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Legislative Process and Its Judicial Renderings: A Study in Contrast

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I. INTRODUCTION

The object of this Article is to provide a description of the legislative process and, based upon this description, some observations about the interpretation of statutes. This undertaking is motivated by my recognition, after six years of serving as Counsel to the New York State Senate Democrats and ten years of teaching law, of how dissimilar actual legislative process is from the judicial renderings of it. This dissimilarity is of particular concern since courts are constitutionally charged with effectuating legislative intent[1] and offer their frequent descriptions of the legislative process in purporting to fulfill this obligation. Moreover, such descriptions often constitute a law student's entire education on legislative process.

These descriptions include both implicit and explicit references to the legislative process. The implicit references are statements of interpretative principles which presume for their legitimacy some consistency between their direction and the general manner in which a legislative body operates. Random examples of these are expressions such as "remedial statutes are to be read broadly," "*expressio unius est exclusion alterius*," and "all parts of a statute are to be construed together."[2] The explicit references are notations of actual legislative communication which presume for their legitimacy some reliable relationship between these communications and legislative intent about a

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1. U.S. CONST. art. I; N.Y. CONST. art. III.

2. *See generally* N.Y. STATUTES §§ 1-424 (McKinney 1971 & Supp. 1987). This volume contains an extensive collection of court decisions interpreting statutes. New York has no statute concerning statutory interpretation.

particular statute. Examples of these are references to reports, debates, amendments, and postenactment statements.

The reasons for this dissimilarity are not easy to divine, although several possibilities come to mind. First, it is evident that there has been and remains a great reluctance on the part of the judiciary to accommodate themselves to the less dominant role necessitated by the significant growth of statutory lawmaking. This breeds a defensive disrespect for legislators and the process by which they make the law. In 1908, Roscoe Pound wrote, "[I]t is fashionable to point out the deficiencies of legislation and to declare that there are things that legislators cannot do try how they will. It is fashionable to preach the superiority of judge-made law."[3] That this remains fashionable is well illustrated by the comments of the noted jurist, Bernard S. Meyer, of the New York Court of Appeals: "The deference courts give to legislative action or inaction is predicated upon assumptions many of which are little more than fiction: that legislatures act in the interest of the majority, that most legislators who vote upon a given bill have studied it carefully and are knowledgeable concerning its provisions . . . ."[4]

The attitude is both perpetuated and informed by the law schools through their relentless concentration on the judicial process and its products and their haphazard treatment at best of the legislative process and its products. Dean Guido Calabresi of the Yale Law School provided stark evidence of this when he recently lectured that "the heroes of American Law Schools were and *are* those common law judges—Lemuel Shaw and Chancellor Kent" who, in his view, aggressively adopted the common law to the needs of their time.[5] While no one can doubt the brilliance of either of these two common law judges, this apotheosis of two men who reigned prior to what Calabresi has characterized, somewhat lamentfully, as the "age of statutes"[6] is quaint, but of questionable utility.

Secondly, this same law school myopia assures that the training of judges and lawyers is void of perspective or information which

3. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383-84 (1908).

4. Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 677-78 (1983).

5. Calabresi, *Too Much, Too Little, or Both: Some Thoughts on Law Making by American Courts*, in CAMBRIDGE LECTURES 1983, at 1, 4 (E. Baldwin ed. 1984).

6. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). For an excellent criticism of Calabresi, see Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534 (1982).

would permit, much less encourage, an educated approach to the difficult duty of finding legislative intent. One obvious example of this lack of information is provided by Judge Harold Leventhal, who wrote: "[W]hether legislative purposes are to be obtained from committee reports, or are set forth in a separate section of the text of the law, is largely a matter of drafting style."[7] A simple review of the typical law school curriculum and the cases and materials through which it is presented supports this point. Most law schools do not even offer courses in legislative process, and where they do, they are frequently taught by an adjunct professor.

Moreover, traditional law school courses do not, and, basically, cannot fulfill this pedagogical task. Judge Richard Posner makes this point clearly when he states:

> Nor is it an adequate reply . . . that every good course in a statutory field . . . will impart to the students, in proper law school inductive fashion, a feel for the recurrent issues and problems involving legislation in general. Most teachers of statutory fields believe they have only enough time to introduce the students to the field . . . . They do not feel they have enough time to explore with the class the process by which the legislation is enacted, the political and economic forces that shaped it, or even the methods the courts use to interpret it, as distinct from the particular interpretations that the courts have made.[8]

To this I would add that even if the time constraints were otherwise, considerable faculty effort would be necessary to adequately include the missing material, since faculty are the products of this same case-focused system. The law schools' posture toward statutory lawmaking is also unfortunate because it represents a lost opportunity for the schools to improve the legislative process by its study and the training of many of its future participants, including judges.

Many commentators have raised similar criticisms, including most recently such stalwarts of the legal community as Judges Posner and Abner Mikva.[9] This Article seeks to add to such criticism, using legislative examples drawn from my experience to validate many of these critical perspectives. Additionally, it is the intent of this Article to add to the body of information necessary for the education of the legal community on the legislative process and for the reformulation of some theories of statutory interpretation. While the Article's per-

7. Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 750 (D.D.C. 1971).

8. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 802 (1983).

9. Posner, *supra* note 8; Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987).

spective is based on my experience with the New York Legislature, its observations and conclusions have broader application in light of the similar dynamics among all United States legislative bodies.

The legislative process described below contains some references to the personal habits and traits of legislators. In my view the negative attitudes and misconceptions about the legislative process are partially a consequence of academic and judicial reservations about legislators themselves as exemplified earlier in the quote of Judge Meyer.[10] Therefore, this issue will also be addressed in the following description of the legislative process.

II. THE LEGISLATIVE PROCESS

Studying the legislative process requires a focus on two distinct yet inextricably related components. Legislators form the initial component. Who they are and the manner in which they act significantly affects the nature and quality of legislation that is enacted, as does the pressures to which they commonly respond. The actual processes by which legislators enact laws is the second component of the legislative process.

In the following Sections of this Article, I will describe these two components as I have come to understand them from my years as counsel to the New York Senate Democrats. Based on these descriptions, I will make several general conclusions. I present these conclusions in Section II.C below. They then form the basis for my evaluation in Section III of the validity of judicial approaches and practices in the interpretation of statutes.

A. Legislators

Legislators are for the most part what Hart and Sacks asked the courts to assume, "reasonable persons pursuing reasonable purposes reasonably."[11] To state this, however, is only to describe their form. Their legislative particulars require more detail. Except in badly divided districts and regardless of party, the average legislator basically reflects the constituency from which he or she is elected. While the legislator may not support every momentary view of that constituency, he or she will reflect its dominant attitudes and statuses.

10. *See supra* text accompanying note 4.

11. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1415 (tent. ed. 1958).

Measured against their constituencies, legislators are also, as one commentator described, "exceptional people."[12] They possess well above the average abilities and motivation. They are also simultaneously very aggressive and insecure, traits required for remaining in office. The more a legislator's constituency demands the legislative resolution of a problem, the more ferocious the legislator becomes about achieving a solution. On occasion, the idea of a solution is more important than the ideas in a solution,[13] but this is not the rule. Generally, legislators are concerned about the particulars of a piece of legislation and its foreseeable application.

Legislators generally believe that they are responsible for expressing in the legislature the dominant views of their constituents. Sometimes, however, on issues which touch most poignantly on a legislator's personal view of morality, legislators will vote against their districts. An example of this is the recent history of legislative support for the death penalty in New York.[14] On these occasions the legislators' perception of their responsibility to their constituencies may change.[15]

Voter-legislator imbalance on a popular issue such as the death penalty creates a need for deflection of the issue on which the pressures are based. In New York, on the death penalty, this takes the form of the proposed "life in jail without parole" penalty. This solution is illustrative of the Holmesian observation that the logic in a law

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12. J. BARBER, THE LAW MAKERS 217-33 (1965).

13. *See infra* text accompanying notes 20-21.

14. For the last several years, issue polls in New York demonstrated that between 80-85% of those of voting age supported the death penalty. Nevertheless, the death penalty passes the New York Assembly with far less support, and the two-thirds supermajority needed to override the continuously-exercised Governor's veto has never been achieved.

15. Consider the following exchange from a debate in the New York State Senate:

> Senator Solomon: . . . As late as Sunday night I was out in my district on a forum on crime and the overwhelming majority of constituents in my area are in favor of the death penalty. Now, I feel that as an elected representative, on an issue where such an overwhelming majority of the constituents are in favor of capital punishment, it is my moral obligation to vote to restore capital punishment in this state.
>
> Senator Burstein: . . . I just want to say to my colleague, Senator Solomon . . . that somebody once addressed himself to the particular problem that they are confronting. It was Edmund Burke. He said, "[T]heir [constituents'] wishes ought to have great weight with him, their opinions high respect. It is his duty to sacrifice his repose, his pleasures . . . and all ever and in all cases to prefer their interests to his own, but his unbiased opinion, his mature judgment, his enlightened conscience he ought not to sacrifice to you . . ." I vote no.

New York Senate Transcript, Mar. 14, 1978, at 1766, 1835.

is not the logic of a law.[16]

Legislators work hard and under inordinate pressures. Almost all must live away from home for extended periods each year. In New York, on average at least three days a week for six months is spent in the capitol, mostly in hotels or furnished apartments. The average New York State legislator's day away from home will consist of meeting with staff, lobbyists, constituents and colleagues. He or she will also attend legislative sessions, committee meetings, hearings and party conferences, and numerous events sponsored by lobbying groups.

At home, legislators are continuously barraged by requests for appearances and meetings by constituency groups, a great many of which they feel obliged to accept. Many of these meetings and appearances occur in the evenings or on weekends, reducing to a minimum available personal time. Many legislators in New York have told me that when they are at home during session time, they make appearances every evening and on each day of the weekend and that during the non-session time, they make appearances at least four nights a week and on both weekend days. These appearances are an extremely important part of the legislative function. They are essential to representative government, for it is in this way that the legislator educates and is educated by his constituents on legislative issues.

Additionally, in New York, many legislators are part time and their legislative work has to compete with the time required for their other vocation. As Professor Rosenthal and the commentators to whom he refers correctly note: "[F]ew people are able to cope with legislative service in a casual, leisurely way. As Smallwood describes things, the pressures are 'so chaotic and so unpredictable that plain hard physical stamina becomes of overriding importance' and life is 'a tiring, grueling, continuous depletion of personal energy reserves.' "[17]

B. Lawmaking

The legislative function is divided into two parts, constituency service and lawmaking. As discussed above, constituency service constitutes a significant part of every legislator's responsibility. Nevertheless, lawmaking remains for most their central focus, and of course, the central focus of this Article.

16. O. HOLMES, THE COMMON LAW 1 (1909).

17. A. ROSENTHAL, LEGISLATIVE LIFE 45 (1981) (citations omitted).

Ideas for the introduction of bills spring from many sources, including constituents, lobbyists, representatives of other governmental agencies, as well as from the legislator's own perception of district and state problems needing legislative response. The decision to propose legislation is related of course to the demand level, the legislator's own interest in and concern about the subject, and his or her own level of legislative industriousness. The more complicated a legislative solution appears to be, the fewer the number of members willing to undertake it.

In most cases, once the decision to introduce legislation has been made, the outline of a legislative response will be drafted. That response generally will be a joint effort of the legislator, legislative staff and, in many cases, interest groups which favor the measure. In New York, this legislative outline will then be forwarded to a bill drafter assigned by the New York State Bill Drafting Commission.[18]

The bill drafter is responsible for transforming the proposed solution into bill language, bill form, and to fit its provision within the existing body of statutory law. A draft bill is then produced and returned to the requesting legislator for review. The main purpose of this review is to make sure that the bill drafter has properly translated the legislator's ideas. Revisions, if needed, are then made and the bill is introduced. Bills that are introduced with the assistance of the Bill Drafting Commission are professionally drafted, with proper statutory format and proper referencing to other statutes.

Many bills, however, follow different paths to introduction. A member will sometimes introduce a bill provided by the executive or an outside group. On other occasions, depending on the significance of the problem to the particular legislator and the sophistication of the legislator's staff, the bill will be drafted by the legislator and his or her staff. In certain instances bills will also be drafted by the staff of the conference to which the legislator belongs. This latter category always includes the session's most controversial bills and also frequently involves bills on issues on which the conference staff has developed particular expertise.

It is my experience that in New York, the more complex and significant the bill, the less likely it is to be drafted by Commission bill drafters and the more likely it will be drafted by key legislative com-

18. The New York Legislative Bill Drafting Commission is established pursuant to N.Y. LEGIS. LAW § 24 (McKinney Supp. 1987). The Commissioners are appointed by the Speaker of the Assembly and the Temporary President of the Senate.

mittee staff members or the conference staff. These latter members of the legislative staff are usually among the most skilled of the legislative personnel, almost always lawyers, and are chosen for their reliability in translating ideas for legislation into the language of the bill. With these more significant bills and any other bill not drafted by the assigned bill drafter, the Bill Drafting Commission's staff assures proper bill format and proper references to other statutes.

New York legislative rules require that a sponsor's bill memorandum accompany the introduction of all bills. The memorandum must "contain a statement of the purposes and intent of the bill."[19] The purpose of these memoranda is principally one of notice and they are usually bare recitations of the bill's provisions with perhaps some reference to the sponsor's purpose. The New York State Senate does not require that these memoranda be revised as bills are amended, and frequently they are not. This situation can lead to confusion. Recently, for example, a student approached me with a copy of a published bill memorandum which indicated that a newly enacted statute on medical malpractice provided for hospital arbitration. As enacted, however, the statute did not contain any corresponding provisions for such arbitration. Of course, the bill had been amended but the memorandum had not. This failure to amend legislative memoranda to reflect amendments in the bill can be attributed to legislative efficiency, which assigns little value to anything other than the progress of the bill itself.

Once a bill has been introduced, it is referred to a committee where the vast majority of bills are gratefully allowed to die. For example, of the 9,624 bills introduced in the New York State Senate in 1986, only 1,852 bills passed the Senate, while only 265 bills were actually signed into law.[20] One reason for this disparity is that in New York, unlike some other states,[21] a member may introduce an unlimited number of bills. Consequently, legislators will introduce legislation in response to almost any demand from constituents, lobbyists or other interest groups. The introduction of legislation, thus, is frequently not a commitment to pursuing passage of a new law or

19. Rules of the New York State Senate VI(1) (copy on file at University of Pittsburgh Law Review).

20. These numbers are derived from the official statistics of the Journal Clerk of the Secretary for the New York Senate.

21. *See* A. ROSENTHAL, *supra* note 17, at 65-67.

even airing a proposal, but rather a tactic for reducing pressure from these groups.

Once a "serious" bill is referred to a committee, two overlapping processes begin, revision and majority building. The revision process in its most limited sense is the process by which a bill is reviewed by committee members, staff and conference staff to ensure that the legislative idea is properly expressed. This process continues even after a bill has been reported from the committee to the legislative calendar. Not infrequently, a bill will pass through several prints prior to the actual vote on it. A bill will also undergo revisions in the process of building a majority as provisions are changed to secure the number of votes needed for passage.

The process of building a majority in the New York State Legislature is relatively easy for most bills. In New York, as in all other states, the legislature has jurisdiction over numerous local matters such as alienating public property, creating municipal water districts, and other similar matters. As a result, a large number of bills are not controversial and they occasion no particular contention. These local bills generally pass the legislature with near unanimity, and with very little individual legislative attention other than that of the sponsor. Legislative staff members, however, will generally review those bills to verify their clarity and provide summaries of their contents to the conference members. Local bills tend to generate little litigation.

Bills other than local bills may also be non-controversial. Whether a bill is non-controversial or controversial depends not on the significance of a bill's content, but on the intensity and diversity of the legislative viewpoints which swirl around its contents. For example, a corporate take-over bill[22] enacted in 1985, the contents of which had potentially profound effects on the New York economy, sailed through the legislative process virtually without comment.[23] As with local bills, the absence of legislative contention concerning potentially significant legislation means that the bill will receive less legislative attention, although a significant bill will generate extensive staff-prepared briefing papers.

While bills for which it is difficult to build a majority are far fewer in number, they take up the largest part of legislative time.

22. 1985 N.Y. Laws ch. 915.

23. This was the consequence of many factors, including the Governor's intense support of the measure, the complexity of the issue and the bill, and the absence of any resistance from any of the state's major or even slightly important interest groups.

These are the controversial bills, which, to repeat, are not defined by their content but by the intensity and diversity of the legislative viewpoints with which they are received. The intensity and variety of legislative viewpoints that a bill generates are of course fueled by a mixture of influences including individual and party policy, political predilections, and constituency and interest group pressures. The more intense and diverse the viewpoints and hence the more controversial a bill is, the more the legislative body will focus on the particular subject of the bill and strain to void that irritant. During this period of strain, legislative politics is at its most robust and fragile and "essential techniques of politics in real life persuasion, exchange of services, rewards and benefits, alliances and deals"[24] take place. In addition, during this time the legislative process exercises its most moderating influence on those with inconsistent viewpoints, as compromises are forged to win votes and reduce adverse pressures. While this process frequently does not allow for an individual drafter to explore every implication of a bill, the foreseeable implications are generally examined in the intense exchanges which occur among interested parties, through which the ultimate legislation is fashioned.

Majorities are most frequently built before a bill is ready for formal legislative action. In the New York State Legislature, majority building generally occurs in private nonrecorded conferences,[25] where legislative leaders express their views on bills, staff are given an opportunity to fully brief the legislators on the provisions of each controver-

24. M. FINLEY, POLITICS IN THE ANCIENT WORLD 51 (1983).

25. The New York Legislature is a bicameral body containing a Senate and an Assembly. Its constitutional officers are the Temporary President of the Senate and the Speaker of the Assembly, chosen respectively by the Senate and Assembly. Both houses are organized by party conference, through which nominations for Speaker and Temporary President are made. The nominees of the majority party will in almost all cases become the Speaker of the Assembly and the Temporary President of the Senate. During 1983 and 1984, the Republicans formed the Senate majority conference and the Democrats formed the Assembly majority conference. The minority conferences also choose their leaders who, together with the Speaker and Temporary President of the Senate, form the legislative leadership. In New York these leaders dominate the Legislature through custom, rules, and strong central staffs. A leader can generally effectuate his will as long as he understands his conference's dynamics and the limits of their indulgence. The Speaker and Temporary President select the majority members for the committees, and the minority members are chosen by the minority leaders. The legislative leaders also determine, within their budget, the amount of funding members will receive for their staff. In addition, each conference has a central staff that is controlled by the conference leader and includes a counsel's office, a program office, and a fiscal office.

Lane, *Legislative Oversight of an Executive Budget Process: Impoundments in New York*, PACE L. REV. 211, 221 (1985).

sial bill, members most openly discuss the policies and politics of each bill, and conference negotiators are given their instructions. The more controversial a bill becomes, the more it will be discussed in conference and the less freedom negotiators will have in making an agreement. The need for conference privacy is so significant that in 1985, the New York State open meetings law[26] was amended to specifically exclude legislative conferences after a lower court decision suggested they may be covered under the law's provisions.[27]

Legislative conferences also bring together members of the same party for intra-party trading.[28] Inter-party trading and discussions with lobbyists, of course, occur outside the conference, although the results of this trading are brought inside by the actions of the particular legislator with respect to controversial legislation.

Since most majorities are built behind the scenes, it is rare for a floor debate to influence the outcome of a bill, particularly a controversial one. As a result, most statements on the floor do not relate to the deliberative process, but to the public relations process. In other words, members do not speak substantively to their colleagues in floor debate, but politically to their constituents and interest groups. Occasionally, however, there will be an actual floor debate in which an analysis of the bill is undertaken. This debate will almost always involve the bill's sponsor and presents one of the few publicly accessible moments of actual legislative deliberation or exposition.

While floor debates offer little hope of enlightenment in interpreting or explaining a statute, postenactment statements are even more incompetent for this task. Postenactment statements are always the product of some subsequent policy dispute, and such legislative statements are always directed toward the politics of that dispute, not the meaning of the prior bill.

Floor amendments are equally unreliable indicators of a bill's meaning. They are almost always offered solely for the campaign purpose of adducing negative votes on particular issues.

While the decision to support or oppose a non-controversial bill is rather simple, grounded to a large extent in personal affinities and leadership cues, the decision on a controversial bill is more complex. The more controversial a bill, the more the typical legislator's deci-

26. N.Y. PUB. OFF. LAW §§ 100-111 (McKinney Supp. 1987).

27. Orange County Publications v. Council of the City of Newburgh, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978).

28. *See infra* text following note 32.

sion will be the product of his or her independent cognitive process. This process of deciding whether to support or oppose a controversial bill will include the legislator's own understanding of a bill based on a reading of it, a reading of staff-prepared memoranda, and discussion with colleagues and lobbyists. Contrary to what has been suggested by some critics,[29] legislators are generally familiar with the particulars of controversial legislation which they enact. Once a bill is understood, numerous factors are weighed in determining whether to vote for its enactment. They include the legislator's judgment on the merits of the bill, the views of his or her constituents, any impact on the chances of reelection, views of lobbyists and colleagues, conference and leadership views, the views of editorial boards, campaign fund raising opportunities, opportunities for amending the proposed legislation, and opportunities for trading for the support of his or her own legislation or for other legislative favors. It is impossible to determine in any given case the weight of any of these factors, since they depend to a large extent on the continuing intensity of each and on the current needs of the legislator.

C. Conclusions About the Legislative Process

From this description of the legislative process, several general conclusions which are significant for the interpretation of statutes flow.

First, most bills are drafted skillfully and carefully by professional non-partisan or partisan bill drafters. If bills suffer from any of what Professor Dickerson has labeled the "diseases of language; ambiguity, overvagueness, overprecision, overgenerality or undergenerality,"[30] they do so either by intent, in the case of a planned vagueness, or as a result of what Justice Frankfurter and others have characterized, somewhat exaggeratedly, as the inexact nature of words.[31] Only infrequently is an enacted bill sloppily drafted.

Second, although some bills are intentionally vague, this occurs infrequently, usually as a result of the process of building a majority to permit legislators on both sides of an issue to believe or say that they have prevailed on a particular point. This device is also used to turn over to agencies or the courts issues which the legislature does

29. *See supra* text accompanying note 4 and *infra* text accompanying note 47.

30. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 43-53 (1975).

31. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528-29 (1947).

not want to be bothered with or is unable to resolve satisfactorily within the time given. In any case, without regard to propriety or constitutionality, planned vagueness is clearly a delegation to an agency or a court of the power to make law.

Third, the bill drafting and majority building processes force legislators to consider the foreseeable circumstances, especially with respect to controversial bills. The absence from a statute of a provision that deals with something that is foreseeable is generally not an oversight but an intended exclusion resulting from an explicit compromise or determination by sponsors or negotiators not to consider a particular event for fear of disrupting the majority building process.

Fourth, bill drafters are generally not aware of the canons of construction or other guidelines for interpretation. More importantly, even if they were, it would make no difference, since the logic of the canons is not applicable to the process from which legislation emerges and could not be applied.[32]

Fifth, all controversial legislation is the product of compromise. Most compromises relate to the substance of the bill, although votes on one bill are occasionally exchanged for votes on bills that suit other legislative or district needs. Unfortunately, it is frequently very difficult to observe or define the compromises in a bill, because many controversial bills are passed without meaningful floor debate and with few negative votes. Even when there is debate and a large dissenting minority, this will typically not produce any substantive insights into compromises which form the bill, since the compromises have been made among the supporting majority.

Sixth, as a general rule, in New York and probably most state legislatures, legislative intent is evidenced only in the language of a statute. Very rarely will a bill memo, committee report, or floor speech offer reliable insight into legislative intent. This is a consequence of the majority building process, which dictates that legislative energies be committed to the single purpose of solving a particular problem through legislation, leaving little time to focus on non-lawmaking vehicles such as legislative expression. More simply stated, legislative history is generally ignored because legislators see no need for it. Exceptions to this occur when a compromise and agreement is reached to publicly delimit a bill on a particular point, usually in return for a vote on the bill.

32. *See infra* Section III.B.

Seventh, once a statute has been enacted, a multitude of decisions are made concerning its meaning by all affected parties which may but usually do not include judicial decisions. Whether or not a legislative body will reexamine the problem underlying the statute as a result of these decisions does not depend upon some abstract concept of a subsequent legislature being the guardians of prior legislative intent. Rather, it depends on whether these decisions create sufficiently intense demands on the legislative process to attract adequate attention in order to build another majority.

III. INTERPRETATION OF STATUTES

The general conclusions stated above demonstrate the many inconsistencies between the realities of the legislative process and the courts' renderings of this process. If the constitutional commitment to honoring legislative intent is sincere, these conclusions must be accommodated. Approaches to statutory interpretation which accommodate these conclusions will be suggested below.

A. Self-Restraint

First and most difficult, the courts in applying a statute should focus their attention almost exclusively on its language. This is not only a constitutional mandate; it is the ineluctable conclusion to be drawn from any meaningful examination of the legislative process. Legislators work only toward the passage (or defeat) of legislation. All of their considerable skills and energies are directed toward that end, and in almost all cases they consider the enacted statute the only expression of their intent. The courts must do likewise, if for no other reason than that other evidence is not available or, if available, will not suffice as an accurate indication of legislative intent.

Nevertheless, despite this and endless expressions of judicial fealty to legislative language, the courts regularly continue to look to extrinsic materials to find legislative intent. In fact, Judge Richard Posner has written: "The judge rarely starts his inquiry with the words of the statute, and often, if the truth be told, he does not look at the words at all."[33] Regardless of whether Judge Posner's observation is exaggerated, evidence of his fundamental point concerning judicial disregard for statutory language is manifest in the numerous decisions in which courts avidly depart from the statute to find legislative intent

33. Posner, *supra* note 8, at 807-08.

in other legislative communications. The most extreme example of this is the suggestion found in *Citizens of Overton Park v. Volpe*,[34] where the United States Supreme Court reversed the normal order, reviewing first the legislative history of an act and then stating, "[B]ecause of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent."[35]

This suggestion of more fealty to statutory language does not exclude all reference to sources beyond it. Certain cases require such reference for the court to apply the law. These numbers however should be greatly reduced. There are at least four types of cases in which courts regularly depart from statutory language. They include cases where the statute exhibits planned vagueness or inescapable ambiguities[36] and cases where unforeseeable circumstances make application of the statutory language nettlesome. These three situations will be discussed below.[37] The fourth type of case involves a statute which is facially clear, but the application of which for some reason leads to doubt concerning its meaning. These cases can be identified by the inclusion in the decisions of phrases such as "the absence of ambiguity facially is never conclusive";[38] "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, not within the intention of its makers";[39] and "[s]tatutory construction must be sought which is . . . 'consistent with achieving [the statute's] purpose and with justice and common sense.' "[40]

These admonitions always indicate that the court has made an excursion into history, legislative or otherwise, as these same cases illustrate: "As noted the theory behind the bill as outlined by its proponents . . .";[41] "[i]t appears, also, from the petitions, and in the testi-

34. 401 U.S. 402 (1971).

35. *Id.* at 412 n.29.

36. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

37. *See infra* text accompanying notes 52-67.

38. Uniformed Firefighters Ass'n Local 94 v. Beekman, 52 N.Y.2d 463, 420 N.E.2d 938, 941, 438 N.Y.S.2d 746 (1981).

39. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). *See also* River Brand Rice Mills v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545, 548 (1955).

40. Freeman v. Kiamesha Concord, Inc., 351 N.Y.S.2d 541, 546 (1974) (quoting N.Y. STATUTES § 96 (McKinney 1971)).

41. *Firefighters Ass'n*, 420 N.E.2d at 941.

mony presented before the committees . . .";[42] and "[i]n 1883, the year of statutory enactment . . . ."[43] While these cases are not scientific samples of the nation's jurisprudence nor have they necessarily been decided incorrectly, the reader will recognize them as accurate portrayals of much of the jurisprudence with which he or she is familiar.

Professor Dickerson has asked, "[W]hy do American judges (and therefore lawyers) consult legislative history so avidly?"[44] He answers, "One reason is the belief that it improves their access to actual legislative intent. . . . Another reason is that many courts feel a higher fidelity to legislative intent than they do to the official, constitutional vehicles for expressing that intent."[45] My answer to the question of why judges consult legislative history is that the consistent disregard of statutory language and resort to extrinsic evidence of legislative intent is a disguise for judicial opposition to the outcome of the application of the statute as enacted.

As I noted in the introduction,[46] to a large extent the judicial tendency to "interpret" statutes is the result of the common law tradition, continually fed by law schools, which stresses judicial enlightenment in an otherwise bleak environment. On this point, consider the remarks of Judge Meyer, in his unfavorable comparison of the legislature to the judiciary as a lawmaking body:

> There are important differences [between legislators and judges], however. Legislators are answerable not only to the voters who put them in office, but also to the discipline of their party's legislative caucus, to the time pressures of schedules which crowd passage of most legislation into the final few days of a legislative session, and, even if not, afford realistic understanding of the problem dealt with by a particular bill to but few of those whose votes enact it, and, finally, to the coercion of compromise in the interest of some, if only partial, success. Legislators therefore are neither as independent nor as disinterested as are judges. Moreover, legislation is essentially a bureaucratic process. Because the body is larger and more diverse in interest than is a collegial judicial body, legislators, as a group, will usually be more dependent upon the staffs of the drafting bureau and of the various committees through which a given piece of legislation passes in the process of legislative consideration and less intensively informed about the issue at hand and its ramifications than will be judges acting as a collegial body.[47]

42. *Holy Trinity Church*, 143 U.S. at 464.
43. *Freeman*, 351 N.Y.S.2d at 547.
44. R. DICKERSON, *supra* note 30, at 137.
45. *Id.*
46. *See supra* text accompanying notes 3-10.
47. Meyer, *supra* note 4, at 663.

This statement demonstrates a profound problem which requires for its remedy long term attitudinal and curriculum changes in the law schools. Nevertheless, a willing judge could make some immediate improvements in the process of statutory interpretation. The exercise of self-restraint over an impulse to fashion a remedy consistent with the judge's perception of public policy or moral views by reaching beyond clear, contrary statutory language would be a significant step. However, without educational and institutional support, large scale change will be extremely difficult to realize, since it requires judges in many cases to accept as part of their duty a "humility of function" as merely the translator of another's command.[48] This standard, I think, would require a reversal in *United Steelworkers v. Weber*[49] (unfortunately) and *Church of the Holy Trinity v. United States*[50] and leave only the inescapably irrational results for judicial creativity.[51]

B. Canons and Legislative History

The adoption of the restrained approach to legislative interpretation suggested herein does not mean, of course, that the exercise of judicial discretion in a statutory framework will be eliminated. As noted earlier,[52] at least three types of cases remain in which either no legislative intent exists other than that of delegating lawmaking to the judiciary (as with planned vagueness), or when legislative intent cannot be discerned from the language of the statute alone (as with ambiguous statutory language or unforeseeable circumstances). Cases in which the application of the statute would lead to an inescapably irrational result can be added to this list.

In these cases in which judicial discretion is required, improved knowledge about the legislative process would prove invaluable. Judge Mikva makes this point when he states:

> Even the nuts and bolts of the legislative process can be valuable in

48. Frankfurter, *supra* note 31, at 534.

49. 443 U.S. 193 (1979) (where the word "discriminate" in the phrase "discriminate . . . because of . . . race" was interpreted as permitting discrimination against white males).

50. 143 U.S. 457 (1892) (where the foreseeable vocation of rector of a church was grafted onto a list of exceptions to a statute barring contracting with foreign workers). In my view, this case and *Weber* demonstrate judicial attempts to avoid clear statutory language in order to implement the judges' own policies.

51. For an example of a case in which applying the literal language of a statute led to an inescapably irrational result, see Ferres v. City of New Rochelle, 68 N.Y.2d 446 (1986).

52. *See supra* text accompanying notes 36-37.

> divining the intent of Congress. The use of committee reports and floor debate (and the lack of it), the difference between floor amendments and committee amendments, the trade-offs between statutory language and committee report language, the impact of conference committee changes in a bill, the effect of conflicting interpretations given by members during floor debate—all of these elements are weighed differently by judges who have been exposed to the tortuous way in which a bill becomes law.[53]

The present rule for statutory interpretation is exemplified by the following statement from a frequently cited New York treatise on statutory interpretation: "The intention of the Legislature is first to be sought from a literal reading of the act itself, but if the meaning is still not clear the intent may be ascertained from such facts and through such rules as may, in connection with the language, legitimately reveal it."[54] This statement has been interpreted as follows: "Where . . . after a reading of the statute, its meaning is still not clear . . . all available aids to statutory construction should be explored . . . and the courts are proscribed from applying time honored presumptions to the legislative process in an attempt to ferret out the legislative intent."[55]

As noted earlier,[56] the courts have used indirect and direct references to legislative process to "ferret out" the legislative intent. The number of indirect references the courts have employed are so multitudinous that the only sense that has ever been made of the entire scheme is Professor Llewellyn's famous proof[57] that it makes "no sense," since for each canon supporting a particular interpretation, one in opposition exists. Moreover, I agree with Judge Posner that, in addition to Llewellyn being correct about the canons' senselessness, on their own "most of the canons are just plain wrong."[58]

The canons are wrong for two reasons. First, to the extent that their applicability requires legislative awareness that "the legislature is deemed to have knowledge of the rules of construction,"[59] this is not the case. Perhaps Judge Mikva overstates this point when he argues, "When I was in Congress, the only 'canons' we talked about

53. Mikva, *supra* note 9, at 634.

54. N.Y. STATUTES § 92(b) (McKinney 1971).

55. *Id.* § 92(b), at 183-84.

56. *See supra* Section III.A.

57. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

58. Posner, *supra* note 8, at 806.

59. N.Y. STATUTES § 91, at 174 (McKinney 1971).

were the ones the Pentagon bought that could not shoot straight,"[60] but this is very close to a legislative truth. Second, and more importantly, even if the bill drafters were aware of the rules of construction,[61] they could not abide by them.

An excellent illustration of this point, which Judge Posner also discusses, is the canon which states that "remedial statutes are to be construed broadly"[62] or a slightly different New York version of this canon, "[s]tatutes promoting the public good are liberally construed."[63] Ignoring the difficult question of what is a remedial statute or what promotes the public good, these canons are simply inconsistent with legislative practice, particularly when applied to controversial statutes. Since the building of majorities necessarily requires compromise, a broad reading of a controversial statute is far more likely to undermine legislative intent than to support it. Moreover, a bill drafter's awareness of this rule of interpretation would not influence the legislative process except to guarantee the defeat of the bill if he or she were to take the position that no compromise is possible because the courts will ignore it. If a canon of interpretation is necessary, a more accurate one would be "all statutes should be construed moderately."

Another canon which suffers from the same weakness is "statutes which are *in pari materia* are to be construed together as though forming part of the same statutes."[64] While from a judicial perspective this canon may appear compelling, echoing the common law methodology of following precedent, from a legislative perspective this canon is generally unworkable. The legislative process is designed to resolve through conflict and compromise particular problems which compel the legislators' attention. While consistency among statutes may be a factor in any solution, it will not be a dominant or persistent concern, since it does not have an influential constituency. Moreover, attempts by members of the judiciary to impose their view of order on the legislature through the use of this canon and others undermines the crucial responsibilities of legislative bodies in the United States to moderate divergent and opposing views and to

60. Mikva, *supra* note 9, at 629.

61. *See supra* text accompanying notes 18-19 & 32.

62. Posner, *supra* note 8, at 805.

63. *See, e.g.*, Patrolmen's Benevolent Ass'n of New York v. City of New York, 41 N.Y.2d 205, 359 N.E.2d 1338, 1344, 391 N.Y.S.2d 544 (1976) (Cooke, J., dissenting) (citations omitted). *See also* N.Y. STATUTES § 326 (McKinney 1971).

64. N.Y. STATUTES § 221(b) (McKinney 1971).

protect minority positions.[65]

The use of direct references to vehicles of legislative communications other than statutes, commonly referred to as legislative history, is equally problematic. Aside from a constitutional concern about reliance on non-enacted language in determining statutory meaning, a court must concern itself with the difficult task of measuring the reliability of any such communication. To determine the reliability of a particular item of legislative history, an interpreter must ascertain the relationship between the provision under interpretation and the item of legislative history, whether the item was intended to be evidence of legislative intent, and whether the legislative body focused, even constructively, on this item as reflecting legislative intent. Very few items of legislative history satisfy these standards of reliability.

One item of legislative history that generally satisfies these standards is a joint resolution of the legislative body on a particular provision which is in dispute. For example, each year in New York, contemporaneously with passage of the budget, the legislature also passes a joint resolution adopting, as legislative history, the *Report of the Fiscal Committees on the Executive Budget*. This volume basically sets forth all legislative changes in the budget bills and their explanations.

Inalterably excluded from any list of potentially reliable items of legislative history are postenactment statements of any character. These statements are never the object of legislative attention and are always tempered by the political context that evolves subsequent to the time in which the dispute over the statute arose.

All other items of legislative history must be approached cautiously, with a presumption of unreliability. I am tempted to suggest that Professor Dickerson is entirely correct when he argues that "interpretative materials . . . are slovenly prepared and, even when carefully prepared by professionals, have almost no reliability. Their total elimination therefore would be a net benefit."[66] However, if approached on a case by case basis, other exceptions exist. For example, the floor comments of a bill's principal sponsor on the meaning of a particular provision are generally reliable, unless otherwise contradicted. Explanations found in committee reports, particularly on complex bill provisions, may also be reliable depending on the ac-

65. *See* Comment, *Judicial Modification of Statutes: A Separation of Power Defense of Legislative Inefficiency*, 4 YALE L. & POL'Y REV. 228 (1985).

66. R. DICKERSON, *supra* note 30, at 195.

cepted function of committee reports in the particular legislative body. In Congress, for example, where there is an inordinate focus on the committee as the legislative working arm and consequentially on committee reports, it may be argued that these reports are, at least constructively, made before the entire legislative body. On the other hand, New York has a very different practice in which committee reports are almost entirely disregarded and therefore they are almost never reliable.

Other than the two items of legislative history discussed above, it is difficult to perceive, at least in New York, any other item of legislative history that reliably reflects legislative intent. Judge Mikva has made a similar observation from the perspective of the legislative process of the United States Congress:

> Because the committee reports frequently are used in the legislative arena for political horsetrading, individual ego trips, it's too easy for a chairman who's trying to resist an amendment to say, "Well, look we'll put it in the report. Don't worry about it." And, unfortunately, those reports are then viewed by the courts as gospel. . . . I used to wince when I would hear a member of Congress get up and say, "Now for the purpose of making legislative history, I want to utter the following remarks." It happens all the time and unfortunately some judges treat those remarks with special credibility.[67]

C. *Hard Cases*

The above analysis addresses statutes in which legislative intent is discoverable and criticizes the courts' use of canons and legislative history in interpreting the statutes. This does not reduce the need to formulate rules or an approach for decisionmaking in those few remaining hard cases in which reliable evidence of legislative intent is not discoverable. Simply put, the court must make a decision in these hard cases, and that decision must be consistent with legislative intent, even though reliable evidence of legislative intent is unavailable. With respect to planned vaguenesses, this dilemma is not particularly difficult. The court should treat these statutory provisions as a delegation of power to it and exercise its judicial discretion accordingly. This approach would resolve cases such as *Steadman v. SEC*[68] far

67. A. Mikva, Remarks Before the Legislation Section, AALS Convention, New Orleans, La. 33-34 (Jan. 5, 1986) (transcript on file at University of Pittsburgh Law Review). *See also* Mikva, *supra* note 9, at 631.

68. 450 U.S. 91 (1981).

more simply and honestly than the unreliable tour through the legislative process which was undertaken in that case.

The remaining cases are far more difficult to resolve. If no reliable evidence of legislative intent exists, consistency with legislative intent, though required, cannot be achieved. While any decision in these particular cases may reflect the intent of the legislature which enacted the statute, this probability does not license the courts to simply make any decision. They must at least protect the constitutional values of institutional separation and the lawmaking supremacy of the legislature.

One way to assure that these values are protected has been suggested by Judge Posner, who writes that in interpreting a statute, a judge should utilize "imaginative reconstruction,"[69] which Posner defines as a judge trying "to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[70] While I do not support Judge Posner's broad application of this approach, I think it has utility. Indeed, it may be the only satisfactory approach for resolving these hard cases.

In undertaking the forray into the legislative mind suggested by Judge Posner, it is essential that the court be attentive to the actual legislative process. The court must reevaluate evidence of legislative intent which has previously been determined by the court to be unreliable as a basis for the decision. This otherwise unreliable evidence may serve as a bridge between the judicial imagination and the legislative process from which the particular statute emerged. In reevaluating this evidence, the court can employ as guides the general conclusions about the legislative process which I enumerated earlier. In making a decision as to a statute's intent, particular attention should be paid to Judge Posner's caveat, which I reiterate here:

> It is not the judge's job to keep a statute up to date in the sense of making it reflect contemporary values; it is his job to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations which they did not foresee.[71]

69. Posner, *supra* note 8, at 817.

70. *Id.*

71. *Id.* at 818.

IV. CONCLUSION

Judicial approaches to statutory interpretation are based on incorrect assumptions and inaccurate information about the legislative process. This is a consequence of law school training, which fosters the image of the judge as policymaker and ignores the legislator and the legislative process. This undermines the constitutional mandate that legislators be the primary policymaking branch of government. This Article offers several suggestions for remedying this situation. These include increased judicial self-restraint on urges to move beyond clear statutory language, more tempered use of the canons of interpretation and legislative history, and an approach incorporating reconstruction of legislative intent in hard cases.