopted by both Houses of Congress and submitted to the President.⁴⁰ According to Justice Scalia, where the statute contains an unambiguous phrase that has a clearly accepted meaning in both legislative and judicial practice, we do not permit statements of individual legislators or committees during the course of the enactment process to expand or contradict its meaning.⁴¹ In addition, there is a risk of upsetting the delicate compromise reached in Congress if the Court departs from the clearly expressed statutory wording.⁴²

A further objection to considering legislative history is the infringement of the constitutional principles of separation of powers, bicameralism, and presentment. The Presentment Clause provides that a statute

35. See Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 905 (2000) (citing criticisms by Justice Scalia).

36. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1844–45 (1998).

37. See William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT. L. REV. 365, 392 (1990); Justice Felix Frankfurter, *The Benjamin N. Cardozo Lecture* (Mar. 18, 1947) (transcript available at 47 COLUM. L. REV. 527, 542–43 (1947)); SCALIA, *supra* note 1, at 30.

38. *Holy Trinity Church*, 143 U.S. at 459.

39. *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

40. *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (Scalia, J.) (citations omitted).

41. *Id.* at 98.

42. John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 41 (2006) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002)).

must pass through both Houses and be signed by the President to become law.⁴³ Separation of powers provides for a strict demarcation of powers between the legislature, the executive, and the judiciary. Justice Scalia argues that whatever Congress has not prescribed is left to the legislature and the judiciary.⁴⁴ He argues that Congress cannot authorize a committee to fill in “minor details” of a law, no more than it can authorize a committee to enact minor laws.⁴⁵

Finally, it is questionable whether the statement of a single legislator should be attributable to all of Congress. Justice Scalia argues that the only conceivable basis for considering committee reports as authoritative is if they are considered indicative of the will of the entire House or Senate, which they cannot be.⁴⁶

As a matter of public policy, there is a risk of infringing on legal certainty, the law’s predictability, and the ability of the law to guide conduct if recourse is had to legislative history.⁴⁷ There is also a risk of imposing undue costs on litigants if they are required to pore over legislative history to determine whether any authoritative statements had been made during the legislation’s debates in Congress or Parliament.

C. *What Lessons Can be Gleaned from the Arguments in Favor of and Against Consultation of Legislative History?*

As was argued above, there is value in considering legislative history where a statute is ambiguous. However, the objections to the use of legislative history should not be dismissed all too easily. These considerations show that the best approach would be to strictly circumscribe the circumstances under which legislative history may be consulted. The next section will show that it is currently difficult to discern any true limiting principles regarding the use of legislative history in American courts.

IV. DRAWING PRINCIPLES OF STATUTORY INTERPRETATION FROM AMERICAN CASES

This section will consider whether it is possible to discern any conditions limiting the use of legislative history for purposes of statutory interpretation in the approach of the American courts. This will be done by way of considering some recent Supreme Court opinions that have referred to legislative history. This section will show that while the Supreme Court has purported to refer to some limiting conditions, it has not strictly adhered to them. This discussion will show the need for laying down conditions regarding the consultation of legislative history that can be more strictly adhered to.

43. See Brudney, *supra* note 6, at 5.

44. SCALIA, *supra* note 1, at 35.

45. *Id.*

46. *Id.*

47. Aileen Kavanaugh, Pepper v. Hart and Matters of Constitutional Principle, 121 L. Q. REV. 98, 102 (2005).

A. *The Requirement of Ambiguity*

Many cases suggest that legislative history need not be consulted where the statutory text is unambiguous. Thus, Justice Sotomayor held in *Mohamad v. Palestinian Authority* that the Court need not rely on legislative history given the text's clarity, but noted that the history supported the justices' interpretation of what it meant to be an "individual" under the Torture Victim Protection Act (TVPA).⁴⁸ She proceeded to quote a report from the Hearing and Markup before the House Committee on Foreign Affairs and its Subcommittee on Human Rights and International Organizations, wherein one of the bill's sponsors proposed an amendment "to make it clear we are applying it to individuals and not to corporations."⁴⁹ She noted that "the amendment was unanimously adopted, and the version of the bill reported out of Committee reflected the change."⁵⁰ While recognizing the limits of the drafting history, Justice Sotomayor found it "telling that the sole explanation for substituting 'individual' for 'person' confirms what we have concluded from the text alone."⁵¹ If the Supreme Court were truly to adhere to a requirement that the statute be unclear in order to allow consultation of legislative history, then the Court would not have gone beyond the text of the statute in *Mohamad*. Rather than using legislative history as an aid to interpret an unclear statute, it was used here merely to support the Court's reading of the statute.

Justice Sotomayor took a similar approach in *Milavetz, Gallop & Milavetz v. United States*, a case involving the application of certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) to attorneys.⁵² Here, again, Justice Sotomayor held that reliance on the legislative history of the statute was unnecessary in light of the statute's unambiguous language, but in a footnote emphasized that the legislative record provided support for the Government's reading of the statute.⁵³ She argued that "[s]tatements in a Report of the House Committee on the Judiciary regarding the Act's purpose indicate concern with abusive practices undertaken by attorneys as well as other bankruptcy professionals."⁵⁴ Notably, she referred to hearings from 1998. Though these hearings preceded the BAPCPA's enactment by several years, she noted that these hearings formed part of the record cited by the 2005 House Report.⁵⁵ As above, a strict application of a requirement of ambiguity would have prevented consultation of the legislative history in this instance.

Allowing recourse to the legislative record despite the clarity of the statute raises some serious public policy concerns, which Justice Scalia emphasized in his dissent in *Milavetz*. He began by noting that the

48. 132 S. Ct. 1702, 1710 (2012).

49. *Id.*

50. *Id.*

51. *Id.*

52. 559 U.S. 229 (2010) [hereinafter *Milavetz*].

53. *Id.* at n.3.

54. *Id.*

55. *Id.*

Court's cases have said that legislative history should not be resorted to where the statutory text is clear.⁵⁶ He criticized Justice Sotomayor's reliance on legislative history in her footnote, predicting that conscientious lawyers would now no longer be able to disregard legislative history where the statute was clear, and would have to spend time and their clients' money to buttress their case where the statutory text was unambiguously in their favor; and to attack an unambiguous text that was against them.⁵⁷ According to Justice Scalia, "[i]f legislative history is relevant to confirm that a clear text means what it says, it is presumably relevant to show that an apparently clear text does not mean what it seems to say."⁵⁸ Thus, he concluded that "[e]ven for those who believe in the legal fiction that committee reports reflect congressional intent, [Justice Sotomayor's footnote] is a bridge too far."⁵⁹ This criticism shows that the use of legislative history to confirm the meaning of a clear statute is even more objectionable than consulting legislative history in the case of an ambiguous statute.

Further confirmation of an apparent requirement of ambiguity before allowing recourse to the legislative record is provided in *Zuni Public School District v. Department of Education*, a case concerning distribution of federal Impact Aid funds.⁶⁰ Here, Justice Breyer noted that neither legislative history nor the reasonableness of the method determined by the Secretary of Education would be determinative if the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation.⁶¹ He noted that "if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."⁶² Ultimately the Court found in favor of the Department of Education. Justice Breyer agreed with the Secretary of Education's argument that the statute in question was ambiguous on the specific formula to be used. The Court therefore gave deference to the Secretary's formula for calculating the distribution of federal Impact Aid funds.⁶³

The concurrence and dissent in *Zuni* reveal two starkly differing approaches. Justice Stevens in his concurrence noted that the legislative history was "pellucidly clear and the statutory text [was] difficult to fathom."⁶⁴ He added that any competent counsel would examine the legislative history.⁶⁵ In contrast, Justice Scalia's dissenting opinion heavily criticized reliance on legislative history, arguing that it could never

56. *Id.* at 254 (citing *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

57. *Id.*

58. *Id.*

59. *Id.*

60. 550 U.S. 81 (2007).

61. *Id.* at 93.

62. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

63. *Id.* at 94.

64. *Id.* at 106.

65. *Id.*

be “pellucidly clear.”⁶⁶ Legislative history, as Justice Scalia noted, is never voted on, or ordinarily even seen or heard by the lawmaking bodies, which consist of both Houses of Congress and the President.⁶⁷ To illustrate the misuse to which legislative history may be put, Justice Scalia cited *Holy Trinity Church*.⁶⁸ According to him, every justice on the Court in that case had disregarded the plain language of the statute that forbade the hiring of a clergyman from abroad, in order to find that the clergyman in the case at hand was not covered by the statute.⁶⁹

A requirement that a statute first be deemed ambiguous is difficult to adhere to. First of all, the courts have not spelled out how to determine ambiguity in a statute. Even where the statutory text is clearly unambiguous, the above cases show that some justices clearly cannot help but rely on legislative history to support their conclusion. Further, as a matter of public policy, the justices’ referral to legislative history regardless of clarity of the statute creates an incentive for lawyers to pore through legislative history simply to find something that may bolster their argument, regardless of the statute’s actual clarity. This may lead to increased time and expense and resulting litigation costs. In a legal system that is already marked by a sharp divide between rich and poor litigants, the chasm should not be further exacerbated by favoring wealthy litigants whose lawyers can afford to go through vast amounts of legislative history to find statements supporting their argument.⁷⁰ Public policy, at a minimum, requires that use of legislative history be restricted to those instances where the statute is unclear on its face. The trend among the justices to use legislative history to support their reading of an already clear text gives too much weight to legislative history in the face of a statute that has been duly enacted through bicameralism and presentment. Legislative history should be a last resort for interpreting an unclear statute rather than authoritative support for the already clear meaning of a statute.⁷¹

B. *The Nature of the Legislative History Relied On*

Not all statements in the legislative record should be given equal weight. This point was forcefully made by Justice Scalia in *Zuni*, where he questioned “can it really be that this case turns, in the Court’s view, on whether a freshman Congressman from New Mexico gave a floor

66. *Id.* at 117.

67. *Id.*

68. 143 U.S. at 457.

69. *Zuni*, 550 U.S. at 117.

70. See Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1236–37 (2007) (noting that “[t]he United States spends only \$300 million on legal services to serve over forty million poor citizens”) (citations omitted).

71. See *Samantar v. Yousuf*, 560 U.S. 305, 327 (2010) (Scalia, J., concurring) (citing *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring) (noting that the past practice of using legislative history “was ‘not the practice of using legislative history for the purpose of giving authoritative content to the meaning of a statutory text’”)).

speech that only late-night C-SPAN junkies would witness?”⁷² He argued that the only fair inference from Congress’s silence during debates on the statute was that Congress had nothing further to say, and that the statutory text was to do all of the talking.⁷³

Justice Scalia also made the point about the authority of legislative history in his concurrence in *Samantar*, arguing that the Court had cited for its proposed interpretation a Committee Report that the Court had no reason to believe was read by the Senate or House, or even members of the Committee itself, who had never voted on the Report.⁷⁴ In addition, he noted that the Report cited to did not address the particular issue in the case, but rather only spoke of “consular and diplomatic immunity,” which was not at issue in the case at hand.⁷⁵

A judge should not simply be able to rely on the statement of any given Congressman in order to support his or her reading of a particular statute. There is an inherent risk in relying on the legislative record if the result is to allow a judge to cherry-pick those statements that conform to his interpretation of the statute and to ignore those that do not conform to it. What is needed is a hierarchy of legislative material. It has been argued that this has already been done to a certain extent in U.S. courts, namely that American judges “privilege a small subset of legislative materials, namely committee reports and sponsor statements.”⁷⁶ He notes that American courts generally look first to committee reports, and are somewhat leery of floor debates. Thus, an implicit hierarchy of sources of legislative history may be discernible in American courts.⁷⁷

As Justice Scalia’s comment in *Zuni* made clear, it is at the very least desirable to limit the nature of legislative material that can be used as support for a particular reading of a statute. Such a requirement would ensure that the legislative material relied upon had a certain degree of legitimacy. However, it is questionable whether such a requirement could be adhered to in practice, and whether committee reports may in fact be deemed authoritative.

C. Ambiguity in Legislative History

A major concern regarding the use of legislative history for purposes of statutory interpretation is the reality of conflicting legislative history. In *Kirtsaeng v. John Wiley & Sons, Inc.*,⁷⁸ a case involving the application of the Copyright Act, Justice Breyer made a reference to the

72. 550 U.S. at 121.

73. *Id.*

74. 560 U.S. at 328.

75. *Id.*

76. Nathan Oman, Note, *Statutory Interpretation in Econotopia*, 25 PACE L. REV. 49, 65 (2004) (noting that “in actual practice, American judges take a somewhat holistic approach”).

77. *Id.* at 67.

78. 133 S. Ct. 1351 (2013).

House Judiciary Committee Report⁷⁹ as support for his reading of the statutory text. He prefaced this reference to the legislative history with the words “[t]hose who find legislative history useful will find confirmation in [citing the House Report].” These words seemed to imply that legislative history may provide authoritative support for the Court’s reading of a statute. He later referred to another House report, again for the benefit of “those who find legislative history useful.”⁸⁰ He ultimately held that there was no geographic restriction on the “first sale” doctrine in the Copyright Act, a conclusion which was supported both by language and common-law history of the Act.⁸¹

However, Justice Ginsburg’s dissenting opinion in the same case shows that legislative history may have been less clear than Justice Breyer assumed it to be. According to Justice Ginsburg, the legislative history confirmed the plain text of the statute, and was hardly “inconclusive.”⁸² She argued that the language and legislative history of the Act indicated that the “first sale” doctrine was not intended to apply to copies of a copyrighted work manufactured abroad, thereby finding against Justice Breyer’s conclusion.⁸³

This case is an example of the difficulty of using legislative history for purposes of statutory interpretation, namely the possibility of conflicting or inconclusive legislative history. If the courts were to insist on a requirement that the legislative history relied on be clear, then perhaps courts should not be allowed to rely on legislative history where it is ambiguous. However, there will likely be many instances where the legislative history will be ambiguous. This is a problem that does not have an easy solution. In such cases, however, legislative history may be best used in conjunction with other methods of statutory interpretation, such as a purposive approach, and by discerning which elements of legislative history best support the reading of a statute through that particular interpretive lens.

V. THE BRITISH APPROACH: SETTING CONDITIONS ON THE USE OF LEGISLATIVE HISTORY

In light of the disagreement over the use of legislative history in American courts, it is instructive to consider whether British courts have adopted a workable approach to legislative history by laying down conditions regarding its consultation. The experience of British courts subsequent to the decision in *Pepper v. Hart* provides a good indication of the utility of laying down limiting conditions. This section will lay out the changes brought about by *Pepper v. Hart* and will then consider the impact that the case had on subsequent cases.

79. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., REP. ON COPYRIGHT LAW REVISION 5 (Comm. Print 1965).

80. *Kirtsaeng*, 133 S. Ct. at 1361.

81. *Id.* at 1363–64.

82. *Id.* at 1382.

83. *Id.* at 1382–83.

A. *The Status of Legislative History Prior to Pepper v. Hart*

The relaxation of the exclusionary rule in *Pepper* is particularly noteworthy because British courts had long rejected using legislative history for purposes of statutory interpretation. As early as 1769, British courts held that a statute must take its meaning from the enacted text, not from the changes made in the House where it arose.⁸⁴ The exclusionary rule was extended to prohibit the use of reports made by commissioners upon which the legislation was based.⁸⁵ However, despite the apparent rigor of the exclusionary rule, some exceptions began to develop over time. As Lord Browne-Wilkinson noted in *Pepper*, the courts had for some time permitted “reports of commissioners, including law commissioners, and white papers to be looked at for the purpose solely of ascertaining the mischief which the statute is intended to cure but not for the purpose of discovering the meaning of the words used by Parliament to effect such cure”⁸⁶ As a result of Britain’s party-controlled parliamentary system, white papers could give insight into the intention behind the enacted statute.

A further encroachment on the exclusionary rule prior to *Pepper* was the covert consultation of legislative history by judges. Lord Browne-Wilkinson noted in *Pepper* that some judges had in the past admitted to privately consulting legislative history. The most striking example of this was Lord Denning M.R.’s admission in the Court of Appeal case of *Hadmor Productions Ltd. v. Hamilton* that he had relied on his own research into Hansard to reach his conclusion regarding the proper interpretation of the statute in that case.⁸⁷ When that case reached the House of Lords, counsel argued that they would have liked to have drawn Lord Denning’s attention to other passages of legislative history, had they known that he was going to consult it.⁸⁸

British cases reveal that a primary justification for the adoption of the exclusionary rule was a practical one. The House of Commons debates were initially not fully and accurately reported, making it impossible for either of the House of Parliament or litigants to consult such history.⁸⁹ Even after Hansard’s Parliamentary Debates offered an authoritative and comprehensive report of proceedings starting in 1909, there was still a fear that requiring parties to examine vast amounts of Hansard would be unduly burdensome, particularly on parties with lesser resources.⁹⁰

84. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 217 (K.B.).

85. *Salkeld v. Johnson*, (1848) 2 Exch. 256, 273 (Exch.).

86. [1993] A.C. 593, 630 (H.L.). White Papers constitute the government’s firm proposal for legislation, which may be published after the government has issued Green Papers, which set out and invite comments from interested parties on particular proposals for legislation. See SLAPPER & KELLY, *supra* note 10, at 86.

87. *Pepper*, [1993] A.C. at 636 (referring to *Hadmor Prod. Ltd. v. Hamilton*, [1983] A.C. 191).

88. *Hadmor*, [1983] A.C. at 233.

89. See *Millar*, (1769) 98 Eng. Rep. at 217 (noting that the history of changes that a bill has undergone in one House are not known to the other House or to the sovereign).

90. See Brudney, *supra* note 6, at 8.

B. *The Decision in Pepper v. Hart*

Despite the reasons supporting the adoption of the exclusionary rule, the objections to the rule ultimately prevailed in the House of Lords' decision in *Pepper v. Hart*, which significantly relaxed the rule. The issue in the case was how to measure the taxable fringe benefit received by a member of the teaching staff at a boys' school whose sons had for many years been educated there at a charge of one-fifth of the fees charged to the general public.⁹¹ The education of the children at reduced fees was a taxable benefit under section 61(1) of the Finance Act 1976.⁹² The issue that arose was the amount to be treated as an emolument, namely "the cash equivalent of the benefit."⁹³ The taxpayers contended that this should be calculated as the additional, or marginal, cost to the school of educating the boys, which would have been zero.⁹⁴ The Inland Revenue, on the other hand, argued that the "expense incurred in or in connection with" the provision of education for the boys (pursuant to the language of the statute)⁹⁵ was the same as the expense incurred in connection with the education of other students, and therefore constituted a proportionate part of running the school.⁹⁶ The House of Lords did not initially consider the statute's legislative history, and it was not considered at oral argument. As a result, the Law Lords concluded that the "cost of the benefit" meant the average cost of providing the same educational benefit to all boys in the school.⁹⁷

Prior to handing down the decision, however, the Law Lords became aware that an examination of the parliamentary proceedings leading to the enactment of the Finance Act of 1976 might shed light on which of the two rival contentions represented the intention of Parliament.⁹⁸ The House of Lords decided that there should be a further hearing to consider whether, and in what circumstances, parliamentary debates might be used as an aid to interpreting a statute, particularly regarding the debates in Parliament concerning the provisions of the Finance Acts.⁹⁹ After a second hearing before an enlarged panel of seven judges, the Law Lords decided that they should depart from the exclusionary rule and that recourse to parliamentary debates would provide guidance in the case at hand.¹⁰⁰

91. [1993] A.C. at 621.

92. *Id.*

93. *Id.* at 622.

94. *Id.*

95. Finance Act 1976, 1976, c. 40, § 63(2) ("Subject to the following subsections, the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and (here and in those subsections) includes a proper proportion of any expense relating partly to the benefit and partly to other matters.").

96. *Pepper*, [1993] A.C. at 622.

97. *Id.* at 623 (noting that the appeal was initially heard before their Lordships without reference to Parliamentary proceedings, and was subsequently set for a rehearing).

98. *Id.*

99. *Id.* at 597.

100. *Id.* at 640.

Lord Browne-Wilkinson, giving the leading judgment in the case, was cautious in deciding that the exclusionary rule should be relaxed. He noted that in most cases reference to parliamentary materials would not shed light on the matter. However, in the cases where it was found that the very question before the court had been considered in Parliament, he saw no reason for the courts to blind themselves in light of Parliament's clear indication of intention.¹⁰¹ He concluded that "[t]he court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?"¹⁰² He limited the relaxation of the exclusionary rule by laying down three requirements that must be satisfied in order to allow recourse to legislative history. The requirements are: (a) the legislation must be ambiguous, obscure, or lead to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together with such other Parliamentary material as is necessary to understand such statements and their effect; (c) and the statements relied upon must be clear.¹⁰³

Lord Browne-Wilkinson's opinion addressed a number of practical objections that had been raised regarding consultation of legislative history. It is clear that Lord Browne-Wilkinson did not wish to take the American courts' unfettered approach to consultation of legislative history. He drew a sharp distinction between the approach of American courts and the approach of other common law countries in using legislative history. He emphasized that the experience in American courts, where legislative history had for many years generally been much more admissible than he was suggesting, showed the importance of maintaining strict control over the use of such material.¹⁰⁴ In contrast, he pointed to experience in New Zealand and Australia, where they had relaxed the rule to approximately the extent that he had suggested.¹⁰⁵ He noted that there was no evidence of any complaints of the nature made in American courts coming from those countries.¹⁰⁶ His statement that it would likely be the rare case in which legislative history was of utility,¹⁰⁷ as well as the three requirements laid down to determine whether legislative history should be considered,¹⁰⁸ further underline that he intended to strictly circumscribe the instances in which courts should be allowed to consult legislative history, and did not wish to embark upon the path taken by American courts. Lord Browne-Wilkin-

101. *Id.* at 635.

102. *Id.* at 634-635.

103. *Id.* at 640.

104. *Id.* at 637.

105. *Id.*

106. *Id.*

107. *Id.* at 634-635.

108. These being that (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear. (*Pepper*, [1993] A.C. at 640).

son clearly believed that by laying down principled limitations, the British courts would not run into the same difficulties faced by American courts.

Concerning the risk of taking up the court's time by considering unnecessary amounts of parliamentary material, he believed the concern was unfounded so long as courts insisted that Parliamentary material only be introduced in the limited cases he had mentioned and where such material contained a clear indication from the Minister of the mischief aimed at, or the nature of the cure intended, by the legislation.¹⁰⁹

Regarding the practical difficulties of accessing parliamentary materials, Lord Browne-Wilkinson argued that these difficulties were often overstated, the problem being one of expense and effort, not one of availability of material.¹¹⁰ He also dismissed the objection that lawyers would have trouble understanding parliamentary procedure and hence how much weight to give individual statements.¹¹¹ Finally, Lord Browne-Wilkinson considered a last practical objection, namely that legal advisers faced with an ambiguous statutory provision may feel that they have to research the materials to see whether they yielded the pot of gold; in essence, a clear indication of Parliament's intentions. He dismissed that concern as well, arguing that if a reading of Hansard showed that there was nothing of significance said by the Minister in relation to the clause in question, further research would become pointless.¹¹²

A final objection addressed by Lord Browne-Wilkinson was of a constitutional nature. Article 9 of the English Bill of Rights protects freedom of speech in parliamentary debates.¹¹³ According to the Attorney-General in *Pepper*, the use of Hansard for purposes of statutory interpretation would constitute a "questioning" in violation of Article 9 of the Bill of Rights.¹¹⁴ But in the opinion of Lord Browne-Wilkinson, Article 9 could not have the effect of stifling the freedom of all to comment on what was said in Parliament. Article 9, viewed against its historical background, was intended to prevent Members of Parliament from suffering civil or criminal penalties for what they said in Parliament.¹¹⁵ Members of Parliament were thus allowed to discuss what they, as opposed to the monarch, chose to discuss.¹¹⁶ Lord Browne-Wilkinson did not consider the consultation of legislative history to constitute a "questioning" for Article 9 purposes – [f]ar from questioning the inde-

109. *Pepper*, [1993] A.C. at 640.

110. *Id.* at 636.

111. *Id.* at 637.

112. *Id.* at 637.

113. The Bill of Rights, 1688, 1 W. & M., c. 2, § 1(9) ("That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.").

114. [1993] A.C. at 638.

115. *Id.*

116. *Id.*

pendence of Parliament and its debates, the courts would be giving effect to what is said and done there.”¹¹⁷

In addition to addressing the objections to consulting legislative history, Lord Browne-Wilkinson gave a number of reasons in support of relaxing the exclusionary rule. For one thing, he noted that judges were already allowed to consult government White Papers in order to determine statutory meaning. He deemed it artificial to draw a distinction between consulting government White Papers in order to determine the mischief aimed at by the statute but not to consider Parliament’s intention in enacting the statute.¹¹⁸ In addition, he recognized that some consultation of parliamentary debates was already happening in practice, though unofficially so, referring to the above-mentioned *Hadmor* case. He noted that parties in such situations do not know and have no opportunity to address the judge on the matter.¹¹⁹

The new test laid down by Lord Browne-Wilkinson was applied in *Pepper* itself. It was determined that the statutory provision of the Finance Act was ambiguous, and that the parliamentary debates shed light on its meaning. It was also held reasonable to attribute to Parliament as a whole the views repeatedly uttered by the Financial Secretary.¹²⁰ As a result, the House of Lords found in favor of the taxpayers.¹²¹

C. Criticism of *Pepper v. Hart*

Much of the criticism that was leveled against the decision in *Pepper* mirrors the objections that have been raised against consultation of legislative history in American courts. This subsection will consider the objections that have been raised, which will help better understand whether laying down limiting conditions regarding the use of legislative history is workable in practice.

One scholar perceived the new rule laid down in *Pepper* as a decision that would have been best left to the legislature rather than the courts.¹²² Others sought to limit the impact of the case by suggesting that it was only authority for a principle of estoppel, whereby a categorical assurance by the government as to the meaning of legislation would prevent the government from later contending for a different meaning.¹²³

117. *Id.*

118. *Id.* at 635.

119. *Id.* at 636.

120. *Id.* at 642.

121. *Id.*

122. See Richard Buxton, *How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales*, (2009) 125 L. Q. Rev. 60, 72 (arguing that the decision in *Pepper* was a “rush to judgment, that would not have occurred if it had been recognized that the revocation of long-standing rules and the invention of new remedies is the business of the legislature and not of the courts”).

123. See Lord Steyn in *McDonnell v. Christian Bros. Tr.*, [2003] UKHL 63, [2004] 1 A.C. 1101, [29].

As a constitutional matter, it has been argued that *Pepper's* relaxation of the exclusionary rule violates the deeply-enshrined principle of parliamentary privilege, laid down in Article 9 of the English Bill of Rights, which safeguards the freedom of parliamentary debates and proceedings from impeachment or questioning in courts.¹²⁴ According to Philip Joseph, the effect of the decision in *Pepper* has been to “compromise Parliament’s ability to function independently free from outside interventions or repercussions, and . . . realign the relationship between the political and judicial branches in ad hoc and unplanned ways.”¹²⁵ As noted above, this constitutional concern was addressed and dismissed by Lord Browne-Wilkinson in *Pepper*. While recognizing that Article 9 was a provision “of the highest constitutional importance,” he argued that it would be stretching the meaning of “questioning” too far to hold that reference to parliamentary statements for purposes of statutory interpretation constituted a violation of the article.¹²⁶ Rather, the purpose of such reference in court would be to give effect to what was being done in Parliament, rather than questioning its independence.

Even if legislators do not fear liability for their statements in Parliament, there is nonetheless a concern as to the effect that awareness of the power of their statements might have on their minds. Opportunistic legislators might take advantage of their power to exert influence over the courts’ interpretation of statutes by making particular statements as to the meaning of statutes in Parliament.¹²⁷ As Lord Steyn has argued, “why should a minister not take advantage of the opportunity under *Pepper* to explain the effect of the legislation in the way in which the government would like it to be understood?”¹²⁸ If this were the case, then the statements of a minister promoting a Bill would be “no more than indications of what the government would like the law to be.”¹²⁹ The risk that the government might “plant” questions so as to elicit *Pepper* responses in Parliament suggests that the reliability of parliamentary statements made in the wake of *Pepper* might be questionable.¹³⁰ An example of such awareness of the potential use by the courts of statements made in Parliament is provided by the debates concern-

124. The Bill of Rights, 1688, 1 W. & M., c. 2, § 1(9) (“That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”).

125. Philip A. Joseph, *Parliament’s Attenuated Privilege of Freedom of Speech*, 126 L. Q. REV. 568, 568 (2010).

126. *Pepper*, [1993] A.C. at 638.

127. Joseph argues that the effect of *Pepper* is that ministers might be economical in stating reasons for their decisions in Parliament, or that they might misrepresent or embellish the purpose of the Bill, knowing that the courts might use their statements for purposes of interpretation. The result would be interpretations of statutes that serve the government’s interests. Joseph, *supra* note 125, at 574.

128. Johan Steyn, *Pepper v Hart; A Re-examination*, 21 O.J.L.S. 59, 65–69 (2001).

129. *Id.* at 65.

130. See Joseph, *supra* note 125, at 576 (“It was also inevitable that governments would resort to planted questions to elicit *Pepper v. Hart* responses.”); William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 570–71 (2000) (noting that legislative history may now be “less illuminating in the United

ing the enactment of the Human Rights Act in Parliament. In response to a question regarding the omission to incorporate Article 13 of the European Convention on Human Rights in the Human Rights Bill before the House of Lords, the Lord Chancellor replied, "One always has in mind *Pepper v. Hart* when one is asked questions of that kind. I shall reply as candidly as I may."¹³¹ This statement shows the practical effect that *Pepper* has had on parliamentary debates and the risk that questioning in Parliament may now be geared towards future use in judicial review.

The concern about planted questions flows into another constitutional concern, namely separation of powers. There is a fear that using ministerial statements for purposes of statutory interpretation gives the British Parliament, and with that the executive, too much power over the meaning of statutes. Aileen Kavanaugh argues that by allowing the judiciary to accept ministerial statements for purposes of statutory interpretation, the executive is given power to make law, allowing "Ministers to specify the details of statutory meaning, even though these details are not incorporated in the statutory text."¹³² Giving the executive such power cannot be reconciled with the constitutional principle of separation of powers and of vesting lawmaking power in Parliament.¹³³ In addition to giving the executive too much power in Parliament, there is also a risk that the executive, through its statements in Parliament, might encroach upon the judiciary's function of independently interpreting legislation.¹³⁴ While Aileen Kavanaugh recognizes Lord Browne-Wilkinson's acknowledgment of the practice of consulting government White Papers for contextual information in statutory interpretation, she emphasizes this was not what was done in *Pepper*. Rather, the ministerial statements were treated as an authoritative explanation of the meaning of the statute.¹³⁵ In light of Britain's party-controlled system, with the executive being formed by the majority in the House of Commons, most legislative proposals constitute policy decisions made by the executive.¹³⁶ In light of Britain's party-controlled system, with the executive being formed by the majority in the House of Commons, most legislative proposals constitute policy decisions made by the executive.¹³⁷ Giving legislative history authoritative force creates a real risk of allowing the executive to encroach upon the judiciary's function by means of planting statements in the legislature.

The above-noted criticisms are ones that can also be raised in American courts. While the risk of the executive exerting excessive power in the legislature and hence in the courts is unique to Britain's

Kingdom after *Pepper*, if the relevance of parliamentary debates to subsequent legislators inspires legislators to plant their own partial views into the record").

131. Steyn, *supra* note 128, at 69 (quoting Hansard (H.L.) (Nov. 18, 1997), col. 476).

132. Kavanaugh, *supra* note 47.

133. *Id.*

134. *Id.* 102–103.

135. *Id.* at 103–104.

136. SLAPPER & KELLY, *supra* note 10, at 84.

137. *Id.*

party-controlled system, the risk that legislators may plant statements in Congress is equally applicable in the United States, as is the risk that legislators may exert excessive control over courts' interpretations of statutes.

A further criticism made against *Pepper* that is applicable in both the British and American context is that consultation of legislative history allows courts to give effect to Parliament or Congress's unenacted, rather than enacted, intentions, despite the fact that only the latter have gone through the legislative process and been voted on. There are good reasons for requiring courts to respect and give effect to the enacted text of the statute, which has resulted from the legislative process when interpreting legislation.¹³⁸ While Parliament and Congress have an institutionalized system for giving effect to its enacted intentions, namely the statutory text, they have no mechanism for expressing their unenacted intentions, and there is, therefore, no way of knowing either their unenacted intentions or what support they had.¹³⁹ Allowing recourse to legislative history would allow Parliament and Congress's unenacted intentions to trump their enacted intentions contained in the authoritative text, thus subverting the rationale of the legislative process.¹⁴⁰ "[J]udges might replace the intentions contained in the authoritative statutory text with intentions which did not command majority support in Parliament."¹⁴¹ The consequence of such reliance on parliamentary debates is the introduction of an element of uncertainty into the law. It is undesirable that people should be left to guess the true meaning of a statute based on Parliament or Congress's unenacted intentions contained in their debates. Citizens should be able to rely on the text of the statute as a complete intimation to guide their conduct. Thus, it has been argued that one should proceed cautiously in considering material for purposes of statutory interpretation that is not readily available to the ordinary citizen.¹⁴² The effect of *Pepper* might be that diligent lawyers feel required to engage in extensive

138. Kavanaugh, *supra* note 47, at 99–100. In the American context, see Justice Scalia's statement in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (emphasis omitted) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1844)).

139. Kavanaugh, *supra* note 47, at 100.

140. *Id.* at 101 (citing Steyn, *supra* note 128, at 68 (arguing that *Pepper v. Hart* treats ministerial policy statements as a "source of law")). *Pepper* has also been described as offering "an alternative way of legislating." See also J. C. Jenkins, *Pepper v. Hart: A Draftsman's Perspective*, 15 STATUTE L. REV. 23 (1994).

141. Kavanaugh, *supra* note 47, at 106.

142. Lord Oliver of Aylmerton noted in *Pepper v. Hart*, [1993] A.C. 593, 619–620 (H.L.) that,

[A statute is] the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

Id.

research which is both costly and time-consuming in order to determine the meaning behind the statute.¹⁴³

Though these concerns are certainly valid, it is worth noting that Lord Browne-Wilkinson emphasized the need for strict adherence to the three requirements he laid down. If consultation of legislative history is strictly reserved for instances where the statute is deliberately left unclear or ambiguous by the legislature, it might be argued that the unfairness towards private citizens is somewhat diminished. In such a situation, it seems that the unfairness would not be generated by the courts' use of legislative history for purposes of interpreting the statute, but rather by Parliament's initial enactment of an ambiguous statute. Requiring lawyers to do extensive research into a statute's legislative history to determine its meaning would simply be a consequence of the legislature's having enacted an ambiguous statute. Rather than considering this as an argument against the use of legislative history, it might be considered an argument in favor of a condition limiting recourse to such legislative instances where the meaning of the statute is obviously unclear on its face.

A final constitutional consideration is whether it is legitimate to attribute to the intention of the legislature as a whole the statement of one minister or member of Congress. As Aileen Kavanaugh has argued, members of Parliament may remain silent about a ministerial statement for many reasons, perhaps precisely because the statement has not been incorporated into the statute and hence does not have the force of law.¹⁴⁴ This concern is likely somewhat diminished today. Twenty years have passed since the decision in *Pepper*, and members of Parliament should now be well aware that their silence in the face of statements about a statute's meaning might be interpreted as acquiescence. Indeed, as the Lord Chancellor's remarks above show,¹⁴⁵ members of Parliament are now cognizant of the use to which their statements in Parliament might now be put in the courts. Applying these considerations to the American context, it could also be argued that if Congress or the Supreme Court laid down conditions regarding the use of legislative history, the mere knowledge that such conditions exist would encourage legislators to be more clear or more emphatic during debates in Congress and not to remain silent in the face of disagreement with a given statement.

D. *Is It Possible to Lay Down Conditions that Address the Objections to the Use of Legislative History?*

While it would be desirable for American courts to adopt limiting conditions, it is important to recognize that the *Pepper* requirements are deficient in some respects. The requirement of ambiguity fails to recognize that some statutes do not appear ambiguous on their face, but rather become ambiguous when recourse to legislative history is had. A

143. Kavanaugh, *supra* note 47, at 107–08.

144. *Id.* at 105.

145. 583 Parl. Deb., H.L. (1997) 466 (U.K.).

good example of this is the case of *Pepper* itself, in which the statute appeared clear, but the Law Lords later decided on a rehearing when it was brought to their attention that the Finance Secretary had addressed the very issue in the case during parliamentary debates.¹⁴⁶ In addition, novel facts may arise that were not contemplated by the legislature.¹⁴⁷ In such circumstances, it is questionable how much light can be shed on apparently ambiguous statutes through consultation of legislative history. Finally, the legislature may intentionally leave a question open, thereby punting a particular policy question to the courts.¹⁴⁸ However, despite these concerns, there will still be cases where a statute is ambiguous on its face, and the issue was clearly discussed in parliamentary or congressional debates. Even if the precise issue at hand was not discussed in debates, it may be possible for courts to infer the intention of Parliament or Congress based on statements made during debates. The question is simply when courts should be allowed to use statements made during debates in Congress or Parliament and how much weight should be given to such statements.

In order to determine whether American courts should adopt conditions similar to the one adopted in *Pepper*, one should consider subsequent cases that have been decided in the wake of *Pepper*. As noted above, it is clear that Lord Browne-Wilkinson in *Pepper* sought to avoid the very problem that American courts have faced in light of broad, unfettered recourse to legislative history.¹⁴⁹ The question arises whether the limitations in *Pepper* succeeded in maintaining strict control, or whether subsequent British cases are simply comparable to American cases in their use of legislative history.

A great fear that critics of *Pepper* had was that the decision would lead to an excessive reference to legislative history by litigants, in the hopes of persuading the courts of their desired interpretation of a given statute. In *Pepper* itself, Lord Mackay, dissenting, objected to relaxation of the exclusionary rule based on considerations of practice and principle.¹⁵⁰ It is for that reason that Lord Bingham in *R. (on the application of Spath Holme) v. Secretary of State for the Environment, Transport and the Regions*, insisted that the conditions laid down by the House in *Pepper* be strictly adhered to.¹⁵¹ He argued that the worst of all possible worlds would be reached if parties and the courts dredged through vast amounts of conflicting parliamentary statements simply to find that the statute required no further elucidation or that the statements were not clear and unequivocal. Lord Bingham found that neither the first nor the third threshold test under *Pepper* was satisfied here.¹⁵² Reference could not be made to ministerial statements in Parliament for purposes of construing s. 31 of the Landlord and Tenant Act of 1985 because the

146. *Id.* at 623.

147. See Mary D. Fan, *Textual Imagination*, 111 YALE L.J. 1251, 1258 (2002).

148. *Id.*

149. [1993] A.C. at 637.

150. *Id.* at 615.

151. [2001] 2 A.C. 349, 392 (H.L.).

152. *Id.* at 392-394.

statute was neither ambiguous, nor were there clear and unequivocal ministerial statements that could be relied upon.

A further important pronouncement on the requirements in *Pepper* was made in *Robinson v. Secretary of State for Northern Ireland and Others*, in which Lord Bingham stated that this was a good illustration of the sort of case in which the limited departure permitted by the House in *Pepper v. Hart* could not be properly relied upon as an aid to interpretation.¹⁵³ It was held that the Secretary of State's statements in debates on the Northern Ireland Act of 1998 neither explained the language of the statute nor accurately stated its effect.¹⁵⁴ As Lord Bingham noted, "It is not surprising that a minister, called upon at very short notice to answer a number of unexpected points, failed to speak with the precision of a parliamentary draftsman."¹⁵⁵ This case also raised awareness of the consequences of *Pepper* for purposes of references to Hansard in litigation. Lord Hoffman noted that Lord Mackay had "turned out to be the better prophet" in *Pepper*, pointing out that "[r]eferences to Hansard are now fairly frequently included in argument and beneath those references there must lie a large spoil heap of material which has been mined in the course of research without yielding anything worthy even of a submission."¹⁵⁶ He noted that it would be rare that a statute be construed to mean something other than what a member of the public, aware of all the background to the legislation but unaware of what individual members of Parliament had said during debates, would take it to mean.¹⁵⁷ This case clearly signaled caution regarding the use of legislative history for purposes of statutory interpretation. Similarly, Lord Carswell recognized in another case that *Pepper* had been out of judicial favor in recent years, no doubt due to its over-use.¹⁵⁸ However, he also emphasized that the principle had a place in statutory interpretation, and that it would be a shame if *Pepper* were now to be sidelined.¹⁵⁹

Cases following *Pepper* have consistently referred to the conditions laid down in that case. As Lord Carswell noted, they "have been authoritatively stated in a number of cases."¹⁶⁰ Recent cases have shown that the problem of excessive reference to legislative history by litigants, alluded to in *Robinson* and *Spath Holme*, are still present. In *Assange v. Sweden*, Lord Philips lamented that "[c]ounsel for both parties had placed before [the court] a substantial volume of parliamentary material without any close analysis as to whether this was admissible as an aid to interpretation of the 2003 Act under the doctrine of *Pepper v. Hart* or for any other reason."¹⁶¹ Though twenty years have passed since the decision in *Pepper*, cases such as *Assange* show that there are still clear

153. [2002] UKHL 32 at [17].

154. *Id.*

155. *Id.*

156. *Id.* at [40].

157. *Id.*

158. *Harding v. Wealands*, [2006] UKHL 32 at [81].

159. *Id.*

160. *Id.* at [82].

161. [2012] UKSC 22 at [11].

attempts to circumvent the conditions for use of legislative history that were laid down in *Pepper*, despite the House of Lords' insistence in *Robinson* and *Spath Holme* that the requirements would be strictly adhered to.¹⁶²

Though there are obvious difficulties in preventing litigants from referring to vast amounts of legislative history that support their argument in the hopes that the courts might be persuaded by some of it, the above discussions show that there are numerous examples of cases in which the British courts have refused to even look at legislative history because one of the three *Pepper* conditions had not been met. As such, the courts do indeed seem to be sending a strong message to litigants that legislative material will only be consulted when all three conditions have been met. Of the conditions, the requirement that the statute be unclear or ambiguous appears to be the most frequent reason for refusing to consult legislative history.¹⁶³ The other condition that has been heavily used as a reason not to consult legislative history is the requirement that the legislative history statements relied on be clear.¹⁶⁴ Though difficulties are inherent in allowing recourse to legislative history, it is noteworthy that subsequent British cases have all consistently referred to the conditions laid down in *Pepper* to determine whether or not to consult such materials.

Though *Pepper* clearly took a step in the direction of the American approach to treatment of legislative history in statutory interpretation, *Pepper* and subsequent cases have shown that the British courts did not intend to go entirely down the American path.

VI. A PROPOSED SOLUTION FOR THE USE OF LEGISLATIVE HISTORY IN AMERICAN COURTS

This section will consider why it would not be possible for American courts to take the approach of the British courts in *Pepper v. Hart*. It will then discuss what considerations would have to be taken into account in laying down conditions regarding the consultation of legislative history in U.S. courts.

162. See also *Wilson v. Sec'y of State for Trade & Indus.* [2003] UKHL 40 at [140] (arguing that there must be no "extension to the *Pepper v. Hart* decision or relaxing the strict observation of the safeguards which it included . . .").

163. See *In re G (A Minor)*, [2013] EWHC 134, [114] (Fam) (holding that there was no ambiguity in the relevant provisions of the Human Fertilisation and Embryology Act 2008, and hence, that the court would not be justified in consulting parliamentary proceedings for statutory interpretation); *Re IBM Pension Plan*, [2012] WL 4808667 at [55] (holding that the relevant provisions of the Pensions Act 2004 could be construed applying ordinary canons of construction, and that the sort of ambiguity which justified recourse to *Hansard* was not present).

164. See *Urenco UK Ltd. v. Urenco UK Pension Tr. Co. Ltd.*, [2012] EWHC 1495, [88] (Ch) (holding that the parliamentary statements referred to did not provide the clear statement required by *Pepper v. Hart*); *R. v. Coulson*, [2013] EWCA Crim 1026, [19] (applying usual principles of statutory interpretation when relevant provision "could be considered ambiguous or obscure, there [was] no clear statement by the promoter of the legislation which casts light on the issue . . .").

A. *Could a Framework Based on the Principles in Pepper v. Hart Address the Concerns Regarding the Use of Legislative History?*

Having considered the development in British courts subsequent to *Pepper v. Hart*, it is worth considering whether U.S. courts should adopt similar conditions. As has been noted above, the British courts have attempted to faithfully adhere to these conditions, in many cases refusing to consult the legislative record where the statute was clear or the legislative history sought to be relied upon was unclear.¹⁶⁵

As mentioned at the beginning of this Note, the question arises as to whether U.S. courts should have no conditions at all, adopt similar conditions, or not allow recourse to legislative history at all. It is clearly undesirable to set no conditions at all regarding the use of legislative history. It is unduly burdensome for litigants to have no guidance whatsoever regarding when legislative history may be consulted and when it may not be.

There are a number of reasons why the British approach would not work in American courts. Firstly, if any conditions were to be laid down, they would have to come from Congress, rather than the courts, because methods of statutory interpretation do not have *stare decisis* effect in American courts. In addition, the requirement that the statement relied upon be one made by the proponent of the bill is also not workable in U.S. courts. Instead, there would have to be a requirement that the material relied upon be a committee report or something similarly authoritative. Finally, the requirement that the statement relied upon be clear creates a risk of cherry-picking in the courts, leading judges to ignore certain statements and give weight to others on the basis of clarity.

The key to developing conditions regarding the use of legislative history is to recognize the reality that legislative history will always remain a valuable tool in statutory interpretation, while at the same time addressing the concerns that have been raised regarding the use of legislative history in statutory interpretation. The concerns regarding the use of legislative history have been discussed above both with regards to the reaction to the relaxing of the exclusionary rule in *Pepper v. Hart* and with regards to the use of legislative history in American courts. To summarize, these concerns are the violation of separation of powers and the principles of bicameralism and presentment by giving effect to unenacted legislative intent.¹⁶⁶ In addition, there is a fear that an opportunistic lawmaker may make a statement in Congress or Parliament simply to benefit from the weight that might be given to such statements when the statute is later interpreted in court. Finally, there is a fear that allowing such recourse would be unduly burdensome for litigants, requiring them to pore over legislative history in every case simply to find something that might support their argument and their reading of the statute.

165. See *supra* notes 162–63.

166. See Kavanaugh, *supra* note 47, at 102; SCALIA, *supra* note 1, at 29.

B. *What Considerations Would Have to Be Taken into Account in Developing Conditions Limiting Recourse to Legislative History?*

As was noted above, many jurists and commentators have argued that the use of legislative history violates principles of separation of powers and of bicameralism and presentment.¹⁶⁷ The concern about separation of powers is even more apparent in the United States, where there is a clear separation between the three branches of government. First, one would have to lay down criteria for how to determine whether a statute is ambiguous. If a statute were deemed ambiguous according to these criteria, then it could not be said to violate separation of powers to consult other legislative materials. Since the statute was not clear on its face, the courts should be allowed to go deeper by looking at legislative history. In addition, the conditions would have to stipulate that legislative history should never be deemed authoritative. While judges should be allowed to consult the legislative history as background information under certain circumstances, they may choose to give it as much weight as any other interpretive tool, such as textualist or purposive approaches. Though the *Pepper* requirement of clarity poses the risk of cherry picking, it is helpful to focus the judges' attention on the need to only consult clear statements. The courts would still exercise their judicial function by considering the clarity of the statute and the weight to be given to the legislative history at issue.

The concern about the opportunistic lawmaker making deliberate statements in Congress for purposes of influencing statutory interpretation is a valid one. However, this concern can be limited by providing that the courts should exercise prudence in evaluating legislative history, and should only consider certain types of legislative history, such as committee reports. Even if such a committee report turned out to be made on opportunistic grounds, the courts would always have discretion as to how much weight to give to the legislative history. If it became apparent that the statement relied upon was made on opportunistic grounds, they could simply disregard it. If Congress were to adopt limiting conditions, it would hopefully signal to lawmakers that "planting" statements in Congress would not necessarily lead the courts to adopt their desired interpretation of the statute.

The burden on litigants is also not to be easily dismissed. There is a very real risk that lawyers might find themselves forced to expend vast amounts of time and money on researching a statute's legislative history. This is so because some statutes may appear ambiguous though the courts might deem them clear. A conscientious lawyer would therefore research the legislative history in the event that a court did deem a statute unclear. However, in a system where some judges are willing to look at legislative history and some are not, this risk is inevitable. Setting down limiting conditions would put some boundaries on how much research would have to be done. For one thing, a wholly clear statute would not require additional research. This would address the

167. See SCALIA, *supra* note 1, at 29.

concerns that Justice Scalia had in recent cases where legislative history was used simply to confirm the Court's interpretation of a seemingly clear statute.¹⁶⁸ Furthermore, by requiring that a statute's clarity be determined on its face, not based on legislative history, lawyers would be able to make an *ex ante* determination as to whether or not recourse to legislative history will be required. In addition, imposing strict limits on the clarity of legislative history would signal to lawyers what sort of statements should be examined. As a result, lawyers would know what materials of legislative history to look at, and how to weigh such material in light of their clarity.

VII. CONCLUSION

There is much to be said for the fact that methods of statutory interpretation do not have *stare decisis* effect in American courts. Despite the sentiments of some Supreme Court justices, such as Justice Scalia,¹⁶⁹ it is unlikely that the Supreme Court would ever decide that judges should never be allowed to consult legislative history. This is particularly true in light of the fact that the British courts made the move to officially allow recourse to legislative history two decades ago. Rather than argue about whether or not to consult legislative history at all, one should discuss conditions limiting when such consultation should be allowed.¹⁷⁰ Though this would not appease Justice Scalia, it would certainly help assuage the more vigorous concerns he has voiced about the use of legislative history in the recent cases discussed above. While the use of legislative history for statutory interpretation will always remain controversial, experience in both British and American courts shows that it is desirable to center the debate around *when* courts should be able to consult legislative history, not *whether* they should be allowed to do so in the first place.

Future research in this area should consider what conditions would satisfy the concerns regarding the use of legislative history in courts. If conditions were to be laid down by the Supreme Court, a further consideration would be whether state courts could be bound by such conditions regarding the use of legislative history, or whether such conditions would only be binding on federal courts. If Congress set such conditions, one would further have to consider whether they would have the ability to bind state courts.

168. See *Milavetz*, 559 U.S. at 254 (Scalia, J., concurring).

169. *Id.*

170. See Brudney, *supra* note 6, at 60 (“[R]ecent debate on the Supreme Court between legislative history advocates and skeptics has generally been cast in an all-or-nothing form.”).

