

JUSTICE JACKSON'S LAMENT: HISTORICAL AND COMPARATIVE PERSPECTIVES ON THE AVAILABILITY OF LEGISLATIVE HISTORY

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I. INTRODUCTION

In 1969, the newly-established Law Commissions of Great Britain and Scotland issued a joint report on *The Interpretation of Statutes*¹, which looked at interpretive practices of courts in the United States, other common-law jurisdictions and several civil-law systems as part of a review of the rules of interpretation applied by English and Scottish courts.² In part, the report focused on whether evidence from “the parliamentary history of an act” (legislative history in the U.S.) should be admissible in resolving statutory interpretation questions. In discussing the question, the joint report considered three criteria: relevance, reliability, and availability.³

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1. THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, THE INTERPRETATION OF STATUTES (1969) (Law Com. No. 21; Scot. Law Com. No. 11) [hereinafter Joint Commissions Report]. The Law Commissions were established by the Law Commissions Act 1965, sec. 1 & 2, with the idea of inserting greater political independence into the theory and practice of law reform. See Andrew Martin, *The Machinery of Law Reform*, in MORE LAW REFORM NOW: A COLLECTION OF ESSAYS ON LAW REFORM 229, 231 (Peter Archer & Andrew Martin ed. 1983). See also R. T. OERTON, A LAMENT FOR THE LAW COMMISSION (1987).

2. The rules of statutory interpretation were controversial in England before and after the issuance of the 1969 joint report, which has been called the “only [law commission] report to have been rejected by Parliament.” Alec Samuels, *The Interpretation of Statutes*, 1980 STATUTE L. REV. 86, 87. See also Alec Samuels, *The Interpretation of Statutes: No Change*, THE LAW SOCIETY'S GAZETTE, Oct. 7, 1982, at 1252, 52 (discussing parliament's failure to enact a 1981 statutory interpretation bill).

3. Joint Commissions Report, *supra* note 1, at 31-37. For a similar list, with one addition (whether the material is relied on by the legislature), see Reed Dickerson, *Statutory Interpreta-*

After quickly concluding that legislative material would be relevant to most questions of statutory interpretation, the joint report turned to matters of reliability and availability. The discussion of reliability looked at contemporary uses of the materials in the United States and other systems, and in many ways anticipated questions about the uses of legislative history that would be raised in the 1990s “new textualism” debates in the United States. The report’s discussion of availability looked back for insight largely to the comments of Justice Robert H. Jackson of the United States Supreme Court, who at mid-century had voiced his concern that the materials of legislative history were not readily available to all lawyers arguing cases before the Court.⁴ The Joint Commissions Report acknowledged Justice Jackson’s concerns about judicial reliance on materials that were fully available only to “the lawyers of the capital or the most prosperous offices in the large cities,”⁵ but also pointed out that problems of availability were not much emphasized by other American writers on the uses of legislative history.⁶ In fact, the 1958 “tentative edition” of Hart and Sacks’ materials on “The Legal Process” had challenged one of Jackson’s primary examples⁷ by reprinting several pages of correspondence between the attorneys in *United States v. Public Utilities Commission of California* and the Harvard Law Library, and detailing the general availability of the materials in U.S. government depository libraries in each state.⁸ In the end, the Law Commissions

tion: Dipping into Legislative History, 11 HOFSTRA L. REV. 1125, 1130 (1983). For a more detailed discussion, see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 142-62 (1975).

4. See Robert J. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948) (remarks before the American Law Institute, May 20, 1948), reprinted with revisions as *Problems of Statutory Interpretation*, 8 F.R.D. 121 (1949). See also *United States v. Public Utilities Comm’n. of Calif.*, 345 U.S. 295, 319 (1953) (Jackson, J. concurring); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J. concurring).

5. Jackson, *supra* note 4, 34 A.B.A.J. at 538; 8 F.R.D. at 125.

6. Joint Commissions Report, *supra* note 1, at 35, n. 149. See also Note, *A Re-Evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125, 132 (1952) (“There seems to be little indication that [Justice Jackson]’s position has been accepted by the other members of the Supreme Court.”).

7. In *Public Utilities Commission of California*, Jackson had argued that neither the Commission nor the California Supreme Court had access to documents relied upon by the U.S. Supreme Court in its resolution of the case. The necessary material apparently was unavailable in San Francisco, and according to the record, could not be obtained through interlibrary loan (although requests were made of the Library of Congress and the Harvard Law School library). 345 U.S. 295, 319-320.

8. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1248-1252 (William N. Eskridge, Jr. & Philip P.

concluded that parliamentary history should not be admissible for interpretation, citing the difficulties both of isolating which information would assist the courts and of providing the information "in a reasonably convenient and accessible form."⁹

In the United States, concerns about the availability of legislative history materials to lawyers, judges, and the public remained a little-discussed topic in statutory interpretation opinions and the legal literature.¹⁰ By 1983, in an analysis of the Supreme Court's increasing reliance on legislative materials, Court of Appeals Judge Patricia Wald was little enough concerned with problems of availability to suggest that "Technology has made an anachronism of Justice Jackson's lament. . . ."¹¹

The general lack of interest in questions of availability continued even as the literature on statutory interpretation and the uses of legislative history exploded in the 1990s.¹² Many recent commentators on the federal courts' reliance on legislative history have questioned the reliability of Congressional materials, but most have assumed that the documents in question are readily available and that the information they contain is easily accessible to those who use them.¹³ Writers who have looked at the history of U.S. courts' uses of legislative documents in statutory interpretation have noted the courts' increasing reliance on legislative history in the late nineteenth century. However, they have typically failed to consider what effects improvements in the systems for publishing and distributing Congressional documents in the late nineteenth and early twentieth centuries might have had on judges' increased reliance on legislative history as the twentieth century progressed.

Frickey eds., 1994). For another contemporary comment, see Elizabeth Finley, *Crystal Gazing: The Problem of Legislative History*, 45 A.B.A.J. 1281, 1283 (1959) (suggesting that Jackson's concern may have been over the unavailability of a "compiled" legislative history for the act in question, rather than the individual documents from which the information could have been drawn).

9. Joint Commissions Report, *supra* note 1, at 36.

10. *But see, e.g.*, DICKERSON (1975), *supra* note 3, at 147-154.

11. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court*, 68 IOWA L. REV. 195, 200 (1983)

12. For the legislative history literature, see the materials cited *infra* note 30.

13. For contrary examples, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 868-869 (1992); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408-09 (1992); Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 377-378. For expressions of concern over problems of "practical availability," see generally DICKERSON (1975), *supra* note 3, at 147-154.

Bob Berring has suggested that the forms in which legal information is published and distributed can be influential in the development of legal knowledge.¹⁴ This article tests the possibilities of that idea by examining the role of greater availability of legislative history information on the increased use of legislative history in the early twentieth century. The article explores the availability question in light of developments in the history of the printing and distribution of Congressional documents, while looking specifically at the impacts of late nineteenth century changes in the systems for publication and distribution of federal documents. Part II of the article introduces the primary approaches to statutory interpretation in United States courts, provides comparisons with other common law jurisdictions, and describes the publication history of Congressional committee reports and records of debates on the floor of Congress. Part III discusses uses of Congressional materials in nineteenth century courts, and how legislative history was viewed in contemporary treatises. Part IV explores possible explanations for the increased uses of legislative history by federal courts in the late nineteenth and early twentieth centuries. Part V examines the impacts of the Printing Act of 1895 and other changes in the distribution system for government publications on the greater availability of legislative history in the early twentieth century. Part VI discusses the continued applicability of concerns about availability in the twentieth-first century information environment, twenty years after Justice Jackson's "lament" was deemed anachronistic in light of technological advances.

II. APPROACHES TO INTERPRETATION AND THE USES OF LEGISLATIVE HISTORY

A. United States

The primary factor differentiating the usual approaches to the interpretation of statutes in the United States is captured in a question asked by Justice Jackson in 1948: "[S]hould a statute mean to a Court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are

14. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 15 (1987) ("From the late nineteenth century, the development of the American legal system can be seen as a history of the development of forms of legal publication. This history poses the question of whether the forms of publication have been mere vehicles for the transmission of legal knowledge, or important influences in the development of that knowledge.").

expected to obey it?"¹⁵ Some approaches emphasize the primary, if not the exclusive, role of the meaning of the text of the statute to readers; the others begin with the text, but focus either on the law makers' intentions regarding the specific language at issue or on the general purpose of the statute. Intentionalist and purposive interpreters are more likely than text-based interpreters to examine and rely on sources outside the enacted text. Most modern writers have acknowledged this basic taxonomy of approaches while occasionally using other terminology to describe and elaborate the boundaries among them.¹⁶

Prior to the twentieth century, U.S. courts generally limited their analyses to the statutory text, even if their stated goal was to identify the intent of the legislature. In the nineteenth century, what came to be known as the "plain meaning rule" was increasingly invoked by federal and state courts, at times to deny that there was any need to interpret statutory language deemed to be plain and unambiguous.¹⁷ In the early twentieth century, judges began to look more frequently at sources outside the statutory text as aids to interpretation, and by 1940 the Supreme Court had repudiated use of the plain meaning rule

15. Jackson, *supra* note 4, 34 A.B.A.J. at 538, 8 F.R.D. at 124. See also J. A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 289-290 (1936) ("There have always been two schools of thought as to the interpretation of the meaning of words. One has held that, in the search, it is not profitable or necessary to go beyond the words themselves. The other view has insisted that words by themselves do not have definite and exact meanings, and that their true meaning can be expounded only by reference to the intention of him who used them. In relation to legislation, this latter view has always led to a search for the 'intention of the legislature.'").

16. Surveys of theories and approaches are found throughout the literature of statutory interpretation. See, e.g.: WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 9-47 (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22-32 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815 (1990), published in slightly different form as Peter C. Schanck, *The Only Game in Town: Contemporary Interpretive Theory, Statutory Construction, and Legislative Histories*, 82 LAW LIBR. J. 419 (1990).

17. Blatt notes that plain meaning approaches developed gradually during the nineteenth century in the United States, being mentioned periodically early on, and gaining stature after the 1835 publication of an American edition of Sir Fortunatus Dwarrris's *A General Treatise on Statutes*, first published in England in 1830. By the 1850s, courts "felt compelled to commence their analysis by mentioning the plain meaning rule." William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 812 (1985). For an extensive treatment of the interpretive practices of the early nineteenth-century federal courts, see William N. Eskridge, Jr., *All about Work: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1058-1082 (2001).

as a “filtering device” for statutory interpretation,¹⁸ stating that “there certainly can be no ‘rule of law’ which forbids [the use of legislative history], however clear the words may appear to be on ‘superficial examination.’”¹⁹ In the 1980s, however, after decades in which U.S. courts regularly looked beyond the text to determine intent or purpose, text-centered approaches regained prominence due in large part to the influence of Justice Antonin Scalia.²⁰

Intentionalist interpreters, like advocates of text-based approaches, usually consider the meaning of legislation to have been determined at the time of enactment.²¹ Rather than emphasizing the meaning of the text to the receiver of the statutory message, however, intentionalism emphasizes the intention of its sender. In asking what the legislature intended by the words that it enacted into law, the intentionalist opens the questions of where beyond the text one can legitimately search for evidence of meaning and intent²² and whether statements of possible intent in sources extrinsic to the text should be allowed to raise doubts about the meaning of apparently clear text.

18. Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 322 (1995).

19. *United States v. Amer. Trucking Assoc.*, 310 U.S. 534, 544 (1940). For discussions of judges’ continuing uses of the plain meaning rule, see Harry Wilmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Statutes*, 25 WASH. U. L.Q. 2 (1939). Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299 (1975); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S.C.T. L. REV. 231; David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997); Eric S. Lasky, Note, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891 (1999).

20. On the differences between plain meaning and “modern textualist” approaches, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109-115 (2001). See also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

21. See ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION, *supra* note 16, at 9 (“The ‘original intent’ and ‘plain meaning’ rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment.”) For an approach less reliant on the idea that statutes are “static texts,” see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

22. “On the traditional ‘intentionalist’ account, language [of the text] is the best evidence of the legislative intent underlying a statute, but judges may legitimately consult materials like committee reports or floor statements in the search for intent where the language is ambiguous.” Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 6 (1998).

In his history of statutory interpretation, Blatt notes discussions of the intent approach in *Kent’s Commentaries* and cites its use in early nineteenth century cases. Blatt, *supra* note 17, at 809. See also Manning, *supra* note 20, at 103 (“By the late nineteenth century . . . the Supreme Court had firmly settled on the idea that the federal judge’s duty was to implement the legislature’s intent.”).

Purpose-based approaches to statutory interpretation can be traced as far back as *Heydon's Case* in 1584,²³ but their immediate American roots are in the legal process theories of Hart and Sacks.²⁴ In their materials on "The Legal Process," Hart and Sacks' approach to interpretation started from the proposition that each statute is a purposive act. Questions of interpretation not answered by the text, therefore, can be resolved by identifying the purpose of the statute and interpreting the statute in light of the purpose.²⁵ In contrast to the intentionalist approach, which looks to discover what the legislature thought about a specific problem at the time of enactment, the purposive approach looks to the broader purpose of the statute to discover how the legislature would have dealt with unforeseen issues. Like the other approaches, purposivism usually looks to sources created at the time of enactment to resolve questions of interpretation.

Because of their potential relevance to examinations of legislative intent or purpose, the documents generated during the legislative process come into play as sources of assistance whenever the inquiry moves beyond the enacted text of a statute.²⁶ In the 1980s, as proponents of "new textualism" argued that judicial interpreters should not go beyond statutory text,²⁷ American courts' reliance on legislative history became a focus of criticism and commentary,²⁸ both from the

23. 76 Eng. Rep. 637 (1584). See Blatt, *supra* note 17, at 828-834 (emphasizing role of Heydon's case); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 256 (1998) ("Purposive interpretation traces its roots to *Heydon's Case*. . ."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-540 (1947).

24. See generally Hart & Sacks, *supra* note 8. See also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332-333 (1990). On the general influences of legal process scholarship on the study of legislation, see Eskridge, Jr. & Frickey, *supra* note 16, at 694-701.

25. Hart & Sacks, *supra* note 8, at 1374. See also Eskridge, Jr. & Frickey, *Practical Reasoning*, *supra* note 24, at 333.

26. Kenneth Starr cites the "American rule, which smiles upon and ordains the use of legislative historical materials in the interpretive process." Starr, *supra* note 13, at 373. See also Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J. L. & PUB. POL. 59, 60 (1988) ("The common uses of legislative history assume that intent matters."); William T. Mayton, *Law among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 143 (1992) ("intent seems to be the major justification for the use of legislative history.").

27. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VANDERBILT L. REV. 1457, 1458-59 (2000) ("Legislative history is the ultimate bugaboo of the textualists. . .").

28. William Eskridge provided the label "new textualism" in a 1990 article. See Eskridge, Jr., *supra* note 20, at 623. The literature is filled with discussions of textualist critiques of the uses of legislative history and the responses of those defending its use. For recent examples, see

bench (most notably in opinions of Justice Scalia),²⁹ and in the legal academy.³⁰

CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 153-186 (2002); William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301-02 (1998); Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 266-273 (2000). See generally Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK L. REV. 807 (1998).

29. See, e.g., *INS v. Cardozo-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

30. The new textualism debates helped initiate what Daniel Farber called "something of a renaissance of scholarship about statutory interpretation," Daniel Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEORGETOWN L.J. 281, 281 (1989), with scholars writing both for their colleagues and for the attention of the judiciary. For a list of articles published between 1988 and 1997 and a discussion of their impact on the courts, see Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9 (2000). See also Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679 (1999).

A sizeable portion of the recent scholarship has focused on legislative history. See, e.g.: Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Recurring Question—Clarification or Confusion?*, 16 SETON HALL LEGIS. J. 551 (1992); Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Bernard W. Bell, *Legislative History without Legislative Intent: the Public Justification Approach to Statutory Interpretation*, 60 OHIO STATE L. J. 1 (1999) [hereinafter Bell I]; Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253 (2000); Breyer, *supra* note 13; James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 9 JURIMETRICS J. 294 (1982); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); George A. Costello, *Average Voting Members and other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates and other Sources of Legislative History*, 1990 DUKE L.J. 39; Dickerson (1983), *supra* note 3; Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1997); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990-91); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1990-91); Eskridge, Jr., *Supreme Court*, *supra* note 28; Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. LAW & SOC. POL. 43 (1988); Bradley C. Karkkainen, Note, "Plain Meaning": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J. L. & PUB. POL'Y 401 (1994); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. LEGIS. 369 (1999); Kozinski, *supra* note 28; Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57; MAMMEN, *supra* note 28; Garth L. Mangum, *Legislative History in the Interpretation of Law: An Illustrative Case Study*, 1983 BYU L. REV. 281; John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Mayton, *supra* note 26; Noah, *supra* note 28; Daniel R. Ortiz, *The Self-Limitation of Legislative History: An Intra-institutional Perspective*, 12 INT'L REV. L. & ECON. 232 (1992); Schacter, *supra* note 22; Peter C. Schanck, *An Essay on the Role of Legislative Histories in Statutory Interpretation*

B. Other Common Law Jurisdictions

In general, legal systems outside the United States impose few restrictions on the admissibility of extrinsic materials for statutory interpretation, including legislative documents (or *travaux préparatoires*).³¹ The interpretive weight of legislative materials varies, however, depending on the form of the documentation, the circumstances under which the materials were presented, and the status of the speaker or writer.³² Now-Justice Stephen Breyer has noted that outside the United States, courts have developed “other institutions to

tion, 80 LAW LIBR. J. 391 (1988); Schanck, *supra* note 16; Siegel, *supra* note 27; Slawson, *supra* note 13; Harold P. Southerland, *Theory and Reality in Statutory Interpretation*, 15 ST. THOMAS L. REV. 1 (2002); Starr, *supra* note 13; Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998); Patricia Wald, *supra* note 11; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1888-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term*, 23 SW. L. REV. 47 (1993); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990); Jesse M. Barrett, Note, *Legislative History, the Neutral Dispassionate Judge, and Legislative Supremacy: Preserving the Latter Ideals through the Former Tool*, 73 NOTRE DAME L. REV. 819 (1998); Allison C. Giles, Note, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEORGETOWN L.J. 359 (1990); Lori L. Outzs, Note, *A Principled Use of Congressional Floor Speeches in Statutory Interpretation*, 28 COLUM. J. L. & SOC. PROBS. 297 (1995); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160; Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

For indications of the federal government's interest in courts' uses of legislative history, see *Statutory Interpretation and the Uses of Legislative History: Hearing before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. (1990); U.S. Department of Justice, Office of Legal Policy, *Using and Misusing Legislative History: A Re-evaluation of the Status of Legislative History in Statutory Interpretation* (1989).

31. See Robert S. Summers & Michelle Taruffo, *Interpretation and Comparative Analysis*, IN INTERPRETING STATUTES: A COMPARATIVE STUDY 461, 476 (D. Neil MacCormick & Robert S. Summers eds., 1991). The book includes individual chapters on statutory interpretation practices in several European jurisdictions, the United States, and Argentina. See also Stig Strömholm, *Legislative Material and Construction of Statutes: Notes on the Continental Approach*, 10 SCANDINAVIAN STUD. L. 173, 176 (1966).

32. Summers & Taruffo, *supra* note 31, at 476-477. Summers and Taruffo also point out that the use of *travaux préparatoires* is facilitated in some systems through publication of accessible basic documents that draw together the materials relevant to interpreting a statute. In others (such as the United States), the documents are less accessible and costlier to identify and present. *Id.* at 477.

bring about and maintain necessary interpretive consistency and coherence.”³³

Plucknett’s history of the common law traces the history of common-law approaches to the use of legislative materials in statutory interpretation to the middle of the eighteenth century, when English courts concluded that statutes could be construed only “in the light of strictly professional learning.”³⁴ The first reference to the exclusion of parliamentary materials appears in the 1769 case of *Millar v. Taylor*,³⁵ which established the principle that judges could refer neither to parliamentary debates nor to earlier versions of bills than the version enacted. Plucknett observed that no authority was cited for the proposition in *Millar*, nor were the facts that parliamentary debates were not officially reported and that their unofficial reporting was probably inaccurate cited as reasons for the rule.³⁶ Following *Millar*, however, “the prevailing rule in England and in the English-speaking Commonwealth [was] that legislative intent has to be ascertained from within the four corners of the statutory text. . . . Evidence of legislative intent is generally inadmissible.”³⁷

33. Breyer, *supra* note 13, at 868 (noting that in England the corps of professional drafters in the Office of Parliamentary Counsel understands how the English judiciary interprets statutes and drafts legislation to reinforce the judiciary’s interpretive tendencies).

34. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 335 (5th ed. 1956). The development of English approaches to interpretation was also influenced by the historical overlapping between the legislative and judicial functions in parliament. See Manning, *supra* note 20, at 43-47. See also Eskridge Jr., *supra* note 17, at 998-1009 (discussing pre-1776 interpretive practices of English courts).

35. 4 Burr. 2303, 2332 (1769) (“The sense and meaning of an act of parliament must be collected from what it says when passed into a law, and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the sovereign.”).

36. PLUCKNETT, *supra* note 34, at 335. In a 1991 article, Baade discusses whether the English “no-recourse rule was actually a “common-law canon of statutory construction” or simply a reflection of the “then-current lack of legislative documentation?” Baade, *supra* note 30, at 1011-1012.

37. Baade, *supra* note 30, at 1007. For an enumeration of the reasons behind the exclusionary rule, see Francis Bennion, *Hansard—Help or Hindrance? A Draftsman’s View of Pepper v. Hart*, 14 STAT. L. REV. 149, 151-155 (1993). Among the reasons, Bennion cites unreliability of the materials, as well as the additional costs to litigation of accessing them. *Id.* at 154-155. Justice Frankfurter found the English rules to be “too simple. . . disregard[ing] the fact that the enactments are, as it were, organisms which exist in their environment.” Frankfurter, *supra* note 23, at 541.

One exception to the rule, justified by reference to *Heydon’s Case*, allowed courts to examine pre-legislative reports of commissions and white papers for insight into the general purpose of legislation, but not for evidence of the intended meaning of enacted language. See Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT’L. L. 231, 236-237 (1999). See

In the twentieth century, the exclusionary or “no-recourse” rule was often critiqued and challenged by members of the judiciary and others, but survived the Joint Commissions report on interpretive practices in 1969,³⁸ as well as later studies of British drafting and interpretation practices.³⁹ Critics noted that, despite the rule, judges occasionally cited to what was said in parliamentary debate⁴⁰ and that there was nothing to prevent judges from surreptitiously reviewing parliamentary materials, even if they could not acknowledge the materials in their opinions.⁴¹ It was also noticed in England that, by the 1990s, other Commonwealth common-law jurisdictions had managed to relax their applications of the exclusionary rule “without indulging in the excessive recourse to the legislative record exemplified by United States courts.”⁴²

In 1992, through its decision in *Pepper (Inspector of Taxes) v. Hart*,⁴³ the House of Lords relaxed the exclusionary rule to make Parliamentary material that “clearly discloses the mischief aimed at or the legislative intention”⁴⁴ admissible under certain conditions. *Pepper v. Hart* established a two-part test requiring both that the text be “ambiguous or obscure or the literal meaning of which leads to an absurdity,” and that the material cited “clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.”⁴⁵ In his opinion, Lord Browne-Wilkinson noted further that “I cannot foresee that any statement other than the state-

generally William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994).

38. Joint Commissions Report, *supra* note 1.

39. See Lord Lester of Herne Hill, *Pepper v. Hart Revisited*, 15 STAT. L. REV. 10, 10-11 (1994); David Miers, *Barking up the Wrong Tree: Determining the Intention of Parliament*, 13 STAT. REV. 50, 50-51, 60 (1992).

40. Miers, *supra* note 39, at 51.

41. See Lord Lester, *supra* note 39, at 17 (noting that Parliament “could not control what the Law Lords read at bedtime, in their baths, or even in the library of the House of Lords”). In addition, the rules of interpretation have allowed advocates and courts to cite learned treatises in briefs and in opinions, providing a means for referencing parliamentary materials quoted in the treatises. See Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L. AND COMP. L. REV. 1, 9 n. 31 (1996).

42. Lord Lester, *supra* note 39, at 14 (discussing uses of legislative materials in Australia, Canada, India, and New Zealand). See also Bennion, *supra* note 37, at 156-159 (discussing Australia, Canada, and New Zealand).

43. 1993 App. Cas. 593 (1992).

44. *Id.* at 634.

45. *Id.*

ment of the minister or other promoter of the bill is likely to meet these criteria.”⁴⁶

The rule in *Pepper v. Hart* seems to presume that recourse to legislative history will be unusual, perhaps because of the skills of the drafters of legislation and their understanding of judicial expectations.⁴⁷ In the immediate wake of the decision, librarians and others raised concerns about whether such materials as standing committee debates (the likely sources of statements regarding the intended effect of particular language) were sufficiently available to lawyers and the public, as well as about the cost implications of the new rule for solicitors and for libraries.⁴⁸ In response to these concerns, and perhaps to limit the use of parliamentary materials, a 1995 Practice Note requires all parties intending to cite parliamentary proceedings to provide copies of the extract and a summary of arguments to be based on the materials to all other parties and the court.⁴⁹

Pepper v. Hart's long-term impact on the use of parliamentary materials for statutory interpretation in English courts is not certain. Although the approach outlined in *Pepper* seems designed to limit the circumstances under which legislative materials can be cited, as well as what materials will have probative value, at least a few later cases indicate that judges have been willing to consider evidence from legislative history, regardless of whether the text in question was ambiguous or obscure.⁵⁰

46. *Id.* In 1995, the Law Lords stated that “the only materials which can properly be introduced are clear statements made by a minister or other promoter of the Bill directed to the very point in question.” *Melluish (Inspector of Taxes) v. B.M.I.*, 1996 App. Cas. 454, 481 (1995).

47. See Garrett, *supra* note 30, at 691 (The English Office of Parliamentary Counsel “is a powerful institution structured to mediate between the drafting of legislation and the background rules used by judges to understand the legislation.”). See also Patrick S. Atiyah, *Judicial-Legislative Relations in England*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 129, 156 (Robert Katzmann ed. 1988).

48. See Guy Holborn, *Pepper v. Hart and Parliamentary Standing Committee Debates*, 24 *THE LAW LIB'N* 141 (1993). Holborn also expressed concern over possible problems in accessing proceedings on private bills and on early (pre-1909) debates, noting that *Pepper* “put no time limits on the age of the statute that might need to be interpreted.” *Id.* at 142.

49. Practice Note, [1995] 1 W.L.R. 192, 193. (S. Ct.)

50. See Healy, *supra* note 37, at 248-250. For post-*Pepper* comparisons of uses of legislative history in England, Canada, and the U.S., see Gordon Bale, *Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process*, 74 *CAN. B. REV./LA REVUE DU BARREAU CANADIEN* 1 (1995).

C. Documents of Legislative History

In the United States, particularly at the national level, the legislative process generates a large amount and variety of material, much of which is published and is available for later examination when the statute is interpreted.⁵¹ Although the legal literature usually focuses on how these materials are used as legislative history, most of the documents themselves are not prepared (at least primarily) for later use by courts in interpreting the law, but to provide explanations to legislators voting on the bills and to fulfill procedural requirements,⁵² or “for other audiences, such as interest groups, constituents, and the press.”⁵³ Because the enactment process encourages participation, the documents are heterogeneous both by type and by source. Alternative bills and amendments to bills can be introduced by all members and all members are free to state their understandings of the meaning and intent of the legislation during debate and at other points in the process.⁵⁴ In Congress, most of the statements are recorded and preserved.⁵⁵

51. A study of materials cited in statutory cases decided by the Supreme Court from 1890-1990 identified thirty-nine kinds of legislative sources (counting statutes and different varieties of committee reports or comments in debate). Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1092, 1138-39 (1992). A current casebook provides a “partial list” of twenty sources. See OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 589-590 (3d ed. 2001).

52. See Schacter, *supra* note 22, at 51 (noting that legislative scholars see committee reports as “primarily directed at a congressional audience, and as intended to persuade other legislators to support a bill . . .”). See also WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 102 (5th ed. 2001).

53. Vermeule suggests that legal scholars might overestimate “the effects of judicially developed interpretive doctrine on legislators’ behavior, especially on legislators’ production of statutory text and legislative history.” Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 94-95 (2000). See also Bell I, *supra* note 30, at 9-23 (arguing that the creation of legislative history is part of the legislature’s responsibility to explain its actions to the public). But see a 1989 Congressional Research Service report on courts’ uses of legislative history noting that “[a] major purpose of the report is to assist Members and staff in determining where their best chance (short of amendment) is to influence interpretation of legislation.” George A. Costello, Sources of Legislative History as Aids to Statutory Construction 1 (1989) (CRS Report 89-86 A).

54. See generally OLESZEK, *supra* note 52, at 75-108 (describing preliminary legislative actions in Congress).

55. Other systems generate fewer documents and less variety. In England, legislative history is considered to include: antecedents (earlier statutes); pre-parliamentary materials (reports of committees and commissions); and parliamentary materials (bill texts, records of committee deliberations, and parliamentary debates). See Vaughn, *supra* note 41, at 7. The English legislative process and the materials are presented in detail in GUY HOLBORN, BUTTERWORTHS LEGAL RESEARCH GUIDE 123-156 (2d ed. 2001).

Which of the documents are considered to be most useful for statutory interpretation? In general, the most important documents of legislative history are defined to include: the original and later amended versions of the bill which eventually became law; various documents generated by Congressional committees, including studies by committee staff, transcripts of hearings before committees and subcommittees, records of markup sessions (when available) and committee reports; records of debates on the floors of the House and Senate; and conference committee reports. In the twentieth century, U.S. courts eventually came to consider all of this material admissible as evidence of legislative intent,⁵⁶ recognizing that some categories of materials are more reliable sources of legislative intent than others, and that within the categories, some individual sources are more reliable than others.⁵⁷ Committee reports are generally considered to be more reliable sources of legislative intent than statements made during debate on the floor of the House or Senate, because of the politicking and sales talk that enter into the debates.⁵⁸ Yet, some statements made during debate are thought to be more valuable than others. The comments of the floor manager of a bill or the chair of the subcommittee that considered it will usually be given more weight than statements of members who did not work on the bill, or those of an original sponsor who lost contact with the bill after it was first introduced.⁵⁹ Judges weigh the usefulness of possibly relevant statements in light of their own assumptions and understanding of the leg-

56. Commentators have noted the difficulties involved in limiting consideration to only some types of documents, *e.g.* reports and sponsor statements. See Eskridge, Jr., *supra* note 20, at 685 (“[O]nce you open the door to consideration of legislative history it is hard to exclude any type of evidence without viewing it in the context of the whole story.”). See also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 35-36 (1997) (“Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be relied upon or dismissed with equal plausibility.”).

57. For a review of the materials and discussion of their relative values for interpretation, see generally Costello, *supra* note 30; Costello, *supra* note 53. Vermeule finds the “abstract character of the hierarchy” to be “both poorly theorized and practically unstable.” Vermeule, *Legislative History*, *supra* note 30, at 1880. Since the Reagan administration, the relationships among the sources have been further complicated by questions regarding the uses of presidential signing statements as evidence of legislative intent. See, *e.g.*, William Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 *IND. L.J.* 699 (1991).

58. See generally Costello, *supra* note 30, at 50-57. For a Congress member’s take on the strategic uses of comments in debate, see William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 *A.B.A.J.* 314 (1959).

59. For a list of factors adding credibility to legislators’ statements, see Hatch, *supra* note 30, at 48-49. See also Outzs, *supra* note 30, at 325-329.

islative process.⁶⁰ The open admissibility of all varieties of legislative history has long been subject to criticisms, both in the United States and abroad.⁶¹

This article focuses on uses of legislative debates and committee reports, traditionally the two primary sources of information about legislative intent, as well as those generally accorded the most weight for interpretation.⁶² They would also have been the sources most likely to be available for citation by nineteenth century courts.

1. *Legislative Debates.* Although the Constitution requires that each house of Congress keep a journal of its proceedings,⁶³ it does not require that the proceedings of Congress be recorded or published. The journals, which have been kept since 1789, record actions taken in each house, and are described as “minute books or summaries of the floor proceedings.”⁶⁴ They do not include the texts of statements or speeches, but do include information on introduction and passage of bills.⁶⁵ Government publication of Congressional proceedings and debates began only on March 5, 1873 with the first issue of the *Con-*

60. For a critique of how well law schools do in helping their students develop understanding of the legislative process, see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 803 (1983).

61. Examples include the well-known statements of Judge Harold Leventhal that citing legislative history is “akin to looking over a crowd and picking out your friends,” quoted in Wald, *supra* note 11, at 214, and of Charles Curtis, who characterized legislative history as “rummaging among the ashcans of the legislative process.” CHARLES CURTIS, IT'S YOUR LAW 52 (1954). The Canadian writer J.A. Corry once noted that a basic principle of statutory interpretation in the United States is “not [to] look at the act unless the legislative history is obscure!” J.A. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 636 (1954). Corry's jibe rose from the witty to the ironic, however, after the comment of Justice Marshall in *Citizens to Preserve Overton Park v. Volpe* to the effect that the legislative history of the statute involved was itself ambiguous, and that “because of the ambiguity, it is clear that we [the Court] must look primarily to the statutes themselves to find the legislative intent.” 401 U.S. 402, 413 n. 29 (1971).

62. See, e.g., Noah, *supra* note 28, at 274 (“For the most part, committee reports accompanying a bill and statements made by its sponsors during floor debates receive the highest marks . . .”).

63. U.S. Const. art. I, sec. 5, cl. 3.

64. Robert C. Byrd, *Reporters of Debates and the Congressional Record* (July 21, 1980) in ROBERT C. BYRD, THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 311, 311 (1991). A late nineteenth-century commentator found the journals to be “analogous to the minutes of an ordinary assembly.” William F. Willoughby, *Government Publications*, YALE REV., Aug. 1896 at 143, 148 (listing the contents).

65. Despite these limitations, journals can be useful in early legislative history research. See Richard J. McKinney, *Compiling a Federal Legislative History from Older Records*, AALL SPECTRUM, Oct. 2001, at 20, 22.

gressional Record. Prior to 1873, Congressional proceedings were recorded and published by private publishers.

Early Congressional attitudes toward reporting and publishing proceedings have been described by a late nineteenth-century observer as one of “indifference and in some instances almost positive hostility.”⁶⁶ The primary historian of the early reporting and publication of Congressional debates, Elizabeth McPherson, explains Congress’s initial failure to provide for authentic reporting of its proceedings largely in terms of the lack of either English or American precedents for full reporting.⁶⁷ In England, parliamentary proceedings had not been published for several hundred years because of long-standing antagonisms between parliament and the Crown. In North America, colonial assemblies followed parliament by keeping journals, but no other accounts, of their proceedings. The practice of requiring only that journals be kept was followed by the first and second Continental Congresses, and then incorporated into the Constitution. When Congress met for its first session in 1789, newspaper reporters were allowed to witness and record deliberations in the House of Representatives. The Senate, however, deliberated in secret until December, 1795.⁶⁸

One history of public printing in the United States suggests that, although early House proceedings were “very fully reported” by newspapers in New York and Philadelphia, the debates “were very inaccurately reported, or printed, and . . . gave rise to many complaints and much discussion in the House.”⁶⁹ McPherson notes, too, that Congress’s continuing attempts to regulate the reporting of its debates (as well as its failure to subscribe to copies of the publications covering the debates) contributed to the tendencies of newspapers

66. Willoughby, *supra* note 64, at 147.

67. Elizabeth G. McPherson, *Reporting the Debates of Congress*, 28 Q.J. OF SPEECH 141, 141 (1942). Other factors included the influences of partisan politics and the attitude of the contemporary press. *Id.*

68. *Id.* at 142. There were also no reports on Senate debates from November 17, 1800 to January 6, 1802, because reporters were not initially admitted to the floor of the Senate after Congress moved to Washington D.C. from Philadelphia. *Id.* at 142. See also Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates*, 12 J. SOUTHERN HIST. 223, 241 (1946).

69. U.S. GOVERNMENT PRINTING OFFICE, 100 YEARS GPO 1861-1961, at 10-11 (1961). House debates were first reported in the *Congressional Register*, which drew concerns of partisan and inaccurate reporting in the first session of Congress in 1789. McPherson, *supra* note 67, at 142.

and other publications to carry only “running reports of the debates. . . colored to suit the political leanings of the editors.”⁷⁰

In 1824, the privately-published *Register of Debates* became the first publication “devoted entirely to congressional proceedings,” although it included only abstracts of debates “that the editors considered important.”⁷¹ The *Register of Debates* was published until 1837, overlapping for a few years with the *Congressional Globe* (1833-1873), which was the immediate predecessor to, and model for, the *Congressional Record*. Initially, the *Globe*, too, provided only abstracts of congressional debates, but by 1851, it was publishing something closer to verbatim accounts of the proceedings of both houses.⁷² In addition to being published while Congress was in session,⁷³ both the *Register of Debates* and the *Globe* were published in compilations at the end of each session. In 1846, the publishers of the *Register of Debates* completed publication of the *Annals of Congress*, an authorized compilation from various contemporary sources of “reconstructive abstracts” of Congressional proceedings from 1789-1824, thereby closing the gap in coverage between the first Congress and the start of the *Register of Debates*.⁷⁴

McPherson divides the history of the publication of Congressional proceedings into two periods, marked by the decisions of the Senate (in 1848) and the House (in 1850) to finance the transcription and publication of the debates in each house.⁷⁵ After these dates the published records came closer to being verbatim accounts of the debates.⁷⁶ However, by this time, the practices of allowing members to

70. McPherson, *supra* note 67, at 143. For a list of the “several short-lived publications” that attempted to publish the debates, *see id.* at 144. For descriptions of the coverage of the *National Intelligencer*, a Washington newspaper that reported on Congressional proceedings, see Elizabeth G. McPherson, *Major Publications of Gales and Seaton*, 31 Q.J. OF SPEECH 430, 430-432 (1945); Byrd, *supra* note 64, at 312-313. *See also* Mildred L. Amer, *The Congressional Record; Content, History and Issues 2-3* (1993) (CRS Report 93-60 GOV).

71. Amer, *supra* note 70, at 3. Amer found the reports in the *Register of Debates* to be “more complete” than those in the *National Intelligencer*. *See also* McPherson, *Major Publications*, *supra* note 70, at 432-434.

72. McPherson, *supra* note 67, at 147.

73. In 1865, Congress provided for the daily publication of the *Globe*, as well as for its delivery to the members. Byrd, *supra* note 64, at 314.

74. Amer, *supra* note 70, at 4. According to McPherson, the editors of the *Annals of Congress* claimed that, while the debates were not necessarily reported literally, they were substantially accurate. McPherson, *supra* note 67, at 144.

75. *Id.* at 147.

76. WILLIAM D. POPKIN, *STATUTES IN COURT* 123 (1999) (“[N]ineteenth-century legislative materials were not always accurate, although matters improved at the federal level with the mid-century adoption of phonography, the approximation of verbatim reporting in the *Congres-*

revise their speeches before publication and to extend their remarks by publishing speeches not actually delivered on the floor were already well-established⁷⁷ and have continued to the current day.⁷⁸

In the twenty-first century, the *Congressional Record* continues to be published in print in a daily edition while Congress is in session and in bound compilations at the end of each Congress.⁷⁹ The daily edition, but not the bound edition, is also available electronically from 1985 to date on Westlaw and Lexis, and via such Internet services as the Library of Congress's legislative information system, Thomas (1985 to date)⁸⁰ and the Government Printing Office's GPO Access (1995 to date).⁸¹

2. *Committee Reports.* Committee reports accompanying legislation to the floor of the House or Senate are written to explain the legislation to voting members.⁸² After enactment these explanations provide information about the meaning, intent, and purpose of the

sional Globe, and, in 1873, congressional authorization for the Government Printing Office to publish the *Congressional Record*.”).

77. Amer traces the history of the tradition allowing members to revise, extend and insert remarks into the records of debate back to the early 1800s. Amer, *supra* note 70, at 15-16. See also U.S. Government Printing Office, *supra* note 69, at 11 (1961) (noting the practice of the *National Intelligencer* to submit reports of proceedings for members to revise “at their leisure”).

78. The history of attempts to use font changes and other signals to differentiate spoken from unspoken remarks is traced, along with the story of 1984 litigation to compel publication of an accurate report of Congressional proceedings, in Joe Morehead, *Congress and the Congressional Record: A Magical Mystery Tour*, 13 SERIALS LIBR. 59 (1987). See also Byrd, *supra* note 64, at 320-321.

Since 1995, the Rules of the House of Representatives have allowed members to make only “technical, grammatical, and typographical corrections” to their remarks on the floor. See H.R. Rule XVII, para. 9(a)(2001). Yet, immediately after the new rule was instituted, the *New York Times* found significant differences between tape-recorded and published versions of a House debate regarding a book contract entered into by the Speaker. See Michael Wines, *How the Record Tells the Truth Now*, N.Y. TIMES, Jan. 22, 1995, sec. 4, at 7.

79. McKinney, *supra* note 65, at 21. Because the federal government now relies on electronic information formats for its depository library program, the bound compilations of the Congressional Record are now distributed only to regional depositories or to one library in each state without a regional depository. See Essential Titles for Use in Paper Format, at http://www.access.gpo.gov/su_docs/fdip/pubs/estitles.html (last visited July 12, 2002). See also Karrie Peterson, et al., *Government Documents at the Crossroads*, AM LIBR., Sept. 2001, at 52 (criticizing the move toward electronic-only publication of depository publications).

80. <http://thomas.loc.gov/> (last visited Oct. 10, 2002).

81. http://www.access.gpo.gov/su_docs/index.html (last revised Sept. 12, 2002).

82. See OLESZEK, *supra* note 52, at 102. See also Thomas F. Broden, *Congressional Committee Reports: Their Role and History*, 33 NOTRE DAME LAWYER 209, 210 (1958) (“The legislative role of the written committee report cannot be overemphasized”). For a detailed description of the elements of the typical committee report, see Jerrold Zwirn, *Congressional Committee Reports*, 7A GOVERNMENT PUBLS. REV. 319, 321-322 (1980).

statutory text, and have traditionally been viewed as the most trusted and reliable sources of information on legislative intent. As described in the current edition of a standard guide: “Committees are the infrastructure of Congress. They are where the bulk of legislative work is done—where expertise resides, where policies incubate, where most legislative proposals are written or refined. . . .”⁸³ Citation studies have shown that committee reports are cited more often in Supreme Court decisions than other legislative history sources,⁸⁴ and the Court has often noted the authoritative value of committee reports for interpretation.⁸⁵ Even Justice Jackson’s criticisms of legislative history did not extend to committee reports,⁸⁶ and it is notable that Justice Scalia included committee reports within his general critique of legislative history.⁸⁷

Judge Kozinski has pointed out, however, that “[w]hile committee reports and hearing transcripts are now so common that hardly a piece of federal legislation comes into being without its own printed legislative record, this was not always so.”⁸⁸ In the early nineteenth century, written committee reports were produced infrequently and were less important to the process of enactment than they became in the twentieth century. Initially, both the Senate and House usually operated not through standing committees that developed and drafted bills, then reported them to the floor for consideration with accompanying explanations, but through select or special committees appointed to draft specific pieces of legislation after preliminary debate and agreement on the floor.⁸⁹ Under this approach there was less need for written explanations, other than at times for private

83. 1 CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 535 (5th ed. 2000) [hereinafter CQ GUIDE].

84. Carro and Brann’s often-referenced study of the Supreme Court’s use of legislative history from 1938-1979 and Michael Koby’s 1980-1998 updating of the study both found that committee reports were the most cited items. Carro & Brann, *supra* note 30, at 299; Koby, *supra* note 30, at 390. See also Costello, *Average Voting Members*, *supra* note 30, at 43-50.

85. See, e.g., *Thornberg v. Gingles*, 478 U.S. 30, 44, n. 7 (1986) (“We have repeatedly recognized that the authoritative source of legislative intent lies in the committee reports on the bill.”); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (“A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.”).

86. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S.384, 395 (1951) (Jackson J., concurring) (“. . . I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared”).

87. See SCALIA, *supra* note 56, at 34-35.

88. Kozinski, *supra* note 28, at 810.

89. For the early procedures in the House, see Broden, *supra* note 82, at 220. The committees were dissolved after submitting the bills for consideration.

bills.⁹⁰ The standing committee system was established gradually during the first half of the nineteenth century, then expanded during the latter half, with the number of Congressional committees peaking in 1913.⁹¹

As the role of committees became more important, the practice of relying on written reports for private claims bills grew, first in the House.⁹² The increasing numbers of reports on private legislation established the basic format for committee reports that continued into the twentieth century.⁹³ Before 1880, however, although written reports were used increasingly for private bills, no committees made general use of reports for public bills.⁹⁴ Only since 1880 has the House of Representatives required that each bill—public or private—reported from committee be accompanied by a written report, and only since the turn of the twentieth century has the Senate followed the practice of submitting reports for most bills.⁹⁵ Senate rules still do not require that written reports accompany legislation.⁹⁶

In addition to being published individually as issued, Congressional committee reports on legislation are also included in the consecutively numbered series of Congressional (and other) publications known as the Serial Set, or the Congressional Series. In the twentieth century, as written reports became more common, and as their importance for legislative history research grew, committee reports became more available in commercial publications, selectively in West's *United States Code Congressional and Administrative News* (1941 to date), and later more comprehensively in microform sets; on Lexis and Westlaw (1990 to date)⁹⁷; and through the Library of Congress's Thomas web site and the Government Printing Office's GPO Access (1995 to date).

90. *Id.* at 216.

91. 1 CQ Guide, *supra* note 83, at 543-544.

92. Broden, *supra* note 82, at 221-222.

93. *Id.* at 230.

94. *Id.* at 231.

95. *Id.* at 215.

96. OLESZEK, *supra* note 52, at 102.

97. Westlaw also includes selected reports from 1948-1989.

III. NINETEENTH-CENTURY USES OF LEGISLATIVE HISTORY IN THE UNITED STATES

A. English Approaches and Common-Law Traditions

At the turn of the nineteenth century, American courts looked for help in statutory interpretation neither to the few available committee reports nor to what might have been said in Congressional debates. In the first years after independence, the traditional attitudes of the English courts toward legislation and the English approach to statutory interpretation colored the approaches of courts in other common-law countries, including the United States.⁹⁸ H. Jefferson Powell has identified “[t]he two most obvious sources of hermeneutical wisdom” as “the anti-interpretive tradition of Anglo-American Protestantism and the accumulated interpretive techniques of the common law.”⁹⁹

Powell found that by the early nineteenth century the common-law tradition in hermeneutics had focused on identification of the intent behind written texts, including statutes.¹⁰⁰ Yet, although both English and American courts purported to attend to the subjective intentions of the drafters of legislation to locate evidence of intent, judges looked nowhere else than at the text of the statute or its common-law background.¹⁰¹ As Willard Hurst wrote: “From about 1820 to 1890 the growth of common law captured the ambition and imagination of judges and legal writers to the extent that they tended to identify this sector as the true law compared with which legislation

98. See Baade, *supra* note 30, at 1009 (“It seems safe to assume . . . that the English common-law rule barring recourse to legislative history in aid of statutory interpretation prevailed [in the colonies] before the Declaration of Independence (1776), and that the decision laying down the ‘English rule’ was well known at the time of the framing of the Constitution.”).

99. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985). Richard Posner also found two strands of thinking dominating both England and the United States in the nineteenth century. One, the stronger, was distrust of legislation and was embodied in the maxim that statutes in derogation of the common law were to be narrowly construed; the other, stemming from Francis Lieber, emphasized the problematic aspects of interpretation. Richard Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431, 433 (1989). On Lieber, see *infra* text accompanying notes 114-118.

100. Powell, *supra* note 99, at 894. See *Schooner Paulina’s Cargo v. U.S.*, 11 U.S. (7 Cranch) 52, 60 (1812) (“In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature.”) In the first volume of his *Commentaries on American Law*, Kent stated that the object of interpretation “is to discover the true intention of the law,” 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 437 (1826).

101. See Powell, *supra* note 99, at 897 (“The modern practice of interpreting a law by reference to its legislative history was almost wholly nonexistent . . .”).

was marginal, exceptional, and indeed intrusive.”¹⁰² Writers in both England and the United States saw “strict judicial adherence to the legislature’s language as a constitutional necessity.”¹⁰³ Yoo’s study of the Marshall Court’s approaches to interpretation found that, although the Court looked for assistance to such extrinsic sources as statutes in *pari materia* and the common law, there was not “a single instance . . . where a Justice resorted to legislative history.”¹⁰⁴

Baade’s study of nineteenth century decisions indicates that the English rule allowing no recourse to legislative expressions was in place in the United States “for the first four decades of the nineteenth century.”¹⁰⁵ Baade concluded his analysis of early state and federal cases, and U.S. Attorney General opinions, with a discussion of the 1845 Supreme Court decision in *Aldridge v. Williams*,¹⁰⁶ in which Justice Taney’s opinion for the Court rejected the use of statements in debate as evidence of legislative intent.¹⁰⁷ Baade cites the use of House committee documents in the 1860 decision in *Dubuque & Pacific Railroad v. Litchfield*¹⁰⁸ as the Supreme Court’s first resort to legislative history in statutory interpretation,¹⁰⁹ but he (and other recent students of the Court’s use of legislative materials) have found few other uses of committee reports or statements in debate before the 1890s.¹¹⁰ A 1992 *Harvard Law Review* note also pointed to *Litchfield*, finding that the “legislative history was used for the first

102. JAMES WILLARD HURST, *DEALING WITH STATUTES* 41-42 (1982).

103. Powell, *supra* note 99, at 898. For discussions of early federal court interpretive practices, see Manning, *Textualism and the Equity of the State*, *supra* note 20, at 85-102; Eskridge, Jr., *All About Work*, *supra* note 17, at 1058-1087.

104. See John Choon Yoo, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 *YALE L.J.* 1607, 1613, n. 37 (1992). For other discussion of the Marshall Court’s approaches to interpretation, see POPKIN, *supra* note 76, at 73-80; Manning, *Textualism and the Equity of the State*, *supra* note 20, at 86-102; Eskridge Jr., *All About Work*, *supra* note 17, at 1070-1082.

105. Baade, *supra* note 30, at 1025.

106. 44 U.S. (3 How.) 9 (1845).

107. Baade, *supra* note 30, at 1032.

108. 64 U.S. (23 How.) 66 (1860).

109. Baade, *supra* note 30, at 1079.

110. Baade also cites the later cases of *Gardner v. The Collector*, 73 U.S. (6 Wall.) 499 (1868) (House journal); *The Collector v. Richards*, 90 U.S. (23 Wall.) 246 (1874) (Senate committee report); *Blake v. National Banks*, 90 U.S. (Wall.) 307 (1874) (journals); *Jennison v. Kirk*, 98 U.S. 453 (1879) (Senate debates) as additional instances of the court’s use of legislative history before 1892. Baade, *supra* note 30, at 1079-1081. See also Lawrence M. Solan, *Law, Language, and Lenity*, 40 *WM. & MARY L. REV.* 57, 97, n. 182 (1998) (citing *Blake*, *Jennison*); Chomsky, *supra* note 30, at 944 (citing *Blake*, *Jennison*); Vermeule, *Legislative History*, *supra* note 30, at 1836, n. 14 (citing *Blake*, *Jennison*, *Richards*).

time outside the context of a private bill when the Supreme Court relied on both a committee report and floor statements to construe an act.”¹¹¹

B. Contemporary Treatises and Other Commentary

According to Powell, “the sixty years following 1800 saw a remarkable outpouring of scholarly discussion of hermeneutical issues in both Great Britain and America.”¹¹² Within this literature can be found the first of the great treatises on legislation and statutory interpretation, shorter monographs on techniques of interpretation, and discussions of how statutes should be treated in the more comprehensive works of Kent, Bentham, and others.¹¹³ While acknowledging the central role of legislative intent, none of the nineteenth-century treatises on statutory interpretation endorsed the use of legislative history as a means for divining intent.

In the United States, the first full-length edition of Francis Lieber’s *Legal and Political Hermeneutics* was published in 1839.¹¹⁴ Lieber’s work was cited in all later nineteenth century American works

111. Note, *Learned Hand*, *supra* note 30, at 1009. The note also cited *Blake, Jennison, Richards*, *id.* at 1011 nn. 33-34; and identified instances in which the U.S. Attorney General opinions relied on legislative history to interpret private laws. *Id.* at 1009.

112. Powell, *supra* note 99, at 900.

113. For discussion of nineteenth century American treatises on statutory interpretation, see Baade, *supra* note 30, at 1064-1068; POPKIN, *supra* note 76, at 62-73. For discussions of the major treatises on statutory interpretation see Paul H. Sanders & John W. Wade, *Legal Writings on Statutory Construction*, 3 VANDERBILT L. REV. 569 (1950); Richard A. Danner, *From the Editor: Books about Statutes*, 79 LAW LIBR. J. 361 (1987) (reviewing contemporary English, Canadian and U.S. treatises). See also JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, at 74-75 (1981) for a discussion of the “anti-legislation” attitudes of some nineteenth century treatise-writers.

On the general development and role of legal treatises in the nineteenth century, see generally A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 540-563 (1911). Baade writes that nineteenth-century treatises “were not always entirely accurate in their statements of current American jurisprudence, but they furnish at least some insight into professional opinion then prevailing. Furthermore, the rules set forth in treatises (accurate or not) entered into the stream of jurisprudence through judicial citation.” Baade, *supra* note 30, at 1063. See also ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 129 (1990) (“legal texts are rarely examined by those interested in American legal history, . . . , but this literature does reflect what the contemporary profession thought to be the applicable rules of law.”).

114. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (Enlarged ed. 1839). An earlier version was published in the *American Jurist* in 1837 and 1838. A third edition was published in 1880. See FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (William G. Hammond, 3d. ed. 1880).

on statutory interpretation.¹¹⁵ Lieber acknowledged intent as the basis of interpretation,¹¹⁶ although he said nothing about the potential uses of extrinsic sources as aids to interpretation.¹¹⁷

A second influential early nineteenth century work devoted to interpretation was Sir Fortunatus Dwarri's *A General Treatise on Statutes*.¹¹⁸ Dwarri wrote that "[t]he real intention. . . will always, in statutes, prevail over the literal sense of the terms."¹¹⁹ Blatt, though, traces early formulations of what would become the American plain meaning rule to the first edition of Dwarri, as well as to several American cases preceding the first London edition of his book.¹²⁰

By mid-century, other American treatises on interpretation contained early formulations of the plain meaning rule and the proposition that, if the language of the statute is clear and unambiguous, then interpretation is not needed at all. In 1848, E. Fitch Smith stated "that it is only when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office, and that it is only to be resorted to when there is obscurity as to the meaning."¹²¹ Smith, however, struggled with some of the questions that would be raised by later critics of the plain meaning rule and other literal approaches to interpretation: given the "imperfection of human lan-

115. William G. Hammond, *Preface to the Third Edition*, in LIEBER (3d ed. 1880), *supra* note 114, at iii ("its contents soon became the common property of our recent writers of law-books and special editions."). Posner noted the influence of Lieber's work, giving him credit for bringing "news of German research in the problematics of interpretation" to the U.S., and notes that the book continues to be cited. Posner, *supra* note 99, at 433. Lieber's broader influences on the American legal profession are discussed in PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999).

116. LIEBER (1839), *supra* note 114, at 23.

117. Lieber did cite favorably the policies of the Bavarian penal code, which included publication of "the motives, explanations, &c., which were given in the course of discussions in the king's privy council, for adopting the various laws." LIEBER (1839), *supra* note 114, at 41.

118. FORTUNATUS DWARRIS, *A GENERAL TREATISE ON STATUTES AND THEIR RULES OF CONSTRUCTION* (1830-31) (Reprinted in part in 9 *THE LAW LIBRARY* (John Purdon ed. 1835)). A second English edition was published in 1848, *see* FORTUNATUS DWARRIS, *A GENERAL TREATISE ON STATUTES* (2d. ed. 1848), and an American edition in 1871, *see* FORTUNATUS DWARRIS, *A GENERAL TREATISE ON STATUTES* (Platt Potter ed. 1871). In 1847, J. G. Marvin called Dwarri and Lieber the "only professed works upon interpretation and construction to be found in the common law." J. G. MARVIN, *LEGAL BIBLIOGRAPHY, OR A THESAURUS OF AMERICAN, ENGLISH, IRISH, AND SCOTCH LAW BOOKS* 283 (1847).

119. DWARRIS (1835), *supra* note 118, at 192.

120. Blatt, *supra* note 17, at 812.

121. E. FITCH SMITH, *COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION* 691 (1848).

guage,” statutory drafters cannot “foresee all possible complex cases.”¹²²

Theodore Sedgwick's *Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law*,¹²³ published in 1857, stated the plain meaning rule: “if the statute is plain and unambiguous there is no room for construction or interpretation,”¹²⁴ but noted that, if interpretation is necessary, the object of statutory interpretation is to ascertain the intention of the legislature.¹²⁵ Sedgwick cited the rule in *Heydon's Case* to support the court's need to identify the previous state of the law as well as the mischiefs the statute was enacted to correct, but noted that Lord Coke provided no advice on the means to employ or the evidence to consult in determining these factors.¹²⁶ He pointed out, however, that “We are not to suppose that the courts will receive evidence of extrinsic facts as to the intention of the legislature: that is, of facts which have taken place at the time of, or prior to, the passage of the bill.” Citing Justice Marshall's opinion in *Schooner Paulina's Cargo v. United States*,¹²⁷ Sedgwick stated that “the tendency of all our modern decisions is to the effect *that the intention of the legislature is to be found in the statute itself*, and that there only the judges are to look for the mischiefs meant to be obviated, and the remedy to be provided.”¹²⁸

Delivered in 1860, Vaughan Hawkins's paper *On the Principles of Legal Interpretation*¹²⁹ dealt mainly with the interpretation of wills, but offered comments on general interpretive principles, including those applicable to statutes. Hawkins asked whether the true object of inquiry in interpretation is the intention of the writer or the meaning of the words used in the document,¹³⁰ and argued that reliance on the meaning of words alone fails whenever what the words reveal is not plain to the reader.¹³¹ Interpretation, therefore, must proceed on

122. *Id.* at 661.

123. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* (1857).

124. *Id.* at 231.

125. *Id.* at 229.

126. *Id.* at 241.

127. 7 Cranch 52, 60 (1812).

128. SEDGWICK, *supra* note 123, at 243.

129. F. Vaughan Hawkins, *On the Principles of Legal Interpretation*, in JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE IN THE COMMON LAW* 577 (1898).

130. Hawkins, *supra* note 129, at 581.

131. *Id.* at 584-585.

the basis of determining intent.¹³² Responding to this essay nearly thirty years later, after its publication in Thayer's treatise on evidence, Oliver Wendell Holmes disagreed with Hawkins's analysis, and was prompted to make his frequently-cited comment that, in interpreting statutes, "We do not inquire what the legislature meant; we ask only what the statute means."¹³³

The 1891 first edition of the major continuing American treatise on statutory interpretation, *Sutherland on Statutory Construction*, began its discussion of interpretation and construction by stating that "intent is the vital part, the essence of the law,"¹³⁴ but moved quickly to the plain meaning rule: "If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless."¹³⁵ If interpretation is necessary, its object is to ascertain the intent of the legislature,¹³⁶ and the statute itself is the first and best source of evidence of legislative intent.¹³⁷ According to Sutherland, "The court will not hear proof of extrinsic facts known to the legislature or members thereof which are supposed to indicate their intention in passing a law."¹³⁸

The first edition of Henry Black's *Handbook on the Construction and Interpretation of the Laws*, an early entry in the West Publishing Company Hornbook Series, was published in 1896. As stated by Black, the goal of interpretation is "the meaning and intention of the legislature."¹³⁹ The interpreter looks first to the statute itself to resolve doubts and ambiguities, but if this proves unsuccessful may look to "extraneous facts, considerations, and means of explanation. . .to find the real meaning of the legislature."¹⁴⁰ What may be looked at? Black described the general agreement of English and American courts that legislative committee reports are not "pertinent evidence

132. *Id.* at 589.

133. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Zeppos describes the "battle for Holmes," noting that Holmes is quoted on both sides of the debate over the usefulness of legislative intent. Zeppos, *supra* note 51, at 1126-27. See also Strauss, *supra* note 23, at 247-248.

134. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 309 (1891).

135. *Id.* at 310.

136. *Id.* at 311.

137. *Id.* at 312.

138. *Id.* at 380. Sutherland does cite several instances where courts had cited legislative history. *Id.* at 382-384.

139. HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 196 (1896).

140. *Id.* at 197.

of the meaning which the legislature intended to attach to the statute.”¹⁴¹ The recently decided *Holy Trinity Church* case¹⁴² was cited for the Supreme Court’s use of committee reports, and testimony before committees,¹⁴³ but the case is discussed in a section on uses of contemporary history, rather than within Black’s brief treatment of the uses of committee reports.¹⁴⁴ Black also provides a full treatment of the rationale for excluding individual statements made in debate,¹⁴⁵ while noting instances where such statements in debate might have argumentative force in interpretation and where they had been cited.

IV. EXPLANATIONS FOR INCREASED USE IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

Despite the cautions offered by Sutherland, Black, and earlier commentators, by the 1890s U.S. courts were entering a period of significant change in their approaches to statutory interpretation and attitudes toward the admissibility of non-textual sources of authority. There are several explanations for why in the late nineteenth and early twentieth centuries it became acceptable to use legislative history in arguments about the meaning of statutory language.

A. Impacts of *Holy Trinity Church v. United States*

The recently intensified scholarly interest in statutory interpretation and courts’ uses of legislative history has prompted a number of studies of the materials cited in Supreme Court opinions.¹⁴⁶ For the most part, the newer studies have analyzed citation patterns for fairly recent terms of the Court,¹⁴⁷ and do not extend into the nineteenth

141. *Id.* at sec. 91 at 226.

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

143. BLACK, *supra* note 139, at 214.

144. *Id.* at 226.

145. *Id.* at 227 (citing *Aldridge v. Williams*, 44 U.S. 9 (1845)).

146. In 1981, John W. Johnson wrote that “it is impossible to pinpoint an exact date at which . . . the U.S. Supreme Court began to accept information gleaned from committee reports and legislative debates for use in establishing ‘legislative intent.’” JOHNSON, *supra* note 113, at 78. Since that time, ready access to full-text databases of nineteenth century court opinions has made it easier for researchers to identify the Court’s uses of legislative history and other sources of authority in its older opinions.

147. See Carro & Brann, *supra* note 30 (1938 through 1979); ESKRIDGE, JR., *supra* note 16 (1986-1991 terms); Koby, *supra* note 30 (1980 through 1998) (updating Carro & Brann); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002) (1996 term) (includes decisions and briefs; covers other authorities); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) (1992

century.¹⁴⁸ Reviewing these studies, Vermeule found that “[t]he most recent work suggests that the Court’s use of legislative history rose slowly between 1892 . . . and the Second World War, reached an apogee during the Burger Court, and declined sharply after Justice Scalia joined the Court. . . . [It] was not used (or hardly ever used) before 1892. . . .”¹⁴⁹

Most commentators have acknowledged that the Supreme Court’s 1892 decision in *Rector of Holy Trinity Church v. United States*,¹⁵⁰ was a turning point in the Court’s use of legislative history for statutory interpretation.¹⁵¹ In *Holy Trinity*, Justice Brewer relied

term); Schacter, *supra* note 22 (1996 term); Patricia Wald, *supra* note 11 (1981 term); Patricia Wald, *supra* note 30 (1988 term); Stephanie Wald, *supra* note 30 (1992 term).

148. Nicholas Zeppos’s study of 20 Supreme Court terms between 1890 and 1990 provides data on legislative materials cited during the 1894 term. Zeppos, *supra* note 51, at 1096 (figure 3). Solan provides data on references to legislative history by decade from 1890-1899 through 1930-1939. Solan, *supra* note 110, at 99-102. Another long term study does not include legislative history within its coverage. See Wes Daniels, “Far Beyond the Law Reports:” *Secondary Source Citations in United States Supreme Court Opinions; October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1 (1983).

For an analysis of sources cited in U.S. Supreme Court cases decided in 1899-1900, see Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1686 (2000) (noting that in the several cases dealing with statutes the Court cited extensively from the text of the acts involved and was “doing legal analysis, not legal history”).

149. Vermeule, *supra* note 53, at 131-132.

150. 143 U.S. 457 (1892).

151. See, e.g., Karkkainen, *supra* note 30, at 434 n. 132 (citing *Holy Trinity* as “[t]he earliest Supreme Court case commonly cited for the use of legislative history to construe a statute”); Noah, *supra* note 28, at 261-262 (“The Court first clearly endorsed a departure from this tradition [the English rule against no consideration] in 1892.”); POPKIN, *supra* note 76, at 122 (*Holy Trinity* marks “the onset of the use of conventional legislative history to interpret statutes”); Solan, *supra* note 110, at 97 (“*Church of Holy Trinity* presaged a gradual change in the Supreme Court’s methodology”); Strauss, *supra* note 23, at 246 (“Political history came into judicial use as an interpretive aid in American courts before the turn of the [twentieth] century, more or less simultaneously with the increased pace of legislation that accompanied the Progressive Era.”); Vermeule, *Interpretive Choice*, *supra* note 53, at 84 (citing *Holy Trinity* as “the first, or at least the most famous, majority opinion to use a committee report to trump contrary statutory text”).

Although he cited the 1860 decision in *Dubuque & Pacific Railroad v. Litchfield*, 64 U.S. (23 How.) 66 (1860), as the source of the Supreme Court’s first resort to legislative history in statutory interpretation, Baade acknowledged *Holy Trinity* as one of a trilogy of cases decided between 1892 and 1904 that “established more reliable guidelines for the use by federal courts of legislative history.” Baade, *supra* note 30, at 1082. In addition to *Holy Trinity*, which he notes is “now remembered mainly for its florid allusions to Christianity as the national religion,” *id.* at 1083, for its use of committee reports, Baade cites *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) (acquiescing in the doctrine that the debates are not appropriate sources for the meaning of statutory language), and *Binns v. United States*, 194 U.S. 486 (1904) (reconciling the two earlier decisions). *Id.* at 1083-1084. For discussions of other cases citing legislative history prior to *Holy Trinity*, see Chomsky, *supra* note 30, at 945-946; MAMMEN, *supra* note 28, at 78-81; Solan, *supra* note 110, at 94; Vermeule, *Legislative History*, *supra* note 30, at 1836; Note, *Learned Hand*, *supra* note 30, at 1009.

in part on committee reports to determine that Congress could not have intended to include the work of ministers within the phrase “labor or service of any kind” in the Alien Contract Labor Act.¹⁵²

Eskridge describes the decision in *Holy Trinity* as “a sensation,” which marked an immediate “sea change” in how legislative history was used in the early twentieth century:

As a consequence [of *Holy Trinity* and its endorsement by contemporary commentators] legislative history became common in Supreme Court as well as lower federal court opinions in the early twentieth century. The Court relied not only on committee reports, but also on preliminary drafts of bills ultimately enacted, changes made in legislation by committees or considered by the legislative chamber, and statements made by sponsors or floor managers of enacted bills.¹⁵³

New twentieth-century editions of Sutherland's treatise and Black's hornbook each were notable for the changes in the discussions of American courts' willingness to accept committee reports and other legislative information as evidence of intention and meaning.¹⁵⁴ The 1904 second edition of Sutherland's treatise, edited by John Lewis, retained much of the text of Sutherland's original edition, but added a new section on the uses of legislative documents and proceedings in interpretation.¹⁵⁵ While the first edition had discussed legislative reports and journals within the limits posed by the rule in *Heydon's Case*, Lewis's new section began with the proposition that “[t]he proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act,”¹⁵⁶ and continued by noting that committee reports “have been held to be proper sources of information in ascertaining the intent or meaning of the act.”¹⁵⁷ Seven years later, the second edition of Black's hornbook on interpretation also acknowledged the change in American courts' willingness to accept committee reports as evidence of intention and meaning. In the discussion of committee reports (somewhat expanded from his first edition), Black noted that American courts were

152. Act of Feb. 26, 1885, ch. 164, sec. 1, 23 Stat. 332, 332.

153. ESKRIDGE, JR., *supra* note 16, at 209.

154. The changes in the treatises are noted in Chomsky, *supra* note 30, at 948-949.

155. 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 470 (John Lewis 2d. ed. 1904).

156. *Id.* at sec. 470 at 879.

157. *Id.* at sec. 470 at 880 (citing *Holy Trinity* and state cases). Lewis retained the text and citations from the original edition regarding use of legislative journals, but expanded the original comments against using statements made in debate by quoting at length from the recently decided *United States v. Trans-Missouri Freight Association* (1897). *Id.* at sec. 470 at 882-83.

now “inclining to the broader view that, if there is real doubt about the meaning of the law, they are not debarred from consulting any proper sources of information, including those which are of a quasi official or authoritative nature.”¹⁵⁸

By the 1930s, discussions of the Supreme Court’s increasing use of legislative history had become a popular topic in the law reviews.¹⁵⁹ At the end of the decade, Harry Wilmer Jones could write that, despite the theoretical limitation posed by the plain meaning rule, “the federal courts have come to make use of extrinsic aids in virtually every case.”¹⁶⁰ In 1942, the third revised edition of Yale Law Librarian Frederick C. Hicks’s treatise on the materials of legal research included for the first time a section on “Interpretation of Statutes by Extrinsic Aids,”¹⁶¹ a topic not covered in the 1923 and 1932 editions.

B. Changing Attitudes toward “Extra-legal” Sources of Information

In *American Legal Culture, 1908-1940*,¹⁶² John W. Johnson explored changes in the availability of information and its uses by lawyers and the judiciary in the early twentieth century. After noting that nineteenth century lawyers and judges “seldom ventured beyond common law authority,”¹⁶³ Johnson characterized the first decades of the twentieth century as “the beginning of “an era dominated by information.”¹⁶⁴ Johnson focused on the role of Louis Brandeis in cre-

158. HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 311 (2d ed. 1911). The *Holy Trinity* case was still not mentioned within the discussion of committee reports, but was cited in an earlier section on construction according to “the spirit and reason of the law.” *Id.* at 68.

159. See, e.g., Jacobus ten Broek, *Comment, Admissibility of Congressional Debates in Statutory Construction by the U.S. Supreme Court*, 25 CALIF. L. REV. 326 (1937); J.P. Chamberlain, *The Courts and Committee Reports*, 1. U. CHI. L. REV. 81, 87 (1933); Markley Frankham, *Some Comments Concerning the Use of Legislative Debates and Committee Reports in Statutory Interpretation*, 2 BROOK. L. REV. 173 (1933); James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886 (1930); Charles B. Nutting, *The Relevance of Legislative Intent established by Extrinsic Evidence*, 20 B.U. L. REV. 173 (1933); Richard R. Powell, *Construction of Written Instruments (Continued)*, 14 IND. L.J. 309 (1939); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Warren H. Wagner, *The Use and Abuse of Legislative History in the Construction of a Statute*, 5 I.C.C. PRACTITIONERS J. 485 (1938); Note, *Legislative Materials to Aid Statutory Interpretation*, 50 HARV. L. REV. 822 (1937); K. M. McManes, Note, *Effect of Legislative History on Judicial Decision*, 5 G.W. L. REV. 235 (1936).

160. Jones, *supra* note 19, at 25. See also Baade, *supra* note 30, at 1087-1089 (discussing connections between New Deal legislation and courts’ increased use of legislative history).

161. FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 80-82 (3d rev. ed. 1942).

162. JOHNSON, *supra* note 113.

163. *Id.* at 17.

164. *Id.* at 29.

ating the intellectual basis for this shift through Brandeis's references to extra-legal sources of information in his briefs and opinions.¹⁶⁵ He also examined the generally growing impacts of authorities other than cases and statutes in appellate opinions, quoting Max Radin's 1928 observation that "There are scarcely ten pages of [volume 158 of the *Northeastern Reporter*] in which some treatises do not appear and certainly not ten in which there is no reference to one of the many existing cyclopedias, repertories, handbooks, or digests or dictionaries."¹⁶⁶

Radin noted that most of these new (or newly recognized) sources (encyclopedias, multi-volume treatises, annotated reporters, the Restatements) were prepared, not to serve as authorities in their own right, but in order to assist lawyers in finding and applying the existing body of the common law.¹⁶⁷ Yet, the growing general acceptance and use of secondary authorities in American court opinions contributed also to judges' willingness to use the materials of legislative history in interpreting and applying the growing body of statutory law they were asked to deal with in the twentieth century. Like other analysts of Supreme Court opinions from the first part of the century, Johnson found that the Court's citations to legislative history increased, slowly at first, then substantially during the 1930s. By the late 1930s, legislative history was cited more frequently than any other category of extra legal information.¹⁶⁸ Greater use of Brandeis-style briefs "provided a convenient medium for the recitation of legislative history," and some observers found more value in the briefs' references to legislative materials than in the social science data they contained.¹⁶⁹

C. Growing Importance of Legislation as a Source of Law

A large part of the reason for the growing acceptance of legislative history lies in the greater volume, broader scope, and increased importance of legislation itself at the turn of the twentieth century.¹⁷⁰ In contrast to the tiny legislative output that characterized the first years of the Republic,¹⁷¹ the later years of the nineteenth-century saw

165. *Id.* at 29-46.

166. Max Radin, *Sources of Law—New and Old*, 1 SO. CALIF. L. REV. 411, 416 (1928) (quoted in JOHNSON, *supra* note 113, at 54).

167. Radin, *supra* note 166, at 417-418. See also JOHNSON, *supra* note 113, at 65.

168. JOHNSON, *supra* note 113, at 79.

169. *Id.* at 81.

170. ESKRIDGE, JR., *supra* note 16, at 209.

171. See Frankfurter, *supra* note 23, at 527.

the beginning of an outpouring of legislation that served in many ways to displace the body of judge-made law.¹⁷² Willard Hurst noted that for the first three quarters of the century, “[t]he bulk of the statute books consisted of highly particularized measures; statutes of broad policy or general reach were relatively few and reflected little bold programming or implementation.¹⁷³ During the last decades of the century, legislation to protect workers from the hazards of their employment, regulation of commerce and public utilities, and various forms of social legislation served to remove large areas of law from common law coverage both in the United States and in England.¹⁷⁴ “[B]y the early twentieth century statute law had increased in reach and density to become the central element of law, showing sustained lines of policy as sturdy as judicial precedent.”¹⁷⁵

The growth in legislative activity and the altered nature of the legislative product had immediate and dramatic effects on the federal courts. In 1947, Justice Frankfurter noted that while “as late as 1875 more than 40% of the controversies before the [Supreme] Court were common-law litigation, fifty years later only 5%, while today cases

172. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982). (“In [the last fifty to eighty years] we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.”)

173. HURST, *supra* note 102, at 10. Hurst points out that in Wisconsin, “each year a pencil-thin volume of ‘general’ laws stood dwarfed alongside a two-to four-inch thick volume of ‘private and local’ laws.” *Id.* For an argument that legislation was an important source of nineteenth century law throughout the century, at least in the states, see POPKIN, *supra* note 76, at 60-61.

174. For explanations of the increased legislative activity in the United States, see, e.g., JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 36 (1977) (“From the 1880’s, but most markedly from the take-off decade of 1905-1915, the regulatory component of statute law became much more prominent and added considerably to the volume of legislation, a shift of emphasis that brought a new type of statute law concerning organized relationships.”); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 63 (1977) (“The legislatures, stirred by populist discontents, experimented with social legislation—regulating the hours and conditions of employment, restricting the exploitation of women and children, and so on.”). See generally MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933* (1990).

Civil law systems were also affected. See Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 667 (1984) (“[I]n the first part of the twentieth century, mainly in response to economic crises, a second wave of modern legislation appeared. . . . The state started to attend systematically to the elementary needs of its disadvantaged citizens. Each country laid down the main lines of its legal treatment of industrial relations. The administrative apparatus of the modern state began to take on its present contours.”).

175. HURST, *supra* note 102, at 42.

not resting on statutes are reduced almost to zero.”¹⁷⁶ As the courts dealt more and more with statutory issues, the conflict between courts and the legislature over the inroads made in the common law by legislation intensified. In 1908, Roscoe Pound observed that the courts of his era were impeding new social legislation both through narrow constitutional interpretation and through a “narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language.”¹⁷⁷ As put by Calabresi: “The slow, unsystematic, and organic quality of common law change made it clearly unsuitable to many legal demands of the welfare state. . . . [S]tarting with the Progressive Era . . . we have become a nation governed by written laws.”¹⁷⁸ Eventually, as Hurst pointed out, judicial doctrine and techniques for dealing with legislation changed, to “show a markedly different temper” from nineteenth century approaches. Among the changes was the courts’ willingness to consider legislative history in the process of statutory interpretation.¹⁷⁹

V. THE ROLE OF PRINTING AND DISTRIBUTION OF CONGRESSIONAL PUBLICATIONS

Changes in the Supreme Court’s attitude toward the usefulness of congressional committee reports after *Holy Trinity*, the courts’ increasing general openness to new sources of authority, and the growing amounts both of legislation being enacted by Congress and litiga-

176. Frankfurter, *supra* note 23, at 527. The workloads of courts in other jurisdictions also changed. See Jackson, *supra* note 4, 34 A.B.A.J. at 538; 8 F.R.D. at 122, quoting Lord MacMillan: “There will soon be little left of the common law either in England or in Scotland The work of our courts is more and more concerned with the interpretation of almost unintelligible legislation.”

177. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). See also Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408 (1989) (“courts often treated regulatory statutes as foreign substances.”) “Especially in older decisions one senses that sometimes judges, conscious and proud of their leading role in the nineteenth century as makers of common law on a grand scale, invoked such rules of construction because they regarded the growth of statute law as an intrusion on their importance and their superior professional skill in building policy.” HURST, *supra* note 102, at 64 (footnote omitted). “Statutes were no longer part of the same fabric as the common law but were antagonistic to it. Derived from different sources, they comprised an alien body of law.” Blatt, *supra* note 17, at 818 (noting increased use of maxim on statutes in derogation of the common law).

178. CALABRESI, *supra* note 172, at 5.

179. HURST, *supra* note 102, at 42. See also ESKRIDGE, JR., *supra* note 16, at 209 (“Without the common law to guide interpretation in such statutes, legislative history emerged as another useful context for interpretation.”).

tion involving its interpretation all help to explain the more frequent citations to legislative history in appellate briefs and judicial opinions in the first decades of the twentieth century. Yet, regardless of their probative value for interpretation, extra-legal sources of authority could not be cited with regularity unless the materials were known to brief and opinion writers, and available to them.

Several observers have noted that the Supreme Court's failure to make significant use of legislative history in the nineteenth century was in part a result of the fact that Congress generated little material that the Court could have consulted.¹⁸⁰ Judge Kozinski has pointed out that "One given the thankless task of interpreting most statutes passed before the 1940s finds precious little legislative history to use for guidance: Committee reports are cursory or nonexistent, floor statements are unilluminating and there is hardly any indication whether there even *were* hearings, much less a list of who testified or a transcript of what they said."¹⁸¹ Popkin mentions improvements in the committee structures of Congress as a factor in the generation of more legislative information. "[O]nce the legislature began to operate primarily through committees in the later part of the nineteenth century, courts appropriately turned to congressional committee reports to learn about the public history of the statute."¹⁸² By 1885, committees played so dominant a role in the legislative process that Woodrow Wilson could write that there was no better way to describe "our form of government in a single phrase than by calling it government by the chairmen of the Standing Committees of Congress."¹⁸³

But, even as the committee system matured and Congress began to generate materials explaining the reasoning behind federal legislation, to be useful for statutory interpretation the materials still had to be known and available to attorneys and judges. Until the late nineteenth century, however, congressional materials and other govern-

180. See, e.g., Noah, *supra* note 28, at 261 ("During most of the nineteenth century, the Supreme Court resisted using legislative histories, though the relative scarcity of federal legislation at the time offered few occasions for consulting such materials for statutory interpretation even if otherwise available."); see also *supra* text accompanying notes 66-70, 89-90.

181. Kozinski, *supra* note 28, at 810 (emphasis in original) (citing Civil Rights Act of 1871 as an exception).

182. POPKIN, *supra* note 76, at 123. See also HURST, *supra* note 102, at 10. Zeppos cites the small staffs available to Congress and fewer committees as reasons for the lack of more legislative history in the late nineteenth century. Zeppos, *supra* note 51, at 1105.

183. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 82 (Johns Hopkins Univ. Press, 1981) (1885).

ment documents were not widely available to lawyers or to other researchers.

A. Nineteenth Century Printing and Distribution Systems

At the turn of the twentieth century, opinions differed regarding the effectiveness of the government's programs for publishing and distributing Congressional and other government information. A 1901 bicentennial history of American law by the Yale law faculty noted the "presence in the United States, throughout the last century of a great and steadily accumulating store of public records, stating the law from day to day as it was actually existing and actually enforced. . .," and concluded that the government's publication system gave "the student of American political institutions, or of American history at large, an immense advantage over those engaged in similar researches in other lands. It is accessible to all."¹⁸⁴ Other students of the first century of government printing were more critical. In 1896, William F. Willoughby detailed the faults of the decentralized system for distributing federal documents, which largely depended on copies distributed through members of Congress. Willoughby found that "millions of copies of reports, many of them of great value and unobtainable through the regular channels, had accumulated in the Capitol building."¹⁸⁵ Later, the director of the New York State Library found that "[n]o comparable mass of printing of equal importance ever has been less available for consideration or purposes of scholarship than the documents of our government for [its] first hundred years."¹⁸⁶

At least in its first years, Congress was not much concerned with developing long-term or stable systems for the printing and distribution of federal government information.¹⁸⁷ The first law calling for distribution of public documents was not enacted until 1813.¹⁸⁸ Prior to the 1813 act, Congressional reports and other materials were usually printed in small official runs with distribution limited to govern-

184. Simeon E. Baldwin, *Introduction to TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901*, at 1, 7 (1901).

185. Willoughby, *supra* note 64, at 161.

186. James Ingersoll Wyer, *Government Documents-1876-1926*, 51 LIBR. J. 891, 891 (1927).

187. See LAURENCE F. SCHMECKEBIER, *THE GOVERNMENT PRINTING OFFICE* 3 (1925) (even after the government moved to Washington, DC in 1801, "there was a decided diversity of opinion in Congress as to the propriety of printing public documents at all").

188. Act of Dec. 27, 1813, 3 Stat. 140 (1814). See PETER HERNON ET AL., *GPO'S DEPOSITORY PROGRAM: A DESCRIPTIVE ANALYSIS* 4 (1985).

ment agencies and officials.¹⁸⁹ By 1813, Congress had become more aware of “the growing importance and permanent value of its . . . transactions,”¹⁹⁰ and acted to provide for distribution to the states of congressional reports and documents, as well as the previously distributed copies of laws and the journals of each house,¹⁹¹ and added 200 copies to the statutorily-defined “usual number” of copies printed in order to include distribution to non-governmental institutions such as universities, colleges, and historical societies in each state.¹⁹² In 1817, Congress mandated common size and other standards for publishing the reports and documents issued during each session,¹⁹³ which made it easier to number, organize, and bind the documents into sets that could be preserved, and provided the basis for the Congressional Series or Serial Set, which begins with the 15th Congress. For the pre-1817 period, later observers noted that even in the capitol no complete collections were known to exist.¹⁹⁴

The Serial Set included those few written committee reports that were issued, as well as other congressional publications and documents originating in the executive branch. However, it did not include bills and resolutions, slip laws, bound compilations of laws, or published records of Congressional debates.¹⁹⁵

The distribution system established in 1813 remained in place until a series of legislative actions in 1857-1859 expanded the range of institutions eligible for distributed publications and gave the Secretary of the Interior responsibility for distribution of documents to the

189. Sarah Jordan Miller, *The Depository Library System: A History of the Distribution of Federal Government Publications to Libraries of the United States from the Early Years of the Nation to 1895*, at 84 (1980) (unpublished Ph.D dissertation, Columbia University) (available from University Microfilms). See also Wyer, *supra* note 186, at 891 (“For the first thirty or forty years most of [the government’s] printing was tossed off unbound, often without title-pages, of varying sizes, often with no numbers, dates, designations, or descriptions.”).

190. A. W. Greely, *Public Documents of the First Fourteen Congresses, 1789-1817*, S. Doc. No. 428 (56th Cong.) 6 (1900).

191. 3 Stat. at 141-142.

192. 3 Stat. at 141. Miller, *supra* note 189, at 209; HERNON ET AL., *supra* note 188, at 4.

193. Act of Mar. 3, 1817, 3 Stat. 400. See Miller, *supra* note 189, at 198.

194. In 1900, a compiler of early Congressional documents stated that “there exists neither a complete collection nor detailed list of the documents of the First to the Fourteenth Congresses . . .” Greely, *supra* note 190, at 5. See also Miller, *supra* note 189, at 130 (“Near the end of the nineteenth century, the Library [of Congress] . . . didn’t have a copy of every document issued since the founding of the government.”).

195. Miller, *supra* note 189, at 246. Though produced by commercial publishers for much of the nineteenth century, publications containing the debates were subsidized by the government and qualified as government publications. *Id.* at 246-47.

public, including libraries.¹⁹⁶ For many libraries, systematic acquisition of congressional publications began only after the 1857-1859 enactments.¹⁹⁷ Separately, an 1857 appropriations act provided for distribution of certain retrospective publications and compilations including the *Register of Debates*, the *Annals of Congress*, and the *Congressional Globe* to Congressionally designated libraries.¹⁹⁸

Yet, congressional committee reports, debates, and other documents that could have been used as legislative history were not widely available in libraries or other institutions.¹⁹⁹ It was particularly difficult for libraries to acquire copies of older publications issued before they became depositories, despite Interior Department programs to distribute duplicate volumes to fill gaps in the collections of libraries designated as depositories after 1857,²⁰⁰ and to assist libraries in exchanging duplicate or discarded volumes to complete their collections.²⁰¹ Many existing nineteenth-century collections of government publications were developed privately, often on the basis of publications originally distributed in Washington to members of Congress and others in government office.²⁰² Eventually, the holdings of some of these private collections became parts of collections in research libraries. Collections of documents at the law school libraries established at universities in the latter half of the century benefitted from gifts or from duplicate volumes and discards provided by their parent institutions' main collections.²⁰³

196. Wyer, *supra* note 186, at 891-92. The new system was established by an 1857 joint resolution, Act of Jan. 28, 1857, 11 Stat. 253; an 1858 joint resolution, Act of Mar. 20, 1858, 11 Stat. 368; and an 1859 act, Act of Feb. 5, 1859, ch. 22, sec. 5, 11 Stat. 379, 380, which ensured that designation of the libraries would be done by members of the House and Senate rather than the secretary. See also Miller, *supra* note 189, at 392-394; HERNON ET AL., *supra* note 188, at 4-5.

197. Miller, *supra* note 189, at 424.

198. Act of Mar. 3, 1857, ch. 110, 11 Stat. 240, 241. See Miller, *supra* note 189, at 343.

199. Nor were they indexed well-enough to allow a researcher to determine whether or not a relevant report or other document existed. For a description of contemporary indexes to congressional publications in the nineteenth century, see LAWRENCE F. SCHMECKEBIER & ROY B. EASTIN, *GOVERNMENT PUBLICATIONS AND THEIR USE* 31-32 (2d rev. ed. 1969).

200. Miller, *supra* note 189, at 426-432.

201. Sarah Jordan Miller, *Government Publications in the Private Collections of Nineteenth Century America: A Century Long Source for Federal Document Holdings in Libraries*, 13 *GOV'T PUB. REV.* 355, 365 (1986).

202. See *id.* at 357-359, 363-365.

203. *Id.* at 361. For a history of the development of academic law libraries in the nineteenth century, most of which occurred in the latter part of the century, see Christine A. Brock, *Law Libraries and Law Librarians: A Revisionist History; or More than You ever Wanted to Know*, 67 *LAW LIBR. J.* 325, 341-345 (1974). Brock found that most law library development in the 1800s was in privately-funded bar, or "social" law libraries. *Id.* at 332. Her article makes no note of law libraries collecting government publications.

B. Late Nineteenth-Century Legislative Actions

In the 1870s, Congress responded to some criticisms of its publication practices by establishing official publication of Congressional debates in the *Congressional Record* in 1873, and with the publication of the first attempt at codifying U.S. statutory law (the *Revised Statutes of 1873*).²⁰⁴ In 1885, the first attempt at a comprehensive listing and index of federal government publications was published, covering the years 1774-1881.²⁰⁵ Yet, throughout the last quarter of the nineteenth century, the depository system was regularly criticized by librarians and others concerned about the shortcomings of the distribution mechanisms and the lack of indexing and bibliographic control over government publications. Despite improvements in the programs for distributing documents through the depository system, members of Congress and departments in the executive branch continued to distribute copies of publications unsystematically and inefficiently (at least in the eyes of the critics).²⁰⁶

In 1895, after years of complaint and study, and recommendations by a special joint committee on printing and distribution, Congress passed the Printing Act of 1895,²⁰⁷ which was later called the “only comprehensive, carefully studied act” ever passed on the subject of government printing.²⁰⁸

The 1895 Act moved the office of the superintendent of documents (and responsibility for the depository program) from the Department of the Interior to the Government Printing Office²⁰⁹ and again expanded the types of libraries that could become depositories.²¹⁰ It also contained several key provisions aimed at improving the availability and usability of Congressional and other government publications: 1) it increased the number of titles to be received by depository libraries and included the *Statutes at Large* and the *Congressional Record* as depository publications,²¹¹ and provided for distribution of the *Congressional Record* and several other titles to non-

204. POPKIN, *supra* note 76, at 123.

205. See BEN PERLEY POORE, A DESCRIPTIVE CATALOGUE OF THE GOVERNMENT PUBLICATIONS OF THE UNITED STATES, SEPTEMBER 5, 1774-MARCH 4, 1881 (1885). For a description of the contents and shortcomings of *Poore's Catalogue*, see SCHMECKEBIER & EASTIN, *supra* note 199, at 6-11.

206. See generally Willoughby, *supra* note 64, at 156-161.

207. Act of Jan. 12, 1895, 28 Stat. 601.

208. Wyer, *supra* note 186, at 893.

209. Sec. 64, 128 Stat. at 611.

210. Sec. 98, 28 Stat. at 624.

211. Sec. 73, 28 Stat. at 615, 618.

depository libraries;²¹² 2) it simplified the organization of materials in the Serial Set;²¹³ and 3) it called for the Superintendent of Documents to begin compiling lists and indexes of both executive and congressional materials, and a comprehensive “monthly catalogue” of new publications.²¹⁴

The first issue of the *Catalogue of Publications Issued by the Government of the United States* (commonly known as the *Monthly Catalog*) was dated January 1895, and has continued with several variations in title to the present.²¹⁵ A separate *Document Index*, covering only congressional publications, began publication with the second session of the 54th Congress in 1895, and was normally issued after each session.²¹⁶ The *Document Catalog*, normally published biennially after each Congress, superseded the *Monthly Catalog* and the *Document Index*,²¹⁷ and served to continue the role played by *Poore's Catalogue* for the years 1774-1881.²¹⁸ In addition, several publications issued in the early 1900s attempted to list and index pre-1895 Congressional documents.²¹⁹

In the end, although the 1895 Act did not solve all the problems of the distribution system,²²⁰ it did improve and broaden distribution of federal publications, and provided the basis for further expansion

212. Sec. 73, 28 Stat. at 617-618.

213. Sec. 81, 28 Stat. at 621-622.

214. Sec. 62, 28 Stat. at 610-611; sec. 69 at 612.

215. For the early history of the *Monthly Catalog*, see SCHMECKEBIER & EASTIN, *supra* note 199, at 17-20. The current title is *Monthly Catalog of United States Government Publications*.

216. See SCHMECKEBIER & EASTIN, *supra* note 199, at 20-22. The *Document Index* was discontinued after the 72d Congress in 1933.

217. See SCHMECKEBIER & EASTIN, *supra* note 199, at 22-26. The *Document Catalog* ceased publication in 1947, with the *Monthly Catalog* assuming its role, as well as that of the *Document Index*.

218. The gap between *Poore's Catalogue* and the first *Document Catalog* was filled in 1905 with the publication of JOHN G. AMES, COMPREHENSIVE INDEX TO THE PUBLICATIONS OF THE UNITED STATES GOVERNMENT, 1881-1893 (1905). An earlier (1894) version of Ames' index covered the years 1889-1893.

219. A. W. Greely's *Public Documents of the First Fourteen Congresses, 1789-1817* was published in 1900, see Greely, *supra* note 190, with a later supplement issued in 1903. In 1902, the Superintendent of Documents published *Tables of and Annotated Index to the Congressional Series of United States Public Documents*, which listed and selectively indexed congressional reports and documents from 1817-1893. In 1909, the Superintendent issued volume 1 of a *Checklist of United States Public Documents, 1789-1909*. (A second volume indexing the publications was never published.)

220. For continuing criticisms of the practices of free distribution of publications through the Congress and executive agencies, see EDITH E. CLARKE, GUIDE TO THE USE OF UNITED STATES GOVERNMENT PUBLICATIONS 61-62 (1919); Wyer, *supra* note 186, at 892-893; ANNE M. BOYD, UNITED STATES GOVERNMENT PUBLICATIONS 50-51 (2d rev. ed. 1941).

of the depository program and protections for depository libraries in later legislation in the early twentieth century.²²¹ The improvements fostered by the 1895 Act and later legislation, as well as by initiatives taken by the Superintendent of Documents and the Government Printing Office in the first part of the twentieth century, effectively made government information more available generally and Congressional documents more readily available for use in statutory interpretation than they had been in the nineteenth century. While the quality and comprehensiveness of the new indexes could be criticized, and the *Document Catalog* in particular was slow in appearing,²²² the new indexing system greatly improved the researcher's chances for determining whether or not a committee report or other document relevant to the legislative history of a recent federal statute existed.

VI. CONCLUSION

In the century and more since enactment of the 1895 Printing Act, the means for publication and distribution of government information in the United States have changed dramatically, initially through greater availability of print publications through expansion of the depository and sales programs,²²³ and later through commercial publication of heavily used documents in retrospective and ongoing microform collections.²²⁴ As U.S. courts turned more and more to legislative history for guidance in interpreting federal statutes, the most-used documents became more accessible in publications aimed at lawyers,²²⁵ and new tools for locating them were developed by law librarians, as well as by commercial publishers.²²⁶ In the last quarter

221. HERNON ET AL., *supra* note 188, at 8-9; SCHMECKEBIER, *supra* note 187, at 32-33.

222. See SCHMECKEBIER & EASTIN, *supra* note 199, at 26.

223. Law libraries became eligible for depository status in 1978. Act of April 17, 1978, Pub.L. 95-261, sec. 1, 92 Stat. 199, 199. There are presently over 1350 federal depository libraries. See http://www.access.gpo.gov/su_docs/ (last visited June 30, 2002).

224. For contemporary as well as historical legislative history research, it is hard to over estimate the importance of the publishing programs of the Congressional Information Service (now a part of Lexis-Nexis). Since 1970, CIS has comprehensively published Congressional documents (reports, hearings, and prints) in microform. The accompanying indexes include legislative history tables for each law enacted; since 1984, legislative histories have been covered in a separate annual volume, which lists and provides abstracts for each document relevant to a new public law. Since 1997, CIS has offered the documents and the indexes electronically.

225. Since 1941, West's *United States Code Congressional and Administrative News*, offered as a supplement to the *United States Code Annotated*, has included the texts of selected congressional committee reports for new enactments, greatly increasing the availability of the reports in law offices and smaller law libraries.

226. In a presentation at the 1946 annual meeting of the American Association of Law Libraries, Elizabeth Finley, librarian at Covington & Burling in Washington, D.C. discussed the

of the twentieth century, commercial publishers and the government made large databases of congressional materials available through subscription services or via the world-wide-web.²²⁷

Fifty years ago, Justice Jackson was concerned with what he saw as the practical effects on practitioners of the court's growing acceptance of outside sources to gain insight into legislative intent. He lamented the inability of "small town lawyers" to gain access to the legislative documents more readily available in cities.

Today, an actual small town lawyer in Greenville, North Carolina still might not have access to a collection of legislative history documents in her office or in the Greenville public library, but she can obtain and examine most of them fairly easily at a local university library documents department, through the services of one of the law school libraries in the state, or electronically. Perhaps, as Judge Wald claimed already in 1983, well before the Internet's impacts on legal

"craze for legislative histories [that] started with the New Deal," as well as growing practice among Washington law librarians to compile legislative histories for important laws. Elizabeth Finley, *Legislative Histories*, 39 LAW LIBR. J. 161, 164 (1946). In a comment following Finley's talk, the Librarian of the U.S. Supreme Court noted that his library had "complete histories of all of the Revenue Acts, and a good number of other major acts passed in the last five or six years." *Id.* at 165 (remarks of Vincent E. Fiordalisi). In his 1942 legal research text, Hicks noted the recent development of published legislative histories, such as J. S. SEIDMAN, *LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1938-1861* (1938), which provided the text of the acts and summaries of congressional documents. HICKS, *supra* note 161, at 81-82. More recent examples of published legislative histories include a number of compilations by Bernard D. Reams and others. *See, e.g.*, BERNARD D. REAMS, JR. & CHARLES R. HAWORTH, comps., *CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY, 1787-1977* (1978-1979).

As Kenneth Starr wrote in 1987, "in the current era legislative history truly abounds, with library specialists compiling vast tomes designed to aid lawyers and judges in divining the meaning of statutory law." Starr, *supra* note 13, at 371. The Law Librarians' Society of Washington D.C. continues to publish a union list of compiled legislative histories held in D.C. area libraries. *See* LAW LIBRARIANS SOCIETY OF WASHINGTON D.C., *UNION LIST OF LEGISLATIVE HISTORIES* (7th ed. 2000). *See also* NANCY P. JOHNSON, *SOURCES OF COMPILED LEGISLATIVE HISTORIES: A BIBLIOGRAPHY OF GOVERNMENT DOCUMENTS, PERIODICAL ARTICLES, AND BOOKS* (1979).

227. *See* Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: the Imperative of Digital Information*, 69 WASH. L. REV. 9, 29 (1994), on the effects of online legal research systems on the availability of legislative history information ("Materials that were once held in the sub-basements of only the best law libraries are now as easily retrieved on LEXIS and Westlaw as a Supreme Court decision."). Even such early nineteenth century publications as the *Register of Debates*, the *Congressional Globe*, and the *Annals of Congress* are now available electronically along with other nineteenth century Congressional materials through the Library of Congress's American Memory Project. *See* A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774-1873, at <http://memory.loc.gov/ammem/amlaw/lawhome.html> (last visited July 4, 2002).

research, “[t]echnology has made an anachronism of Justice Jackson’s lament.”²²⁸

However, one should not too quickly assume that greater availability of the documents guarantees all parties meaningful access to the information they hold.²²⁹ Jackson was concerned not only with having necessary documents in hand, but with the increased demands and costs that reliance on increasingly voluminous legislative history places on judges and particularly on attorneys. As he told the American Law Institute in 1948: “[A] formal Act, read three times and voted on by Congress and approved by the President is no longer a safe basis on which a lawyer may advise a client, or a lower Court decide a case. . . . [T]he lawyer must consult all of the committee reports on the bill, and on all its antecedents and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court.”²³⁰ As Jackson knew, the availability problem involves more than the difficulties involved in laying hands on documents in a library, or identifying them in an online database. It includes the problems of effectively using large documents that are poorly indexed internally and those of knowing what information to look for.

William Eskridge and others have noted that, if judges find legislative history relevant, the incentives increase for all parties to do more than simply “read the statute.”²³¹ As a result, “[t]he costs of legislative history are pervasive and potentially large. . . .”²³² The costs are large because legislative history research is difficult. Adrian Vermeule has argued that legislative history is a unique research source, “distinctively voluminous and heterogeneous in comparison to other interpretive sources,”²³³ providing examples of compiled legislative histories running to nearly 11,000 pages²³⁴ and noting the difficulties, even for judges with large staffs of clerks and staff attorneys,

228. Wald, *supra* note 11, at 200.

229. See Vermeule, *Legislative History*, *supra* note 30, at 1871, n. 139 (Wald’s argument “seems too dramatic”).

230. Jackson, *supra* note 4, 34 A.B.A.J. at 538, 8 F.R.D. at 125.

231. Eskridge, Jr., *Supreme Court*, *supra* note 28, at 1321. Eskridge briefly examines the possible costs and benefits of instating an exclusionary rule in U.S. courts. *Id.* at 1321-1323.

232. *Id.* at 1321, n. 100.

233. Vermeule, *Legislative History*, *supra* note 30, at 1867. Vermeule focuses primarily on the risks of judicial error created by the distinctive features of legislative history, but recognizes that questions involving the risk of error and the costs imposed by the inaccessibility of legislative history materials are “intertwined in practice.” *Id.* at 1871.

234. Vermeule, *Legislative History*, *supra* note 30, at 1867-1868.

involved in obtaining information relevant to points at issue.²³⁵ The heterogeneity of the materials of legislative history research contributes to the problems of finding relevant information because the record for any statute “consist[s] of materials offered on different occasions, for different purposes, and enjoying different degrees of authority; actors in the judicial process may often simply lack the comprehensive background knowledge of the legislative process necessary to assess the significance and weight of the sources.”²³⁶ Is it then surprising for critics of legislative history to view its use at times as something akin to picking one’s friends out of a crowd?²³⁷

Comparisons with other systems’ approaches to the uses of legislative history in statutory interpretation can be only suggestive, but they do highlight the unusual amount of undifferentiated and dispersed material potentially available in the U.S. setting. Both in England, where courts have historically been limited in their uses of extrinsic sources in interpretation, and in civil law jurisdictions, where courts are allowed to consult legislative information when it is available, the materials needed are fewer and more focused than in the United States. Other legislatures do not have “the elaborate tradition of structured committee reporting”²³⁸ that characterizes the U.S. Congress. In parliamentary systems, the amount of material generated by the legislative process is smaller, the materials may be of superior quality, and the material relevant for interpretation may be more readily packaged for use by attorneys and judges. As a result, the problems of availability and accessibility of the materials may be less troubling for judges and lawyers in those countries than for their counterparts here.

The problems of understanding and weighing the likely authority of materials in the legislative record are unlikely to be solved with a technological fix. Indeed, as Vermeule has pointed out “cheaper technology makes it easier not only to research legislative history but

235. *Id.* at 1870. For comments on the additional costs posed when courts rely on non-legislators’ contributions to the legislative history of a statute, *see* Giles, *supra* note 30, at 377-379.

236. Vermeule, *Legislative History*, *supra* note 30, at 1873. Eskridge points out the need for parties in litigation and for attorneys advising clients “to attain some level of competence in the ever-expanding legislative history.” Eskridge, Jr., *supra* note 28, at 1321. Richard Posner has called legislative history research a “formidable subspecialty of library science,” suggesting that “it would not demean the law schools to offer formal instruction in a highly relevant aspect of it.” Posner, *supra* note 60, at 804-805.

237. *See* Wald, *supra* note 11, at 214 (comment of Judge Harold Leventhal).

238. Tiefer, *supra* note 30, at 275, n. 369.

also to generate it.”²³⁹ In the twentieth century, successful legislative history research involved more than the establishment of more government documents depositories, and it now requires more than access to larger electronic databases of Congressional materials. Newer information delivery systems may have made it easier to locate relevant documents, but using them effectively remains difficult and costly because of the large number of possibly relevant documents, because they are poorly indexed internally, and because of the difficulties of determining in advance which parts of the history may be deemed relevant to questions of interpretation.

From this perspective, the greater availability of legislative information only increases the difficulties of retrieving information pertinent to questions of legislative history. The practical aspects of information retrieval that Justice Jackson identified in 1948 still create meaningful problems in the twenty-first century for judges deciding cases turning on statutory interpretation and for attorneys advising their clients.

239. Vermeule, *supra* note 53, at 135. The federal government’s increased reliance on electronic sources for public information also creates barriers for some information seekers and makes access dependent on reliable and available technologies. *See* Peterson et al., *supra* note 79, at 53.