The Misunderstood History of Interpretation in England

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American purposivists and textualists have both invoked the authority of the English statutory interpretation tradition to give their respective approaches pedigree and credibility. But both sides have misunderstood this history. The search for the purpose of the statute's authors does not date to the sixteenth century, as Hart and Sacks suggested. Neither did the English courts categorically ban "legislative history" as an aid to interpretation in the 1760s, as Scalia claimed. The seminal case of Pepper v. Hart *(1992), finally, did not mark the death knell of English textualism or the return of purposivism—at least as that term is usually understood.*

This Article aims to correct the record. It begins in the early nineteenth century, with the appearance of new evidentiary sources that made it possible, for the first time, to try to peer into the mind of Parliament. This triggered decades-long disagreement about whether the intentions of past legislators were relevant to statutes' meaning—and whether, in turn, evidence of those intentions should be admissible in court. Late-Victorian judges ultimately rejected intentionalism for an approach centered on the "plain meaning" of the statute's text. That formalistic method aimed to discipline construction and cabin judicial discretion, but its failure to do so led to its collapse in the late twentieth century. What emerged in its wake—the approach dominant in England today—was a novel kind of purposivism, one that centers the objective purpose of the statute and generally ignores evidence of the subjective intentions of its authors. The English courts' contemporary approach, in other words, presents an alternative to the kind of congressional-intent purposivism dominant on the federal courts today.

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Retrieving this history, in turn, opens up new ways of thinking in the present. The history of interpretation in England suggests that textualists have been too quick to rule out evidence of the statute's historical context; that purposivists have conflated the purpose of the statute and the purpose of its authors; and that today, when federal judges debate congressional intent, they are often talking past each other. The English tradition has much to offer us—just not what we think it does.

INTRODUCTION

What is a judge looking for, exactly, when she interprets an ambiguous statute? The objective public meaning of the law's terms? The meaning its authors intended? The meaning that, given the equities, the statute should have?[1] The judge's answer to this question will invariably shape the kinds of evidence she relies on. If, as the Supreme Court recently said, the statute's meaning resides in the "ordinary public meaning of its terms at the time of its enactment,"[2] the judge will need to know the historical context in which the statute was passed,[3] how the words in question fit within the broader statute,[4] and how they were popularly understood at the time (by, for instance, looking to dictionaries, newspapers, novels, or law reports).[5] If, on the other hand, a statute's meaning is equivalent to the one its authors intended, her sources will be different. She might look to congressional floor debates, committee

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1. *Cf.* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1244–53 (2015). Fallon points to *six* potential "meanings" available to the interpreting judge, but his options are broadly consistent with the ones given here. Three of his options ("semantic," "contextual," and "real conceptual meaning") identify possible ways to interpret the statute's objective meaning. Two more ("reasonable" and "interpreted meaning") can be redescribed as varieties of equitable meaning. *See infra* note 9. Fallon's last option is just the "intended meaning" of the law's authors.

2. Bostock v. Clayton Cnty., 590 U.S. 644, 654 (2020).

3. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) ("[I]t is now well settled that textual interpretation must account for the text in its social and linguistic context."); *see also* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1291–92 (2014) (distinguishing a text's "semantic content" from the "communicative content" it carries in context); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 987 (2017) (similar).

4. *See* Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 68–69 (2015).

5. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92 (2006) [hereinafter Manning, *What Divides*]. We might call the object of this textualist inquiry "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris.*" ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) [hereinafter Manning, *Equity*] (statutory text as the "most reliable indicium" of legislative intent). That idea of intent stands in opposition to "classical intentionalism," which seeks to uncover an intention ulterior to the text. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423–24 (2005) [hereinafter Manning, *Textualism*]. *But see* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 463–69 (2005) (arguing for textualism's compatibility with intentionalism, classically conceived); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 374–98 (2005) (similar).

reports, or hearing transcripts.[6] Alternatively, she might infer the reason the legislature enacted the statute from its context of enactment, and construe the statute's terms to further it.[7] If, finally, her interpretive aim is the law's equitable meaning—if statutes are properly read in light of the basic moral principles that undergird and legitimate the law[8]—she will need a normative

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6. The relative priority will depend on the judge's understanding of "how Congress really works." Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 143 (2012); *see also id.* at 72, 85; ROBERT A. KATZMANN, JUDGING STATUTES 8, 18–20, 49 (2014); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 854–59 (1992); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1226–27 (2010); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 988–89 (2013).

For doubts about whether these sources really capture the legislature's intentions—or whether such intentions even exist—see Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); Doerfler, *supra* note 3, at 1008–20; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) [hereinafter Easterbrook, *Statutes*]; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 446–49 (1990); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 283–97 (2019). For counterarguments, see JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 280–84 (2009); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437–52 (1988); Breyer, *supra*, at 865–67; and Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1637–58 (2014) [hereinafter Nourse, *Elementary*].

7. On this move—from context to purpose to intended meaning—see Doerfler, *supra* note 3, at 989–94, and *infra* notes 131–37 and accompanying text. *Cf.* Nourse, *Elementary*, *supra* note 6, at 1628–32 (distinguishing "communicative intent," or what the legislature meant to say, from "pragmatic intent," or what it meant the statute to do).

Here, by "purpose," I mean to refer to what the legislature intended the law to do in the world (the legislature's subjective purpose), in contrast to the aims a reasonable legislature would have had, given the statute's text and its context of enactment (the statute's objective purpose). *See infra* notes 28–34, 59, 394–401 and accompanying text.

8. *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

account of what those principles are[9] (and, in turn, a meta-account of how to find them).[10]

These three things—the statute's objective meaning, intended meaning, and equitable meaning—can of course converge in any given case. But just as often—and this is more typical of the statutes that vex courts—a law's most natural meaning will diverge from what the legislature meant to say; its authors' intent will have been unjust, illiberal, or imprudent; or its objective meaning will run up against what, considering the equities, it should mean. In those cases, the judge must choose from among these approaches, and give reasons for that choice.[11] Usually, those reasons will rest on a theory of what law is.[12]

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9. If she centers some normative vision of a just social order, for instance, equitable interpretation begins to look like a kind of morally inflected instrumentalism. By contrast, if she centers substantive reasonableness, equity dissolves into pragmatism. *See* Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 683 (2004) ("The ultimate criterion of pragmatic adjudication is reasonableness."). Similarly, one might describe the very strong norm of continued adherence to past judicial constructions of statutes as a reflection of our legal system's appreciation of the basic values of fair notice and stability. On that way of thinking, *stare decisis* is just a thumb on the interpretive scale—a "principle of policy" meant to further substantive ends extrinsic to either the statute's objective meaning or its authors' intentions. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363 (2010).

10. *E.g.*, RONALD DWORKIN, LAW'S EMPIRE 333–47 (1986).

11. It is also possible to design approaches that draw from one or more of these paradigms. One might think, for instance, that courts should enforce a law's objective meaning whenever possible, but that equity should break any ties. This is how many of the so-called "substantive canons" that textualists endorse function in practice. *Cf.* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017) (documenting the Roberts Court's reliance on such substantive presumptions).

Or one might give legislative intent a similar tiebreaking role: this has been the approach in the English courts since the early 1990s. *See infra* Part V. Conversely, a court might adopt a rebuttable presumption of equity, giving ambiguous statutes their morally preferable construction, but allowing clear evidence of legislative intent to overcome it.

Amalgamating each of these approaches, William Eskridge has influentially argued that statutory meaning resides in the dynamic interplay of text, legislative purpose, established interpretive conventions, and present-day mores. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

Finally, one might think that these approaches (or hybrids of them) are appropriate depending on the statute's substantive content—that equitable interpretation is most fitting in the constitutional context, that objective meaning should control the interpretation of tax statutes, and so forth—or depending on whether the statute regulates primary conduct. *Cf.* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1500–04 (2019).

12. *Cf.* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 514–22 (2013). *But see* Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1653–54 (2023) (arguing that, at this moment of decision, the law may run out).

This Article is about the shifting approaches to statutory interpretation the English high courts have taken over the past two centuries, and the reasons they have given for those approaches. Recent work from Farah Peterson and Tara Grove has illustrated how, in the American context, contemporary theorists' attempts to situate their own approaches to interpretation vis-à-vis past judges'—to position modern textualism as an improvement on the plain meaning school of the late nineteenth century,[13] to trace the origins of originalism and living constitutionalism to the practice of the early federal courts[14]—have distorted our understanding of the law's past.[15] By projecting our own intellectual categories onto the historical record, we lose sight of what past legal actors themselves took the objects of interpretation to be, of the tools they used to construe legal texts, of the debates they thought mattered. In the English case, this Article shows, this kind of presentism has led American scholars to mistake rupture for continuity, occluding just how variegated and discordant the English courts' approach to statutes has been since the early nineteenth century. The history of interpretation in England is more fraught and complex than we have recognized.

In recapturing the history of English interpretation on its own terms, this Article makes two contributions. The first is a genealogical or critical one. American purposivists and textualists have both invoked the authority of the modern English tradition to give their respective theories of interpretation pedigree and credibility.[16] But as this Article shows, that rhetorical move is

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13. *See* Tara Grove, *The Misunderstood History of Textualism*, 117 NW. U. L REV. 1033, 1085–88 (2023).

14. *See* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 6–31 (2020) [hereinafter Peterson, *Expounding*]; *cf.* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 732–48 (2018) [hereinafter Peterson, *Kent*] (demonstrating the persistence of equitable interpretation in nineteenth-century America).

15. For other recent work in this historicist vein, see generally JONATHAN GIENAPP, THE SECOND CREATION (2018) (arguing that the most basic premise of modern constitutional law—that it involves the interpretation of a written text—was not self-evident at the Founding, but emerged from the ideological and political contestation of the 1790s and early 1800s); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (grounding the theory and practice of early American judicial review in early-modern English understandings of judicial duty); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019) (recapturing the fragility of state sovereignty at the Founding); Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621 (2021) (placing the early federal courts' refusal to provide advisory opinions in comparative and historical context); and T.T. Arvind & Christian R. Burset, *Partisan Legal Traditions in the Age of Camden and Mansfield*, OXFORD J. LEGAL STUD. (forthcoming 2024), https://ssrn.com/abstract=4709910 [https://perma.cc/5652-SEYS] (recapturing the partisan valences of debates over the common law's identity among eighteenth-century jurists).

16. *See infra* notes 28–45 and accompanying text.

predicated on a historical category error. Past English judges did not understand themselves as "textualists" or "purposivists"—at least as we use those terms—because textualism and purposivism were not concepts or interpretive practices available to them.[17] By recentering the concepts that *did* inform past English debates, this Article underscores the contingency of the way contemporary American theorists have framed the choice before the interpreting judge.

Second, this Article demonstrates how the contextualized study of the history of legal ideas can open up new ways of thinking in the present.[18] For instance, although they have recognized the centrality of statutory context to the interpretive process,[19] American textualists have historically been stingy in applying this insight, refusing to rely on any extra-statutory materials that fall into the category of "legislative history."[20] But careful attention to the English debates suggests that some of what textualists have shunted into this category may in fact be useful for making sense of the statute's context of enactment and, by implication, the objective meaning it bore in that context—the self-described aim of the textualist enterprise.[21]

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17. *Cf.* QUENTIN SKINNER, *Meaning and Understanding in the History of Ideas*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29, 48 (James Tully ed., 1988).

18. *See* Michael Lobban, *Law and History, History and Law*, *in* HISTORY IN THE HUMANITIES AND SOCIAL SCIENCES 20, 43 (Richard Bourke & Quentin Skinner eds., 2023).

19. *See, e.g.*, Manning, *Textualism*, *supra* note 5, at 424; Easterbrook, *Statutes*, *supra* note 6, at 536.

20. *See, e.g.*, Bostock v. Clayton Cnty., 590 U.S. 644, 673–74 (2020) (Gorsuch, J.); *see also* ANTONIN SCALIA, *Legislative History*, *in* SCALIA SPEAKS 234, 236–38 (Christopher J. Scalia & Edward Whelan eds., 2017); SCALIA, *supra* note 5, at 29–37; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 694–95 (1997) (presenting constitutional objections to the use of legislative history); *cf.* Doerfler, *supra* note 3, at 997–98.

In the United States, "legislative history" has traditionally been taken to include a variety of extra-statutory sources—committee reports, congressional floor statements, and hearing transcripts, most classically, but also government policy papers and executive signing statements, among other sources. *See* Brudney, *supra* note 6, at 1126–27; Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 319–22 (2022). To understand the history of interpretation in England, it is vital to distinguish among these various kinds of materials. Below, I refer to legislators' recorded statements about prospective legislation in debates or committee hearings as "direct evidence of intent," in contrast to indirect indicia of intent or purpose on the one hand—such as evidence of how the statute evolution during the legislative process ("procedural history")—and evidence of the statute's historical context—evidence of how the law stood before the statute's passage, or official reports and policy papers that preceded its enactment—on the other. *Cf.* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 256–61 (1998) (distinguishing the statute's "political history" from its "legislative history").

21. *See infra* Sections III.B–C.

Similarly, as scholars have recognized, courts have invoked "legislative intent" for many centuries.[22] But as this Article shows, what they have *meant* by that concept has shifted radically across time. For early-modern judges, the search for intent was essentially an equitable project—a way of justifying what was, in the judge's view, the morally best reading of the statute, based on the conceit that Parliament was wise, just, and rational.[23] For later judges, "intent" referred either to the subjective intentions of the law's authors, or else to the objective meaning the statute's terms bore in their original context. Historically, in other words, appeals to "intent" have obscured rather than sharpened theoretical disagreement about the aims of interpretation. Recapturing the history of this contested concept shows that intentionalism is not a single theory of statutory meaning but (at least) three such theories, all marching under the same banner. It alerts us to the possibility that when federal judges debate congressional intent today, they are just talking past each other.[24]

Finally, American observers have described the contemporary English regime as "purposivist," in the American sense of that term—that is, determined to give effect to the substantive aims the legislature had in mind when it enacted the law.[25] But that description misses what is most interesting and unique about modern English judges' approach to statutes—namely, the unique way in which they conceive of purpose itself. In recent decades, the English courts have expressly renounced the idea that the statute's purpose is equivalent to the subjective intentions of the Parliament that enacted it. Instead, the courts' modern practice centers on the purpose that a hypothetical reasonable legislature—what Ryan Doerfler has called the statute's "generic author"[26]—would have had, given the statute's text and context of enactment, and construes statutes to give effect to that *objective* purpose. Put differently, the English courts sharply distinguish between the subjective intentions of the statute's authors (which are usually irrelevant), and the purpose that inheres in the statute itself.[27] In this way, the modern English approach represents an alternative to the way purposivism is practiced in the United States today. In retrieving it, this Article offers a concrete illustration of the challenges and benefits of conceiving of statutory purpose objectively.

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22. *See infra* note 87 and accompanying text.
23. *See infra* Section I.B.
24. *Compare* SCALIA, *supra* note 5, at 17, *with* Breyer, *supra* note 6, at 854.
25. *See infra* notes 33–34 and accompanying text.
26. Doerfler, *supra* note 3, at 1023 & n.227.
27. *See infra* notes 320–25, 368–86 and accompanying text.

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Thus stated, these claims are a bit abstract and deracinated. But they become clearer once this Article's historical narrative is situated against the history of English interpretation that American theorists have traditionally invoked.

In the 1950s, Henry Hart and Albert Sacks—the progenitors of modern, faithful-agent purposivism[28]—claimed to discover the origins of their own theory of interpretation in *Heydon's Case* (1584), in its exhortation to read statutes in light of their "mischief"—"the disease of the commonwealth" that Parliament meant to cure.[29] "The gist of this approach," they explained,

> is to infer purpose by comparing the new law with the old. Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it? Answering this question, as Lord Coke said, calls for a close look at the "mischief" thought to inhere in the old law and at "the true reason of the remedy" provided by the statute for it.[30]

According to Hart and Sacks, in other words, early-modern judges reasoned indirectly from the problem the statute was meant to solve to Parliament's likely purpose.[31] Hart and Sacks encouraged twentieth-century judges to do the same.[32] Their successors, in turn, have pointed out that

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28. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013) (situating Hart and Sacks against the formalist and realist traditions that preceded them).

29. Heydon's Case (1584) 76 Eng. Rep. 637 (Exch.) 638 [3 Co. Rep. 7 a, 7 b] (Manwood CB).

30. HART & SACKS, *supra* note 28, at 1378; *cf.* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 983–84 (2021).

31. This reading of *Heydon's Case* has been enormously influential. *See* Bray, *supra* note 28, at 976 & n.57; *see also infra* notes 138–29.

32. *See* HART & SACKS, *supra* note 28, at 1377–79; *see also id.* at 1232–54.

To make this move, Hart and Sacks exhorted contemporary judges to seek out the legislature's "general purpose"—based on the presumption that it was comprised of "reasonable persons pursuing reasonable purposes reasonably"—and insisted that the statute's meaning was *not* equivalent to the specific "intention of the legislature with respect to the matter in issue." *Id*. at 1378, 1374. That qualification has led their purposivism to be described as "objective," in contrast to theories that center the legislature's actual, subjective purposes or intentions. *See* Manning, *What Divides*, *supra* note 5, at 90–91, 91 n.73; John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1922–23, 1928–29 (2015).

modern judges often have access to direct evidence of legislative purpose—in the form of committee reports, hearing transcripts, and floor statements—which make it possible to uncover the legislature's actual, historical reason for enacting the statute.[33] Today, American purposivists generally center that latter, subjective understanding of purpose.[34] But if Hart and Sacks were right about *Heydon's Case*, then purposivism, as practiced in the United States today, has ancient origins. In the sixteenth century as in the twenty-first, the basic task of interpretation was the same: to ascertain the legislature's reasons for enacting the law and construe the statute's terms to further it.[35]

That characterization of Hart and Sacks's formal position is correct, but only if "reasonable legislature" is taken to mean a *minimally* reasonable legislature—that is, a legislature that expresses its purposes through the reasonable use of language. If read to imply a *substantively* reasonable legislature, Hart and Sacks's purposivism amounted to an equitable theory of interpretation. *See* Doerfler, *supra* note 3, at 1023 & n.227; *infra* Section V.C.3.

Curiously, however, just pages after describing statutory purpose in objective terms—the purpose that reasonable legislators *would have had*—Hart and Sacks went on to endorse "messages of the chief executive," the "reports of commissions," and the statute's "internal legislative history" as useful interpretive aids. HART & SACKS, *supra* note 28, at 1379. That conceptual tension—between a commitment, in theory, to reading statutes in light of the purpose of a *reasonable* legislature, yet simultaneously relying on *historical* evidence of the legislature's *actual* purpose—continues to mark American purposivism today. *See, e.g.*, *supra* note 6 (citing theorists who have endorsed a purposivism grounded in Congress's actual intentions or purposes).

33. American judges had taken an interest in such extra-statutory materials before Hart and Sacks. *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 119–25 (1999); Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169; Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266 (2013). Hart and Sacks provided an analytical framework through which that evidence could be processed, and a faithful-agent account of why it mattered.

34. *See, e.g.*, KATZMANN, *supra* note 6, at 38 (arguing that statutes should be read to give effect to "what Congress was trying to do," and warning against reading them "in ways that the legislators did not intend"); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 906–14 (2011) (defending reliance on legislative history to confirm that Congress in fact intended to use words in their ordinary sense); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1346 (2020) (arguing that judges should "check their backdoor inferences about the organizing purpose behind [the statute's words] or the intent reflected in the legislature's structural choices against record evidence of the legislature's intent"); *cf.* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1850–61 (2008) (charting the reconceptualization of purpose in subjective terms in constitutional cases since the 1970s).

35. A second cohort of purposivists have given a far more plausible account of early-modern interpretation. Pointing to the courts' search for the statute's equity, they have argued that the purpose that mattered to early-modern judges was not the legislature's, but rather the purpose which, in the judge's view, the statute *should* have. *See, e.g.*, POPKIN, *supra* note 33, at 9–29; Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 909–13 (2017); *see also* William N. Eskridge, Jr., *All About Words: Early Understandings*

In England—so the story goes—that purposivist approach to statutes persisted for centuries, only to fall into desuetude in the latter part of the 1700s. *Millar v. Taylor* (1769), in which the King's Bench announced a categorical rule prohibiting judicial reliance on legislative history, is standardly given as the date of expiration.[36] From that point, a new mode of interpretation—one focused solely on the statute's text, and uninterested in the intentions of its authors or the statute's equity—took hold. Hart and Sacks lamented this development, painting the modern English tradition as a "wasteland of legalism"—a regime in which judges willfully blinded themselves to the purposes for which legislation had been enacted, in deference to a rigid, arid formalism.[37] Happily, however, the English courts ultimately recognized the error of their ways and reversed course. On the received account, *Pepper v. Hart* (1992)—in which direct evidence of parliamentary intent was again welcomed into evidence, amidst paeans to that "purposive approach [which seeks to] give effect to the true intentions of the legislature"[38]—figures as purposivism's long-awaited day of return.[39]

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of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 COLUM. L. REV. 990, 998–1009 (2001) (highlighting the equitable powers of the early-modern courts, but also observing their reliance on text, purpose, and precedent). John Manning has characterized this equity-based approach as a kind of "strong purposivism." Manning, *Equity*, *supra* note 5, at 26.

For the realist origins of this historical argument, see James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 214–18 (Roscoe Pound ed., 1934); W.H. Loyd, *The Equity of a Statute*, 58 U. PA. L. REV. 76, 85–86 (1909); and S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 ILL. L. REV. 202, 202–03 (1936).

36. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540–41 (1947); 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, 7 (2007); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1091 (1991) [hereinafter Baade, *Intent*]; Hans W. Baade, *"Original Intention": Raoul Berger's Fake Antique*, 70 N.C. L. REV. 1523, 1523–26 (1992) [hereinafter Baade, *Antique*]; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 571 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)); Holger Fleischer, *Comparative Approaches to the Use of Legislative History in Statutory Interpretation*, 60 AM. J. COMP. L. 401, 416–17 (2012); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1840 n.341 (2010).

37. HART & SACKS, *supra* note 28, at 1234.

38. Pepper (Inspector of Taxes) v. Hart [1993] AC 593 (HL) 633 (1992) (Lord Browne-Wilkinson).

39. *See* Brudney, *supra* note 36, at 6, 13 ("watershed"); James J. Brudney, *The Story of* Pepper v. Hart*: Examining Legislative History Across the Pond*, *in* STATUTORY INTERPRETATION STORIES 259, 261 (William N. Eskridge, Jr. et al. eds., 2011) (claiming *Pepper* "overruled more than two centuries of precedent"); Fleischer, *supra* note 36, at 418 ("paradigm shift"); Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An*

"*Pepper*," it is claimed, "had the effect of Americanizing the English law of statutory interpretation," recentering legislative intent as the touchstone of statutory meaning.[40]

American textualists have told a basically similar story, and for similar reasons—they just draw the opposite conclusions from it. In a speech to law students in 1985, then-Judge Scalia depicted American purposivism as an aberration from an otherwise unbroken common law tradition of textualism. "The use of legislative history to give meaning to a statute is a relatively new development," he argued, because the legislature's intentions were traditionally regarded as irrelevant. "You will find no mention of legislative history in the early common law."[41] Indeed, "[c]omplete disregard of legislative history remains the English practice," Scalia cheerfully reported, citing *Viscountess Rhondda's Claim* (1922) for the "still-authoritative" rule that "the interpretation of an Act of Parliament must be collected from the words which the Sovereign has made into law, [not] the history of previous changes made or discussed."[42] Some years later Scalia qualified this story, projecting the stalking horse of purpose into the early-modern past, dating it to *Heydon's Case*,[43] and situating textualism's rise alongside that of eighteenth-century constitutionalism, dating it to *Millar*.[44] On that framing, *Pepper* represents the return of a pre-modern, retrograde conception of the judicial role.[45]

In broad strokes, therefore, American theorists have imagined the history of English interpretation in essentially Manichean terms—a long-running struggle between text and purpose, letter and spirit. But aside from gesturing at the leading cases, neither textualists nor purposivists have tried to

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Assessment of the Impact of Pepper v. Hart, 35 STAN. J. INT'L L. 231, 235, 253 (1999); *see also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1535–36 (1998) (reviewing SCALIA, *supra* note 5) (endorsing the decision in *Pepper*); William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 569–70 (2000) (reviewing JEREMY WALDRON, LAW AND DISAGREEMENT (1999)) (same); Gluck, *supra* note 36, at 1840–41.

40. Healy, *supra* note 39, at 253.

41. Antonin Scalia, Speech on Use of Legislative History at Various Law Schools 1 (1985) (transcript on file with author).

42. Rhondda's (Viscountess) Claim [1922] 2 AC 339 (HL) 383 (Birkenhead LC) (quoted in Scalia, *supra* note 41, at 1–2).

43. *See* SCALIA & GARNER, *supra* note 36, at 428, 433–34, 438 (2012); *cf.* Bray, *supra* note 30, at 984–89.

44. *See* SCALIA & GARNER, *supra* note 43, at 369 ("[A] complete disregard of legislative history remained the firm rule from 1769, when it was first introduced, until 1992.").

45. *See* Manning, *Equity*, *supra* note 5, at 36–56 (describing the pre-*Pepper*, formalist regime as a necessary corollary of the separation of powers); Manning, *What Divides*, *supra* note 5, at 107 n.137 (similar).

substantiate this narrative historically.[46] In the United States, historical scholarship on the English tradition has tended to focus on the seventeenth and eighteenth centuries, on those interpretive methods that predominated in the run-up to the American Founding.[47] These studies usually peter out around Blackstone, turning their gaze from the colonial metropole to the courts of the early Republic.[48] In England, meanwhile, the history of modern interpretation has primarily been narrated by doctrinally oriented treatise writers, who have echoed the basic claims described above—that, from *Heydon's Case*, the search for the statute's mischief has just been the search for the legislature's purpose;[49] and that, from *Millar*, evidence of legislative intent was categorically proscribed as an aid to interpretation, until the courts' reversal in *Pepper*.[50]

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46. For two notable exceptions, see Brudney, *supra* note 36, at 20–28 (examining the post-1992 caselaw and concluding that the English courts have remained essentially intentionalist since *Pepper*); and Healy, *supra* note 39, at 247–52 (same). *But see infra* Part V (questioning this appraisal of the contemporary English approach).

47. *See, e.g.*, HAMBURGER, *supra* note 15, at 1–255; POPKIN, *supra* note 33, at 7–58; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894–902 (1985); Baade, *Intent*, *supra* note 36, at 1006–12; Baade, *Antique*, *supra* note 36; Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1063–80 (1988) [hereinafter Berger, *Founders' Views*]; Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 298–308 (1986) [hereinafter Berger, *Intention*]; Eskridge, *supra* note 35, at 998–1009; Manning, *Equity*, *supra* note 5, at 22–56; Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1255–88 (2007); *see also* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 13–28, 54–55, 245–49 (1989); RICHARD HELMHOLZ, NATURAL LAW IN COURT 112–16 (2015); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (arguing that, in disputes over constitutional meaning, contemporary American judges should employ eighteenth-century interpretive methods).

48. For background on interpretation in nineteenth-century America, see POPKIN, *supra* note 33, at 59–114; Brady, *supra* note 33; Grove, *supra* note 13; Peterson, *Kent*, *supra* note 14; and Peterson, *Expounding*, *supra* note 14. *Cf.* Parrillo, *supra* note 33 (on American courts' increasing reliance on legislative history beginning in the 1930s and '40s).

49. *See, e.g.*, NEIL DUXBURY, ELEMENTS OF LEGISLATION 192 (2013); MICHAEL ZANDER, THE LAW-MAKING PROCESS 211 n.141 (8th ed. 2020).

50. *See, e.g.*, 1 STEFAN VOGENAUER, DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT 671 (2001); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 335 (5th ed. 1956); DAVID ROBERTSON, JUDICIAL DISCRETION IN THE HOUSE OF LORDS 157 (1998); J.H. Baker, *Statutory Interpretation and Parliamentary Intention*, 52 CAMBRIDGE L.J. 353, 353–55 (1993); Stefan Vogenauer, *A Retreat from* Pepper v. Hart*?: A Reply to Lord Steyn*, 25 OXFORD J. LEGAL STUD. 629, 630 (2005); *see also* Francis Bennion, *Hansard—Help or Hindrance? A Draftsman's View of* Pepper v. Hart, 14 STATUTE L. REV. 149, 151 (1993); *cf.*

This Article tells a very different story.[51] Early-modern English judges did not have access to evidence of how Parliament meant its laws to be read; and, as Part I explains, given then-prevailing constitutional norms, they had little reason to care. It was not until the nineteenth century that arrival of new evidentiary sources made the intentions of past Parliaments a possible object of scrutiny. This forced a debate among jurists (described in Part II) about where, precisely, statutory meaning resided, and which sources a court could use to locate it. Was a law's content equivalent to the objective meaning of its terms? Its authors' intended meaning? When could it be read equitably, to avoid injustice? The nineteenth-century courts were genuinely divided on these questions, and from the 1870s, it fell to the recently created Appellate Committee of the House of Lords—England's highest court, the so-called "Law Lords"—to answer them. Part III recounts how, across the latter nineteenth century, this new body asserted increasing doctrinal authority over the lower courts. Drawing on the work of Victorian treatise writers—who aspired to mechanize interpretation, banish equity, and stamp out indeterminacy from the law—the *fin de siècle* Law Lords cast a kind of proto-textualism as binding precedent across the English judiciary, while fabricating a pedigree for this approach that placed its origins, implausibly, at *Millar v. Taylor* (1769).

Pepper (Inspector of Taxes) v. Hart [1993] AC 593 (HL) 630 (1992) (Lord Browne-Wilkinson) (dating the exclusionary rule to *Miller*, though noting two nineteenth-century deviations from it).

English depictions of the post-*Pepper* regime are more nuanced than American scholars'. *See infra* notes 379–86 and accompanying text.

51. John Magyar has perceptively exposed the deficiencies of the received narrative in a series of important articles. *See* John J. Magyar, *Debunking* Millar v. Taylor*: The History of the Prohibition of Legislative History*, 41 STATUTE L. REV. 32, 35–38, 40–48, 53–58 (2020) [hereinafter Magyar, *Debunking* Millar] (showing disagreement about the "exclusionary rule" among Victorian jurists); John J. Magyar, *The Slow Death of a Dogma? The Prohibition of Legislative History in the 20th Century*, 50 COMMON L. WORLD REV. 121, 121–41 (2021) [hereinafter Magyar, *Dogma*] (noting the liberalization of the mischief rule in the latter part of the twentieth century, and situating *Pepper* as a radicalization of this trend); *see also* John J. Magyar, The Legacy of Anglo-American Textualism (Nov. 6, 2018) (PhD dissertation, University of Cambridge) [hereinafter Magyar, Textualism], https://www.repository.cam.ac.uk/bitstream/handle/1810/286338/The_Legacy_of_Anglo-American_Textualism.pdf [https://perma.cc/B8FP-66G7] (mining Victorian cases and treatises for the origins of modern textualism). This Article seeks to build on Magyar's findings—resituating the cases he highlights in their original institutional and intellectual contexts in order to provide a fuller, more historically sensitive account of the various interpretive approaches English judges have adopted since the early nineteenth century, as well as an internal account of the reasons for those changes.

For comparative work on modern English and American interpretation, see Brudney, *supra* note 36, at 28–54; Healy, *supra* note 39; Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMPAR. & INT'L L. 151, 154–62 (2003); and Fleischer, *supra* note 36, at 416–28.

That formalist consensus persisted through midcentury, but by the 1960s and ’70s it was showing signs of fatigue. Judges had begun bristling at its rigidity and demanding increased access to historical indicia of legislative intent. The Law Lords responded (Part IV explains) by defending the received approach in principle, while narrowing its application in practice. It was that unwieldy state of affairs that ultimately collapsed in *Pepper v. Hart* (1992), leaving later courts to pick up the pieces. As a doctrinal matter, *Pepper* wrote a limited exception into the established law of interpretation, permitting courts to consider evidence of parliamentary intent only in cases of genuine statutory ambiguity, and only if the extrinsic evidence was clear and reliable. But its florid embrace, in dicta, of a “purposive approach to construction” left unclear just how much of the traditional approach had survived. Over the past thirty years, the debate *Pepper* incited has brought the English courts back to first principles. When is a judge bound by a statute’s terms? When by the legislature’s intent? May a judge consider a law’s purpose, even when she is otherwise barred from examining evidence of intent? If so, then where exactly is the line between the purpose and intent? The English courts’ eventual resolution of this debate, Part V shows, was to adopt a kind of objectified purposivism, one that generally abjures the subjective intentions of past legislators and which prioritizes the purpose that a reasonable legislature would have had, given the statute’s text and its context of enactment. As a result, evidence of the legislature’s subjective intentions is inadmissible in most cases; but evidence of the statute’s context of enactment is always relevant, because it furnishes a baseline from which to infer the objective purpose immanent in the statute itself. In this way, the English courts’ contemporary approach is distinct from the kind of purposivism dominant in American courts today. Recapturing the history of English interpretation, therefore, does not simply weaken textualists’ and purposivists’ claim to its mantle: it illustrates a different way of thinking about statutory meaning itself.

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Before turning to this history, two caveats are in order. First, this Article does not claim to provide (nor could it provide) a comprehensive account of the practice of statutory interpretation in England over the past two centuries. Rather, its goal is more limited—to recapture the *theories* of interpretation that held sway on the English high courts, to illustrate their operation by reference to concrete cases, and to situate them in the institutional contexts in

which they were developed.[52] In so doing, it centers the internal account of interpretation that past jurists gave.[53] It would be possible, in principle, to narrate this story in structuralist terms, collapsing past judges' theories of interpretation into some set of allegedly more fundamental institutional changes.[54] Similarly, a cultural historian might try to divine the hidden motives—social, political, ideological—that drove the English courts' approach to statutes.[55] Finally, a more fine-grained empirical study might scrutinize the extent to which the high courts' pronouncements about interpretation were internalized across the judiciary, or indeed the extent to which appellate judges were faithful in practice to their own principles.[56] But one cannot intelligibly pose the question of which factors *really* drove the courts' evolving theories of interpretation, or evaluate judges' fidelity to

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52. Three further points of clarification. First, by "high courts," I mean to refer, in the first half of the nineteenth century, to the common law courts of King's (or Queen's) Bench, Common Pleas, Exchequer, and Exchequer Chamber, as well as the Court of Chancery; from the 1870s, to the Court of Appeal and the Appellate Committee of the House of Lords; and from 2010, the Supreme Court of the United Kingdom. *See infra* notes 178–79, 344 and accompanying text.

Second, this Article centers on the interpretation of *public* laws; private bills are beyond its scope. On the latter, see O. CYPRIAN WILLIAMS, THE HISTORICAL DEVELOPMENT OF PRIVATE BILL PROCEDURE AND STANDING ORDERS (1948). *Cf.* Peterson, *Expounding*, *supra* note 14, at 14–31 (on the different rules and presumptions that governed the interpretation of public laws and private bills in the eighteenth century).

Finally, the English courts have traditionally applied a single interpretive framework to all parliamentary laws, so the American distinction between statutory and constitutional interpretation does not map neatly onto the historical debates recounted here. Whether the Constitution was best understood as a kind of a fundamental public law, directly adopted by the American people in an expression of collective national sovereignty—or, alternatively, as a compact between the sovereign peoples of the states that ratified it, or as some admixture of both of these things—was of course deeply contested in the decades after the Founding. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 349–55 (2021); Peterson, *Expounding*, *supra* note 14, at 31–36; Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13 (2024). The potential relevance of the English courts' statutory interpretation approaches to American constitutionalism turns on that prior question of the Constitution's nature and identity.

53. *Cf.* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 872 & n.36 (2022) (defending the integrity of a context-sensitive, but deliberately internalist approach to the history of legal doctrine).

54. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914 (2003) ("[W]ithout institutional analysis, first-best accounts [of statutory meaning] cannot yield any sensible conclusions about interpretive rules.").

55. *Cf.* Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121, 121–24 (2016) (criticizing the view that "it no longer makes sense [for modern historians] to draw a sharp demarcation" between law and society, on the historicist grounds that earlier generations may themselves have taken the distinction to be meaningful).

56. *Cf.* ROBERTSON, *supra* note 50, at 72–107, 157–83 (1998) (setting out a realist critique of Law Lords' late twentieth century, formalist approach to interpretation).

those theories, without a historical account of what they were. This Article seeks to provide it.

Second, a note about terminology. As indicated above, many of the central concepts past jurists used to describe the interpretative process—"intent," "purpose," and "mischief," to name just three—have shifted over time. One of this Article's aims is to recapture these concepts' historical evolution. To posit a definitive meaning for each of them at the outset would therefore be counterproductive: as a noted polemicist once observed, "only that which has no history can be defined."[57] Still, it will be helpful to begin with at least some preliminary definitions—to be further explained, elaborated, and qualified below. By "intent" or "intentionalism" I mean to refer to the actual semantic intentions of the legislature that enacted the statute under consideration: what it thought the law's words *meant*.[58] Similarly, by "purpose" or "purposivism" I refer to the subjective reasons the legislature had for enacting the statute: what it hoped the statute would *do* in the world.[59] Finally, by "mischief," I mean to describe the external problem in the world that preceded the statute's passage, and which prompted the legislature to pass it. As explained below, it is important to distinguish the mischief, in the sense just described, from the substantive purpose the legislature intended the law to realize.[60] The reasons for doing so will, I hope, become clear in the pages that follow.

I. ANTECEDENTS, C. 1500–1800

The problem of statutory interpretation first emerged in the Tudor era. Before, medieval legislation had generally been cursory and narrow, *ad hoc* orders promulgated in response to subjects' particularized complaints.[61] But as Parliament's authority and ambition grew, the early sixteenth century witnessed the rise of recognizably modern legislation—generally applicable

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57. FRIEDRICH NIETZSCHE, ZUR GENEOLOGIE DER MORAL bk. 2, pt. 13 (1887) (translation mine).

58. As noted above, *see supra* notes 32–35 and accompanying text, "intent" has at times also referred to the statutory meaning that an ideally just legislature would have held (the statute's equitable meaning), or to the meaning that a reasonable English-speaker would impute to the words the legislature chose (the statute's objective meaning).

59. This subjective understanding of legislative purpose can be contrasted with, on the one hand, the purpose that a reasonable legislature would have had, given the statute's text and context of enactment (the statute's objective purpose), and on the other hand, with the purpose that the judge believes the legislature *should* have had, given her normative commitments (the statute's equitable purpose). *See supra* note 32; *infra* notes 394–401 and accompanying text.

60. *See infra* notes 131–37 and accompanying text.

61. *See* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 217–19 (5th ed. 2019).

rules, promulgated to ameliorate problems in the body politic generally.[62] Given the broad scope of these new laws, special attention had to be given to their words. Tudor legislators were therefore careful in the selection of statutory language. As an additional precaution, they began affixing preambles, provisos, and excepting clauses to try to prevent the misapplication of the statute's words.[63]

In light of the care that Parliament invested in crafting laws, it soon became an interpretive truism that, all else being equal, a court should enforce a statute's ordinary meaning.[64] But often, this simple rule was unhelpful. Into the nineteenth century, bills were prepared by legislators and their aides directly, without any help from trained barristers.[65] After they were set before Parliament, these bills were often transformed by the amendments that other (untrained) legislators proposed. Not infrequently, the result was a law which, by the time it arrived in court, appeared ambiguous, absurd, or incoherent.

A. Equity and the Mischief

What were courts to do with such mangled statutes? They approached this problem with two important tools inherited from their late-medieval predecessors. First, from their encounters with private bills and medieval public laws, early-modern judges knew that legal terms could not be understood "in abstraction, in vacuo."[66] It was vital to read any law in light of the problem that gave rise to it, or what the medieval authorities had called its "mischief."[67] Giving voice to what was, by the latter part of the sixteenth century, a quite standard approach, Chief Baron Manwood in *Heydon's Case* (1584) counseled judges to consider the state of the law before the statute was passed—"the mischief and defect for which the common law did not provide"—and "to make such construction as shall suppress the mischief, and advance the remedy" that Parliament had chosen, so as to "add force and life to the cure and remedy."[68]

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62. *See id.* at 219–20.

63. *See* 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 34–39, 76–77 (2003); T.F.T. PLUCKNETT, *Ellesmere on Statutes*, *in* STUDIES IN ENGLISH LEGAL HISTORY 242, 247–49 (1983).

64. *See* BAKER, *supra* note 63, at 77.

65. *See infra* notes 112–14 and accompanying text.

66. Thorne, *supra* note 35, at 215; *cf.* Bray, *supra* note 30, at 979.

67. *See* BAKER, *supra* note 63, at 22.

68. Heydon's Case (1584) 76 Eng. Rep. 637 (Exch.) 638 [3 Co. Rep. 7a, 7b] (Manwood CB); *see* JOHN BAKER, ENGLISH LAW UNDER THE TWO ELIZABETHS 102 & n.52 (2021) (on the

Contextualization could not dispel all opacities, of course, so early-modern judges were forced back onto a second tool—appeals to the statute's "equity." In its technical sense, equity referred to the statute's ability to extend beyond its letter to cover *casus omissi*—cases which, while not falling within the literal meaning of the statute's terms, were similar to those that did.[69] Coke was referring to this narrower definition when he described it as "a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief . . . shall be within the same remedie that the statute provideth."[70] In a more general sense, however, equitable interpretation was simply the exposition of a text in the light of natural justice.[71] On this way of thinking, equity was "the bringing together of things, that which desires like right in like cases and puts all like things on an equality. Equity is, so to speak, uniformity."[72]

In the early-modern courts, equity licensed three interpretive moves. First, given a provision of ambiguous meaning, equity instructed the court to adopt the morally preferable construction; similarly, faced with a statute of indeterminate scope, it permitted the court to constrict or extend the law's reach, as justice demanded.[73] By the late-Tudor period, the repeated use of this power had given rise to a loose set of interpretive presumptions—that penal statutes, or those abridging common law rights, were to be read narrowly, while those extending or enlarging the common law were to be liberally construed.[74] Second, more radically, equity allowed a court to rewrite an otherwise clear statute if its words, taken literally, would bring about an absurd or unconscionable result. In such a scenario, the judge was

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mischief's medieval roots); *see also* Bray, *supra* note 30, at 977–80; *infra* notes 131–37 and accompanying text.

69. *See* Max Radin, *Early Statutory Interpretation in England*, 38 ILL. L. REV. 16, 35–36 (1944) (describing the discussions of equity in two early manuscripts on interpretation, both written circa 1560–1570).

70. 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND bk. 1, ch. 2, § 21 (1628).

71. *See generally* BAKER, *supra* note 68, at 106–18; POPKIN, *supra* note 33, at 11–19; Eskridge, *supra* note 35, at 998–1009; Manning, *Equity*, *supra* note 5, at 22–36.

72. 2 HENRI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 25 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (1569).

73. *See* Jim Evans, *A Brief History of Equitable Interpretation in the Common Law System*, *in* LEGAL INTERPRETATION IN DEMOCRATIC STATES 67, 68–71, 77–80 (Jeffrey Goldsworthy & Tom Campbell eds., 2002).

74. *See* BAKER, *supra* note 63, at 77–78; THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 57–65, 72–81 (Harold Dexter Hazeltine ed., 1980) (describing judges stretching and narrowing the terms of medieval statutes); J. A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 296 (1936) (similar); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *87–88 (cataloging these presumptions).

to construe the statute in a manner that did as little violence to its terms as possible, while also preventing injustice.[75] Finally, if such a saving construction was unavailable, at least some early-modern jurists (Coke among them) intimated that judges had the authority to void the statute altogether.[76] That amounted to a *de facto* power of judicial review, and was contested from the start.[77] But the other two moves—manipulating a statute's terms, or recasting them to avoid absurdity or injustice—were well within the bounds of the early-modern judicial power. As late as 1793, the editor of Bacon's *Abridgement* could report, flatly, that "[i]n some Cases the Letter of an Act of Parliament is restrained by an equitable Construction; in others it is enlarged; in others the Construction is contrary to the Letter."[78]

Although these two tools—equity and the mischief—were conceptually distinct, early-modern judges often blended them together in a single inquiry.[79] Understanding the statute's precipitating problem was helpful not only for contextualizing its words, but also for determining whether, in the instant case, the statute should be equitably manipulated (on the grounds that like cases should be treated alike).[80] Judges were thus invariably led back to the same fundamental question: should they enforce the statute by its terms—read in the light of the mischief, if necessary—or enforce the meaning that, considering the equities, the statute should bear?[81] There were "two" ways to read a law, Lord Chancellor Hatton wrote in the 1570s: "One is, according to the precise words of every Statute; the other according to equity."[82] Courts often analogized this to a war between letter and spirit, form and substance.[83]

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75. *See* Eyston v. Studd (1574) 75 Eng. Rep. 688 (KB) 694 [2 Plow. 459, 464] (justifying a narrowing construction on the grounds that "things, which are within the words of statutes, are [often] out of the purview of them"); Platt v. Lock (1550) 75 Eng. Rep. 57 (KB) 59 [1 Plow. 35, 36] (widening "Warden of the Fleet" to include *all* jailers, not just wardens); *see also* A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 161–70 (Samuel E. Thorne ed., 1942) (c. 1567).

76. *See* Bonham's Case (1610) 77 Eng. Rep. 638 (CP) [8 Co. Rep. 107a] (Coke CJ); Radin, *supra* note 69, at 28 (on the early-modern voidance power); *see also* Eskridge, *supra* note 35, at 1005–09 (on *Bonham's Case*).

77. *See* BAKER, *supra* note 63, at 80–81; BAKER, *supra* note 62, at 222–24; J.H. BAKER, THE LAW'S TWO BODIES 28 (2001); HAMBURGER, *supra* note 15, at 55–56; Theodore F.T. Plucknett, Bonham's Case *and Judicial Review*, 40 HARV. L. REV. 30, 35–52 (1926).

78. 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 649 (6th ed. 1793).

79. *See supra* note 70 and accompanying text.

80. *See* BAKER, *supra* note 68, at 100–05.

81. *See* BAKER, *supra* note 63, at 77 (noting this tension).

82. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT, AND THE EXPOSITION THEREOF 28 (London, Richard Tonson 1677) (c. 1570).

83. *E.g.*, Eyston v. Studd (1574) 75 Eng. Rep. 688 (KB) 695 [2 Plow. 459, 465] (Plowden's commentary).

The early-modern authorities were agreed—with apparent confirmation from a weighty source[84]—that in case of a direct conflict, a statute's spirit should prevail over its letter:

> For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words. . . . [T]he efficacy of statutes consists not only in the words, but in the intent thereof, which intent ought always to be greatly considered, and made agreeable with the words.[85]

Substantively, then, the meaning of a statute turned on whether the court saw a *bona fide* conflict between its words and the equities.

B. "Intent" Before Intent

Importantly, in early-modern cases, the intention of the enacting legislature—what it thought a statute's words meant, or what it hoped a law would accomplish—was basically irrelevant. True, the early reporters contain many references to "the intent of the Legislature," and Tudor judges stressed that courts' interpretations must be consistent with the intent of the law's "makers."[86] Such rhetoric has mistakenly led some scholars to project contemporary intentionalism back onto these sources.[87] But before the nineteenth century, legislative intent was a self-conscious fiction—a means of *justifying* a judge's chosen construction, not an independent factor to be weighed in making that choice. If a court decided to give effect to a law's letter, it could simply claim that the words Parliament had selected were a window into its collective mind: as Hamburger puts it, words were "the

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84. "[O]ur sufficiency is of God; Who also hath made us able ministers of the new testament; not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life." 2 *Corinthians* 3:5–6.

85. Partridge v. Strange (1552) 75 Eng. Rep. 123 (KB) 130–31 [1 Plow. 77, 82] (Sgt. Saunders); *see also* POPKIN, *supra* note 33, at 11–19; Manning, *Equity, supra* note 5, at 29–36.

86. *See, e.g.*, *Eyston*, 75 Eng. Rep. at 695–700 [2 Plow. at 465–69] (Plowden's commentary); Stradling v. Morgan (1560) 75 Eng. Rep. 305 (Exch.) 312–15 [1 Plow. 199, 204–06].

87. *See, e.g.*, HAMBURGER, *supra* note 15, at 49–58; Berger, *Founders' Views*, *supra* note 47, at 1059–65; Berger, *Intention*, *supra* note 47, at 298–308; Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 39 (2014) (intentionalism "at least six centuries" old).

vehicles, images, or signs of intent."[88] On the other hand, if a court felt compelled to deviate from the text, it could invoke the "presumption that, whatever the words, Parliament cannot have intended something contrary to reason."[89] The rhetoric of intent, in other words, permitted early-modern courts to speculate equitably—based on the conceit that the legislature was rational, wise, and just—about what Parliament *must* have intended.[90] The search for "intent" in this idealized sense was not historical but moral. "The seemingly new, purposive method of interpretation was therefore really no different from 'equity.'"[91]

The constitutional and political upheavals of the seventeenth century strained this framework, but did not break it, and three generations after 1688, Blackstone was still rehearsing the letter/spirit dichotomy in basically sixteenth-century terms.[92] To be sure, the institutional position of judges charged with enforcing statutes, and the authority of the legislature that produced them, changed radically after the Glorious Revolution.[93] Straightforward appeals to equity became more difficult to sustain—rooted, as they were, in the sovereign authority of the Crown to dispense justice. The courts adapted by largely jettisoning the language of equity, and advertising their deference to the legislature's intentions.[94] "There can be no doubt but Acts of Parliament are to be expounded by equity," wrote Mansfield.[95] But "the Equity of an Act can be carried no further than to what was within the view and intention of the Legislature, and the mischief meant to be

88. HAMBURGER, *supra* note 15, at 52.

89. BAKER, *supra* note 63, at 81; *see also* HAMBURGER, *supra* note 15, at 54–55.

When presented with a judicial precedent that seemed inequitable or irrational, early-modern judges sometimes made a similar move. Rather than openly accusing the earlier court of error, it was easier to "blame the reporter" for having misreported the court's decision. *See* W.S. Holdsworth, *Case Law*, 50 LAW Q. REV. 180, 187 (1934).

90. *E.g.*, Fulmerston v. Steward (1553) 75 Eng. Rep. 160 (KB) 171 [1 Plow. 102, 109] (Plowden's commentary).

91. BAKER, *supra* note 63, at 80; *see also id.* (distinguishing "objective or presumptive intention," which interested Tudor judges, from "real or subjective intention," which did not); BAKER, *supra* note 68, at 100; Powell, *supra* note 47, at 895–96 (noting that, before the nineteenth century, "'intent' did not depend upon the subjective purposes of the [statute's] author" but referred instead to "what judges, employing 'the artificial reason and judgment of law,' understood 'the reasonable and legal meaning' of [the statute's] words to be") (citations omitted).

Presumably because interpreting a statute equitably was more controversial than simply effectuating its plain meaning, appeals to legislative intent appear most frequently in early-modern cases turning on equitable considerations.

92. 1 BLACKSTONE, *supra* note 74, at *61; *cf.* POPKIN, *supra* note 33, at 19–22.

93. The sheer volume of statutes exploded over the course of the eighteenth century, too. *See* LIEBERMAN, *supra* note 47, at 13–16.

94. *See* POPKIN, *supra* note 33, at 19–29 (giving examples).

95. R v. Williams (1757) 96 Eng. Rep. 1109 (KB) 1111 [2 Keny. 68, 73] (Mansfield CJ).

prevented."[96] Substantively, the courts imposed internal rules to restrain "that liberty and authority that Judges have over laws, especially over statute laws, . . . to mould them to the truest and best use."[97] Most importantly, leading jurists began to insist that, absent exigent circumstances, a court should enforce an unambiguous statute by its terms, irrespective of the equities:

> When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words.[98]

This reversal of the letter/spirit hierarchy implied a tacit renunciation of any right to void unjust statutes, or to construe them in defiance of their plain terms. Eighteenth-century courts continued to make exception for statutes that threatened manifest absurdity: in such cases, judges were permitted to adopt a prophylactic construction, on the grounds that Parliament, being rational and just, could not have intended such an outcome.[99] And if a law were ambiguous—if its words, read in their statutory and historical context, were "dubious"—Blackstone was prepared to allow the judge to lean on the law's "reason and spirit."[100] But the appearance of mere injustice or inequity in an otherwise clear statute was no longer sufficient to license open judicial adventurism. Equity in this attenuated, eighteenth-century sense was a residual power, permitting the judge to exercise independent moral judgment only in exceptional cases.[101]

Through all of this, the subjective intentions of the legislature that wrote and enacted the statute continued to remain marginal. This is unsurprising, both as a matter of constitutional principle, and as a matter of evidence.[102] As critics of intentionalism often stress, any account of legal meaning that grounds out in the subjective intentions of the law's authors must ultimately rest on a kind of positivism—that is, a theory that identifies the pronouncements of some designated lawgiver as the highest authority within

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96. R v. Williams (1757) 97 Eng. Rep. 371 (KB) 374 [1 Burr. 402, 407] (Mansfield CJ).

97. Sheffeild v. Ratcliffe (1616) 80 Eng. Rep. 475 (KB) 486 [Hob. 334, 346] (Hobart CJ).

98. Colehan v. Cooke (1742) 125 Eng. Rep. 1231 (CP) 1233 [Willes 393, 397] (Willes CJ).

99. *See* 1 BLACKSTONE, *supra* note 74, at *91 (reading *Bonham's Case* along these lines).

100. *Id.* at *61.

101. *See id.* at *58–62; *see also* POPKIN, *supra* note 33, at 20–21; Eskridge, *supra* note 35, at 1006–07.

102. On the relation between early-modern constitutionalism and statutory interpretation, see Corry, *supra* note 74, at 293–312.

the body politic. But that conception of law—confected not received, unitary not variegated, mundane not transcendent—did not command widespread support in early-modern England. Before the royal (and hence judicial) acquiescence in Parliament's legislative sovereignty in the nineteenth century, statutes were but an aspect of the law. The authority of early-modern kings and their ministers was a divine deposit, and supervening above human law was divine law, natural and revealed. The intuition that unjust statutes were *ipso facto* null, or that statutes should bend to the demands of a higher law, flowed naturally from the theological premises that legitimated secular authority.

The Hobbesian attempt to ground politics in a this-worldly logic destabilized that earlier frame, but gave rise, in turn, to a centuries-long struggle for sovereignty between Crown and Parliament. Eighteenth-century Tories and Whigs conceived of the English law as a dense web of received customs, statutes, precedents, and tacit norms—a inheritance that set definite constitutional limits on their rivals' claims to power.[103] In this context, modern statutes had to be reconciled to these older authorities.[104] To make the law coherent, the fiction of legislative "intent" was quite helpful; Parliament's actual intent was not. Even more important, for common lawyers, was the realpolitik of equity. After 1688, statutes had been a vital tool through which Parliament could restrain the Crown. By preemptively legislating in a given field, Parliament could occupy a void that might otherwise be filled by the executive. But in order for this project to succeed, statutes needed to work. From this vantage, equitably reforming an ambiguous or absurdity-producing law—under the guise of "intent," naturally—was to constrain royal power. The opinions of a statute's authors often bore little relation to its efficacy in the present.

At any rate, Parliament's actual intent was inscrutable. In the first instance, courts were attuned to the conceptual difficulty of imputing a single, unified intent to a corporate body. What alchemy might bind together "so manie statute makers, so many myndes"?[105] More practically, there existed simply no reliable evidence of past legislators' intentions. Occasionally, judges claimed to know what Parliament had meant to say, since they had

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103. *See generally* RICHARD BOURKE, EMPIRE AND REVOLUTION: THE POLITICAL LIFE OF EDMUND BURKE 1–25, 160–222 (2015); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 30–69 (2d ed. 1987); David Lieberman, *The Mixed Constitution and the Common Law*, *in* THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY POLITICAL THOUGHT 317 (Mark Goldie & Robert Wokler eds., 2006).

104. On eighteenth-century systematization, see LIEBERMAN, *supra* note 47, at 58–87.

105. DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES, *supra* note 75, at 151.

themselves participated in the law's creation.[106] But aside from such exceptional cases, the search for authorial intention was usually fruitless. Many eighteenth-century statutes contained a preambulatory statement of purpose.[107] But these were typically florid and generalized, so not especially illuminating.[108] More promising evidence, perhaps, was contained in the minutes of Parliament's proceedings, which had been kept in its official *Journals* since the early sixteenth century.[109] Initially, these records were sparse, noting the number of MPs or peers present, the business they handled, and any bills introduced or debated. Across the eighteenth century, the *Journals* began including more detail, including the form that bills took upon their introduction, and the words of mooted amendments.[110] But this evidence of intent was circumstantial at best—rather thin gruel for courts that were unable to confirm their interferences about what Parliament had meant by an amendment here, a veto there. Until 1783, it was illegal to print what was said in Parliament, and the available samizdat reports that proliferated in the eighteenth century were little more than partisan, often heavily editorialized tracts.[111] Courts therefore had no reliable evidence of the reasons legislators chose the words they did. Until the nineteenth century, the only direct evidence of what Parliament meant to say was contained in the statute itself.

II. NINETEENTH-CENTURY INNOVATIONS

As a matter of principle, statute law's ultimate ascendancy to a position of unrivaled constitutional primacy made legal positivism, and hence intentionalism, conceivable. A concurrent evolution in the legislative process generated new evidentiary sources, making past legislators' intentions a possible object of judicial scrutiny.

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106. *See, e.g.*, Ash v. Abdy (1678) 36 Eng. Rep. 1014 (Ch.) 1014 [3 Swanst. 364, 364–65]; *see also* BAKER, *supra* note 63, at 79 (giving other examples).

107. Whether such evidence could unsettle the meaning of a *clear* statute was unsettled in the eighteenth century. *See* LIEBERMAN, *supra* note 47, at 182, 204.

108. *See id.* at 187.

109. The first volume of the *Journal of the House of Lords* appeared in 1509; the Commons', in 1547. *See* POPKIN, *supra* note 33, at 10.

110. For an eighteenth-century citation of such evidence, see *infra* note 142 and accompanying text.

111. *See* WILLIAM LAW, OUR HANSARD OR THE TRUE MIRROR OF PARLIAMENT 11–13 (1950).

A. New Sources

Looking back in 1902, Parliamentary Counsel to the Treasury Sir Courtenay Ilbert—the key civil servant in charge of drafting government bills—reported that most of the "ill-expressed legislation of the eighteenth century" had been amateurish, composed by sponsoring MPs themselves.[112] In tacit recognition of these earlier deficiencies, the latter Pitt administration had begun asking barristers in the various departments of the civil service to help draft statutes. Ilbert identified this move with the "dawn of the sense of Government responsibility for Parliamentary legislation," and over the coming decades, later administrations came to exert increasingly firm control over the legislative agenda.[113] The rise of the modern whip system, moreover, effectively prevented hostile MPs from derailing or altering government bills. This shifted the legislative process's center of gravity: from the mid-nineteenth century, the substantive work of lawmaking consisted in the choices made by ministers, and this work was effectively finished by the time a bill reached Parliament. This allowed governments to pass laws of increasing scope and ambition. In turn, the demands of such legislation increasingly led them to rely on expert drafters. In 1869, responsibility for drafting all government bills was consolidated in a single office—the same one Ilbert would later come to occupy.[114]

Meanwhile, the materials upon which ministers and legislators relied in designing and ratifying laws were increasingly accessible.[115] Of particular interest to Victorian judges were the reports of royal commissions. From the 1830s, governments had increasingly begun delegating the authority to investigate and analyze intractable social and economic problems to these bodies.[116] Commissions were typically staffed by party grandees, along with

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112. COURTENAY ILBERT, LEGISLATIVE METHODS AND FORMS 80 (1901). Eighteenth century judges were attuned to the problems such clumsy legislation posed for interpreters. *See* Arvind & Burset, *supra* note 15, at 9 (citing Mansfield's reluctance to place too much weight on "particular expressions" in the statutory text).

113. ILBERT, *supra* note 112, at 82.

114. *See id.* at 84–86; Barry McGill, *A Victorian Office: The Parliamentary Counsel to the Treasury, 1869–1902*, 63 HIST. RSCH. 110 (1990).

115. *See* David Eastwood, *'Amplifying the Province of the Legislature': The Flow of Information and the English State in the Early 19th Century*, 62 HIST. RSCH. 276, 291–94 (1989); Kathryn Rix, '*Whatever Passed in Parliament Ought To Be Communicated to the Public': Reporting the Proceedings of the Reformed Commons, 1833–50*, 33 PARLIAMENTARY HIST. 453 (2014).

116. *See generally* Barbara Lauriat, *'The Examination of Everything': Royal Commissions in British Legal History*, 31 STATUTE L. REV. 24 (2010); 9 OFFICE-HOLDERS IN MODERN BRITAIN: OFFICIALS OF ROYAL COMMISSIONS OF INQUIRY, 1815–1870 (J.M. Collinge ed., 1984) (suggesting

some economists or policy experts. After completing its research, a commission would usually issue a three-part report, containing a summary of its findings, a series of policy recommendations, and (often, though not always) draft legislation.[117] In theory these reports were advisory. In practice, they became an important impetus for legislative action.[118]

The first reliable, direct evidence of legislators' intentions emerged around this time, too. Impartial reporting on what was said in Parliament began appearing in the early nineteenth century, as enterprising publishers vied to capitalize on the relaxation of the formerly strict rules barring such reportage. The most lasting of these ventures was William Cobbett's *Parliamentary Debates* (1st ed. 1803), a project soon taken over by his printer, Thomas Hansard, and renamed *Hansard's Parliamentary Debates*.[119] In the 1830s, *Hansard* became something of a quasi-official organ of Parliament, printing most of what was said during legislative debates (and, eventually, in committee hearings). That evidence, coupled with the procedural history available in Parliament's *Journals*, made it possible for judges to try to reconstruct what past legislators had taken the terms of a statute to mean.

B. New Problems

This access to the legislature's inner machinations presented Victorian judges with a dilemma. Having paid rhetorical homage to legislative "intent" now for centuries, should they not check to see that the intent imputed to Parliament coincided with Parliament's actual intent? Yet evidence of legislative intent did not map neatly onto the pre-Victorian letter/spirit paradigm. What Parliament thought a law meant did not, strictly speaking, bear on either its objective or equitable meaning. There was, moreover, the question of interpretive priority. What was a judge to do if, having construed an ambiguous statute equitably, he came across proof that Parliament's actual interpretation ran contrary to his? Should he jettison fictive "intent" in deference to the real thing? It was possible to imagine a similar conflict between the meaning that a statute, taken in context, would communicate to

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a steep rise in the number of royal commissioners from the 1830s to the 1860s); Eastwood, *supra* note 115, at 285–87 (on the work of these commissions).

117. *See* Lauriat, *supra* note 116, at 31–35.

118. The delegation of major questions to such commissions was not without controversy. *See, e.g.*, J. TOULMIN SMITH, GOVERNMENT BY COMMISSIONS ILLEGAL AND PERNICIOUS (London, Sweet 1849).

119. *See* LAW, *supra* note 111, at 13. The government eventually took over *Hansard*'s publication in 1909. *See id.* at xiv.

an average person and the meaning that, according to the historical sources, Parliament meant to convey.[120] Whose interpretation controlled, the authors' or the audience's?[121]

A Victorian court determined to consider evidence of legislative intent—from the *Journals*, commissioners' reports, or *Hansard*—had, in theory, three ways to do so. First it was widely accepted, at least in cases of ambiguity, that a judge could take note of the historical and political circumstances that surrounded a statute's passage.[122] "The interpreter must, in order to understand the subject-matter and the scope and object of the enactment, call to his aid all those external and historical facts which are necessary for the purpose."[123] This of course raised the ancillary question of *how much* context was permissible, a matter on which courts were divided.[124] But no matter how broadly a court defined "context," this rule was still an odd fit for evidence of the enacting legislature's intentions. Historically, it had permitted *general* evidence of statutory context, not the sort of fine-grained evidence that litigants had begun pressing—the particular form a bill took when it was introduced to Parliament, or the ways in which its terms had been amended; a statement in *Hansard* about the meaning of a particular word; the policy recommendations in a royal commission's report.

A related rule, also uncontroversial, instructed courts to take account of how dated or technical terms were understood by the legal community at the time the statute was enacted.[125] Sir Fortunatus Dwarris, in the first nineteenth-century treatise on statutory interpretation, traced this evidentiary rule to Coke's *Institutes*:

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120. *See* PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 23 (London, Maxwell & Sons 1875) (noting the possibility of such a conflict).

121. This dilemma was only sharpened by the precision with which Victorian legislation was increasingly drafted. *See supra* notes 112–14 and accompanying text. It was at the same time that extrinsic evidence of the legislature's subjective intentions began to proliferate, in other words, that more formalistic, text-centered interpretive methods became viable for the first time.

122. There was, however, considerable disagreement about whether evidence of context was admissible in the case of an *unambiguous* text—about whether, in other words, a court could find a statute's meaning clear, without considering its context at all. *See* 1 BLACKSTONE, *supra* note 74, at *59–60 (arguing for a narrow use of context); *see also* FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 576–77 (W.H. Amyot ed., London, William Benning & Co. 1848) [hereinafter DWARRIS (1848)] (same); MAXWELL, *supra* note 120, at 21 (same).

123. MAXWELL, *supra* note 120, at 20–21; *see also id.* at 19–21 (citing cases).

124. *See* Magyar, *Textualism*, *supra* note 51, at 81.

125. *See* MAXWELL, *supra* note 120, at 271 ("The meaning publicly given by contemporary, or long professional usage, is presumed to be the true one."); *id.* at 272–75 (citing additional cases, c. 1846 to 1875); EDWARD WILBERFORCE, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES 142 (London, Stevens & Sons 1881).

> [G]reat regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made.[126]

But *contemporanea expositio*, classically, instructed court to consider how earlier *judges* read old statutory terms—perhaps, at the margins, the ways in which past litigants read them—in order to illustrate how, in the statute's original context, the "intention of the makers" was *received*.[127] So it, too, was a poor fit for evidence of intent.

That left the mischief rule. This was, in fact, how evidence of legislative intent began to seep into the English caselaw. But this development was far more contested than it may first appear. For the past seventy years, it has been common to equate the statute's mischief and its purpose. Legal scholars from Hart and Sacks to Eskridge and Manning,[128] judges as diverse as Scalia, Katzmann, and Posner,[129] have all variously endorsed this reading. Projecting that equivalence back into the historical record, in turn, has allowed them to locate purposivism's origins in late sixteenth century, in *Heydon's Case* (1584).[130] If that were right—if evidence of a statute's mischief *just were* evidence of its authors' purpose—it would have been uncontroversial for Victorian judges to consider direct evidence of authorial intent under this rule.

But as Samuel Bray has recently shown, that conflation of mischief and purpose is premised on a conceptual error.[131] The former is a fact about the world that predates the statute; the latter is a prospective future state of affairs that the statute's enactors aim to bring into being.[132] To state the point in Aristotelian terms, a law's efficient cause—that which prompted the legislature to act—is distinct from its final cause—the end towards which it

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126. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 693 (2 vols., London, Saunders & Benning, 1830–31) (citing 2 COKE, *supra* note 70, at 11, 136, 181).

127. *See* WILBERFORCE, *supra* note 125, at 142.

128. HART & SACKS, *supra* note 28, at 1378–79; Eskridge, *supra* note 35, at 1003–05; John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119 n.35; Manning, *What Divides*, *supra* note 5, at 78; *see also* Bray, *supra* note 30, at 976 n.57 (collecting many other examples).

129. SCALIA & GARNER, *supra* note 36, at 423–24, 428, 433, 438; KATZMANN, *supra* note 6, at 31; Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 290–91 (1982).

130. *See supra* notes 28–35, 43, 49 and accompanying text.

131. *See* Bray, *supra* note 30, at 997–99.

132. Blackstone described the mischief as "in the eye of the legislator," something external to him. 1 BLACKSTONE, *supra* note 74, at *60.

acted.[133] Sometimes, alerted to a problem in the world, the legislature will act directly to eliminate it. (In Bray's formulation, "Because of *a*, statute *b*, so that *not-a*.") But it is also possible that, having been moved by an evil in the world, the legislature will adopt a purpose broader than, or orthogonal to, that mischief. ("Because of *a*, statute *b*, so that *c*.") As Viscount Dilhorne wrote in 1975, one can know "the 'mischief' which [a statute] was designed to cure" without comprehending its purpose, since "Parliament may, of course, have intended to do more than just cure the mischief."[134] A court can try to *infer* a statute's purpose from its mischief: "Given problem *a* in the world and statute *b*, what substantive aims did the legislature likely have?"[135] But this is to leap across the fact/value divide, and nothing in the logic of the mischief rule compels a court to make that jump.[136] A more restrained judge could simply use a statute's mischief to contextualize it, inferring whatever "remedy" Parliament devised from the words it selected.[137]

Conventionally, the mischief rule permitted courts to examine evidence of the evil in the world that led Parliament to legislate—or (what amounts to the same thing) the deficiency in the prior state of the law which allowed the evil to exist.[138] Taking that context into account, a court could then choose to enforce the law's objective meaning or else its equitable meaning, as circumstances dictated. What became controversial in the mid-nineteenth century was whether a new inferential move—from the law's precipitating problem, to its authors' historical purposes—was licit.[139] As courts made this move with increasing frequency, mischief and purpose bled into one another, a conceptual slippage exploited by enterprising barristers.[140] If courts could infer purpose from mischief, why could they not entertain direct evidence of

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133. *See* ARISTOTLE, PHYSICS bk. 2, § 3 (c. 350 B.C.E.).

134. Maunsell v. Olins [1975] AC 373 (HL) 383 (Visc. Dilhorne); *cf.* MAXWELL, *supra* note 120, at 39 (acknowledging that "the legislative provisions [of many acts] extend beyond the mischief recited" in their preamble).

135. More accurately, there are *three* questions here. A court might inquire into the objective purpose that a reasonable legislature would have held, given the statute at issue and its mischief. It might seek out the subjective purposes of the actual lawmakers who crafted the statute. Finally, the court might investigate the equitable purpose that, as a moral matter, the legislature *should* have had. *See infra* notes 394–401 and accompanying text.

136. *Cf.* Barzun, *supra* note 28, at 48–52 (on Hart and Sacks's skepticism about the fact/value divide).

137. *See, e.g.*, DWARRIS (1848), *supra* note 122, at 566 ("The remedy is to be gathered from the act itself.").

138. *See* 1 BLACKSTONE, *supra* note 74, at *87.

139. *See* DWARRIS (1848), *supra* note 122, at 563–67; MAXWELL, *supra* note 120, at 18–24.

140. *See, e.g.*, M'Master v. Lomax (1833) 39 Eng. Rep. 857 (Ch.) 857 [2 My. & K. 32, 32–34] (Brougham LC) (inferring Parliament's "object" by comparing the initial and final drafts of a bill).

purpose? And if they could, why was evidence of intent—that is, evidence of what Parliament actually thought the statute's words meant—not permissible too?

Some of the new evidentiary sources that Victorian counsel began pressing were clearly within the mischief. For instance, in a dispute over the Statute of Anne (1709) it had been uncontroversial for the King's Bench, in 1769, to take note of the contents of a petition that had been laid before Parliament, and which prompted it to pass the law.[141] It was a far more tenuous use of the mischief for that same court to consider evidence of the act's procedural history—noting that certain words were changed, others excised, during debate, and that its preamble had been watered down.[142] On one way of thinking, that prior iteration of the law was itself "mischief," a threat to the legal order that Parliament had averted by adopting new statutory language. But this was rather tortured, and the more obvious reason for considering a statute's procedural history was to illuminate, indirectly, what the legislature intended its words to mean. Commission reports, meanwhile, were Janus-faced—they contained evidence of the law's mischief in their "findings," but also direct evidence of purpose in their "recommendations"—and so were at once within and outside the mischief, traditionally defined. *Hansard*, finally, was the most difficult new source to construe as mischief. To the extent that an MP's statements about a law were probative of its meaning, it was typically because they illuminated Parliament's reasons for adopting it or what it intended by the law's words—not because they shed light on its mischief.

Counsel began pressing arguments from the statute's procedural history in the latter eighteenth century.[143] And beginning in the 1840s, they began

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141. *See* Millar v. Taylor (1769) 98 Eng. Rep. 201 (KB) 227 [4 Burr. 2303, 2351] (Aston J); *id.* at 247–48 [4 Burr. at 2389–91] (Yates J, dissenting); *id.* at 256 [4 Burr. at 2405] (Mansfield CJ).

142. *Id*. at 217–18 [4 Burr. at 2332–35] (Willes J); *id.* at 247–48 [4 Burr. at 2389–91] (Yates J, dissenting).

143. *See* Donaldson v. Beckett (1774) 1 Eng. Rep. 837 (HL) 843 [2 Bro. P.C. 128, 140–41]; Campbell v. Hall (1774) 98 Eng. Rep. 848 (KB) 871 [Lofft 655, 695–96] (Mansfield CJ); Smith v. Powdich (1774) 98 Eng. Rep. 1033 (KB) 1035 [1 Cowp. 182, 185–87]; Lonsdale (Earl) v. Littledale (1793) 126 Eng. Rep. 562 (CP) 564 [2 H. Bl. 299, 302]; Boulton v. Bull (1795) 126 Eng. Rep. 651 (CP) 656 [2 H. Bl. 463, 472–73].

invoking the reports of royal commissions,[144] and *Hansard*.[145] Perhaps predictably, the judicial response was badly disjointed. After counsel in *Salkeld v. Johnson* (1848) tried to introduce evidence from a commissioners' report, Chief Baron Pollock insisted it was inadmissible, endorsing the lower court's view that "[w]e are not at liberty to infer the intention of the legislature from any other evidence than the construction of the act itself."[146] Yet in *Mew & Thorne* (1862), his contemporary the Lord Chancellor Westbury was perfectly happy to admit not only a commissioners' report, but also evidence of an act's procedural history and, most radically, the way its sponsor had described it in Parliament.[147] Resting uncomfortably between these poles was *Shrewsbury v. Scott* (1859), in which the Queen's Bench found it at once appropriate and inappropriate to consider legislative history:

> I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record; but such discussions . . . may legitimately serve as hints for suggesting a point of view from which[,] when the provisions of the act are once regarded[,] those provisions will of themselves appear harmonious and clear.[148]

The most typical response, however, was evasion. By finding a statute clear, a judge could bar extrinsic evidence of its meaning, without wading

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144. *See* Hemstead v. Phx. Gas Light & Coke Co. (1865) 159 Eng. Rep. 725 (Exch.) 726 [3 H. & C. 745, 747–48]; *In re* Mew & Thorne (1862) 31 L.J.Bcy. 87, 89 (Westbury LC); Martin v. Heming (1854) 156 Eng. Rep. 526 (Exch.) 526 [10 Ex. 478, 478]; Salkeld v. Johnson (1848) 154 Eng. Rep. 487 (Exch.) 495 [2 Ex. 256, 273–74] (Tindal J).

145. *See* Hilton v. Eckersley (1855) 119 Eng. Rep. 781 (Exch.) 790 [6 El. & Bl. 47, 69–70] (counsel citing *Hansard* as evidence of "the modern policy of the legislature"); Phillips v. Pickford (1850) 137 Eng. Rep. 971 (CP) 974 [9 C. B. 459, 468] (counsel citing *Hansard* for the "effect" Parliament expected a law to have); *see also* Veley v. Burder (1841) 113 Eng. Rep. 813 (Exch. Ch.) 813 [12 A. & E. 265, 265–66] (Tindal CJ); Hamilton v. Dallas [1875] 1 Ch D 257, 264.

146. Salkeld v. Johnson (1846) 135 Eng. Rep. 1141 (CP) 1144 [2 C.B. 749, 757] (Tindal CJ), *aff'd*, (1848) 154 Eng. Rep. 487 (Exch.) [2 Ex. 256]; *see Salkeld*, 154 Eng. Rep. at 495 [2 Ex. at 273–74] (Pollock CB); *see also* Att'y Gen. v. Sillem (1863) 159 Eng. Rep. 178 (Exch.) 219 [2 H. & C. 431, 520–23] (Pollock CB); *In re* Archbishop of York (1841) 114 Eng. Rep. 1 (QB) 15 [2 QB 1, 34] (Denman CJ).

147. *In re Mew & Thorne*, 31 L.J.Bcy. at 89 (Westbury LC); *see also* Holme v. Guy (1877) 5 Ch D 901, 905 (Jessel MR) ("The Court is not to be oblivious . . . of the history of law and legislation.").

148. Shrewsbury (Earl) v. Scott (1859) 141 Eng. Rep. 350 (QB) 434 [6 C.B. 1, 213] (Byles J) (considering "the history of the act").

into fraught debates about the scope of the mischief.[149] Similarly, if persuaded by the historical evidence of what the legislature intended an ambiguous provision to mean, a judge could style his construction as an equitable one—justified by "intent" in the older, fictive sense of the term.[150] In this way, without acknowledging the historical sources or touching on the theoretical debate, he could nevertheless give effect to what the legislature meant to say.

III. FORM AND DISCIPLINE

In no small part, the methodological disarray of the Victorian judiciary was a consequence of the heterogeneity of the English court system. Throughout the early nineteenth century, there existed no single, credible authority to coordinate the judiciary's approach to an increasingly voluminous groundswell of statutes.[151] In principle, the House of Lords was England's highest court of appeal, with jurisdiction over cases in law and equity.[152] But the vast majority of peers were not barristers, and until the mid-eighteenth century their verdicts were sparse, not reasoned judgments that might provide organizing principles of interpretation for the courts below.[153] The decisions of one common law court—King's (or Queen's) Bench, Common Pleas, or Exchequer—were not, in practice, able to bind the others. (Neither could Chancery dictate mandatory principles of interpretation for all judges.)[154] As a result, while the Victorian courts spoke the same language,

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149. *See, e.g.*, *Hemstead*, 159 Eng. Rep. at 726 [3 H. & C. at 747–48] (dodging evidence from a commissioners' report); *Salkeld*, 154 Eng. Rep. at 495 [2 Ex. at 273–74] (Pollock CB) (same); Cameron v. Cameron (1834) 39 Eng. Rep. 954 (Ch.) 954 [2 My. & K. 289, 289–92] (dodging *Hansard* by finding a statute's meaning plain).

150. Courts were still using "intent" equitably, without grounding in the historical record, well into the Victorian era. *See, e.g.*, Mounsey v. Ismay (1865) 159 Eng. Rep. 621 (Exch.) 625–26 [3 H. & C. 486, 496–500] (Martin J).

151. *See* BAKER, *supra* note 68, at 120–21 (noting the proliferation of nineteenth-century statutes).

152. *See* David Lewis Jones, *The Judicial Role of the House of Lords Before 1870*, *in* THE JUDICIAL HOUSE OF LORDS, 1876–2009, at 3 (Louis Blom-Cooper et al. eds., 2009).

153. *See* ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976, at 3–34 (1978). From 1844, peers untrained in the law were not allowed to vote in the Lords' judicial proceedings. *See id.* at 32–34.

154. On the convoluted structure (and limited scope) of nineteenth-century appeals, see BAKER, *supra* note 63, at 147–48. From 1830, this system was partially streamlined, after Parliament directed that civil appeals from the common law courts would go to the new Court of Exchequer Chamber (and, from there, to the Lords). Jim Evans, *Changes in the Doctrine of Precedent During the Nineteenth Century*, *in* PRECEDENT IN LAW 35, 48–49 (Lawrence Goldstein

invoked the same principles, and acknowledged the same authorities, their approaches to statutes were varied, and often *ad hoc*.

A. Independent Authorities

The first attempt to solve this problem was extrajudicial. From the 1830s, a series of independent treatise writers stepped into this breach. Much like Kent and Story's efforts to impose consistency on America's federated legal system,[155] these authors collected and collated the leading cases on interpretation, and tried to organize them into a coherent, unified approach. In so doing, they hoped to erect an *ersatz* source of authority for the English judiciary. For many decades, the only contender to this role was Dwarris's two-volume *Treatise on Statutes*, first published in 1831, and in a second, expanded edition in 1848.[156] But this project accelerated dramatically in the latter nineteenth century, with five new treatises appearing between 1875 and 1896.[157] The tone of these later works shifted, too. Whereas Dwarris's approach was largely descriptive—trying to identify the approach to construction that actually prevailed on the English courts, while

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ed., 1987). Exchequer Chamber's decisions (like those of the Lords) were not binding until later in the nineteenth century. *See* BAKER, *supra* note 63, at 211; Evans, *supra*, at 58–63.

From 1848, trial judges in criminal cases could refer questions of law to the Court for Crown Cases Reserved; it was not possible to directly appeal criminal sentences until the creation of the Court of Criminal Appeal in 1907. *But see* Lester B. Orfield, *History of Criminal Appeal in England*, 1 MO. L. REV. 326, 327–35 (1936) (describing the stark limits on criminal appeals before 1848).

155. On that homogenizing project, see generally G. Blaine Baker, *Interstate Choice of Law and Early-American Constitutional Nationalism*, 38 MCGILL L.J. 456 (1993) (reviewing ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS (1992)); and Peterson, *Kent*, *supra* note 14.

156. *See generally* DWARRIS, *supra* note 126; DWARRIS (1848), *supra* note 122.

157. Maxwell's *Interpretation of Statutes* first appeared in 1875, *see* MAXWELL, *supra* note 120, with second and third editions in 1883 (London, Agnew & Co.) and 1896. PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES (Alfred Bray Kempe ed., London, Sweet & Maxwell 2d ed. 1896). It was soon followed by HENRY HARDCASTLE, A TREATISE ON THE RULES WHICH GOVERN THE CONSTRUCTION AND EFFECT OF STATUTORY LAW (London, Stevens & Haynes 1879) and WILBERFORCE, *supra* note 125 (1881). In 1892, William Craies published an effectively rewritten version of Hardcastle's *Treatise*, HENRY HARDCASTLE, A TREATISE ON THE RULES WHICH GOVERN THE CONSTRUCTION AND EFFECT OF STATUTORY LAW (London, Stevens & Haynes 1892) [hereinafter CRAIES], expanding it again in 1901 and 1907 [hereinafter CRAIES (1901) and CRAIES (1907), respectively]. The last of the Victorian treatises was EDWARD BEAL, CARDINAL RULES OF LEGAL INTERPRETATION (London, Stevens & Sons 1896), expanded in 1908 [hereinafter BEAL (1908)]. On this literature, see Stephen Waddams, *The Authority of Treatises in English Law (1800–1936)*, *in* LAW AND AUTHORITY IN BRITISH LEGAL HISTORY, 1200–1900, at 274 (Mark Godfrey ed., 2016); and Alexandra Braun, *Burying the Living?: The Citation of Legal Writings in English Courts*, 58 AM. J. COMPAR. L. 27, 35–37 (2010).

acknowledging nuance and inconsistency—his successors were far more prescriptive, selectively highlighting cases that supported their preferred approach, while downplaying, recasting or ignoring those that did not.

This treatise literature's achievement was to transform the interpretive approach that Blackstone had loosely sketched into a rigid, self-reinforcing analytic. Dwarris set out its basic architecture. To discover "the true meaning of the statute," he instructed the judge to begin with its words, "taken in their ordinary and familiar signification and import," or according to "their general and popular use."[158] If those words, considered in the context of its broader statute, were unambiguous, the judicial inquiry was complete.[159] For "an act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled, in any Court of Justice."[160] But how was a court to know if a statute was clear? To discipline this initial clarity/ambiguity determination, Dwarris dusted off established eighteenth-century interpretive rules of thumb, and redescribed them as binding rules of construction—or what his successors would call "canons."[161] These rules were of two kinds. A first set of "fundamental rules[,] founded upon the universal principles of criticism, and the grammatical sense and meaning of words," gave courts a common set of tools for construing difficult statutory text.[162] Many of these rules, taxonomized here for the first time, remain in use today: *eusdem generis*, *noscitur a socio*, the may/shall distinction, *quod voluit non dixit*.[163] Second, Dwarris drew on early-modern presumptions about which statutes should be read broadly or narrowly, and repurposed them into distinct clarity standards for different areas of law. Thus, penal and tax statutes—or those in derogation of the common law—needed to meet a heightened standard of clarity, while a lower bar governed remedial statutes or those enlarging the common law.[164]

Only if a provision was ambiguous—so Dwarris insisted—was it permissible to consider extra-statutory context.[165] Under that heading he

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158. DWARRIS (1848), *supra* note 122, at 507, 573.

159. *See id.* at 567–72 (*in pari materia*).

160. *Id.* at 484.

161. *See, e.g.*, MAXWELL, *supra* note 120, at 55; WILBERFORCE, *supra* note 125, at 118, 172; *cf.* William Cornish, *Sources of Law*, *in* 11 OXFORD HISTORY OF THE LAWS OF ENGLAND, 1820–1915, at 41, 55–59 (William Cornish et al. eds., 2010) (on the nineteenth-century transformation of interpretive rules of thumb into more rigid "canons").

162. DWARRIS (1848), *supra* note 122, at 552.

163. *See id.* at 598–99, 604, 666–67.

164. *See id.* at 614–58; *see also* MAXWELL, *supra* note 120, at 133–48, 202–08, 237–70; *cf.* 1 BLACKSTONE, *supra* note 74, at *87–91.

165. *See* DWARRIS (1848), *supra* note 122, at 576 (citing Paddon v. Bartlett (1834) 111 Eng. Rep. 648 (Exch.) 653 [3 A. & E. 884, 895] (Abinger CB)).

included the law's mischief, evidence of the political and social conditions that prevailed at the time of its enactment, and any contemporary judicial pronouncements that bore on its meaning.[166] As his successor Maxwell put it, an unclear statute could only be clarified with "such arguments and inferences as may be based within the four corners of the law . . . , viewed by such light as its history may properly throw upon it."[167] But if, after situating the provision in statutory context and reading it in light of these historical aids, it remained unclear, its terms were simply unenforceable, just like an inscrutable line in a contract, will, or deed.[168]

What was ostracized in Dwarris's schema, conspicuously, was equity.[169] In his view, it was proper to consider a statute's equity only if its terms were ambiguous[170]—or, perhaps, if they threatened "absurdity or manifest injustice." In that latter case, Dwarris was prepared to allow courts to "modify [the words] to avoid that which certainly could not have been the intention of the legislature."[171] Later treatise writers would not even make this limited concession, rejecting any judicial manipulation of a statute's terms with a kind of "moral outrage":[172]

> [A] Court is not at liberty to speculate on the intention of the Legislature when the words are clear, or to construe an Act according to its own notions of what ought to have been enacted. . . . To depart from the plain and obvious meaning . . . , is, in truth, not to construe the Act, but to alter it.[173]

In part, these writers' skepticism about equitable interpretation stemmed from concerns about judicial encroachment on the legislature.[174] But far more

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166. *See id.* at 562–66; *see also* MAXWELL, *supra* note 120, at 25 (whole act); *id.* at 27–28 (*in pari materia*); *id.* at 271 (contemporaneous construction).

167. MAXWELL, *supra* note 120, at 49.

168. *See* DWARRIS (1848), *supra* note 122, at 555. This analogy between statutory interpretation and the construction of private instruments was a prominent theme in the Victorian treatises. *See id.* at 550–60; MAXWELL, *supra* note 120, at 19.

169. *See* DWARRIS, *supra* note 126, at 792–93 (condemning "equitable interference [as] judicial usurpation"); *see also id*. at 708, 711 (similar).

170. *See id.* at 721–34.

171. DWARRIS (1848), *supra* note 122, at 587 (quoting Perry v. Skinner (1837) 150 Eng. Rep. 843 (Exch.) 845 [2 M. & W. 471, 476] (Parke B)); *cf.* Becke v. Smith (1836) 150 Eng. Rep. 724 (Exch.) 726 [2 M. & W. 191, 195] (Parke B) ("[If the statute's] ordinary meaning [threatens] manifest absurdity or repugnance, . . . the language may be varied or modified, so as to avoid such inconvenience, but no further.").

172. Magyar, Textualism, *supra* note 51, at 64.

173. MAXWELL, *supra* note 120, at 6; *see also id.* at 16, 49; CRAIES (1901), *supra* note 157, at 114.

174. *See* DWARRIS (1848), *supra* note 122, at 555; WILBERFORCE, *supra* note 125, at 9.

importantly, their skepticism was of a piece with the very project of treatise writing. Not only did these authors aim to standardize English interpretation; they wanted to *systematize* it. By setting out clear, uniform rules of interpretation, they hoped to iron out indeterminacy from the law, transforming statutory construction from an art into a science. This was an attempt to purge the common law of those embarrassing early-modern relics that still clung to it.[175] "Although the spirit of an instrument . . . is to be regarded no less than its letter, yet the 'spirit is to be collected from the letter.'"[176] To authorize the contrary, allowing a court to invoke a statute's spirit to thwart its letter, would inject arbitrariness into the judicial process, fatally undermining—and here is a slogan popularized in precisely this historical moment—"the rule of law."[177]

B. Their Lordships Ascendant, 1879–1906

In the 1870s, in an effort to modernize the administration of justice, the Disraeli government introduced a series of reforms that witnessed the reorganization of the lower common law courts, the dissolution of Chancery, the merger of law and equity, and the creation of a new English appellate court, the Court of Appeal.[178] But most important, in retrospect, was the renovation of the House of Lords through the Appellate Jurisdiction Act 1876. Under this Act, exceptional jurists were selected from across the United Kingdom, given life peerages, and installed in the House of Lords as Lords of Appeal in Ordinary—colloquially, "Law Lords."[179] The judicial duties of

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175. *See, e.g.*, MAXWELL, *supra* note 120, at 226–36.

176. DWARRIS (1848), *supra* note 122, at 561–62 (quoting *Sturges v. Crowningshield*, 17 U.S. (1 Wheat.) 122, 202 (1819) (Marshall, C.J.), but wrongly attributing the line to Joseph Story).

177. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (London, MacMillan & Co. 1885); *cf.* Julia Stapleton, *Dicey and His Legacy*, 16 HIST. POL. THOUGHT 234, 235–39 (1995). Not coincidentally, Dicey was also a leading defender of parliamentary supremacy. *See* MARK D. WALTERS, A.V. DICEY AND THE COMMON LAW CONSTITUTIONAL TRADITION 162–225 (2020).

178. On these reforms, see Patrick Polden, *The Judicial Roles of the House of Lords and the Privy Council, 1820–1914*, *in* 11 OXFORD HISTORY, *supra* note 161, at 528, 544–47; and David Steele, *The Judicial House of Lords: Abolition and Restoration, 1873–76*, *in* THE JUDICIAL HOUSE OF LORDS, *supra* note 152, at 13.

179. Some years earlier, a structurally similar set of reforms had been introduced in the Privy Council, which was responsible for taking final appeals from the courts of the British Empire. *See* Judicial Committee Act 1833, 3 & 4 Will. 4 c. 41; *see also* P.A. HOWELL, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833–1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT 1–48 (1979).

the full House were then delegated to this committee, which exercised them more-or-less autonomously. Across the latter part of the nineteenth century, their learned speeches became a source of precedent for the entire English judiciary. This state of affairs was officially ratified in 1898, when the Lords announced that their majority holding in any case had the force of law: it was, without exception, categorically binding on all lower courts going forward, as well as in any future litigation before them.[180]

This new tribunal's authority and expertise ideally positioned it to impose coherence on the lower courts' muddled approaches to statutes.[181] From the start, the Law Lords moved quickly, and with increasing confidence, to install as orthodoxy the basic approach outlined in the treatises. In 1877, for instance, they endorsed the principle that statutes should be interpreted no differently from private-law instruments like contracts or wills:

> In [both] cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.
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> [A] Court [will not] make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.
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> And this, as applied to the construction of statutes, is no new doctrine . . . .[182]

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180. London Tramways Co. v. London CC [1898] AC 375 (HL) 381 (Halsbury LC); *see also* Beamish v. Beamish (1861) 11 Eng. Rep. 735 (HL) [9 H.L.C. 274]; Evans, *supra* note 154, at 58.

181. *See* Cornish, *supra* note 161, at 48–49.

182. River Wear Comm'rs v. Adamson (1877) 2 App. Cas. 743 (HL) 763–64 (Lord Blackburn).

It followed that a statute's words, read in context, were dispositive of its meaning.[183] Except perhaps for rare cases of genuine ambiguity, debates about the statute's equity were immaterial.[184]

What about the intent of its authors? The parol evidence rule generally barred consideration of what the parties to a contract meant to say. But as all Victorian jurists knew, if faced with an *ambiguous* contract, it was wholly permissible—indeed, advisable—for a court to consider evidence of what the parties had intended, and to adopt the reading consistent with their shared intent.[185] Did this rule also apply to statutes? Or did the unique character of public laws—their ability to impose rights and duties on persons not party to the original "contract"—demand a different approach?

It is worth emphasizing how genuinely unsettled this debate was at the time of the Judicature Acts. The standard narrative, recall, holds that evidence of parliamentary intent had been forbidden a century earlier, in *Millar v. Taylor* (1769).[186] But recent scholarship has rendered this claim untenable.[187] One of the judges in *Millar* did indeed opine, in dicta, that "[t]he sense and meaning of an Act of Parliament must be collected from what it says when passed into law; and not from the history of changes it underwent in the house where it took its rise."[188] But that same judge then proceeded to flagrantly disregard these words, inferring the legislature's intent from the history of the act in question; and every one of his fellow judges followed suit.[189] Though *Millar* was frequently cited for its substantive holding in nineteenth-century copyright cases, no English court cited it for the evidentiary rule with which

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183. *See* Herron v. Rathmines & Rathgar Improvement Comm'rs [1892] AC 498 (HL) 502 (Halsbury LC); Green v. R (Elliott) (1876) 1 App. Cas. 513 (HL) 534–37 (Cairns LC); *id.* at 550–51 (Lord Penzance); *see also* Leader v. Duffey (1888) 13 App. Cas. 294 (HL) 301 (Halsbury LC) ("[I]t appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made.").

184. The Lords eventually held that not even absurdity could justify the alteration of a statute's terms. *See* Vacher & Sons, Ltd. v. London Soc'y of Compositors [1913] AC 107 (HL) 121 (Lord Atkinson); *see also* R v. Judge of the London Ct. [1892] 1 QB 273 (CA) 290 (Esher MR) ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question [of] whether the legislature has committed an absurdity.").

185. *Cf.* John H. Wigmore, *A Brief History of the Parol Evidence Rule*, 4 COLUM. L. REV. 338, 352–55 (1904).

186. *See supra* notes 36, 44, 50 and accompanying text.

187. *See* Magyar, *Debunking* Millar, *supra* note 51, at 40–48, 53–55; Magyar, Textualism, *supra* note 51, at 80–117.

188. Millar v. Taylor (1769) 98 Eng. Rep. 201 (KB) 217 [4 Burr. 2303, 2332] (Willes J).

189. *See supra* notes 141–42 and accompanying text; *see also* Magyar, *Debunking* Millar, *supra* note 51, at 35–38.

it is now associated until 1887.[190] In that case, *Caird v. Sime*, a dissenting Law Lord noted the tension between *Millar's* dicta and the actual approach that its judges took—and then went on to ignore the dicta, construing a difficult act by reference to *Hansard* and the *Journal of the House of Commons*.[191] No treatise writer identified *Millar* with the "exclusionary rule" until Craies—in 1907.[192] Despite his considerable learning, Chief Baron Pollock had been unable in *Salkeld* (1848) to cite authorities to support the proposition that evidence of intent was always impermissible.[193] Both editions of Dwarris's *Treatise* (1831, 1848) were silent on the question.[194] And Maxwell's, published on the eve of the Law Lords' installation, explicitly reported that the judiciary was divided on the matter. While he was convinced that "[t]he intention of the Legislature can be collected from no other evidence than its own declaration, that is, from the Act itself," he also admitted that "[r]eference is occasionally made to what the framers of the Act, or individual members of the Legislature intended to do by the enactment, or understood it to have done."[195] In the mid-1870s, the question of legislative intent was genuinely open.

The treatise writers were the first to answer it; in time, the Law Lords canonized their approach as law. Because the statute's meaning resided in the objective content of its terms, what its authors meant by those terms was irrelevant. "If a statute is not clearly worded," Wilberforce wrote in 1881,

> [t]he Court cannot consider what was the intention of the member of Parliament by whom any measure was introduced. It cannot look at the reports of commissions which preceded the passing of statutes, and upon which those statutes were founded. . . . The Court cannot look at the history of a clause, or of the introduction of a proviso, nor at debates in Parliament, nor at amendments and alterations made in Committee, . . . nor at the policy of the Government with reference to any particular legislation.[196]

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190. *See* Caird v. Sime (1887) 12 App. Cas. 326 (HL) 355 (Lord Fitzgerald, dissenting).

191. *See id.* at 357–59.

192. CRAIES (1907), *supra* note 157, at 122–23; *see* Magyar, *Debunking* Millar, *supra* note 51, at 35.

193. Salkeld v. Johnson (1848) 154 Eng. Rep. 487 (Exch.) 495 [2 Ex. 256, 272–74] (Pollock CB). Neither did Pollock cite cases for this position in *Attorney General v. Sillem* (1863). *See* 159 Eng. Rep. 178 (Exch.) 219 [2 H. & C. 431, 520–23] (Pollock CB).

194. *See* Magyar, *Debunking* Millar, *supra* note 51, at 40.

195. MAXWELL, *supra* note 120, at 23 (contrasting *Mew & Thorne* with *Salkeld*, among others).

196. WILBERFORCE, *supra* note 125, at 105–07.

As a practical matter, historical evidence of intent threatened the crystalline purity and definitiveness of the treatise writers' approach: such evidence might tempt judges to stray from the fixed lodestar of objective meaning. Firm in these convictions, from the late 1870s the treatise writers began emphasizing the distinction between admitting evidence of the mischief in order to contextualize a statute's terms and admitting it to infer purpose or intent. While the first move was appropriate, the second never was. More ambitiously, they began projecting this distinction back onto the historical record, attempting to give it the imprimatur of custom.

Initially, it was difficult to locate authorities for the rule that evidence of intent was inadmissible. In 1875, Maxwell was only able to give four cases in plausible support of it.[197] But two of these opinions were not about statutory meaning at all, and the other two could quite easily be read for the limited holding that a court may not consider evidence of intent if faced with clear statute (but might, presumably, in cases of ambiguity).[198] A few years later, Hardcastle tried to give Maxwell's position more ballast:

> [T]here is one matter which it is not allowable to refer to in discussing the meaning of an obscure enactment, and that is what is sometimes called "the parliamentary history" of a statute, that is to say, the debates which took place in Parliament when the statute was under consideration; and the alterations made in it during its passage through committee, are . . . "wisely inadmissible" to explain it.[199]

Dictum in a Queen's Bench opinion chimed with this view, as did an earlier Exchequer case that Hardcastle unearthed, *Attorney General v. Sillem* (1863).[200] In the latter, Chief Baron Pollock had insisted that judges may not

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197. *See* MAXWELL, *supra* note 120, at 23 (citing Hemstead v. Phoenix Gas, Light & Coke Co. (1865) 159 Eng. Rep. 725 (Exch.) [3 H. & C. 745]; Martin v. Heming (1854) 156 Eng. Rep. (Exch.) 526 [10 Exch. 478]; *Salkeld*, 154 Eng. Rep. at 487 [2 Ex. at 256]; and Cameron v. Cameron (1834) 39 Eng. Rep. 954 (Ch.) [2 My. & K. 289]).

198. *Hemstead* was a brief *per curiam* opinion that made no mention of counsel's reference to a commissioners' report, and *Martin* was dismissed on procedural grounds before the court reached the statutory question. The courts in *Salkeld* and *Cameron* had found the statutes at issue clear and refused to consider extrinsic evidence of their meaning.

199. HARDCASTLE, *supra* note 157, at 56 (quoting R v. Hertford Coll. (1878) 3 QBD 693, 707 (Coleridge CJ)). Hardcastle's was the first treatise to suggest that commissioners' reports should be categorically barred. *See id.* (first citing *Salkeld*, 154 Eng. Rep. at 487 [2 Ex. at 256]; and then citing Farley v. Bonham (1861) 70 Eng. Rep. 1019 (Ch.) [2 J. & H. 177]).

200. *Hertford Coll.*, 3 QBD at 707 (Coleridge CJ); Att'y Gen. v. Sillem (1863) 159 Eng. Rep. 178 (Exch.) [2 H. & C. 431].

> construe any statute, and least of all a criminal statute, by what counsel are pleased to suggest, were alterations made in Committee by a Member of Parliament . . . . This is not one of the modes of discovering the meaning of an Act of Parliament recommended by Plowden, or sanctioned by Lord Coke or Blackstone.[201]

Pollock cited these luminaries, of course, to polish his position with a veneer of received authority. In citing him, Hardcastle did not bother to note that "parliamentary history" had been unavailable to Plowden, Coke, and Blackstone—making the question of whether they "recommended" it meaningless. Undeterred, Hardcastle and his allies continued to scour the historical record, while keeping an eye on developments in the upper judiciary. By the turn of the twentieth century, the treatise writers had marshalled a seemingly impressive catalogue of cases in support of their anti-intentionalist stance.[202]

The Law Lords ultimately ratified this context/intent distinction in a pair of *fin de siècle* cases. They had earlier chastised the Court of Appeal for its careless use of *Hansard*.[203] But it was not until the *Solio Case* of 1898 that they issued their first major ruling on the scope of the mischief. In that case, the lower court had considered evidence from a commissioners' report, which purported to identify the mischief of a recently enacted statute.[204] In the Lords' unanimous judgment, Lord Chancellor Halsbury found it appropriate to rely on such a report as evidence of the context in which the statute's ambiguous words were adopted:

> I think that no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of [a] commission. . . . It appears to me that, to construe the statute now in question, it is not only legitimate, but highly convenient, to refer both to the former Act and to the ascertained

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201. *Sillem*, 159 Eng. Rep. at 219 [2 H. & C. at 521–22] (Pollock CB).

202. *See* BEAL (1908), *supra* note 157, at 286–90; CRAIES (1901), *supra* note 157, at 137–41; MAXWELL, *supra* note 157, at 30–39.

203. *See* Julius v. Bishop of Oxford (1880) 5 App. Cas. 214 (HL) 222–23, 225 (Cairns LC); *cf.* Lyons v. Wilkins [1899] 1 Ch 255 (CA Civ.) 262 (Lindley MR) (interrupting counsel to stop him from citing *Hansard*). However, in *Herron v. Rathmines*, Lord Chancellor Halsbury had said that "the subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature." [1892] AC 498 (HL) 502.

204. *See* Eastman Photographic Materials Co.'s Application for Trade Mark (1897) 14 RPC 487 (CA Civ.) 489 (argument of counsel).

> evils to which the former Act had given rise, and to the later Act which provided the remedy.[205]

Solio caused consternation among some observers, who feared that it may have opened the door to a more aggressive intentionalism.[206] Would evidence from *Hansard* soon be admissible, too? These worries were allayed a few years later, when the Lords endorsed the Court of Appeal's approach in *West Riding* (1907).[207] "The construction of the Act as printed and published," Lord Farwell had insisted in that case,

> is the final word of the legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible . . . . The Court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the authors of the words to be interpreted at the time when such words were written or otherwise become effectual; but this will [not] justify us in admitting, as evidence on the construction of an Act, speeches in either House or subsequent statements in the public papers, or elsewhere, of the effect of an Act. . . . [T]he aim and object of the Act must be sought in the Act itself.[208]

West Riding made explicit, in other words, what was implicit in *Solio*: the mischief rule permitted a court to consider evidence of a statute's linguistic context, but never in order to ascertain the legislature's subjective intentions. This conceptual distinction soon became an evidentiary one. While commissioners' reports might perhaps adduce relevant evidence about the mischief that prompted parliamentary action, statements about legislation in Parliament generally could not. It followed that *Hansard* was a categorically impermissible aid to interpretation.[209]

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205. Eastman Photographic Materials Co. v. Comptroller-Gen. of Patents, Designs & Trademarks (*Solio Case*) [1898] AC 571 (HL) 575–76 (Halsbury LC).

206. *See, e.g.*, CRAIES, *supra* note 157, at 144 (opposing any judicial use of commissioners' reports); *cf.* Magyar, Textualism, *supra* note 51, at 104.

207. R v. W. Riding of Yorkshire Cnty. Council [1906] 2 KB 676 (CA Civ.), *rev'd on other grounds*, [1907] AC 29 (HL).

208. *Id.* at 716–17 (Farwell LJ); *see also* Assam Rys. & Trading Co. v. IRC [1935] AC 445 (HL) 458–59 (Lord Wright) (characterizing *West Riding* as adopting Farwell's view of the mischief rule).

209. *See* CRAIES (1901), *supra* note 157, at 140. On principle, Maxwell refused to acknowledge the admissibility of commissioners' reports for many years. *See* Magyar, *Dogma*, *supra* note 51, at 5.

C. High Formalism, 1906–c. 1960

The basic paradigm constructed by the treatise writers and the late-Victorian Law Lords—built on the three-legged stool of plain meaning, the mischief, and the rule against absurdity—remained intact for decades. After *West Riding*, the Lords' main interpretation cases consisted of attempts to police that paradigm at the margins and otherwise reiterate its authority. In *Viscountess Rhondda's Claim* (1922), for instance, they rejected an attempt to introduce evidence of a statute's procedural history under the mischief rule—placing Parliament's *Journals*, in effect, in the same proscribed category as *Hansard*.[210] "Decisions of the highest authority"—so the Lords intoned, citing *Millar v. Taylor* among them—"show that the interpretation of an Act of Parliament must be collected from the words [that] the Sovereign has made into law," and nowhere else.[211] A decade later in *Assam Railways* (1934), the Lords recast their earlier holding in *Solio*, clarifying that, while commissioners' reports were indeed permissible under the mischief rule—"to show what were the surrounding circumstances with reference to which the words were used"—it was inappropriate to use a report's "recommendations" to infer statutory purpose.[212] "[O]n principle," Lord Wright wrote for a unanimous court,

> no such evidence [is admissible for] showing the intention, that is, the purpose or object, of an Act . . . . It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.[213]

In practice, *Assam Railways* constricted the mischief rule dramatically, allowing access only to a commission's "findings," never its "recommendations." Though this followed logically from the established context/intent distinction, it nonetheless entailed a tightening of that distinction's grip.[214] Unsurprisingly, as the upper judiciary strengthened their formal interpretive rules, treatise writers duly cited them in subsequent

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210. Rhondda's (Viscountess) Claim [1922] 2 AC 339 (HL) 383–84 (Visc. Haldane); *see also id.* at 365 (Birkenhead LC). This case was in fact heard not by the Law Lords, but by the Committee on Privileges (a tribunal on which many of the Law Lords, including the Lord Chancellor, sat).

211. *Id.* at 383 (Visc. Haldane); *cf. id.* at 383–84 (citing *Millar*).

212. *Assam Rys*. [1935] AC at 458 (Lord Wright).

213. *Id.*

214. *See id.* at 537–38 (tracing the context/intent distinction to *Heydon's Case*).

editions of their works. Narrowing theories of interpretation led to stricter judicial precedents, and those precedents, in turn, were grist to the mill of later treatises—creating a self-reinforcing hermeneutical loop that continued to feed on itself into the mid-twentieth century.

IV. CRITIQUE AND CRISIS

A. Intent Recidivus

One of the features of the formalist approach that made it so durable was its ostensible ability to depoliticize interpretation, transforming it into a value-neutral science.[215] A longstanding, unwritten rule barred members of the legal community from openly criticizing the courts, so open criticism of the courts' approach was rare in the early twentieth century.[216] But for those paying attention, it was evident that the Victorian approach had not wholly banished the contingencies of personality and politics from the interpretative process. There remained substantial room for discretion in the judge's initial clarity/ambiguity determination; and if he found a law ambiguous, the contexts he deemed relevant, and the outcomes he deemed absurd, went a long way to shaping its meaning.[217] Thus an appellate court, determined to convict a man of bigamy, could find the word "marry" ambiguous—encompassing both the act of marriage, and an ineligible person's *attempt* to marry—and declare absurd any construction that let the defendant go free.[218] Or take *Corkery v. Carpenter* (1951), which concerned a law banning the drunken operation of "carriages."[219] Was a bicycle a carriage? The court thought the question ambiguous and, after considering the mischief, construed the term broadly, to further "the preservation of public order."[220] The carriage-operator went to jail. But no such *deus ex machina* came to the plaintiff's aid in *London & North Eastern Railway v. Berriman* (1946).[221]

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215. *See* STEVENS, *supra* note 153, at 67–68.

216. For criticisms emanating from outside the United Kingdom, see generally D.J. Llewelyn Davies, *The Interpretation of Statutes in the Light of Their Policy by the English Courts*, 35 COLUM. L. REV. 519 (1935); and Corry, *supra* note 74.

217. *Cf.* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 880–81 (1930) (making this criticism of American formalists).

218. R v. Allen (1872) 1 LRCCR 367, 373–75 (Cockburn CJ); *cf. Re* Sigsworth [1935] 1 Ch 89, 92–93 (Clauson J).

219. Corkery v. Carpenter [1951] 1 KB 102.

220. *Id.* at 105 (Goddard CJ).

221. *See* [1946] AC 278 (HL).

Two railroad workers had been killed while oiling a pair of tracks, and their survivors invoked a law that protected any person injured while "relaying or repairing" tracks. The Lords found those words clear: to oil an otherwise functional track was to *maintain* it, not repair it.[222] As such, it was not permissible to consider the law's mischief or the demands of equity. The survivors recovered nothing.

In 1963, in a break with convention, a group of Labour-affiliated legal minds published *Law Reform Now*, a collection of essays criticizing the Victorian approach as callous and counter-productive.[223] A year later, after Harold Wilson was elected Prime Minister, he named one of that collection's editors, Gerald Gardiner, Lord High Chancellor. Among Gardiner's first moves was to soften the Law Lords' formerly rigid position on *stare decisis*, which had become the subject of considerable criticism.[224] In 1966, he announced that the Lords would no longer invariably treat their own prior rulings as binding, and would "depart from a previous decision when it appears right to do so."[225] Concurrently, he established a Law Commission to review the judiciary's approach to interpretation. That commission's report, released in 1969, diplomatically but firmly rejected what it characterized as the prevailing hyper-formalism of the English courts.[226] It criticized the context/purpose distinction as artificial and contrived, and suggested that, when interpreting an opaque provision, it was appropriate for a judge to seek out "the underlying policy of the statute in question."[227]

Although the Law Commission's report did not have any independent authority to change the rules of construction, it gave judges much-needed cover, if they wished, to test the limits of the received paradigm. In its wake,

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222. *Id.* at 294–95 (Lord MacMillan); *id.* at 307–08 (Lord Porter); *id.* at 314 (Lord Simonds). *But see id.* at 300 (Lord Wright, dissenting) (finding the words ambiguous); *id.* at 290–91 (Jowitt LC, dissenting) (similar).

223. LAW REFORM NOW (Gerald Gardiner & Andrew Martin eds., 1963); *see also* J.A.G. GRIFFITHS, THE POLITICS OF THE JUDICIARY (1977) (rehearsing similar arguments).

224. *See* Julius Stone, *1966 and All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1176–80 (1969).

225. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (Gardiner LC). On the conceptual impossibility of this move—establishing a new (binding?) rule, clarifying that the Lords' rules will not always bind—see Roy Stone, *The Precedence of Precedents*, 26 CAMBRIDGE L.J. 35 (1968). On ways to finesse it politically, see Stone, *supra* note 224, at 1162–71.

226. *See* LAW COMM'N & SCOTTISH LAW COMM'N, THE INTERPRETATION OF STATUTES, 1969, LC-021, at 48–49 [hereinafter SCARMAN REPORT]; *see also* COMM. ON THE PREPARATION OF LEGIS., THE PREPARATION OF LEGISLATION, 1975, Cm. 6053 [hereinafter RENTON REPORT] (report of a parliamentary select committee, calling for a broadening of the mischief, as well as the passage of a Legislation Act liberalizing the rules of statutory construction).

227. SCARMAN REPORT, *supra* note 226, at 11; *see also id.* at 17–20, 30 n.124. This report declined, however, to call for direct evidence of legislative intent to be admissible. *See id.* at 36.

judges began openly trying to stretch the mischief rule, widening its utility. The rather defiant Judge Denning, sitting on the Court of Appeal, defined the terms of this project:

> A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.[228]

In the 1970s and '80s, the courts became noticeably more receptive to evidence of the mischief.[229] Direct evidence of purpose remained formally inadmissible, a point traditionalists often stressed.[230] Nevertheless, after a court had admitted evidence of a law's context, nothing prevented it from going on to infer purpose, and then to reason backwards to the meaning of the law's words.[231] As this context-to-purpose move became more common, the distinction between the two blurred.[232] Increasingly, the Law Lords tacitly permitted this move; indeed, some of them encouraged it.[233] Lord Scarman, for instance, found it

> quite absurd to say to a judge, "You may look at [certain extrinsic] material . . . to determine the mischief that the Act was passed to eliminate or eradicate, but you must not use what you read to

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228. Seaford Ct. Ests. Ltd. v. Asher [1949] KB 481 (CA Civ.) 499 (Denning LJ), *aff'd*, [1950] AC 508 (HL).

229. Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) 647 (Lord Simon) (rejecting the traditional view that a statute's mischief should be considered only in cases of ambiguity); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 185 (1961) (reporting "conflicting schools of thought" about whether courts could consider the mischief in the absence of ambiguity).

230. *See, e.g.*, R v. Allen [1985] AC 1029 (HL) 1035 (Hailsham LC) (examining a commission's report "for the purpose of defining the mischief of the Act but not to construe it"); Beswick v. Beswick [1968] AC 58 (HL) 74 (1967) (Lord Reid).

231. *See* Buchanan & Co. v. Babco Forwarding & Shipping Ltd. [1977] QB 208 (CA Civ.) 213 (Denning MR) (endorsing "teleological" construction); Barker v. Wilson [1980] 1 WLR 884 (QBD) 887 (Caulfield J) (similar); FRANCIS BENNION, STATUTORY INTERPRETATION 586 (1984) (giving examples).

232. As Bray notes, in editions of *Black's Law Dictionary* published between 1891 and 1990, mischief was defined narrowly, as "the evil or danger which a statute is intended to cure"; after 1990, it gave a new definition, which encompassed purpose. *See* Bray, *supra* note 30, at 990 n.126.

233. *See, e.g.*, Royal Coll. of Nursing v. Dep't of Health & Soc. Sec. [1981] AC 800 (HL) 822 (Lord Wilberforce, dissenting) (moving from context to purpose); *see also* IRC v. McGuckian [1997] 1 WLR 991 (HL) 999 (Lord Steyn) (noting that "[d]uring the last 30 years there has been a shift away from the literalist approach to purposive methods of construction," which employ a "contextual approach").

> influence your views as to what the Act means." It is that sort of nonsense that we must really get out of the law.[234]

In the 1970s, new evidentiary sources appeared that eased this move from context to purpose. The most important were White Papers, quasi-official statements of executive policy that often accompanied draft legislation.[235] The result of all this conceptual stretching was that in 1984—a year *before* Scalia would laud the pure textualism of the English tradition—Bennion could introduce *Statutory Interpretation* by announcing that "[o]ur courts have moved on from the old simplistic view." Today, he reported, "we have purposive construction."[236]

A second criticism, far more radical, also threatened the established paradigm. From the late 1960s, a vocal cohort of judges had begun calling, for the first time in living memory, for direct evidence of intent to be admissible in court. This was not a push to widen the mischief: it was a call for a new kind of evidence altogether. Across the twentieth century, statements from *Hansard* about what the legislature thought a statute meant had been categorically excluded.[237] But why? "Under [our] constitution it is self-evidently undesirable that statutes should be so interpreted as to run counter to what Parliament meant to say," protested Lord Simon in 1974.[238] "Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion," why must a court ignore it?[239] Lord Denning was openly insubordinate, directly citing *Hansard* in two opinions from this

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234. HL Deb (9 Mar. 1981) (418) col. 67.

235. The earliest White Papers, dating to the early twentieth century, were departmental reports prepared for Parliament in response to the legislature's specific inquiries. Gradually, governments began to use this decide to notify Parliament of their legislative priorities. For this transition, see the database of White Papers available at *House of Commons Parliamentary Papers*, https://parlipapers.proquest.com/profiles/hcpp/search/basic/hcppbasicsearch [https://perma.cc/UQH8-KGUV]. Courts did not begin citing these materials with any frequency until the 1970s. *See, e.g.*, Laker Airways Ltd. v. Dep't of Trade [1977] QB 643 (CA Civ.) 709–10 (Roskill LJ); Att'y Gen.'s Reference (No. 1 of 1988) [1989] AC 971 (HL) 992 (Lord Lowry).

236. BENNION, *supra* note 231, at xxvii; *cf. Royal Coll. of Nursing* [1981] AC at 822 (Lord Wilberforce, dissenting) (arguing that it is often "proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time" of the statute's passage, since "Parliament's policy or intention is [presumably] directed to that state of affairs").

237. *See* S.G.G. EDGAR, CRAIES ON STATUTE LAW 128–29 (7th ed. 1971).

238. Race Rels. Bd. v. Dockers' Lab. Club & Inst. Ltd. [1976] AC 285 (HL) 299 (Lord Simon).

239. *Id.*; *see also* Warner v. Metro. Police Comm'r [1969] 2 AC 256 (HL) 279 (Lord Reid); *cf.* Davis v. Johnson [1979] AC 264 (CA Civ.) 276 (Denning MR).

period.[240] "[I]n cases of extreme difficulty, I have often dared to do my own research," he mischievously admitted in *Hadmor v. Hamilton* (1981).[241] "I have read *Hansard* just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so."[242] Adding force to these criticisms, in 1980 the House of Commons expressly disclaimed any objection to the judicial use of its proceedings.[243]

But the clearest sign of change came in 1989, when Lord Irvine called for reconsideration of the courts' attitude towards *Hansard* in the full House of Lords.[244] Irvine had earlier represented the plaintiffs in *Hadmor*, persuading the court to decide the case by recourse to the legislative record.[245] Irvine asked his peers to consider, whether, at least in a case like *Hadmor*—where the statute was genuinely ambiguous, and the record clearly indicated the meaning Parliament had in mind—it was really so eccentric to allow a court to research, and then enforce, the meaning Parliament intended.[246] In the ensuing debate, it emerged that many of his colleagues were also open to revisiting the so-called "exclusionary rule." "We profess to attempt to give effect to the intention of Parliament when we are construing a statute," Lord Griffiths complained, "and yet we refuse to check whether Parliament said what its intention was."[247]

B. The Rear Guard

Many of the clearest statements of the formalist approach appeared in this period, in response to these stirrings of discontent. "We often say that we are looking for the intention of Parliament, but that is not quite accurate," Lord Reid explained. "We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what

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240. *See* Hadmor Prods. Ltd. v. Hamilton [1983] 1 AC 191 (HL & CA Civ.) 201 (1982, 1981) (Denning MR); *Davis* [1979] AC at 277 (Denning MR); *cf.* R (Bradford Metro. Cnty. Council) v. Loc. Comm'r for Admin. [1979] QB 287 (CA Civ.) 311 (Denning MR).

241. *Hadmor* [1983] 1 AC (CA Civ.) at 201 (Denning MR).

242. *Id.*

243. *See* David Miers, *Citing* Hansard *as an Aid To Interpretation*, 4 STATUTE L REV. 98, 99–102 (1983).

244. *See* HL Deb (18 Jan. 1989) (503) cols. 278–307.

245. *See id.* at cols. 278–79 (Lord Irvine). Denning was ultimately reversed by the House of Lords. *See Hadmor* [1983] 1 AC (HL) at 232–33 (Lord Diplock) ("The rule that recourse to *Hansard* is not permitted as an aid to the construction of an Act of Parliament is one which it is the duty of counsel to observe in the conduct of their clients' cases before any English court of justice.").

246. *See* HL Deb (18 Jan. 1989) (503) col. 281 (Lord Irvine).

247. *Id.* at col. 286 (Lord Griffith); *see also id.* at col. 282 (Lord Goff).

they said."[248] And since the meaning of any law resided in the "true meaning" of its words, the subjective intentions of the legislature were irrelevant. "It is a well and long established rule," explained Viscount Dilhorne, "that counsel cannot refer to *Hansard* as an aid to the construction of a statute. What is said by a Minister or by a member sponsoring a Bill is not a legitimate aid to the interpretation of an Act."[249]

Throughout the 1970s and '80s, the Law Lords gave two kinds of arguments for this stance. The first were practical. Supposing for the sake of argument that Parliament's intent *was* relevant, the record of debates in the legislature was not, they insisted, an especially good place to find it. Of the reams of pages that filled *Hansard*, the overwhelming majority have no relation to statutory meaning at all.[250] And if a litigant were able to find evidence of how an MP or minister interpreted an unclear provision, how could a court be sure that the rest of Parliament shared that interpretation? Moreover, statements made during legislative debates were often spontaneous, and thus unreliable—a problem compounded by the presence of contradictions and ambiguities in the record.[251] Given the weakness of this source and the high costs of mining it, it was not economical to permit recourse to *Hansard*.

This practical argument against *Hansard* had deep roots.[252] Much more novel were the constitutional arguments that appellate judges began invoking.[253] First, they argued that to make the meaning of statutes contingent on their authors' subjective intentions would corrode the rule of law. "The subject should be able, as in the past, to read the words of an Act and decide its meaning without hunting through *Hansard*," Lord Cumming-Bruce insisted.[254] "An Act means what the words and phrases selected by the parliamentary draftsmen actually mean, and not what individual members of

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248. Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) 613 (Lord Reid); *cf.* Pickstone v. Freemans [1989] AC 66 (HL) 126 (Lord Oliver) ("The intention of Parliament has, it is said, to be ascertained from the words which it has used and those words are to be construed according to their plain and ordinary meaning.").

249. Davis v. Johnson [1979] AC 264 (HL) 337 (Visc. Dilhorne); *see also Hadmor* [1981] 1 AC (HL) at 232–33 (Lord Diplock); Beswick v. Beswick [1968] AC 58 (HL) 74 (Lord Reid).

250. *See* Lord Reid, *The Judge as Law-Maker*, 12 J. SOC. PUB. TCHRS. L. 22, 28 (1972); *see also* HL Deb (18 Jan. 1989) (503) col. 303 (Lord Elwyn-Jones) (searching through *Hansard* a hopeless quest for a "nugget of gold"); *id.* at col. 284 (Lord Renton); *id.* at col. 288 (Lord Donaldson).

251. *See Davis* [1979] AC at 349–50 (Lord Scarman).

252. Both the Scarman and Renton Reports had endorsed the exclusionary rule on economic grounds. *See supra* note 226.

253. *See* Vogenauer, *supra* note 50, at 630–33.

254. Davis v. Johnson [1978] 1 ER 841 (CA Civ.) 885 (Cumming-Bruce LJ).

the two Houses of Parliament may think they mean."[255] If the latter were the case, how could a citizen be expected to conform his conduct to the law? "[L]egal certainty . . . demands that the rules by which the citizen is to be bound should be ascertainable by him."[256] Second, the Lords rejected intentionalism on separation-of-powers grounds. To give legal effect to the legislature's intended meaning would be an abdication of the judicial responsibility to interpret the law:

> [I]t is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power . . . is an essential part of the constitutional process by which subjects are brought under the rule of law—as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpret[ing] agency might say.[257]

Deferring to the legislature's preferred interpretation, in other words, would invite Parliament to encroach on the judiciary's remit. Finally, the Bill of Rights barred courts from "questioning" the proceedings in Parliament, and some Lords worried that using *Hansard* to ascertain legislative intent might violate this fundamental norm.[258] "To question whether what the Minister or an Opposition spokesman said is a proper explanation of what is ultimately included in the Bill is to some extent to question proceedings in Parliament."[259] Imagine a provision that was ambiguous. Suppose its text, read in light of the mischief, suggested one reading, but the historical record suggested another. An interpreting court would be placed in an impossible situation: it would have to enforce the legislature's apparent intention and ignore the text's more natural construction, or else it would have to set *Hansard* aside and enforce the text's objective meaning. Would not the latter imply that Parliament had misunderstood its own law? Was this not an impermissible "questioning" of Parliament?[260]

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255. *Id.*; *see also* HL Deb (18 Jan. 1989) (503) col. 288 (Lord Donaldson) ("The ordinary citizen who is called upon to govern his day-to-day life in accordance with the statutes of this country should be able to ascertain what those statutes mean.").

256. Fothergill v. Monarch Airlines Ltd. [1981] AC 251 (HL) 279 (Lord Diplock).

257. Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) 629 (Lord Wilberforce).

258. *See* Bill of Rights 1689, 1 W. & M. sess. 2 c. 2, § 9 ("[D]ebates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.").

259. HL Deb (18 Jan. 1989) (503) col. 305 (Lord Mackay); *see also* Davis v. Johnson [1979] AC 264 (HL) 350 (Lord Scarman).

260. *Cf.* Scott C. Styles, *The Rule of Parliament: Statutory Interpretation After* Pepper v. Hart, 14 OXFORD J. LEGAL STUD. 155, 157 (1994) (describing such a scenario).

Somewhat paradoxically, at the same time that the Law Lords were setting forth these strong, principled arguments against intentionalism, they took conspicuous measures to soften the sting of the formalist approach. For one, they tacitly endorsed purposivist uses of the mischief rule.[261] More radically, they carved out a number of exceptions to the exclusionary rule. In *Fothergill v. Monarch Airlines* (1980), they distinguished between statutes prepared in Parliament, and international legal instruments drafted outside Parliament and subsequently incorporated into British law.[262] While evidence of intention was not permissible to construe the former, *Fothergill* found the "travaux préparatoires" of the international instrument admissible evidence of its meaning and, by extension, the domestic law's. Since "in the great majority of the contracting states the legislative history [of the instrument] would be admissible," English courts could consult it too.[263] Lord Wilberforce noted in passing that *Fothergill* might be vulnerable to the "objection that individuals ought not to be bound by discussions or negotiations of which they may never have heard," but neither his nor Lord Diplock's controlling speech squarely addressed this concern.[264] Nor did the Lords explain how Parliament could constitutionally index the meaning of a domestic law to the subjective intentions of a group of foreign diplomats. If it diminished the courts to serve as a "reflecting mirror" of Parliament, was this not even more concerning?

In two opinions from 1988 and 1991 the Lords went further, permitting *Hansard* to be used directly to interpret domestic law. *Pickstone v. Freemans* (1988) concerned "secondary legislation"—that is, regulations promulgated by the government pursuant to a statutory grant of authority.[265] Typically, such regulations must be set before Parliament before they take effect, giving legislators an opportunity to scrutinize and potentially veto them.[266] In *Pickstone*, the Law Lords held that it was "entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in which the draft was presented by the responsible minister and which formed

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261. *See supra* notes 228–36 and accompanying text.

262. *See* Fothergill v. Monarch Airlines Ltd. [1981] AC 251 (HL).

263. *Id.* at 294 (Lord Scarman); *see also id.* at 283 (Lord Diplock) (noting that, where possible, courts should interpret domestic laws giving effect to treaty obligations consistently with how those treaties are construed by other signatories).

264. *Id.* at 278 (Lord Wilberforce).

265. Pickstone v. Freemans Plc. [1989] AC (HL) 66.

266. *See* Statutory Instruments Act 1946, 9 & 10 Geo. 6 c. 36, § 4. For delegated legislation in the nineteenth century, see ILBERT, *supra* note 112, at 36–42; for its constitutional origins in the early sixteenth, see BAKER, *supra* note 63, at 83–84.

the basis of its acceptance."[267] Courts could not look to *Hansard* to understand the law giving regulatory authority to the executive (the "Parent Act"), but after *Pickstone*, statements in Parliament about the meaning of ambiguous regulations *were* permissible, on the assumption that, in voting for the regulations to take effect, the legislature had adopted "the intentions of the government."[268] A similar question was at issue in *Brind* (1991).[269] There, Parliament had adopted a resolution endorsing the government's interpretation of a previously-enacted law. In subsequent litigation over the law's scope, the Law Lords proceeded to use the resolution as presumptive evidence of the endorsed interpretation's validity.[270] *Brind*, in other words, permitted courts to use a law's "subsequent legislative history" to infer what the original, enacting Parliament intended.

At the same time, the Lords had themselves begun to widen the bounds of the mischief. *Factortame* (1989), most notably, relaxed the stark findings/recommendations rule of *Assam Railways*.[271] The case turned on whether the Supreme Court Act 1981 had authorized courts to preliminarily enjoin regulations. That Act, the court noted, had been preceded by the Law Commission's *Report on Remedies in Administrative Law* (1976), which contained a draft bill permitting courts to issue such injunctions.[272] By the time this bill had become law, the relevant provision had been excised. It was therefore implausible, *Factortame* held, to suppose that Parliament had meant to grant this power through ambiguous language elsewhere in the Act:

> [I]f Parliament had intended to confer upon the court jurisdiction to grant interim injunctions against the Crown, it is inconceivable, in light of the Law Commission's recommendation[,] . . . that this would not have been done in [the] express terms . . . [of] the Law Commission's draft Bill or by an enactment to some similar effect.[273]

This move did not technically violate *Assam Railways*: the court did not infer legislative purpose from a reports' recommendations, but the *absence* of legislative intention from the *absence* of language in the report's proposed

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267. *Pickstone* [1989] AC at 112 (Lord Keith).

268. *Id.* at 122 (Lord Templeman).

269. R (Brind) v. Sec'y of State for the Home Dept. [1991] 1 AC 696 (HL).

270. *Id.* at 755–56 (Lord Ackner).

271. Factortame Ltd. v. Sec'y of State for Transp. [1990] 2 AC 85 (HL) (construing the Supreme Court Act 1981, c. 54, § 31.2 by reference to LAW COMM'N, REPORT ON REMEDIES IN ADMINISTRATIVE LAW, 1976, LC-073).

272. *See id.* at 148–49 (Lord Bridge).

273. *Id.* at 149.

bill. Even still, it conspicuously departed from mainstream uses of the mischief.

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While these reforms mollified some of the exclusionary rule's most-criticized effects—estopping the executive, for instance, from representing draft regulations one way in Parliament, and another way to the courts—they also indirectly called attention to those cases where evidence of intent remained proscribed. This only intensified calls for further reform.

V. THE MODERN COMPROMISE

This jurisprudential tension—defending the received approach in principle while undermining it in practice—was inherently unstable. In *Pepper v. Hart* (1992), it collapsed.[274]

A. The Dam Breaks

Initially, *Pepper* seemed like an unexceptional case, asking the Law Lords to interpret "cost of the benefit" in the Finance Act 1976.[275] Should in-kind employee benefits be taxed at the marginal cost incurred by the employer to provide them, or the market-rate value of the benefit? After initial arguments, a majority of the empaneled Lords were prepared to adopt the latter construction, and rule for the government.[276] Before issuing their opinion, however, "it came to [their] Lordships' attention that an examination of the proceedings in Parliament in 1976 . . . might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words."[277] In its initial draft form, they learned, the Act had explicitly taxed in-kind benefits at their market price. After a public outcry, the government had reversed course.[278] Explaining this *volte-face* in Parliament, the Financial Secretary had promised that, with the removal of

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274. *See* Styles, *supra* note 260, at 152 (noting the instability of the pre-*Pepper* regime).

275. Pepper (Inspector of Taxes) v. Hart [1993] AC 593 (HL) (1992) (construing the Finance Act 1976, c. 40, § 63.1). For the principals in this case, see Brudney, *supra* note 39, at 265–71.

276. As the Lords observed, the statute's literal meaning, as well as its technical meaning in the field of accounting, both supported the market-rate interpretation. *See Pepper* [1993] AC at 643 (Lord Browne-Wilkinson) (literal meaning); *id.* at 620 (Lord Oliver) (technical meaning).

277. *See id.* at 623 (Lord Browne-Wilkinson).

278. *See* Nicholas Lyell, Pepper v. Hart*: The Government Perspective*, 15 STATUTE L. REV. 1, 4 (1994).

the controversial provision, "the benefit will be assessed on the cost to the employer."[279]

The Lords called for a second round of arguments before an enlarged panel, on the question of whether this evidence should be admitted.[280] Defending the traditional view, counsel for the Crown argued, first, that the prohibition on *Hansard* was needed to preserve the separation of the legislative and judicial powers, and second, that its abolition would tempt courts to impermissibly "question" the proceedings of Parliament.[281] Strikingly, every one of the judges in *Pepper* rejected these two arguments.[282] In his leading speech Lord Browne-Wilkinson explained that, while it would be constitutionally unacceptable to treat evidence of parliamentary intent as *binding*, there was nothing untoward about using it as evidence of statutory meaning. "The law," he explained,

> is to be found in the words in which Parliament has enacted. It is for the courts to interpret those words so as to give effect to [Parliament's] purpose. The question is whether, in addition to other aids to the construction of statutory words, the courts should have regard to a further source. Recourse is already had to white papers and official reports not because they determine the meaning of the statutory words but because they assist the court to make its own determination. I can see no constitutional impropriety in this.[283]

It was possible, in other words, to permit access to *Hansard*, yet still insist upon the courts' authority to weigh the evidence and make a determination. "The 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?"[284] And at any rate, the courts had already crossed this separation-of-powers Rubicon in *Pickstone*.[285] As to the Bill of Rights, Browne-Wilkinson held that the purpose of Section 9 was to protect dissident MPs from civil or criminal liability for what they said in Parliament.[286] Permitting access to evidence of legislative intent did not implicate this concern. "The purpose of looking at

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279. *Pepper* [1993] AC at 626 (Lord Browne-Wilkinson) (quoting the legislative record); *cf.* ROBERTSON, *supra* note 50, at 161–64.

280. *See Pepper* [1993] AC at 623 (Lord Browne-Wilkinson).

281. *See id.* at 633–34; *see also* Lyell, *supra* note 278, at 4.

282. The lone dissenter, Lord Mackay, had no constitutional objection to permitting access to *Hansard*; his concern was economical. *See Pepper* [1993] AC at 615.

283. *Id.* at 639–40 (Lord Browne-Wilkinson).

284. *Id.* at 635.

285. *See id.* at 633.

286. *See id.* at 638.

Hansard . . . [f]ar from questioning the independence of Parliament and its debates, [is to give] effect to what is said and done there."[287]

These constitutional impediments removed, the Lords had to decide if, and when, it was prudent to permit access to *Hansard*. Counsel for the plaintiffs, Lord Lester QC—a former student of Hart and Sacks, and a committed purposivist[288]—had argued that judges should be free to consult the record in cases of ambiguity, or if the statute could benefit from "confirmation."[289] The Lords in *Pepper* rejected this suggestion as overly broad. (What statute is not ambiguous or in need of confirmation?)[290] Nevertheless, in a limited range of cases, legislative history could play a constructive role. Lord Browne-Wilkinson outlined three criteria that must be met in order for a court to invoke evidence from *Hansard*: the statute's text must be ambiguous or lead to an absurdity; the statement in *Hansard* must clearly indicate what Parliament thought the statute meant; and the statement must be from an authoritative source, such as the government minister responsible for the bill.[291] Because these criteria were satisfied in *Pepper*, the court was willing to "attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary."[292]

More important than *Pepper's* doctrinal holding were the theoretical premises on which it rested. In Lord Browne-Wilkinson's presentation, legislative "intent" was not a fiction—a shorthand for the law's objective meaning, taken in context—but instead an object of historical scrutiny. In many cases, it was safe to assume that the statute's plain meaning tracked the legislature's historical intentions. But shorn from its *raison d'être*, the plain meaning rule had descended into arid formalism. Rejecting this approach, Browne-Wilkinson announced the arrival of a new

> purposive approach, seeking to discover the Parliamentary intention lying behind the words used and construing the legislation so as to give effect to, rather than thwart, the intentions of Parliament. Where the words used by Parliament are obscure or ambiguous, the Parliamentary material may throw considerable light not only on the

287. *Id.*

288. *See* Lord Lester, Pepper v. Hart *Revisited*, 15 STATUTE L. REV. 10, 11–12 (1994); *see also* Brudney, *supra* note 39, at 272–73.

289. *See Pepper* [1993] AC at 614 (Mackay LC).

290. *See id.*

291. *See id.* at 634, 640 (Lord Browne-Wilkinson); *see also id.* at 620 (Lord Oliver).

292. *Id.* at 642 (Lord Browne-Wilkinson).

> mischief which the Act was designed to remedy but also on the purpose of the legislation and its anticipated effect.[293]

This new conception of "intent" transformed the mischief. For if a statute meant what its authors intended, the context/purpose distinction was incoherent: legislative purpose, like context, will be probative of intent, and therefore relevant. Direct evidence of intent will of course be relevant too. All three—context, purpose, and intent—will be paths to the same final destination. Thus Lord Browne-Wilkinson could use these concepts basically interchangeably:

> [T]he distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial . . . . Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate. Clear and unambiguous statements made by Ministers in Parliament are as much the background to the enactment of legislation as white papers and Parliamentary reports.[294]

The historical intent of the legislature, on this view, was that which animated the statute's text—the spirit behind its letter.

The years following *Pepper* witnessed a "surge of interest in legislative history" throughout the judiciary.[295] Soon, enthusiasm for what one Law Lord called "our new freedom" had overwhelmed the barriers that Lord Browne-Wilkinson constructed around *Hansard*.[296] Often, courts simply ignored his three-part test.[297] In other cases, they duly acknowledged his three desiderata, and then proceeded to construe them loosely. For instance, they made regular recourse to the legislative record even when the statute was clear—reasoning

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293. *Id.* at 633; *see also id.* at 617 (Lord Griffiths) ("Why . . . cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?").

294. *Id.* at 635 (Lord Browne-Wilkinson); *see also id.* at 634 (equating "the mischief aimed at" with "the legislative intention").

295. Brudney, *supra* note 36, at 16; *see also id.* at 16 nn.81–82 (on judicial responses to *Pepper*); Vogenauer, *supra* note 50, at 634–36 (same); *cf.* BENNION, *supra* note 231, at 530–31, 579.

296. Holden & Co. v. Crown Pros. Serv. (No. 2) [1994] 1 AC 22 (HL) 37 (Lord Bridge).

297. *See, e.g.*, Stubbings v. Webb [1993] AC 498 (HL) 507 (Lord Griffiths); R (Johnson) v. Warwickshire Cnty. Council [1993] AC 583 (HL) 587–88, 591–92 (Lord Roskill).

that in such cases, *Hansard* could help confirm its meaning.[298] Likewise, though *Pepper* limited courts to statements from authoritative sources, they repeatedly cited ordinary, non-sponsoring MPs.[299] Finally, they ignored the "clear statement" rule, admitting evidence from *Hansard* that itself required parsing.[300] In 1995, the Lords tried to stem the bleeding, limiting *Pepper* to statements "directed to the specific statutory provision under consideration or to the problem raised by the litigation."[301] But these disciplining efforts were unavailing. "Lord Browne Wilkinson's triple locks for the admissibility of parliamentary material are slowly being unpicked," reported one turn-of-the-century observer.[302] "*Hansard* has become, or is becoming, an open book for guidance on the meaning and purpose of legislative provisions."[303]

B. Second Thoughts

In the academy, initial responses to *Pepper* were far more critical. Aside from the now well-known objections, three new criticisms emerged. First, philosophically, scholars refurbished the argument that, since Parliament did not have a single mind, "legislative intent" was an incoherent concept.[304] Second, they argued that indexing the meaning of statutes to the intentions of past legislators was normatively unattractive, since it would render courts powerless to update them as circumstances demanded.[305] Finally, they pointed out that *Pepper* had in fact implicated two discrete separation-of-powers questions, one of which the Law Lords had completely ignored. The court had addressed concerns about legislature's possible encroachment onto the judiciary's role. But as Sir John Baker pointed out, the far greater threat

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298. *See, e.g.*, Scher v. Policyholders Prot. Bd. [1994] 2 AC 57 (HL) 116 (Lord Mustill); Chief Adjudication Officer v. Foster [1993] AC 754 (HL) 770–72 (Lord Bridge); *Johnson* [1993] AC at 592 (Lord Roskill); *In re* Bishopsgate Inv. Mgmt. Ltd. [1993] Ch 452 (CA Civ.) 481, 490 (Rose LJ); *see also* BENNION, *supra* note 231, at 530–31, 579 (collecting cases).

299. *See, e.g.*, R v. Preddy [1996] AC 815 (HL) 830–33 (Lord Goff); *Foster* [1993] AC at 771–72 (Lord Bridge); *Stubbings* [1993] AC at 507 (Lord Griffiths).

300. *See, e.g.*, *Bishopsgate* [1993] Ch at 487 (Steyn LJ) (complaining that the admitted statement from *Hansard* was too vague to be useful, "a damp squib").

301. Melluish (Inspector of Taxes) v. BMI (No. 3) Ltd. [1996] AC 454 (HL) 481 (Lord Browne-Wilkinson).

302. Kenny Mullan, *The Impact of* Pepper v. Hart, *in* THE HOUSE OF LORDS: ITS PARLIAMENTARY AND JUDICIAL ROLES 213, 238 (Paul Carmichael & Brice Dickson eds., 1999).

303. *Id.*

304. *See* Baker, *supra* note 50, at 354–55; Roderick Munday, *Interpretation of Legislation in England: The Expanding Quest for Parliamentary Intention*, 75 RABEL J. COMPAR. & INT'L PRIV. L. 764, 766–67 (2011).

305. *See* Styles, *supra* note 260, at 158.

of *Pepper* was that the *executive* would be empowered at the legislature's expense.[306] Under Lord Browne-Wilkinson's protocol, the meaning of an ambiguous or absurdity-producing law turns on how the government that introduced the law described it. "[T]he intention of the minister is equated with the intention of Parliament," Baker explained; "the minister's words are to be read as a source of law, attached as it were to the Act."[307] But the distinction between "the policy of the government, which should be of no concern to the courts," and the meaning of the law, which should be, was of the greatest constitutional importance.[308] "Parliament acts as a corporate body and the only expression of its common intention is the text to which the Queen and both Houses have given their unqualified assent," Baker argued.[309] "A minister speaks for the government, but not for the Queen, Lords and Commons all at once."[310] True, *Pepper* had characterized ministerial statements as presumptive, not conclusive, evidence of legislative intent. But in practice, what could possibly rebut this presumption? "It took many centuries of constitutional struggle to eliminate the notion that the policy of the government should have the force of law; now, it seems, something very like it is slipping through the back door."[311]

By the late 1990s, these criticisms began to penetrate the higher judiciary.[312] Lord Millett, for instance, suggested extrajudicially that *Pepper* had been "contrary to principle."[313] But it was Lord Steyn's Hart Lecture, delivered in 2000, that put this debate at the center of the English conversation.[314] In his presentation, *Pepper*—at least as conventionally understood—was constitutionally irredeemable. Echoing Baker, Steyn argued that *Pepper* had obligated courts to interpret ambiguous statutes as the governments that drafted them had, giving them "no element of discretion."[315]

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306. *See* Baker, *supra* note 50, at 355–56; *see also* Aileen Kavanagh, Pepper v. Hart *and Matters of Constitutional Principle*, 121 LAW Q. REV. 98, 102 (2005); *cf.* HL Deb (18 Jan. 1989) (503) col. 288 (Lord Donaldson) (raising this concern).

307. Baker, *supra* note 50, at 356.

308. *Id.*

309. *Id.* at 354.

310. *Id.* at 356.

311. *Id.* at 357.

312. *See* Lord Hoffman, *The Intolerable Wrestle with Words and Meanings*, 114 S. AFR. L.J. 656, 660–64, 668–69 (1997); Johan Steyn, *Interpretation: Legal Texts and Their Landscape*, *in* THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW 79, 87 (Basil S. Markesinis ed., 2000). Lord Steyn had earlier welcomed *Pepper*'s holding. *See* Johan Steyn, *Does Legal Formalism Hold Sway in England?*, 49 CURRENT L. PROBS. 43, 50 (1996).

313. Lord Millett, *Construing Statutes*, 20 STATUTE L. REV. 107, 110 (1999).

314. Johan Steyn, Pepper v. Hart*; A Re-examination*, 21 OXFORD J. LEGAL STUD. 59 (2001).

315. *Id.* at 69.

The result was an interpretive regime in which the executive "ultimately legislates."[316] Even worse, *Pepper* had left these "issues of high principle" wholly unremarked.[317] As a result—because its holding was wrong as a matter of law, and because its consequences had not been properly scrutinized—*Pepper* was not, in Steyn's view, good law.

There were, however, other plausible rationales for admitting the ministerial statement at issue in *Pepper*, Lord Steyn thought. First, since the government had endorsed one interpretation of the act in Parliament and another in court, it would have been unfair to bar evidence of that inconsistency.[318] On this estoppel-like reading of *Pepper*, evidence from *Hansard* would "be confined to the admission against the executive of categorical assurances given by ministers to Parliament" which it was later disclaiming in court.[319] This reading effectively drained *Pepper* of its intentionalist venom. Second, the ministerial statement might have been admitted as mischief.[320] In *Pepper*, Lord Browne-Wilkinson had used "intent" and "purpose" loosely, equating both with the statute's mischief.[321] For Steyn, it was vital to distinguish them. Commissioners' reports, White Papers, a statute's procedural history, even *Hansard*—all of these could potentially serve as evidence of a statute's mischief, "the contextual scene against which Parliament legislates."[322] It was entirely appropriate—indeed, commendable—for a court to situate the statute in its original context and try to deduce, from the problem that moved Parliament to legislate, the statute's purpose.[323] Yet even while he explicitly sanctioned the mischief's use as a tool for *inferring* purpose, Steyn insisted that it was unacceptable to rely on *direct* evidence of why the legislature adopted the law, or what it thought it meant. The salient distinction, in Steyn's view, was between the statute's objective purpose—the purpose that a reasonable legislature, given the statute's words and its context of enactment, could be presumed to have

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316. *Id.* at 70. Lord Steyn's liberal critique of *Pepper* chimed with his broader concerns about executive overreach. *See, e.g.*, Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMPAR. L.Q. 1 (2004).

317. Steyn, *supra* note 314, at 68.

318. *Cf.* R (Liverpool Taxi Fleet Operators Ass'n) v. Liverpool Corp. [1972] 2 QB 299 (CA Civ.) (preventing the government from enacting regulations in a manner contrary to the reasonable expectations it had engendered).

319. Steyn, *supra* note 314, at 67.

320. *See id.* at 70; *cf.* R (Quintavalle) v. Sec'y of State for Health [2003] UKHL 13, [21] (Lord Steyn) (welcoming the recent "shift towards purposive interpretation").

321. *See* Styles, *supra* note 260, at 153–54 (criticizing this conflation).

322. Steyn, *supra* note 314, at 70.

323. *See id.* at 68–72.

held—and the subjective purposes or intentions of individual lawmakers.[324] To make the law into a vessel for the latter was not merely a constitutional travesty; it would ossify statutes, preventing courts from adapting them to contingencies unforeseen by their authors.[325]

Emboldened by the positive response to his address, throughout the early 2000s Lord Steyn began arguing from the bench that his estoppel reading was "the actual decision in *Pepper v. Hart*,"[326] and working to revive the pre-*Pepper* distinction between a statute's mischief and direct evidence of purpose or intent.[327] Soon, his peers began endorsing these arguments,[328] echoing his anti-intentionalist recasting of *Pepper*.[329] In 2001 Lord Nicholls suggested that, despite appearances, *Pepper* had not fundamentally altered the basic task of interpretation:

> [T]he "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promote the legislation.[330]

All *Pepper* had done was "remove[] from the law an irrational exception," permitting *Hansard* to be cited under the mischief rule as evidence of the

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324. *See* Westminster City Council v. Nat'l Asylum Support Serv. [2002] UKHL 38, [6] (Lord Steyn) (distinguishing the statute's objective purpose from its authors' intentions); *cf.* Sirius Int'l Ins. Co. v. FAI Gen. Ins. Ltd. [2004] UKHL 54, [18] (Lord Steyn) (explaining, in the analogous context of contract interpretation, that "[t]he aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language," and that the answer to that "objective" question turns on "what a reasonable person, circumstanced as the actual parties were, would have understood the parties have meant by the use of specific language").

325. *See* Johan Steyn, *Dynamic Interpretation Amidst an Orgy of Statutes*, 35 OTTAWA L. REV. 163, 168–71 (2003); *see also In re* McFarland [2004] UKHL 17, [25] (Lord Steyn) (arguing that statutes should be presumptively given an "always speaking construction," unless their text or context indicates otherwise).

326. *See* R (Jackson) v. Att'y Gen. [2005] UKHL 56, [97] (Lord Steyn); R v. A (No. 2) [2001] UKHL 25, [44] (Lord Steyn).

327. *See Nat'l Asylum Support Serv*. [2002] UKHL at [6] (Lord Steyn); *R v. A* [2001] UKHL at [25] (Lord Steyn).

328. *See, e.g.*, Wilson v. First Cnty. Trust Ltd. (No. 2) [2003] UKHL 40, [67] (Lord Nicholls); Robinson v. Sec'y of State for N. Ir. [2002] UKHL 32, [40] (Lord Hoffman); *id.* at [65] (Lord Hobhouse). The lower courts did not, apparently, share these doubts. *See* Vogenauer, *supra* note 50, at 639–42.

329. *See, e.g.*, *Wilson* [2003] UKHL at [59]–[63] (Lord Nicholls); R (Spath Holme Ltd.) v. Sec'y of State for Env't, Transp. & the Regions [2001] 2 AC 349 (HL) 407–08 (Lord Hope).

330. *Spath Holme* [2001] 2 AC at 396 (Lord Nicholls); *see also* R (Wilkinson) v. IRC [2005] UKHL 30, [18] (Lord Hoffman); Att'y Gen. of Belize v. Belize Telecom Ltd. [2009] UKPC 10, [16] (Lord Hoffman).

statute's context of enactment.[331] "The source of the new law is the document itself[,] not what anyone may have said about it," agreed Lord Hobhouse; "it is a fundamental error of principle to confuse what a minister or parliamentarian may have said (or said he intended) with the will and intention of Parliament itself."[332] Within a few years, this groundswell of support was so pronounced that Steyn could assert that his views were "gaining ground in England."[333] Some observers openly wondered whether *Pepper* was still good law.[334]

Yet even at this high-water mark of skepticism, many of the Lords continued to think it "contrary to natural justice" to blind themselves to clear evidence of Parliament's intent.[335] Their position was strengthened by an intervention from Stefan Vogenauer in 2005.[336] Not only was Lord Steyn's estoppel reading of *Pepper* inconsistent with what the majority had held—so Vogenauer insisted—it was also unjust.[337] Why should a statute's meaning depend on the identity of the parties before the court? Moreover, it was untrue that *Pepper* had *de facto* transformed the government's interpretation of statutes into law. *Pepper* allowed courts to consider how the government described statutes to Parliament because these descriptions were probative, not conclusive, evidence of the legislature's intent—no different, in principle, from evidence of the mischief.[338] It was nonsensical to allow evidence of context and then permit judges to infer the legislature's intent, but to exclude direct evidence of the same thing. *Pepper* just eliminated this incongruity. It remained the judiciary's responsibility to weigh the evidence, and decide what Parliament meant by the words it chose.

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Ultimately, Lord Steyn was unable to topple *Pepper*: it remains good law. But his criticisms were not entirely in vain, for they refocused the judiciary's attention onto first principles—in particular, onto the conceptual distinction between context, purpose, and intention. Broadly, the interpretive framework that emerged in the mid-2000s, in the wake of his critique, remains operative today.

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331. *See Wilson* [2003] UKHL at [56] (Lord Nicholls).
332. *Id.* at [139]–[140] (Lord Hobhouse).
333. Steyn, *supra* note 325, at 172.
334. *See* Vogenauer, *supra* note 50, at 629–30.
335. *Spath Holme* [2001] 2 AC at 404 (Lord Cooke).
336. *See* Vogenauer, *supra* note 50.
337. *See id.* at 665–72.
338. *See id.* at 656–57.

Unlike their Victorian predecessors, contemporary English judges are alive to the necessary interdependence of text and historical context, and are therefore reluctant to find statutes clear in abstraction.[339] The Victorian plain meaning rule is therefore largely obsolete: the court may, if it wishes, consider the mischief without making a prior finding of ambiguity.[340] Aside from commissioners' reports, the *Journals*, and White Papers, it is "permissible as a first step to look at *Hansard* to try to identify the mischief at which [a statute] was aimed."[341] Armed with this evidence, a court may then infer the statute's purpose and construe its words to further it.[342] This

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339. *See, e.g.*, Informer v. Chief Constable [2012] EWCA (Civ.) 197, [67] (Toulson LJ) ("Construction of a phrase in a statute does not simply involve transposing a dictionary definition of each word. The phase has to be construed according to its context and the underlying purpose of the provision."); *cf.* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 546–49 (2017).

340. *See* Westminster City Council v. Nat'l Asylum Support Serv. [2002] UKHL 38, [5] (Lord Steyn) ("[T]here is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates."); Steyn, *supra* note 325, at 166–67; R (O) v. Sec'y of State for the Home Dep't [2022] UKSC 3, [66], [76] (Arden SCJ) (arguing that contextual evidence might render a seemingly clear provision ambiguous). On the old plain meaning rule, see *supra* notes 158–68 and accompanying text.

341. *In re* Hutchings [2019] UKSC 26, [19] (N. Ir.) (Kerr SCJ); *see also* Wilson v. First Cnty. Trust Ltd. (No. 2) [2003] UKHL 40, [67] (Lord Nicholls); Melluish (Inspector of Taxes) v. BMI (No. 3) [1996] AC 454 (HL) 480–81 (Lord Browne-Wilkinson).

For recent instances where the Supreme Court admitted extrinsic material as evidence of the mischief, not under *Pepper*, see R (Palestine Solidarity Campaign Ltd.) v. Sec'y of State for Hous., Cmtys. & Loc. Gov't [2020] UKSC 16, [73]–[76] (Arden & Sales SCJJ); and R (Derry) v. Revenue & Customs Comm'rs [2019] UKSC 19, [7]–[8] (Carnwath SCJ).

342. *See, e.g.*, R (Black) v. Sec'y of State for Just. [2017] UKSC 81, [37] (Hale P); Yemshaw v. London Borough of Hounslow [2011] UKSC 3, [25]–[27] (Hale SCJ); R v. Ireland [1998] AC 147 (HL) 158–59 (Lord Steyn); *cf.* Franked Inv. Income Grp. Litig. v. Revenue & Customs Comm'rs [2020] UKSC 47, [219] (Reed P & Hodge DP) ("[I]n all cases concerned with statutory interpretation [the essential question is]: what is the construction of the provision which best gives effect to the policy of the statute as enacted?"); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 112 (2012) (defending the view that "[r]ational lawmaking is action to change the law in specific ways for (what the legislature takes to be) good reasons," against the minimalist intentionalism of Raz, Gardner, and Manning, who only ascribe to the legislature "the limited, irrational [purpose] of adopting texts").

As Richard Re has noted, the modern English approach is pluralist, in the sense that the judge is not *required* to consider the statute's context and purpose and may instead enforce its "plain meaning" without recourse to extra-statutory evidence, if she wishes. Similarly, where the statute's text is susceptible to more than one interpretation, the court is free to adopt the one that avoids a patently absurd result (though this is usually achieved by an appeal to purpose). *See* Re, *supra* note 12, at 1659–60, 1659 n.43.

analysis tends to swallow up the more prescriptive canons of construction that once structured the search for plain meaning.[343]

Only if this analysis is unavailing does the legislature's intended meaning become relevant, serving as a potential tiebreaker. Since the Supreme Court's first sitting in 2009,[344] it has strictly enforced Lord Browne-Wilkinson's three-part admissibility test, and has been broadly skeptical about direct evidence of intent:

> [A]ny court must be wary of being too ready to give effect to what appears to be the Parliamentary intention from what was said by the authors of a report or by the sponsors of the relevant Bill: one cannot always be sure that what they say has been read or heard, or accepted, by the Parliamentarians who voted in favour of the provision in question.[345]

Before considering such evidence, a court must find the statute genuinely ambiguous or absurdity-producing.[346] It must also find that the statement in

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343. *See* ANDREW BURROWS, THINKING ABOUT STATUTES: INTERPRETATION, INTERACTION, IMPROVEMENT 7–8 (2018); *supra* notes 162–64 and accompanying text.

The English courts' contemporary approach to the interpretation of private contracts is similar. On the one hand, evidence of the context in which a contract was ratified is generally admissible, even absent a prior finding of linguistic ambiguity. *See* Rainy Sky SA v. Kookmin Bank [2011] UKSC 50, [14] (Clarke SCJ) (characterizing contract interpretation as a "unitary exercise in which the court must consider the language used and ascertain what a reasonable person . . . who has all the background knowledge which would reasonably have been available to the parties . . . at the time of the contract, would have understood the parties to have meant"); *see also* Sans Souci Ltd. v. VLR Servs. Ltd. [2012] UKPC 6, [14] (Lord Sumption) (distinguishing "[t]rue linguistic ambiguities," which are "rare," from the more salient question of whether "the meaning of the [contractual] language is open to question," and therefore might be clarified in light of its context); *cf.* Sirius Int'l Ins. Co. v. FAI Gen. Ins. Ltd. [2004] UKHL 54, [19] (Lord Steyn) (decrying "literalism," and defending a contextualist approach to contractual interpretation). At the same time, however, the "background" against which a contract is properly read does *not* include evidence of the "previous negotiations between the parties and their declarations of subjective intent," because they do not bear on the objective "meaning which the document would convey to a reasonable person." Invs. Comp. Scheme Ltd. v. W. Bromwich Bldg. Soc'y [1998] WLR 896 (HL) 912–13 (Lord Hoffman). *See generally* TREITEL, THE LAW OF CONTRACT 227–33 (Edwin Peel ed., 14th ed. 2015).

344. In the mid-2000s, in the course of an energetic spate of constitutional tinkering, the Blair government dissolved the House of Lords as a judicial body and erected a new tribunal—the Supreme Court of the United Kingdom—to assume its responsibilities. *See* Constitutional Reform Act 2005, c. 4. The Supreme Court heard its first case, and the House of Lords its last, in 2009.

345. Williams v. Cent. Bank of Nigeria [2014] UKSC 10, [104] (Neuberger P).

346. *See, e.g.*, *Hutchings* [2019] UKSC at [19] (Kerr SCJ); R v. M [2017] UKSC 58, [15] (Hughes SCJ); Presidential Ins. Co. Ltd. v. Resha St. Hill [2012] UKPC 33, [23], [27] (Lord Mance); Smith v. Royal Bank of Scot. Plc. [2021] EWCA (Civ.) 1832, [37] (Birss LJ).

Hansard is clear,[347] and that it came from an authoritative source.[348] While *Pepper* carved out an intentionalist space in the English interpretive framework, that space is narrow, and its boundaries are strictly policed.[349]

C. Contemporary Debates

The solidification of this approach, in turn, has raised new questions for the courts. How, exactly, should they police the line between ambiguity and clarity—the threshold question that determines *Hansard's* admissibility?[350] How do contemporary understandings of purpose translate into those areas where the courts exercise a limited power of judicial review? And where, exactly, does purpose reside?

1. Meta-Construction

A court may only consider evidence of intent if the statute is ambiguous, and *Hansard* is clear. In theory, then, a judge could effectively nullify *Pepper* by raising these bars, finding few statutes ambiguous and few ministerial statements clear. Ambiguity is not self-defining, or (always) self-evident.[351] So how probing should that preliminary inquiry be? Suppose a judge, after reading a statute in context and in light of its apparent purpose, finds it ambiguous. Must she then also apply all the relevant interpretive presumptions—substantive canons such as the rule of lenity, the presumption of coherence *in pari materia*, and so forth—and only consult *Hansard* if they,

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347. *See, e.g.*, R (Brown) v. Sec'y of State for the Home Dep't [2015] UKSC 8, [27] (Toulson SCJ); R (N) v. Lewisham London Borough Council [2014] UKSC 62, [86] (Carnwath SCJ); *Williams* [2014] UKSC at [104] (Neuberger P); R (Coughlan) v. Minister for Cabinet Off. [2020] EWCA (Civ.) 723, [16] (McCombe LJ).

348. *See, e.g.*, Bocardo SA v. Star Energy UK Onshore Ltd. [2010] UKSC 35, [43] (Hope DP).

349. Brudney's tentative prediction in 2007 that the English courts' use of *Hansard* would grow in the coming decades, and that the courts would employ legislative history more flexibly, has not been borne out. *See* Brudney, *supra* note 36, at 5, 70.

350. This meta-debate is an echo of earlier disagreement about ambiguity and the mischief, and the line between absurdity and its opposite. *See supra* notes 218–22 and accompanying text.

351. *Compare* Associated Newspapers Ltd. v. Wilson [1995] 2 AC 454 (HL) 472–75 (Lord Bridge) (finding the text ambiguous), *with id.* at 487–88 (Lord Lloyd, dissenting) (finding it clear).

On the difficulty of defining ambiguity, see Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing KATZMANN, *supra* note 6); and Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155 (2018); *see also* Re, *supra* note 11, at 1505–22, 1554–61; Ryan D. Doerfler, *The "Ambiguity" Fallacy*, 88 GEO. WASH. L. REV. 1110 (2020).

too, are unable to iron out the ambiguity?[352] Or may she declare the law ambiguous before accounting for these presumptions?

In the most high-profile case to present this dilemma, *Assange v. Swedish Prosecution Authority* (2012), the Supreme Court seemed to endorse the first approach.[353] *Assange* turned on whether a prosecutor is a "judicial authority" under the Extradition Act 2003, which had incorporated the European Arrest Warrant (EAW) framework into British law.[354] The *Assange* majority admitted that this phrase was ambiguous; and as the dissent pointed out, *Hansard* contained evidence that Parliament understood it to refer to judges, not prosecutors.[355] Nevertheless, the majority invoked the presumption that an act giving domestic effect to an international instrument bears the same meaning as the instrument.[356] If the EAW's meaning were clear, the Extradition Act would be unambiguous. Invoking *Fothergill*, the court turned to the EAW's drafting history, which indicated that a prosecutor *was* a "judicial authority."[357] This unraveled the ambiguity, rendering *Hansard* superfluous.

But it is unclear how much weight *Assange* commands as an interpretive precedent since, in cases not implicating international law, the courts have sometimes taken a different approach. Consider *R v. JTB* (2009), which concerned the Crime and Disorder Act 1998.[358] At common law, children between ten and fourteen years old were presumptively incapable of possessing the *mens rea* for criminal liability, but this presumption was rebuttable.[359] In 1998, in response to a perceived rise in juvenile criminality, Parliament announced that "the rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offense is abolished."[360] *JTB* turned on whether this line eliminated the defense of *doli incapax* entirely, or only the *presumption*—in effect, placing the burden onto the defendant to establish his incapacity.[361] The sentence's grammatical structure argued for the latter reading: its subject, that which "[was] abolished," was

352. *See* Steyn, *supra* note 314, at 63–64 (raising this question).

353. Assange v. Swedish Prosecution Auth. [2012] UKSC 22; *see also* Massey v. Boulden [2002] EWCA (Civ.) 1634 [18]–[19] (Brown LJ) (using the rule of lenity to find a plausibly ambiguous statute clear, thereby rendering *Hansard* superfluous).

354. *Assange* [2012] UKSC at [1], [9] (Phillips P).

355. *See id.* at [247]–[251] (Mance SCJ, dissenting); *see also id.* at [191] (Hale SCJ, dissenting) (finding the act ambiguous).

356. *See id.* at [12], [92], [98] (Phillips P).

357. *See supra* notes 261–63 and accompanying text.

358. R v. JTB [2009] UKHL 20.

359. *See id.* at [3]–[4], [10]–[17] (Lord Phillips) (explaining the common law baseline).

360. Crime and Disorder Act 1998, c. 37, § 34.

361. *See JTB* [2009] UKHL at [20] (Lord Phillips).

not the defense itself, but "the rebuttable presumption." But a Home Office report that had accompanied the legislation indicated that it would abolish the defense of *doli incapax* altogether.[362] Read in context, therefore, the provision was ambiguous. At this stage, the Lords could have invoked the rule of lenity, or the presumption that acts disturbing the common law are to be construed narrowly, in order to resolve the ambiguity. Instead, they went on to consider direct evidence of intent under *Pepper*. *Hansard* indicated that, during debate, the Solicitor General had assured Parliament that "[a]ll that the provision does is remove the *presumption* that the child is incapable of committing wrong."[363] Only *after* admitting this statement did the Law Lords proceed to weigh up all the evidence, and factor in the relevant interpretive presumptions. Perhaps surprisingly, they ultimately decided against the Solicitor General's reading, finding the Home Office report more persuasive.[364]

A cognate dilemma is presented by precedents handed down before *Pepper* gave the courts to access *Hansard*. Typically, a precedent renders a statute clear. But in the case of a pre-*Pepper* precedent, may a judge set it aside, find the statute ambiguous, and re-interpret the law with an eye to the historical record? In *Stubbings v. Webb* (1992),[365] the Law Lords used *Hansard* to overturn the settled construction of the Limitation Act 1980, leading some observers to conclude that pre-*Pepper* precedents are broadly open to revision.[366] But the precedent at issue in *Stubbings* had come from the Court of Appeal. The harder case, pitting the Lords' pre-1992 interpretation of an act against direct evidence of intent, has not yet come before the Supreme Court. Lord Bingham has intimated that in such a case, parliamentary intent would have to give way to precedent as a matter of principle.[367]

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362. *See id.* at [29]–[30].

363. HL Deb (16 Dec. 1997) (584) cols. 595–96 (quoted in *JTB* [2009] UKHL at [34] (Lord Phillips)) (emphasis added).

364. *See JTB* [2009] UKHL at [35] (Lord Phillips); *id.* at [40] (Lord Carswell). *JTB* therefore recreated exactly the scenario that pre-*Pepper* defenders of the exclusionary rule warned of. *See supra* note 259 and accompanying text. In *JTB*, the Lords did not provide a clear account of when, precisely, non-intentionalist indicia of statutory meaning can overcome direct evidence of intent.

365. Stubbings v. Webb [1993] AC 498 (HL).

366. *E.g.*, Brudney, *supra* note 36, at 24 n.125; Vogenauer, *supra* note 50, at 651–52.

367. *See* McDonnell v. Congregation of Christian Bros. Trs. [2003] UKHL 63, [20] (Lord Bingham).

2. Judicial Review

The English courts' modern approach to purpose has been articulated most sharply in those areas where they exercise a limited power of judicial review. In administrative law cases, for instance, a court must strike down any regulation that does not further the "policy and objects of the [parent] Act."[368] Similarly, in litigation arising under the Human Rights Act 1998 (HRA), if a judge finds a law facially inconsistent with the European Convention on Human Rights (ECHR), she must perform a so-called proportionality analysis, weighing the severity of the rights deprivation against importance of the law's purposes.[369] In both contexts, the court must characterize the law's purpose—the "policy and objects" of the statute permitting the executive to regulate, the fundamental aim of the law challenged under the HRA—as a necessary step in its analysis.

Dicta in *Pepper* opened the door to a regime in which a law's purpose is equivalent to its authors' intended purpose. In *Spath Holme* (2000), the Law Lords definitively shut it.[370] A landlord had challenged a regulation limiting rent increases, arguing it was *ultra vires*.[371] The Court of Appeal found the statute under which the regulation was promulgated ambiguous, and after resorting to *Hansard*, concluded that Parliament had meant to delegate only a very limited regulatory power.[372] Reversing, the Lords read *Pepper* narrowly, to permit courts to inquire into legislative intent only in cases concerning the meaning of an ambiguous statute, not in cases concerning the executive's regulatory power.[373] The latter turn on the statute's purpose, objectively conceived, so past legislators' subjective purposes were simply irrelevant.[374] While evidence of the mischief may provide circumstantial

368. Padfield v. Minister of Agric., Fisheries & Food [1968] AC 997 (HL) 1030 (Lord Reid).

369. *See, e.g.*, Wilson v. First Cnty. Trust Ltd. (No. 2) [2003] UKHL 40, [68]–[77] (Lord Nicholls); R (Daly) v. Sec'y of State for the Home Dep't [2001] UKHL 26, [15]–[19] (Lord Bingham).

370. R (Spath Holme Ltd.) v. Sec'y of State for the Env't, Transp. & the Regions [2001] 2 AC 349 (HL) (2000).

371. *See id.* at 354 (Lord Bingham).

372. *See id.* at 363.

373. *See id.* at 392.

374. *See id.* at 407 (Lord Hope); *id.* at 392 (Lord Bingham); *see also* R (Palestine Solidarity Campaign Ltd.) v. Sec'y of State for Hous., Cmtys. & Loc. Gov't [2020] UKSC 16, [21] (Wilson SCJ); *id.* at [65], [68] (Arden & Sales SCJJ)); R (Christian Concern) v. Sec'y of State for Health & Soc. Care [2020] EWCA (Civ.) 1239, [37]–[40] (Davies LJ).

evidence of a statute's purpose, it was a category error—so *Spath Holme* held—to turn to *Hansard* for direct evidence of the same.[375]

Courts have policed this distinction even more rigorously in litigation arising under the HRA. As Lord Nicholls explained in *Wilson v. First County Trust* (2003),

> [t]he proportionality of a statutory measure is not to be judged . . . by the subjective state of mind of individual ministers or other members. . . . The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament.[376]

It is the *statute's* purpose, not the legislature's, that is relevant. For a court "to evaluate the sufficiency of the legislative process leading up to the enactment of the statute"—to ask, in effect, whether Parliament's reasons for its law were good enough to pass muster under the HRA—would "contravene article 9 of the Bill of Rights."[377] *Hansard* is admissible in HRA cases only to put the court "in a better position to understand the legislation" by illuminating the context in which—and, in turn, the purpose for which—it was enacted.[378]

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375. In the regulatory context, evidence of legislative intent is admissible only if the executive has given "categorical assurance to Parliament that a power would *not* be used in a given situation." *Spath Holme* [2001] 2 AC at 392 (Lord Bingham) (emphasis added). This exception had clear echoes of Steyn's estoppel reading of *Pepper*. *See id.* at 407–08 (Lord Hope).

376. Wilson v. First Cnty. Trust Ltd. (No. 2) [2003] UKHL 40, [67] (Lord Nicholls).

377. *Id.*

Wilson's purpose/intent distinction was technically dicta (since the HRA was held not to apply to the challenged statute), but it was subsequently adopted in *R (Williamson) v. Secretary of State for Education & Employment*, which held that "the proportionality of a statutory measure is to be judged objectively and not by the quality of the reasons advanced in support of the measure in the course of parliamentary debate." [2005] UKHL 15, [51] (Lord Nicholls); *see also* R (DA) v. Sec'y of State for Work & Pensions [2015] UKSC 21, [80] (Wilson SCJ); Belfast City Council v. Miss Behavin' Ltd. [2007] UKHL 19, [24]–[25] (Lord Hoffman); R (Begum) v. Governors of Denbigh High Sch. [2006] UKHL 15, [30] (Lord Bingham); R (SC) v. Sec'y of State for Work & Pensions [2015] UKSC 16, [175]–[178] (Reed SCJ).

378. *Wilson* [2003] UKHL at [64] (Lord Nicholls).

The Supreme Court has said that the devolution acts—which permit the Scottish, Welsh, and Northern Irish assemblies to legislate within certain defined parameters—are to be "interpreted like any other statute." Imperial Tobacco Ltd. v. Lord Advoc. (Scot.) [2012] UKSC 61, [15] (Hope DP). It follows from *Spath Holme* that, while extrinsic materials may be used to frame the context in which a devolution act was passed (and from there to infer the act's objective purpose), the court may not rely on *Hansard* as evidence of its intended scope. *Cf.* Martin v. Most. (Scot.) [2010] UKSC 10, [14] (Hope DP) (using *Hansard* under the mischief rule, to identify "the background to the scheme that is now to be found in the Scotland Act"). Interestingly, however,

3. Purpose and Its Limits

In his 2017 Hamlyn Lectures, Lord Burrows suggested that the English courts should abandon the "unhelpful" fiction that, when construing statutes, "courts are simply effectuating the intention of Parliament."[379] Aside from the confusion that such rhetoric invites, this is a poor description of contemporary practice.[380] In judicial review cases, the courts are barred, as a matter of principle, from considering the subjective intentions of the law's authors. Likewise, outside the judicial review context, *Pepper* permits courts to scrutinize evidence of the legislative intent in very few cases; in most, intent is simply irrelevant.[381] Under the "modern purposive approach," the court's lodestar is not the legislature's intentions but the statute's objective purpose.[382] As Lord Hodge explained last year, because "[w]ords and

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in scrutinizing the *vires* of a devolved act (i.e., one passed by a regional legislature), the subjective purposes of the laws' authors *are* relevant. *See In re* Devolution Issues Under Para. 34 of Sch. 6 to the Scotland Act 1988 [2022] UKSC 31, [73] (per curiam) (explaining that, in contrast to the "the purposive interpretation of [primary] legislation," where "the court is concerned only with the objective meaning of the language used . . . both the purpose of those introducing [a devolved act] and the objective effect of its terms" are probative of its *vires*); *see also Martin* [2010] UKSC at [25]–[31] (Hope DP); *In re* Agric. Sector (Wales) Bill [2014] UKSC 43, [43], [51]–[52] (Reed & Thomas SCJJ). That is because, in a *vires* dispute, the court "is not attempting to construe the [devolved] legislation," but to determine "what [its] provisions are really about"—the actual reasons the devolved legislature enacted it. *In re Devolution Issues* [2022] UKSC at [73]. (Where the *meaning* of a devolved act's terms is at issue, *Pickstone* permits the courts to consider direct evidence of devolved legislators' intentions. *See, e.g.*, Gow (FC) v. Grant (Scot.) [2012] UKSC 29, [29] (Hope DP); *see also supra* notes 264–67 and accompanying text (on *Pickstone*). *See generally* Mark Keith Heatley, *Devolution: A New Breath of Life for* Pepper v. Hart*?*, 38 LIVERPOOL L. REV. 287 (2017).)

In the early twentieth century, when established rules of interpretation otherwise barred courts from inferring legislative purpose from the statutory context, *see supra* Sections II.B–III.C, this move was permitted in disputes over the *vires* of colonial legislation. *See, e.g.*, Pillai v. Mudanayake [1953] AC 514 (PC) 528 (Lord Oaksey) (inferring an Indian act's purpose from a committee report); Ladore v. Bennett [1939] AC 468 (PC) 477 (Lord Atkin) (same, in the Canadian context).

379. BURROWS, *supra* note 343, at 128–29; *see also id.* at 18, 128 (comparing this fiction to "the declaratory fairy tale" of the eighteenth and nineteenth centuries). In 2017, Burrows was Professor of the Law of England at Oxford and Queen's Counsel; he was appointed to the Supreme Court in 2020.

380. *See id.* at 13–18.

381. *See* Presidential Ins. Co. v. Resha St. Hill [2012] UKPC 33, [23] (Lord Mance) (quoting R (Jackson) v. Att'y Gen. [2005] UKHL 56, [97] (Lord Steyn)) (explaining that, if *Pepper*'s three conditions are not met, "trying to discover the intentions of the Government from Ministerial statements in Parliament is constitutionally unacceptable"); *cf.* Brudney, *supra* note 36, at 29–35 (noting the infrequency of the House of Lords' reliance on *Hansard*, both as mischief and as direct evidence of intent, from 1996 to 2005).

382. *See* BURROWS, *supra* note 343, at 10.

passages in a statute derive their meaning from their context," legislative-historical materials may "assist the court to identify not only the mischief which it addresses but also the purpose of the legislation."[383] The goal of such "purposive interpretation," in turn, is "an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered."[384] This is a step change from the late-Victorian approach, as Burrows notes. "There is a difference between, on the one hand, the literal meaning of words irrespective of context and purpose and, on the other hand, the best plausible meaning of the words in the light of their context and purpose."[385] But the modern approach is equally hostile to methods that equate statutory meaning with *authorial* purpose. The search for the statute's purpose is akin to "identifying the principle behind a common law precedent"—an inquiry "not dependent on identifying any person's intentions."[386]

Today, the leading English debates about interpretation are internal ones among purposivists. All agree, for instance, that "courts cannot depart from a plausible meaning of [the statute's] words."[387] But what meanings are plausible? How malleable are words, and how far can purpose stretch them?[388] In *R v. Ireland* (1998), Lord Steyn invoked a purpose to construe a

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383. R (O) v. Sec'y of State for the Home Dep't [2022] UKSC 3, [29]–[30] (Hodge DP).

384. *Id.* at [30]–[31]; *see also* R (Quintavalle) v. Sec'y of State for Health [2003] UKHL 13, [8] (Lord Bingham) ("The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.").

385. BURROWS, *supra* note 343, at 10; *cf.* Richard Ekins, *Sentences, Statements, Statutes*, 2016 ANALISI E DIRITTO 321, 330 ("Statutes are statements—the legislature's use of language to convey some meaning by uttering this statutory text in the context of enactment. But statutes are also, and especially, choices—the legislature's decision to change the law in some way for some reasons.").

386. *See* BURROWS, *supra* note 343, at 19; *see also* EKINS, supra note 342, at 114 ("The legislature acts on intentions that are formed in part by, but also do not reduce to, the intelligent activity of particular legislators."); *cf.* UMBERTO ECO, INTERPRETATION AND OVERINTERPRETATION 63–64 (1992) (contrasting both "the intentions of [the] author" and "the intention of the reader" with "the intention of the text" itself).

387. BURROWS, *supra* note 343, at 10.

388. In recent years, debates over the relation between text and purpose have sometimes become entangled with debates about the scope of the so-called always-speaking doctrine—that is, the presumption "that the legislature intends the court to apply a construction that allows for changes that have occurred since the Act was initially framed (an 'updating construction')." BENNION, BAILEY AND NORBURY ON STATUTORY INTERPRETATION § 14.1 (8th ed. 2020). But as Lord Leggett pointed out in a recent opinion, the two are conceptually distinct. *See* News Corp UK & Ir. Ltd. v. Revenue & Customs Comm'rs [2023] UKSC 7, [75]–[95] (Leggat SCJ). In his view,

law prohibiting the infliction of "actual bodily harm" to encompass psychiatric injuries.[389] Was this a bridge too far? Or consider *Hurstwood Properties* (2021), a tax case that turned on the phrase "person entitled to possession [of real property]."[390] The question was whether those words encompassed certain taxpayers who had bought properties through special acquisition vehicles which, in the Supreme Court's words, gave them an "immediate legal right to possession of the property."[391] The Court, surprisingly, said no, reasoning that to place such taxpayers within the statute's purview would allow them to avoid investment-rate taxes, thereby "defeat[ing] the purpose of the legislation."[392] How purpose could do this work—moving someone with a "legal right to possession" outside the category of "person entitled to possession"—the Court did not specifically explain.[393]

Another rift involves the characterization of purpose itself. Formally, a statute's purpose is an objective, independent fact about the world—the purpose that a hypothetical, reasonable legislature would have had, given the

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the always-speaking doctrine is either (1) simply an acknowledgement of the "distinction . . . between the meaning of a word and its application . . . between sense and reference," *id.* at [95], or else (2) a recognition that the meaning of statutory text is itself sometimes indexed to historically evolving, external referents (e.g., evolving social values), *see id.* at [84]. The former explains why a court might read "carriage" to encompass bicycles without changing the statute's meaning, even if the statute was enacted before the invention of bicycles—such that neither its authors nor its original audience could have imagined such an application. *See id.* at [92]. The latter, meanwhile, explains why it is appropriate to read "evaluative terms such as 'reasonable', 'safe', 'obscene', etc [in light of] contemporary and not historic standards." *Id.* at [84].

But that is all orthogonal to, and downstream of, the prior question of what referent the statute's words, in light of their context and purpose, actually pick out. It is only after establishing the semantic meaning of the statute's words, and only after determining whether or not they track some evolving historical referent, that a judge may proceed to ask whether the statute in fact applies in the instant, originally unanticipated case. Critically, that is why nothing in the always-speaking doctrine unconstitutionally authorizes the judge to alter the statute's original semantic meaning—whether through an appeal to statutory purpose, or otherwise. *See id.* at [82]–[83], [88].

389. [1997] AC 147 (HL) 158–59 (Lord Steyn) (construing the Offences Against the Person Act 1861, 24 & 25 Vict c. 100 §§ 18, 20 & 47 to permit the criminal prosecution of a man who had harassed women over the phone, causing them to develop nervous disorders); *see also* Yemshaw v. London Borough of Hounslow [2011] UKSC 3, [25]–[27] (Hale SCJ) (invoking purpose to read "violence" in the Housing Act 1996, c. 53 to include psychological harm).

390. Hurstwood Props. (A) Ltd. v. Rossendale BC [2021] UKSC 16.

391. *Id.* at [48] (Briggs & Leggatt SCJ).

392. *Id.*

393. *Cf.* EKINS, *supra* note 342, at 253–54 (arguing that "inference about the legislature's ends should only inform, not displace, inference about the chosen means," and criticizing courts for sometimes "invok[ing] purpose to license departing from the legislature's limited choice").

statute's terms and context,[394] and therefore distinct from either its authors' subjective intentions or the interpreting court's moral views.[395] But in practice, the search for the statute's objective purpose can sometimes become unmoored, drifting in a subjective or equitable direction. For instance, the more evidence of context a judge admits, and the more historically focused her inquiry, the closer her understanding of the statute's purpose will be to its creators'.[396] Similarly, as Ryan Doerfler has noted,[397] in the hands of an adroit judge, "reasonable legislature" can shade into a "desirable" or even an "ideal" one, engendering a purposivism of a more equitable flavor.[398] For instance, Richard Ekins has argued that judges should presume that the reasonable legislature is one that "act[s] to change the law *when this serves the common good*."[399] That assumption fairly obviously invites the judge to impute to Parliament those purposes which, in her view, serve the common good.[400] That move may be perfectly defensible.[401] But it is different from the search for an objective purpose immanent in the statute that can impartially guide courts in applying it to new circumstances.

VI. CONCLUSION

What does all this mean for contemporary American debates? As a historical matter, this Article's account of the English tradition weakens both

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394. *See* R (O) v. Sec'y of State for the Home Dep't [2022] UKSC 3, [31] (Reed SCJ); R v. Luckhurst [2022] UKSC 23, [23] (Burrows SCJ); Rittson-Thomas v. Oxfordshire Cnty. Council [2021] UKSC 13, [33]–[34] (Arden & Burrows, SCJJ).

395. *Cf.* BURROWS, *supra* note 343, at 42 (rejecting "the long discredited idea of the 'equity of the statute'").

396. *See, e.g.*, R (Cox) v. Oil & Gas Auth. [2022] EWHC (Admin) 75, [77]–[87] (Cockerill J); *cf.* Philip Sales, *Legislative Intention, Interpretation, and the Principle of Legality*, 40 STATUTE L. REV. 53, 56 (defending judicial reliance on "official materials which contain proposals for legislation which identify the purpose they are designed to fulfil (such as Law Commission reports and White Papers)" because it is "reasonable to assume that [the legislature's] collective intention or purpose is informed by reference to them").

397. *See* Doerfler, *supra* note 3, at 1023 & n.227.

398. *E.g.*, Owens v. Owens [2017] EWCA (Civ.) 182, [38] (Munby P) (arguing that judges must "tak[e] into account changes in the understanding of the natural world, technological changes, changes in social standards and . . . changes in social attitudes"); *cf.* ZANDER, *supra* note 49, at 214–20.

399. EKINS, *supra* note 342, at 112 (emphasis added); *see also* ZANDER, *supra* note 49, at 242.

400. *Cf.* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251 (1992); John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273 (2001).

401. *See generally* T.R.S. Allan, *Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority*, 63 CAMBRIDGE L.J. 685 (2004) (defending such an approach).

purposivists' and textualists' claims to its mantle. Judges have not been hunting for the legislature's purpose since *Heydon's Case* (1584), and the courts did not categorically reject historical evidence of legislative intent in *Millar v. Taylor* (1769). Before the nineteenth century, these questions were uncontested, because they were not asked. It was not until new evidentiary sources made it possible for Victorian courts to peer into the legislature's mind that judges and commentators begin to interrogate what, precisely, "intent" meant. Nineteenth-century courts flirted with intentionalist uses of the mischief, until the early Law Lords intervened to stop them. Yet the formalist regime installed by the Lords was not the textualist idyll of Scalia's imagining: it permitted access to extrinsic evidence of the statute's historical context, at least in cases of ambiguity, and retained an echo of early-modern equity in the form of the rule against absurdity.

This paradigm's disintegration and eventual collapse in *Pepper* marked a sea-change. Yet *Pepper* did not spell the death of an English textualism, or the ascendance of purposivism, at least as that concept is understood in America. After the dust had settled, *Pepper's* most lasting effect was to focus attention onto the distinction between the intentions of the law's authors (which are relevant, since *Pepper*, in only a narrow range of cases) and the objective purpose that can be inferred from its text and mischief (relevant in all cases). The modern English approach, in other words, maps poorly onto the established American categories of debate. It is textualist, insofar as it (usually) rejects authorial intent or purpose as irrelevant; it is purposivist, in the American sense, insofar as it rejects the premise that the statute's text, divorced from its underlying purpose, is enough.

There are normative insights to be drawn from this story, too. In his early speech on interpretation in England, Scalia denounced those "willful judges" who see statutes as screens on which to project their own moral or policy preferences, and he praised the English tradition for curbing such misfeasance.[402] Yet it was precisely the Victorian paradigm's *inability* to depersonalize construction, as its architects had once promised, that led to its unravelling in the mid-twentieth century. For textualists, then, the English experience suggests that the ability of any formal method to cabin judicial

402. Scalia, *supra* note 41, at 13.

discretion will ultimately be limited.[403] In the last analysis, the only thing that can restrain the willful judge is himself.[404]

Relatedly, this Article adds historical ballast to Samuel Bray's argument that textualists should be more attuned to the historical context in which statutes are enacted.[405] From the latter decades of the nineteenth century, the English high courts were resolutely anti-intentionalist. Their self-described goal, like today's textualists, was to give effect to the objective meaning of the statute's terms. Even still, they recognized that, due to "the imperfection of language," one often cannot grasp the statute's meaning without placing its words in context—"seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."[406] Today, while most American textualists concede the context-dependent nature of language, they are often hesitant to rely on external evidence of the statute's history.[407] As James Brudney notes, American debates about legislative history have often assumed a binary, "all-or-nothing form."[408] But the history of English formalism suggests that sometimes, extra-statutory evidence will be needed to make sense of the statute's historical context. If that is right, the question

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403. In this respect, this Article lends weight to recent scholarship stressing the discretionary nature of interpretive formalism. *See, e.g.*, Ryan Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267; William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119; *cf.* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1220–25 (2015) (recounting debates between American critical legal scholars and their opponents in the 1980s over whether legal texts bear any objective, determinate meaning at all).

404. This is not to say that all approaches to interpretation are equally discretionary. Nor do I mean to deny that, by focusing more intentionally on the decisions points that structure the textualist inquiry—which words are at issue, which contexts (or canons) are relevant, or where the line between ambiguity and clarity is—textualism might be made into a more constraining doctrine. My point, rather, is structural. Even a perfectly comprehensive and harmonious system of interpretive rules cannot be applied, in practice, without an act of judgment—that is, a choice about which rule applies, and when. *Cf.* IMMANUEL KANT, *Theory and Practice*, *in* THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY 273, 274 (Allen Wood ed., 1996). All things equal, the judge who is cognizant that she *is* exercising judgment in interpreting the law will be better able to guard against willfulness than her counterpart who thinks she is just mechanically applying fixed rules.

405. *See* Bray, *supra* note 30, at 990–1013.

406. River Wear Comm'rs v. Adamson [1877] 2 AC 743 (HL) 763 (Lord Blackburn).

407. *See supra* note 20 and accompanying text.

408. Brudney, *supra* note 36, at 60.

textualists should be asking is *which evidence* properly bears on that context—and, in turn, on the objective meaning of the statute's terms.[409]

For American purposivists, finally, the English courts' recent dalliance with intentionalism, and subsequent retreat from it, should be telling too. In searching for an ordering principle to structure and guide interpretation, American purposivists have sometimes prioritized Congress's subjective purposes or intentions. It is that premise that ties the theory of purposivism to the practice of excavating historical evidence of legislative intent. But it may be wrong. It may be that, by conflating the statute's purpose with its creators', purposivists are subverting their own project. For if the law's purpose is in fact objective, then to encourage the judge to center the legislature's reasons for passing it is to encourage her to read the law by reference to a purpose that is alien to it. The English tradition gives purposivists a vantage from which to contemplate that possibility and begin to consider its ramifications.

To be clear, none of this is meant to suggest that recapturing the history of interpretation in England can somehow resolve our own deep, long-running debates about the basic aims of statutory construction. We have to answer those questions ourselves.[410] But what the English tradition does do is illustrate that textualism and purposivism, as they are conceptualized and practiced in the United States today, are more contingent intellectual formations than we often recognize. It can act as a mirror, allowing us to see our own tradition more clearly, from the outside looking in.

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409. I do not mean to argue that textualists should uncritically adopt those sources that today pass as "legislative history." My point is simply that, because statutory language is necessarily embedded in history, textualists should not shy from scrutinizing the statute's context of enactment and should draw on whatever sources are capable of reliably illuminating it. Textualists have regularly made this move in constitutional cases, of course, recognizing that the meaning of the Constitution's text was shaped by its provenance. My suggestion is that the same basic insight applies in the statutory context too.

410. *Cf.* Skinner, *supra* note 17, at 66.