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How to Read a Statute in New York: A Response to Judge Kaye and Some More

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HOW TO READ A STATUTE IN NEW YORK: A RESPONSE TO JUDGE KAYE AND SOME MORE

Eric Lane*

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I. INTRODUCTION

An observation by Chief Judge Judith S. Kaye of the New York State Court of Appeals invites response. As part of Judge Kaye's Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, she suggested a substantially different approach between state and federal courts to statutory interpretation:

Despite the outpouring of scholarly ink, analysis has focused almost entirely on how federal courts read federal statutes. Few, if any, of the recent commentators have considered whether the subject of statutory interpretation presents a different set of issues for state judges reading state statutes.

I submit that it does. And of the many reasons that come to mind, perhaps most important, as is evident in the area of state constitutional law, is the fact that state courts regularly, openly, and legitimately speak the language of the common law whereas federal courts do not.¹

To "speak the language of the common law"² is, to Judge Kaye, to speak the language of "lawmaking and policymaking by judges."³ Such speaking does not trump statutory law, for, as Judge Kaye has acknowledged: Statutory lawmaking "has ... surpassed [the common law] as the preeminent source of law it once was,"⁴ and "[u]nless a statute in some way contravenes the state or federal constitution, we are obliged to follow it—and of course we do."⁵ Rather, Judge Kaye's impressment of the common law is "to fill the 'gaps' inevitably arising from the complex interplay between human facts and abstract laws, and to fill the far deeper void that would result if state courts were to abrogate their traditional role as interstitial lawmakers."⁶ This common law approach is progressive. According to Judge Kaye it "is not static. It proceeds and

². Id. at 20.
³. Id. at 5.
⁴. Id. at 18.
⁵. Id. at 26.
⁶. Id. at 11; see, e.g., People v. Kramer, 706 N.E.2d 731, 733, 735 (N.Y. 1998) (applying "interstitial common-law adjudication" to establish standing to challenge the use of pen registers and trace and trap devices in criminal investigations).
grows incrementally, in restrained and principled fashion, to fit into a changing society."

Understood in this way—using the common law to fill in statutory gaps—Judge Kaye’s view of this approach to statutory interpretation is, I think, both right and wrong. It is right because state courts generally employ this approach, New York doing so with great frequency, particularly because of the chronic absence of any legislative record from which to draw clues of statutory meaning. Her view is only wrong in her limitation of its reach to state courts. As Judge Abner J. Mikva and I have written: "[A]pproaches to statutory interpretation are not divisible into ‘state’ and ‘federal.’ Differences in interpretive approaches are the product of individual judicial sensibilities and not, for the most part, particular jurisdictions." The use of a common law approach as defined by Judge Kaye is what judges must do and do to make a decision. "Must do" because the judicial role is to decide cases and "do" because, in the words of Judge Mikva, as cited by Judge Kaye, this "is really judicial ‘naturalism’—judges doing what comes naturally."

From this perspective federal judges are not different from state judges. They must decide the case before them. They are required to follow legislative dictates. They have views about the legislative process. They have general policy preferences and form outcome preferences in particular cases. Whether a judge will impose his or her own conscious preference in a particular case depends upon a number of factors, including the clarity of the statute’s command in the particular case, the intensity of the preference, and his or her sense of obligation to obey statutory commands. Furthermore, if a statute is unclear and the road to its meaning unmapped, federal judges also will apply common law techniques. Judge Robert Cowen (then of the Third Circuit), on his federal judicial experience in searching for the meaning of unmapped statutes, makes this point clearly: "I think I have to be brutally honest

7. Kaye, supra note 1, at 5 (footnote omitted). Compare this approach to common law approaches intended to limit statutory reach through, for example, canons of construction such as "statutes in derogation of the common law should be read narrowly," or through modern normatively conservative canons such as Judge Easterbrook’s that questions not expressly resolved by statutes ought to be held "outside the statute’s domain [and] . . . . remitted to whatever other sources of law might be applicable." Frank H. Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533, 544 (1983).


with you and say the unspeakable, that I would decide the case based on what I perceive the most just manner of resolving the matter before me.\textsuperscript{10}

Nevertheless, based on the two terms of New York Court of Appeals cases I have reviewed (1998 and 1999), there are several interesting, and perhaps unique aspects to New York's approach to statutory construction that deserve note. First, the New York Court of Appeals seems broadly committed to statutory text as the touchstone of interpretation.\textsuperscript{11} Despite the ambiguity that usually surrounds any case that arrives at the highest judicial level, a surprisingly high number of these cases are, and seem properly, answered by reference to the text itself. Second, the Court of Appeals often appears uncomfortable with simply applying the clear text alone, reaching for what it characterizes as legislative history for support of its already announced clear statutory reading.\textsuperscript{12} Third, the New York Court of Appeals seems to have recognized the frailties of judicial canons and steered away from their use as determinant sources of legislative meaning, except in situations when the use of particularly sensible canons seems appropriate.\textsuperscript{13} This is particularly surprising given the poverty of New York's legislative enactment record for almost any bill. Fourth, despite this dearth of legislative history, the court frequently makes reference to what it characterizes as legislative history, but defines the term broadly to include an array of executive documents that, from a more traditional perspective, are of questionable virtue.\textsuperscript{14} This definition of legislative history shifts legislative power to the executive branch of government, but this is a consequence of the New York Legislature's own decision to conduct business in a largely unrecorded manner. Fifth, notwithstanding this overly inclusive definition of legislative history, the court confronts a large number of "show down" cases\textsuperscript{15} in which common law approaches must be applied.\textsuperscript{16} Sixth, and finally, despite the potential for a politicized court absent the discipline imposed by a legislative record, there is a remark-

\textsuperscript{11} See infra notes 40-54 and accompanying text.
\textsuperscript{12} See infra notes 55-69 and accompanying text.
\textsuperscript{13} See infra notes 155-83 and accompanying text.
\textsuperscript{14} See infra notes 184-222 and accompanying text.
\textsuperscript{15} "Show down" cases are those in which a court is asked to answer a statutory question with no real probative clue as to what the enacting legislature intended. See infra notes 223-24 and accompanying text.
\textsuperscript{16} See infra notes 223-47 and accompanying text.
able level of unanimity over decisions involving statutes. This is particularly noticeable when compared to the Supreme Court which often appears far more legislative than judicial. It is on the above points that this Article will focus.

II. HOW JUDGES INTERPRET STATUTES

New York’s and all judicial approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command. Such legislative superiority means that, in the application of statutes, judges are not free to resolve a dispute by simply imposing their outcome preferences, as they might have done in a common law setting, or to treat statutory laws as loosely binding precedents, as they may have treated common law precedents. In “question[s] of statutory interpretation . . . the Court’s role is clear: our purpose is not to pass on the wisdom of the statute or any of its requirements, but rather to implement the will of the Legislature as expressed in its enactment.” Or, to reiterate Judge Kaye’s observation: “Unless a statute in some way contravenes the state or federal constitution, we are obliged to follow it—and of course we do.” It is through the subordination of the judiciary to the legislature that our laws are assured their “democratic pedigree.”

To “follow” (using the words of Judge Kaye) a statute, a court must determine its meaning in the context of the particular case before it. If the particular text answers the question the inquiry usually ends because, as discussed below, the language of a statute is the best evidence of the legislative will. “The Court’s threshold inquiry in this regard is how to discern the legislative intent. When an enactment displays a plain meaning, the courts construe the legislatively chosen

17. See infra note 260 and accompanying text.
18. As Judge Posner has written, a statute is “a command issued by a superior body (the legislature) to a subordinate body (the judiciary).” Richard A. Posner, The Problems of Jurisprudence 265 (1990).
22. See infra notes 40-54 and accompanying text.
words so as to give effect to that Branch’s utterance.’ This, of course, is the plain meaning rule.

When a statute is unclear with respect to a particular question, lawyers and courts generally commence their search for statutory meaning by asking the question: Did the legislature intend this particular statutory provision to cover this particular fact pattern? In such cases, courts find the answer by reference to additional sources such as other statutory provisions (statutory context), legislative history, and canons of construction. Two New York cases, both decided in 1998, Fumarelli v. Marsam Development, Inc. and Mowczan v. Bacon, illustrate this point. In Fumarelli, confronted with an unclear statute and the question of whether it replaced a common law remedy, the court wrote:

[W]e acknowledge that the enactment does not explicitly utter a legislative direction . . . . To answer the question, therefore . . . the Court must now look beyond the language of the statute. Our preeminent responsibility in that endeavor is to search for and effectuate the Legislature’s purpose. In this respect, legislative history and the events associated with and occasioning the passage of the particular statute are valuable guiding lights.

And in Mowczan, in answering the question of whether contribution was permissible under an unclear provision of the State’s Vehicle and Traffic Law, the court stated: “In matters of statutory construction, ‘legislative intent is “the great and controlling principle’” . . . . ‘Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.’”

Note the reference above to both legislative intent and purpose as the point of reference in the search for meaning. Historically, reference by the courts to legislative intent has been the subject of intense critical analysis. Such criticism argued that judges frequently used legislative

25. 703 N.E.2d 251 (N.Y. 1998).
27. Fumarelli, 703 N.E.2d at 254 (citations omitted).
28. Mowczan, 703 N.E.2d at 244 (internal quotations omitted) (citations omitted).
29. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 7.
intent to trump statutory language the judges disfavored. In other words, if they did not like the outcome effected by the statutory language, they would declare that a favored outcome was required by legislative intent. The denial of legislative intent as a reference point for statutory interpretation left its critics with somewhat of a problem. If reference could not be made to legislative intent, on what basis would a court be able to find the meaning of an unclear statute? Or, for some proponents of broader judicial discretion, on what basis would a court be able to exercise discretion beyond the language of a statute? After all, when interpreting a statute, courts still needed to find some legislative peg on which to hang their decision. The response was to refer to a statute’s “purpose,” which was seen by its proponents as a more objective standard that “is evident [from]... the thing (the statute) itself.” In the words of Professors Hart and Sacks: “Purpose,” to its proponents, is found by “comparing the new law with the old” and asking “[w]hy would reasonable men, confronted with the law as it was, have enacted this new law to replace it?” Whether or not there is a real distinction between legislative “intent” and “purpose,” as is evidenced by the New York Court of Appeals, courts have basically ignored this theoretical debate in their pragmatic search for statutory meaning. Courts, in fact, for the most part, use “intent” unanalytically and interchangeably with “purpose” to refer to a source of statutory meaning (the intent of the legislature, or the purpose of the legislation) outside of the language of the statute at issue in the litigation.

Sometimes even when the language is clear, the court and advocates will question whether the legislature could have intended or meant the result brought about by the application of the language. This is because language always has context and its clear application in one setting may not be so clear in another; “[m]eaning depends on context as well as on the semantic and other formal properties of sentences.”

32. Id. at 875.
35. See Mikva & Lane, Statutory Interpretation, supra note 8, at 8.
36. Posner, supra note 18, at 269.
fusing to grapple with this phenomenon can result in a form of hyper-
textualism that in fact can drain a statute of its meaning. 37 New York ju-
risdiction appears to acknowledge this problem:

In giving effect to these words, “the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to ‘defeat the general purpose and manifest policy intended to be promoted.’”

Of course, such an approach also allows a court to avoid the unfavorable policy consequence of a statute with which the court disagrees. 39 Such judicial activism does not seem to demark the cases reviewed for this Article.

III. WHEN THE TEXT PROVIDES A PLAIN MEANING

The starting point, at least theoretically, for any interpretive effort is the text of the statute in question. It is the text that a legislature enacts, and only through such an enactment can that law be legislatively made. The New York Court of Appeals often reiterates this constitutional truism. “When . . . a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words.” 40 And, more importantly, the court quite often applies it. During 1998 and 1999, the court, using the plain meaning rule decided, for example, Amabile v. City of Buffalo, 41 Casnova v. New York State Department of Health, 42 Mennella v. Lopez-Torres, 43 People v. Stirrup, 44

37. See Smith v. United States, 508 U.S. 223 (1993), in which Justice Scalia dissented arguing that “[t]he Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used.” Id. at 242 (Scalia, J., dissenting).
41. 93 N.Y.2d 471, 476 (1999) (“The Legislature has made plain its judgment that the municipality should be protected from liability . . . .”).
42. 694 N.E.2d 1320, 1322 (N.Y. 1998) (declaring that the plain meaning of “probation” includes “some condition which the party on probation must fulfill”).
43. 695 N.E.2d 703, 705 (N.Y. 1998) (explaining that plain meaning prohibits Civil Court judges from adding procedural steps to the state’s statutory eviction process).
44. 694 N.E.2d 434, 436-37 (N.Y. 1998) (noting that plain meaning dictates the date for
People v. Stevens, and People v. Chavis. In Gonzalez v. Iocovello, the court admonished the losing party explaining that, in the face of a clear statutory provision, it had chosen the wrong forum for its challenge. "But these importunings for implied preclusion against fellow officer lawsuits are more appropriately addressed to the Legislature, especially in view of its unqualified enactment language and the legislative history [of the statute]."

As part of its deference to the plain meaning rule, the court on occasion engages in a dispute over what constitutes plain meaning in a particular case. An example is People v. Owusu. In Owusu, a case in which, among other things, a victim's finger had been bitten to the bone, the question was whether teeth constituted a "dangerous instrument" under provisions of the state penal law which made the use of a dangerous instrument in the commission of a crime a separately chargeable offense. The majority found that teeth did not constitute an "instrument" because "[t]he 'plain' words of the statute have consistently been understood by this Court ... and the Legislature to mean that an instrument is not one's arm, hand, teeth, elbow or any other body part." In response to a blistering dissent accusing the majority of "nothing less than the functional equivalent of judicial legislation" and illogic, the majority simply replied: "We do not reject the principle that the words of [the] statute[] are the primary indicia of their meaning; we simply do not accept the dissent's view of the plain meaning of the term 'instrument.'"

While the jurisprudential evidence supports Judge Kaye's claim of fealty to express statutory terms, the court, in its application of a statute's clear language, will also turn to what it characterizes as legislative history to support its view. In doing so the court seems to support a

45. 692 N.E.2d 985, 989 (N.Y. 1998) (arguing that a "[c]ourt may 'not resort to interpretative contrivances to broaden the scope and application' of unambiguous statutes").
46. 695 N.E.2d 1110, 1112 (N.Y. 1998) (explaining that the People's "argument runs counter to the express words of the statute"). For additional plain meaning cases see Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525 (1999); In re Raymond G., 93 N.Y.2d 531 (1999); Montella v. Bratton, 93 N.Y.2d 424 (1999).
47. 93 N.Y.2d 539 (1999).
48. See id. at 549-50.
49. Id.
51. See id. at 1229.
52. Id. at 1233.
53. Id. at 1234 (Bellacosa, J., dissenting).
54. Id. at 1233.
modified plain meaning rule described by Judge Patricia M. Wald of the District of Columbia Circuit Court of Appeals as follows:

[A]lthough the Court still refers to the “plain meaning” rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will not look at the legislative history. When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.55

Examples abound. The best statement of this approach is found in Council of New York v. Giuliani,56 in which the court held that “the statutory language, amply buttressed by the legislative history, supports the result.”57

Several problems arise from such use of legislative history. First, giving weight to legislative history in the face of a clear textual answer diminishes the theoretical, constitutional, and real significance of the bicameral vote on the text and its presentment to the executive. It is the text, after all, that is the central object of the enactment process. Second, such use of the text suggests that text and legislative history are interchangeable, draining certainty from law, creating more opportunities to argue that a statute is unclear because of contradictions between text and legislative history, and enhancing judicial power.58 The Court of


57. Giuliani, 710 N.E.2d at 260. Despite this statement, the court also used the purpose clause of the statute in question to resolve the dispute. See id. at 259; infra notes 126-30 and accompanying text.

58. For a unique case in which the Supreme Court used legislative history to trump clear statutory language see Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976). In this case, the Court of Appeals stated: “In our view, then, the statute is plain and unambiguous and should be given its obvious meaning. Such being the case, . . . we need not here concern ourselves with the legislative history of the 1972 Amendments.” Colorado Pub. Interest Research Group, Inc. v. Train, 507 F.2d 743, 748 (10th Cir. 1974). The Supreme Court, in reversing the Court of Appeals, replied:

To the extent that the Court of Appeals excluded reference to the legislative history of the [statute] in discerning its meaning, the court was in error. As we have noted before: “When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”

Appeals seems to have rejected such an argument in Brown v. Wing. There, in response to a proffer of legislative history arguably contradicting the text, the court stated that "while we do not find the language ambiguous, we note that the proffered information does not, in any event, support petitioners' theory." Third, the more emphasis on legislative history, the more parties will attempt to "create" such "history" in an attempt to influence the courts. In New York, an additional problem arises from this modified plain meaning rule. As there is little probative legislative history, emphasis on what is characterized as legislative history usually equates to an emphasis on executive-legislative history, that is, comments on a bill collected by the executive prior to the bill's signing. One example of this is Daily Gazette Co. v. City of Schenectady, in which the court, after determining that the plain meaning of a statutory provision protected police personnel records from Freedom of Information requests, added that this view was supported by memoranda from the Division of Budget, the Division of State Police, the Police Conference and a special local prosecutor, as well as two legislative memoranda.

The use of the post facto lobbying efforts of governmental and non-governmental parties to inform judicial interpretive decisions, let alone one based on a clear text, is problematic whether or not the court actually is influenced by such documents. Perhaps aware of this, the court, in Majewski v. Broadalbin-Perth Central School District, discussed later in this Article, implicitly raised questions about its own

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60. Id. at 523 (emphasis added).
61. As stated by M. Douglass Bellis, Assistant Legislative Counsel, U.S. House of Representatives, at the 1996 American Association of Law Professors' annual conference: "If we decide that the legislative history ... is more important than the legislation, legislators will never really know what they have to do, what levers they need to pull in order to get their ideas firmly cemented in place." MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 33 (alteration in original).
62. See infra note 188 and accompanying text.
63. 710 N.E.2d 1072 (N.Y. 1999). In People v. Wilder 93 N.Y.2d 352 (1999), the plain meaning of the statute clearly answered the question of whether a bail jumper was subject to first or second degree bail jumping, but the court felt it necessary to garnish the decision with a memo from the New York State Law Enforcement Council. See id. at 358-59. The New York State Law Enforcement Council is a lobbying group composed of the State's leading law enforcement officials. See Martin Fox, Criminal Court Reforms Suggested by State Law Enforcement Council, N.Y. L.J., May 31, 1999, at 1.
64. See Daily Gazette Co., 710 N.E.2d at 1075-76.
66. See infra notes 176-80 and accompanying text.
practices. In addition, in *Brown v. Wing*, the court suggested that, if legislative history was contrary to a statute's clear meaning, the statutory text would prevail.

### IV. SOME EXCEPTIONS TO THE PLAIN MEANING RULE

#### A. Absurdity

As the goal of statutory interpretation is discerning the legislative intent, sometimes, even when the language is clear regarding a particular case, courts will resist its application. As noted earlier, this resistance is based on a view that the legislature could not have meant to apply the statute in this particular case. For example, as Professor Daniel Farber has written, "virtually no one doubts the correctness of the ancient decision that a statute prohibiting 'letting blood in the streets' did not ban emergency surgery." This means that even when statutory language is clear, a question may arise about its applicability to a particular fact pattern. Usually that question is cast as whether the enacting legislature could have intended such an absurd result. Judge Kaye has described this doctrine as applicable in situations in which the application of a statute's clear language would lead to an absurd conclusion. And the court has written that if the words of a statute are clear "there is no room for construction" unless the "definite meaning" involves an absurdity. In practice, once in a while the application of this doctrine makes sense. A case cited by Judge Kaye in her article falls within such a category. In *In re George L.*, the court held that while the statute was clear, interpreting "currently" in the strictest sense would lead to an absurd conclusion.

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67. See Majewski, 696 N.E.2d at 980.
68. 93 N.Y.2d 517 (1999).
69. See id. at 522.
70. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 6.
71. See supra notes 36-39 and accompanying text.
73. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 6-7.
74. See Kaye, supra note 1, at 26.
76. See Kaye, supra note 1, at 26 n.146.
77. 648 N.E.2d 475 (N.Y. 1995).
78. See id. at 479.
More often, judicial resort to this theory reflects a determined judicial effort to effect a disfavored legislative policy in a particular case. One well known Supreme Court decision makes this point. In *Church of the Holy Trinity v. United States*, the majority simply could not believe that Congress had intended to punish a church for importing an English pastor, despite a statutory provision that prohibited anyone from bringing foreigners to the United States "to perform labor or service of any kind" except, among others, foreigners who were "professional actors, artists, lecturers, [or] singers."

Regarding the doctrine of absurdity, Judge Kaye offers an unnecessary justification for its application. She writes:

No one can question the legislature’s authority to correct or redirect a state court’s interpretation of a statute. Indeed, on our court we especially strive for consensus in statutory interpretation cases as a matter of policy, knowing that the legislature always can, and will, step in if it feels we have gotten it wrong.

If the application of the doctrine is to avoid actual statutory absurdity, it needs no defense, but if it is to justify judicial policymaking it should not be used. The fact that a subsequent legislature can and may overturn a judicial ruling, while perhaps comforting, should not be the basis for judicial lawmaking. In fact, it reverses the constitutional premise of legislature as lawmaker and judiciary as interpreter by placing subsequent legislative bodies in the role of interpreter. Also, such an approach misunderstands the legislative process. The fact that a legislative body can change a judicial decision does not mean that it will, and whether it will or not depends upon many more factors than simply whether members of the legislature or a majority of the legislature disagree with that decision. A legislature’s decision to reverse a judicial decision is not simply a matter of its disapproval of that decision. Much more is needed. For a legislature to reverse a judicial decision, it must

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79. 143 U.S. 457 (1892). In examining the Court’s decision in *Church of the Holy Trinity*, Professor Philip P. Frickey has written:

In my legislation course, I tell my students that *Holy Trinity Church* is the case you always cite when the statutory text is hopelessly against you . . . . The tactic of relying upon the case does sometimes resemble the “hail Mary” pass in football. As a matter of attorney advocacy, that may be all well and good, but as a matter of judicial resolution of a critical social issue, it may seem like something altogether different.


81. Kaye, supra note 1, at 23 (footnote omitted).
also conclude that doing so is more important both from policy and political perspectives than whatever is then commanding its resources and time. Finally, such an approach can lead to the ill conceived canon that a legislature's silence concerning a judicial decision confirms that decision. This is as inaccurate a presumption about the legislative process as can be imagined.

B. Statutory Mistakes

Another instance in which courts are tempted to avoid the application of a statute's plain meaning is when they believe the plain meaning is the result of a drafting error. Often these cases revolve around questions of punctuation, but may also include other types of errors. The court's task at that point is to decide whether they should provide a correction, despite the statute's clear meaning. A recent Supreme Court decision, United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., demonstrates the typical approach used when the question is one of punctuation. In that case a bank's right to sell insurance in certain circumstances was challenged on the basis of a statute which seemed to prohibit such bank activity. The question for the Court was the location of certain quotation marks which, if read as placed, would have barred the bank from selling insurance. In disregarding the punctuation the Court held:

A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.

Here, though the deployment of quotation marks... points in one direction, all of the other evidence from the statute points


83. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 18.

84. See id.


88. See id. at 454.
the other way. It points so certainly, in our view, as to allow only the conclusion that the punctuation marks were misplaced. 89

Sometimes errors other than punctuation are alleged to have occurred. When this occurs courts are generally more circumspect in their approach. Two questions arise: Has there actually been a mistake? and Is the correction evident? In *Harris v. Shanahan*, 90 for example, the Kansas Supreme Court was asked to invalidate a legislative districting statute that failed to include a particular Kansas city in any state senate district. 91 Each house of the legislature had passed a bill that had included the missing city within the same legislative district, but the enrollment clerk erroneously dropped this placement. 92 The court declined to add the city to the allotted senate district because the bill presented to and signed by the governor, omitting the city, was different from the bill, including the city, that passed both houses. 93 The court suggested that it might have reached a different decision if the bill that passed the legislature was identical to the one signed by the governor, but still omitted the particular city. 94 In that case, a statute would have actually been enacted. 95 According to the Kansas court: "[W]ords may be supplied in a statute . . . where omission is due to inadvertence, mistake, accident or clerical error." 96 Although in 1998 and 1999, no New York Court of Appeals’ decisions addressed statutory errors, New York’s approach appears similar to that described above. A good example is *Branford House, Inc. v. Michetti.* 97 In response to a claim that the word “state,” in a statute that exempted housing projects with “state loans” from certain costly requirements, was inserted by error, the court wrote:

Generally, a court may not assume the existence of legislative error and change the plain language of a statute to make it conform to an alleged intent. However, a court may apply a statute by disregarding a clerical error in legislation so as to make the corrected statute conform to the Legislature’s true in-

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89. *Id.* at 454, 455.
91. *See id.* at 778.
92. *See id.* at 781. An enrollment clerk performs the ministerial function of preparing the final form of the bill, as both houses have agreed to it, for presentation to the executive. *See* Eugene Gressman, *Is the Item Veto Constitutional?*, 64 N.C. L. REV. 819, 821 (1986).
93. *See Harris*, 387 P.2d at 786.
94. *See id.*
95. *See id.*
96. *Id.* at 783.
tent, if it is established unquestionably that (1) the true legisla-
tive intent is contrary to the statutory language, and (2) the
mistake is due to inadvertence or clerical error. 98

C. Private Remedies

Cases dealing with private rights of actions are another category of
cases that often raise a challenge to the application of plain meaning.
These cases have involved two questions: whether the legislature in-
tended a private cause of action (sometimes referred to as an implied
cause of action), notwithstanding statutory silence, and whether a court,
based on the common law practice of providing a remedy for a “wrong,”
should supply one. 99 The Supreme Court seems to have narrowed these
questions to one. “The question of the existence of a statutory cause of
action is, of course, one of statutory construction.... [O]ur task is lim-
ited solely to determining whether Congress intended to create the pri-
vate right of action.” 100

New York’s jurisprudence suggests a similar approach. In Carrier
v. Salvation Army, 101 a 1996 case, the court was asked to find an implicit
private right of action for residents of an adult care facility subject to
Department of Social Services supervision to seek the appointment of a
temporary receiver under Social Services Law section 460-d(5). 102 The
statute provided for the grant of equitable relief for violations of the
laws and regulations governing group homes upon petition by the At-
torney General. 103 In deciding that the statute did not implicitly create a
private remedy, the court declared: “[P]laintiffs may seek such relief
‘only if a legislative intent to create such a right of action is “fairly
implied” in the statutory provisions and their legislative history.” 104

V. UNCLEAR STATUTES

Most cases before the New York Court of Appeals do not call for
the application of clear statutes but instead call for finding the meaning

98. Id. at 13.
99. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 16.
100. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (citations omitted). For a
further discussion of this topic see MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at
16-18.
102. See id. at 328.
103. See id.
104. Id. at 329 (quoting Brian Hoxie’s Painting Co. v. Cato-Meridian Cent. Sch. Dist., 556
N.E.2d 1087, 1089 (N.Y. 1990)).
of statutes that are unclear in the context of the particular case. As Judge Kaye has noted: "I would venture the guess that in nearly every statutory case that reaches a state's highest court, there exist at least two plausible interpretations, each in some way supported by the text." \(^\text{105}\)

Several factors account for this. As Judge Mikva and I have written elsewhere: "First, words are not perfect symbols for the communication of ideas and may be understood differently by different audiences. Second, and most importantly, while particular events may stimulate the enactment of a statute, statutes are, for the most part, drafted in general terms, addressing categories of conduct." \(^\text{106}\) This is particularly true of the broad regulatory reforms that are part of this century's legislative legacy, under which substantial interpretive responsibilities are granted to administrative agencies. \(^\text{107}\)

Finally, sometimes statutes are unclear as a result of legislative compromises that are struck to secure votes for the enactment of a statute. \(^\text{108}\) Such compromises can result in the use of undefined general terms or legislative silence. \(^\text{109}\) The structured judgment provisions of New York's Civil Practice Law and Rules are one such example. \(^\text{110}\) Against the background of a crisis in the costs of malpractice insurance, the legislature attempted throughout 1985 to fashion a solution to the problem. \(^\text{111}\) In general, the Democrats focused on the rights of plaintiffs while the Republicans focused on the rights of defendants. As the session came to an end with no final solution in sight, intense negotiations among legislative and executive staffs began. The goal of these negotiations was to arrive at a solution to the agreed upon problem. The means of effecting this goal was to worry less about the clarity of some provisions of the statute and more about whether certain language could attract support. From a legislative perspective, this made perfect sense because it would allow a bill to pass, although leave unclear the breadth of the text. On the other hand, from a judicial perspective, the ambigui-

\(^\text{105}\) Kaye, supra note 1, at 28.

\(^\text{106}\) MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 20.

\(^\text{107}\) See infra notes 248-59 and accompanying text for a discussion of judicial review of administrative interpretive decisions.

\(^\text{108}\) See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 20.

\(^\text{109}\) See id. at 20-21.


\(^\text{111}\) See Bryant v. New York City Health & Hosps. Corp., No. 124, No. 137, 1999 WL 444342 at *3 (N.Y. July 1, 1999). The author served as council to the Senate minority during 1985 and was its representative to those negotiations. This section is based on the author's experience during this time.
ties that emerged from these negotiations have been, according to the Court of Appeals: “[D]eservedly ... labeled ‘circuitous,’ ‘vexing,’ as ‘every Judge’s nightmare,’ and ‘at best ... ambiguous [which] can lead to inexplicable results.’”

Finally, sometimes ambiguities are created by legislative “failure” to consider the question which has become the subject of litigation. One such example of the problem is the statute under consideration in Village of Chestnut Ridge v. Howard. The statute requires towns to maintain bridges. The question before the court was whether this statute also obligated the town to maintain a structure characterized by the town as a “culvert.” This characterization was based on another unrelated provision of law that made a distinction between bridges and culverts. In the end, the court turned to the dictionary to support the Village’s contention of the town’s obligation.

Whatever the cause, when confronted with an unclear statute, the role of either a federal or state court is to find its meaning for application in a particular case. In effect, a court must decide whether the particular behavior in question in the case before it is governed by the particular provision of the statute in question without clear direction from the statute’s language. To search for the collective legislative intent, both state and federal courts have relied on references to other provisions of the particular statute in question (context), canons of construction, and legislative history. All are in effect presumptions about legislative meaning. Legislative bodies speak constitutionally and formally through the text of a statute and any reference to a source other than the text to determine its meaning is, in effect, a presumption about its meaning drawn from another source.

A. Statutory Context

Often the best way to determine the meaning of a particular statutory provision is by reference to another provision of the same statutory enactment. As all of a statute’s language is enacted, there is no con-

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113. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 22.
115. See id at 989.
116. See id.
117. See id.
118. See id. at 990-91.
119. See id. at 990.
cern about the referred to text not reflecting the legislature's meaning. The only question is whether the reading of the two provisions together reflects the meaning of the enacting legislature. One of the most frequently cited sections of a statute for this use is its purpose clause. Not all statutes contain purpose clauses. When used, they are intended to provide the public with the broad reasoning behind the legislation. They also serve to provide interpreters with a screen through which the meaning of the statute's other provisions can be seen. A recent Supreme Court case provides an excellent example of the use of such a clause. In *Sutton v. United Air Lines, Inc.*, the Court used the purpose and findings clause of the Americans with Disabilities Act of 1990 to resolve the question of whether corrective measures should be considered in determining whether an individual was disabled under the Act.

The New York Court of Appeals frequently turns to a statute's purpose clause to find the meaning of another of its provisions. One example from the 1998 and 1999 terms is *Council of New York v. Giuliani*. In this case, the question before the court was whether the New York City Health and Hospital Corporation ("HHC") could sublease one of its hospitals to a for-profit entity under a provision of the HHC that provided: "'[W]hereby the corporation shall operate the hospitals then being operated by the city for the treatment of acute and chronic diseases.'" Depending primarily on the purpose clause of the statute (the HHC "'should be created to provide such health and medical services and . . . operation of the [HHC] . . . is in all respects for the benefit of the people of the state of New York and of the city of New York'), the court found that the provision allowing subleasing did not violate the purpose clause. 120.

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120. One caveat about purpose clauses. Despite their usefulness, they are sometimes difficult to find if one is unfamiliar with New York State's sources of law. Purpose clauses do not appear in McKinney's Consolidated Laws of New York because they are not codifiable. Sometimes they will appear in a footnote in the Code. See e.g., N.Y. Pub. Auth. Law §§ 1045-a & 1046, (McKinney 1999) 1984 N.Y. Laws chs. 513-15. The best place to find purpose clauses is in McKinney's Session Laws where the laws are published in the form in which they were enacted. See Vehicle and Traffic Accident Prevention Courses, ch. 290, § 399-a, 1 N.Y. Session Laws 766, 766 (1998) (codified as N.Y. VEH. & TRAF. LAw § 399-a (McKinney Supp. 1999)).

121. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 164.

122. See id. at 165.


124. See id. at 2147, 2149.


127. See id. at 256.

128. Id. at 259 (quoting New York City Health and Hospital Corporation Act, N.Y. UNCONSOL. LAw § 7386(1)(a) (McKinney 1979)).
York, and is a state, city and public purpose"),\(^{129}\) the court held the sublease *ultra vires*, determining that "[t]he statutory mandate is manifest and self-evident."\(^{130}\)

Sometimes it is not the purpose clause of a statute to which explanatory references are made, but to some other provision of a statute. One such example is *People v. Romero*,\(^{131}\) where the court was asked to determine whether the Attorney General had the power to criminally prosecute for the unlawful practice of law under Judiciary Law section 476-a(1), under which the Attorney General was authorized to bring an "action" against those so engaged.\(^{132}\) Section 476-a(2) similarly empowered the state's bar associations.\(^{133}\) As such empowerment of the bar associations "would be contrary to the fundamental principle that the power to prosecute crimes is traditionally a power of the State as sovereign,"\(^{134}\) the court reasoned that the term "action" was restricted to civil actions.\(^{135}\) Similarly, in *Gonzalez v. Iocovello*,\(^{136}\) the court found that there was no fellow officer lawsuit block in a particular provision of the General Municipal Law based on the inclusion of such a block in a different provision of the same enactment, a provision that amended the General Obligations Law.\(^{137}\)

Other provisions of existing law (not enacted with the provision in question) also may be used by courts as a source of meaning for the provision in question.\(^{138}\) For example, definitions in an earlier enacted statute would no doubt be read to cover subsequently substantive provisions of such a statute if these definitions were not amended. The question, of course, is whether such a provision is intended to inform the meaning of the provision in question. An example of a case in which the court found that such a provision was not intended to inform the provision in question is the earlier noted *Village of Chestnut Ridge v. How-

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129. *Id.* (alteration in original) (quoting New York City Health and Hospital Corporation Act, N.Y. UNCONSOL. LAW § 7382).
130. *Id.*
132. *See id.* at 425.
133. *See id.* at 426.
134. *Id.*
135. *See id.* at 426-27.
137. *See id.* at 549. Note that it does not necessarily matter that the provisions of the statute contain amendments to different titles of state law. What is important is that they are enacted together in one law. Sometimes, even if provisions of the same enactment seem to inform each other, they may not if a contrary legislative intent can be discerned.
In that case the question was whether a particular structure was a bridge or a culvert. A separately enacted provision of the Highway Law, in which the town’s maintenance obligations were established, contained a definition of a culvert that, if applicable, would have carved the structure in question from the town’s maintenance responsibility. According to the court, despite a canon of construction that sections of a law should be read together and the ease with which the application of that canon would have resolved the case, such a reading of the law might have the unintended effect of shifting the preexisting allocation, as between towns and villages, of responsibility for the care and upkeep of bridges and culverts. In the absence of a signal from the Legislature that it wishes to change the rules for determining which municipalities are responsible... we decline to employ such a construction.

Two other cases from the 1998 and 1999 terms provide a contrast to Howard. In People v. Carroll the court was faced with an ambiguity regarding the definition of a particular statutory phrase under which a child’s “stepmother” may or may not have had criminal liability. “Because the Penal Law does not describe who constitutes a ‘person legally charged with the care or custody of a child,’ defining this term falls to the courts.” While the Penal Law referenced the Family Law for the definition of a number of its terms, it did not do so for the phrase in question; but this, according to the court, was not a problem because the Family Law did not contain such a term. The Family Law did, on the other hand, contain a definition for “person legally responsible” which the court read, along with other provisions of the Family Law, to cover

139. 708 N.E.2d 988 (N.Y. 1999); see supra notes 114-18 and accompanying text.
140. See id. at 989.
141. See id.
142. See id. at 990. For a discussion of canons of construction see infra notes 155-83 and accompanying text.
143. Howard, 708 N.E.2d at 990.
144. 93 N.Y.2d 564 (1999).
145. See id. at 567. The court put the term stepmother in quotes to indicate that the Appellant was not the legal stepmother by marriage or adoption. See id. at 566.
146. Id. at 567.
147. See id. at 568 (noting that section 1012(g) of the Family Court Act uses the term “person legally responsible”).
148. See id.
the stepmother in this case. No aspect of the provision referred to was part of the same enactment, nor was there any demonstration of explicit legislative intent to link the provision. Instead the court relied on a fuzzy purpose provision of the Penal Law, which provided that the Penal Law should be “construed according to the fair import of [its] terms to promote justice and effect the objects of the law” to make the link.

Similarly, in People v. Owusu, the court determined that teeth were not a dangerous instrument partially because a subsequent legislature enacted a law that imposed criminal liability on an adult for intentionally causing physical injury to a child under seven. The court then stated:

If a body part such as a hand were within the sweep of the Penal Law definition of a dangerous instrument, however, there would have been no need for the legislation. . . . Because the Legislature did not consider hands or other body parts to constitute dangerous instruments, the new provision was necessary.

This use of the post enactment actions by legislatures must be treated very delicately. First, a subsequent legislature is not the arbiter of the meaning of a prior statute. It can amend it, but it cannot interpret it in the judicial sense of that word. Second, there are other explanations for the “new provision,” including a legislative desire to make a political statement concerning child abuse regardless of any other statute, a concern about the earlier statute’s clarity, and finally, ignorance of the earlier statute.

149. See id.

150. Id. at 567. Of course, the court could alternatively have relied on the “rule of lenity” to limit the criminal statute’s scope but the facts of the case—the stepmother stood-by while the father beat his child to death—compelled a different approach. See Liparota v. United States, 471 U.S. 419, 427 (1985) (“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”); Scalia, supra note 30, at 27 (explaining that the rule of lenity “says that any ambiguity in a criminal statute must be resolved in favor of the defendant”).


152. See id. at 1230-31 & n.2.

153. Id. at 1230-31.

154. There is one instance in which subsequent legislative action, short of amendment, should be judicially used. Assume that a jurisdiction’s high court has interpreted a statute in a particular fashion and subsequently the legislature reenacts that statute without change. It would seem that under such a record a court could sensibly read the reenacted statute as incorporating its interpretation.
B. Canons of Construction

Canons are judicially crafted maxims intended to limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles from which a judge may draw a "correct, unchallengeable rule[] of 'how to read.'" Many of them are quite familiar; for example, remedial statutes should be read broadly. Their use has been held in scholarly ill-repute for over a century. So consistently unfavorably has their use been viewed that two contemporary scholars of statutory interpretation have written "almost everybody thinks [that] canons are bunk."

Two basic observations underlie this criticism of the use of canons. First, canons are not a coherent, shared body of law from which correct answers can be drawn. Second, viewed individually, many canons are wrong.

As to the first criticism, it is clear that canons are a grab bag of contradictory individual rules from which a judge can choose to support...
his or her view of the case. This was Karl Llewellyn’s point when he observed, in his now famous article, that “there are two opposing canons on almost every point.”158 Few have taken issue with Llewellyn’s observation. Indeed, it has been almost universally adopted as the starting place for all criticism of canons.159 This canonical dilemma is pointed to by a 1998 New York Court of Appeals case, Majewski v. Broadalbin-Perth Central School District160 in which the juxtaposition of opposing canons demonstrates the need for more specific analysis.161 The court writes:

> It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it. An equally settled maxim is that “remedial” legislation or statutes governing procedural matters should be applied retroactively.162

Secondly, viewed individually, many canons are wrong and equally flawed. Canons are considered presumptions about legislative intent.163 How, for example, do we know as a general proposition that when a legislature passes a remedial statute that it intends for it to be broadly applied? It is just as probable that the enacting legislature intends the statute to be moderately or narrowly applied. The point is that, as a rule, the canon bars the inquiry, and is at odds with legislative supremacy by forcing the burden on the legislature to overcome a judicial presumption, rather than requiring the court to dig for the meaning.

Several years ago, Judge Mikva and I wrote: “[Despite t]his tide of scholarly criticism . . . . Canons . . . continue to provide judges (and consequently attorneys) with a necessary rationale for making interpretive choices.”164 Recent New York jurisprudence seems to be at odds

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158. Llewellyn, supra note 155, at 401.

The usual criticism of the canons . . . is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not illuminate. (You need a canon for choosing between competing canons, and there isn’t any.)

Id. (footnote omitted). Justice Scalia, on the other hand, considers certain canons valuable aids to the construction of statutes. See SCALIA, supra note 30, at 25-27.

161. See id. at 980.
162. Id. (citations omitted).
163. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 22.
164. Id. at 27.
with this conclusion. Of the many cases reviewed for this article few even used canons. In fact, in at least three cases, *Karlin v. IVF America, Inc.*, *Rust v. Reyer*, and *Village of Chestnut Ridge v. Howard*, the court, given opportunities to apply canons to resolve a dispute, rejected a canonical approach in favor of a more analytical one employing, for example, legislative history and the statute's historical context.

In *IVF America, Inc.*, the court reversed an appellate division decision that was based on a version of the canon that statutes in derogation of the common law should be read narrowly, thus holding that both the plain meaning of the statute and its legislative history suggested a broader construction. A direct statement of this approach is found in *Reyer*, in which the court determined that a statute outlawing the “furnishing” of alcohol to a minor covered a defendant who allowed his home to be used for a party at which alcohol was knowingly served. The defendant had nothing to do with the alcohol. The decision overturned an appellate decision holding that the statute’s reach was not this broad on the basis of the canon that statutes in derogation of the common law should be narrowly construed. Confronted with legislative history that suggested a broader purpose, the court stated: “[W]e are mindful that a statute in derogation of the common law must be strictly construed. We are mindful as well that our prime directive, in matters of statutory interpretation, is to give effect to the intention of the Legislature.” Finally, in *Village of Chestnut Ridge*, as discussed earlier, the court pushed aside a canon (“all sections of a law should be read together”) for what it considered a contrary legislative intent.

In a fourth case, *Majewski v. Broadalbin-Perth Central School District*, the court, faced with the interpretation of the statutory phrase

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166. 693 N.E.2d 1074 (N.Y. 1998).
168. Whether New York will go as far as the State of Oregon by formally stating its preference for legislative history remains to be seen. See Portland Gen. Elec. Co. v. Bureau of Labor and Indus., 859 P.2d 1143, 1146 (Or. 1993). (“If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history . . . .”).
169. See *IVF America, Inc.*, 712 N.E.2d at 666.
170. See *Rust*, 693 N.E.2d at 1076-77.
171. See *id.* at 1075.
172. See *id.*
173. *Id.* at 1076-77 (citations omitted).
174. See supra notes 114-18 and accompanying text.
175. See *Howard*, 708 N.E.2d at 990.
"to take effect immediately," rejected two competing canons. After finding that the phrase was contextually unclear and noting the applicability of certain canons, the court declared: "General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available. . . . To that end, we turn to legislative history to steer our analysis." Interestingly, after an unavailing review of the legislative history, the court did turn to one of the canons noted above, declaring: "That a statute is to be applied prospectively is strongly presumed and here, we find nothing that approaches any type of 'clear' expression of legislative intent concerning retroactive application."

In only two other cases, Whalen v. Kawasaki Motors Corp. and Foley v. Bratton, did the court rely on a canon of interpretation, and in both cases the same canon—facially conflicting statutes must be applied "in the manner that will harmonize and further their purposes."

C. Legislative History

The New York Court of Appeals relies heavily on legislative history in its search for the meaning of unclear statutes. Given the Court of Appeals' aversion to canons, this reliance is not surprising. New York's embrace of legislative history facially sustains two views in the

177. See id. at 980 (rejecting the canons "retroactive operation is not favored by courts and . . . will not be . . . [invoked] . . . unless the language expressly or by necessary implication requires it" and "'remedial' legislation or statutes governing procedural matters should be applied retroactively") (citations omitted).

178. See id. "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts . . . . An equally settled maxim is that 'remedial' legislation or statutes governing procedural matters should be applied retroactively . . . ." Id.

179. Id. at 980-81 (citations omitted).

180. Id. at 984. This is the same canon used by the Supreme Court in Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994), to resolve a question concerning the effective date of the Civil Rights Act of 1991.


182. 709 N.E.2d 100 (N.Y. 1999).

183. Whalen, 703 N.E.2d at 249. According to the court in Foley: "It is not the function of the court, however, to declare one statute the victor over another if the statutes may be read together, without misdirecting the one, or breaking the spirit of the other." Foley, 709 N.E.2d at 102.

national academic debate over the use of legislative history, occasioned by Justice Antonin Scalia's unnaturally striking refusal to ever refer to it. The first is that the use of legislative history is natural. If the judicial task is to find legislative meaning and the statute is unclear, legislative history, more than any other source, may provide the required clues to legislative meaning. As Justice Stephen Breyer has written: "Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute."

The second view sustained by the Court of Appeals is that reference to legislative history is consistent with constitutional principles because probative legislative history is a formal part of the legislative process and is seen as such within the process. This view is well expressed by Judge Patricia M. Wald:

For all its imperfections, legislative history, in the form of committee reports, hearings, and floor remarks, is available to courts because Congress has made those documents available to us. . . . As Justice Scalia has recognized, there does indeed exist a congressional practice of including information in legislative history for the purpose, among others, of informing later judicial construction of the statute. But, to the extent that Congress performs its responsibilities through committees and delegates to staff the writing of its reports, it is Congress' evident intention that an explanation of what it has done be obtained from these extrinsic materials. . . . [L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation,

185. See, e.g., SCALIA, supra note 30, at 29-30 ("[L]egislative history should not be used as an authoritative indication of a statute's meaning."); Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote[s] upon the text of a law and its presentment to the President."). In Blanchard v. Bergeron, 489 U.S. 87 (1989), Justice Scalia, in a concurring opinion, noted:

As anyone [who is] familiar with modern-day drafting of [a] congressional committee report[,] is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . .

Id. at 98 (Scalia, J., concurring).

and it represents the way Congress communicates with the country at large. 187

Legislative history is effectively the formally documented steps through which a bill is enacted into law. Such a history might include the bill or bills through which the statute was introduced, the transcript of introductory remarks, memoranda that accompanies such introduction, the record of a bill’s assignment to committee, transcripts of committee hearings, debates and markup sessions, amendments, committee votes, and committee reports (which normally contain a statement of a bill’s purpose and scope, a statement of the reasons for which a bill should be enacted, a section by section analysis, a statement of changes the bill would make in existing law, committee amendments to the bill, votes taken in committee, and a minority report setting forth reasons for opposition to the bill). 188 A legislative history might also contain transcripts of debates, floor amendments, votes, conference committee reports, and signing or veto statements. 189 Not all pieces of legislative history are equally probative. For a piece of legislative history to be probative of legislative intent, it must bear a significant relationship to the enactment process. Such a relationship may be evidenced by two types of legislative history. First, a legislator’s statements that are central to the actual debate over the bill. Professor Stephen F. Ross suggests two such categories of statements:

(1) statements by the sponsor of the legislation or the particular provision at issue when it appears that members who might otherwise desire to amend the bill have relied on those statements; and (2) colloquies between the “major players” concerning a legislative provision when it appears that the majority of members are prepared to follow any consensus reached by these individuals. 190

188. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 27.
189. See id. at 28.
Second, the formal products of legislative institutions established by Congress and other legislative bodies to effect the level of specialization necessary to effect that legislature’s legislative goals. Such products, characterized by Professor Charles Tiefer as institutional legislative history, would include committee and conference committee reports.\textsuperscript{191} About such legislative history, Professor Edward Correia has aptly noted: “We should assume that legislators want courts to consider primarily statements that are adopted by the majority or that represent explanations by legislators with specialized responsibility for enactment.”\textsuperscript{192} Clearly uncovered by these definitions of probative legislative history are post-passage signing statements by legislators or others. This includes executive signing statements. “While the President has the power to veto a bill and the legislature has the power to override the veto, the legislature has no power to veto or override the executive’s signing message, which can contain any statement the executive chooses to include.”\textsuperscript{193}

Despite New York’s embrace of legislative history, its definition and use vary substantially from the above model. Its temporal focus is almost entirely on the executive signing period which includes the ten day period after the legislature presents the passed bill to the Governor.\textsuperscript{194} During this period the practice is for the Counsel to the Governor to gather comments on the bill from executive agencies and groups affected by the legislation.\textsuperscript{195} These comments are placed in a bill jacket along with the bill itself.\textsuperscript{196} In New York this bill jacket becomes the central repository of a bill’s history.\textsuperscript{197} Sometimes a bill jacket will contain a letter or memorandum from a legislator or legislatively generated documents such as introductory memoranda.\textsuperscript{198} Basically though, almost all materials contained in bill jackets are executively generated post

\begin{thebibliography}{99}
\bibitem{191} See Tiefer, \textit{supra} note 187, at 28 (drawing on the work of Justice Breyer and the decisions by Justices Breyer and Stevens).
\bibitem{193} MIKVA \& LANE, \textit{STATUTORY INTERPRETATION}, \textit{supra} note 8, at 40.
\bibitem{194} See N.Y. CONST. art. IV, § 7.
\bibitem{195} See ROBERT ALLAN CARTER, \textit{LEGISLATIVE INTENT IN NEW YORK STATE} 7 (1981).
\bibitem{196} See ELLEN M. GIBSON, \textit{NEW YORK LEGAL RESEARCH GUIDE} 1-97 (2d ed. 1998).
\bibitem{197} See id. (“While bill jackets do not contain a record of debate, a transcript of any hearings or any committee reports of the sort available as a matter of course for federal legislation, no New York legislative history search is complete without them.”). \textit{But see} CARTER, \textit{supra} note 195, at 8 (“A second misconception . . . is that the Governor’s bill jacket is the sole repository for legislative intent. . . . [I]t is not always true.”).
\bibitem{198} See CARTER, \textit{supra} note 195, at 8.
\end{thebibliography}
passage documents. This means that almost none of that which is referred to as legislative history in New York is institutional legislative history or even legislatively generated legislative history. Rather, it is almost all post facto statements by interested parties on the meaning of a statute.

Judicial attention to this executive-legislative history is well illustrated by the *Fumarelli* decision noted earlier.

The Bill Jacket materials include two memoranda presented for the Governor's consideration, when he approved the bill to become law, that are also useful to the interpretative work of the courts. . . . The first, presented by the Attorney-General, states that "the bill confirms the recent New York Court of Appeals decision in *Caceci.*" It adds that "[t]his bill affords important legislative recognition, for the first time, of the existence of an implied 'housing merchant' quality warranty. Further, it defines the basic contours of this warranty."

The Executive Deputy Secretary of State also submitted a support memorandum from that consumer-sensitive and regulatory entity. It states that "[t]he bill is a legislative reaction to *Caceci*" and that it "also recognizes the housing merchant warranty." This memorandum, like the Attorney-General's, reflects an expectation of a statutory regimen providing definitive governance and direction to contracting parties and creating a uniform universe within which they could rely.

Similarly, a 1999 case, *McCall v. Barrios-Paoli,* demonstrates the same approach.

The history of the statutes, moreover, unambiguously demonstrates that the Legislature expected the State Comptroller might conduct audits into the effective use of State funds by political subdivisions. In signing the 1971 amendments to the General Municipal Law that added New York City (as well as Buffalo and Rochester) to the statute's reporting and auditing requirements, for example, the Governor noted that "[u]niform Statewide audits of all levels of local government required by the bill can provide a great contribution to efficient and economic administration and use of the taxpayers' dollar." As the

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199. See *Gimson,* supra note 196, at I-97.
200. 703 N.E.2d 251 (N.Y. 1998); See supra notes 25 & 27 and accompanying text.
201. *Fumarelli,* 703 N.E.2d at 254-55 (alterations in original) (citations omitted).
Governor had observed in seeking that legislation, "sixty-three cents of every tax dollar [the State collects] goes back to the local governments to help them meet their responsibilities," and it is the State's responsibility to see "that performance standards set by the Legislature in connection with * * * State-supported services are lived up to by local government." The Division of the Budget, in recommending that the Governor sign the bill, echoed the sentiment that the Comptroller's audits would enable the State to fulfill its "responsibility to insure [sic] the efficient and effective use" of the City's funds and "help promote efficiency in their financial administration." 203

Such executive-legislative history is not limited to gubernatorial signing statements or statements of executive officials. Also included within such history are the comments of other governmental officials and lobbyists and the post-passage comments of legislators. For example, in the earlier discussed Council of New York v. Giuliani, 204 the court found that "[t]he legislative intent was perhaps best captured in a letter written by Mayor Lindsay: [which] . . . . indicated that "the health care system [was to] continue to be the City's responsibility."" 205 And in People v. Allen, 206 the court was asked to determine whether an attempt to solicit small amounts of marihuana from undercover police, who were actually selling oregano, constituted "criminal solicitation" under the Penal Code or came under a statutory exemption. 207 After determining that the applicability of the criminal solicitation provision of the Penal Law statute to solicitors of small amounts of marihuana was unclear, the court found that the solicitation was exempt from the sanction because the intent of a subsequently enacted statute which, according to practice commentaries, was to "reduce the penalties for possession and sale of marihuana and in particular to "decriminalize" the possession of a small amount of marihuana for personal use." 208 Finally, in Myers v. Bartholomew, 209 in deciding a particularly difficult question regarding time periods for adverse possession in certain circumstances, the court

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203. Id. at 675-76 (alterations in original) (citations omitted).
204. 710 N.E.2d 255 (N.Y. 1999); See supra notes 126-30 and accompanying text.
205. Id. at 259 (internal quotations omitted) (citations omitted).
207. See id. at 1231.
208. Id. at 1233; see also Maldonado v. Maryland Rail Commuter Serv. Admin., 695 N.E.2d 700, 702 (N.Y. 1998) (examining the legislative intent of Civil Practice Law & Rules ("CPLR") § 205, the court looked to a Bar Association report pertaining to CPLR § 306-b(b), a related section of the statute).
referred to a memorandum from the Senate Minority Leader, as well as memoranda from the Law Revision Commission and from the Bar Association of the City of New York. 210 Other similar sources cited by the court were memoranda of the Police Conference and a special prosecutor, 211 and a memorandum from the New York Law Enforcement Council. 212

Of the cases reviewed for this Article, few made reference (and none exclusively) to what is apparently pre-passage legislatively generated legislative history. Included in this history were memoranda from individual legislators, 213 a sponsor’s memorandum, 214 a legislative debate, 215 a legislative budget report, 216 a legislative memorandum, 217 and a legislator’s floor declarations. 218 It is not clear whether the legislators’ memoranda were prepared for the enactment process or executive signing process. Indeed, save for Majewski, 219 the court neither places the referred to legislative history in the enactment process nor provides any analytical framework for evaluating legislative history, appearing to treat all pieces of legislative history equally or, based on the slimness of any legislative record in New York, as substantively meaningless.

In Majewski, the court did attempt to provide some analytical framework for understanding its approach to legislative history and other tools of construction.

It is clear that one of the key purposes of the Act was the legislative modification of Dole v. Dow Chem. Co. insofar as that case related to third-party actions against employers. That intention was repeatedly expressed by all sides during the legislative debates and is included in the official statement of intent. . . .

210. See id. at 163, 164.
219. See id. at 982-84.
With the recent passage of the Act, the Legislature endeavored to clarify and restore "the force of 'exclusive remedy' (or 'no fault') provisions. Specifically, amendments would protect employers and their employees from other than contract-based suits for contribution or indemnity by third parties (such as equipment manufacturers which have been deemed liable for causing employees injuries or deaths)—in effect, repealing the doctrine of Dole."

Memoranda issued contemporaneously with the passing and signing of the Act provided that "the exclusive remedy" would be "restored and reinforced." In an analysis of retroactive application, we have found it relevant when the legislative history reveals that the purpose of new legislation is to clarify what the law was always meant to say and do. However, labeling the legislation as "remedial" in this regard is not dispositive in light of other indicators of legislative intent.

For example, legislators made declarations during floor debates that conclusively state that the Act was not intended to be applied retroactively. Moreover, a report entitled "New York State Assembly Majority Task Force on Workers' Compensation Reform" explicitly states that the provisions would apply only to "accidents that occur [after the effective] date forward," and was "not intended to limit the rights of parties to a lawsuit filed after the law takes effect, but involving a claim arising from an accident that occurred before the law took effect." Although these averments "may be accorded some weight in the absence of more definitive manifestations of legislative purpose", such indicators of legislative intent must be cautiously used. . . .

On the same footing are statements contained in the Governor's Memorandum issued with the signing of the Act. In it, the Governor states his view that the legislation was intended to be retroactive. . . .

Although postenactment statements of the Governor may be examined in an analysis of legislative intent and statutory purpose, such statements suffer from the same infirmities as those made during floor debates by legislators. Here, the reports and
memoranda simply indicate that various people had various views. [FN2]

[FN]2. Under the circumstances, little weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation.

Importantly, we note that the initial draft of the Act expressly provided that it would apply to "lawsuits [that have] neither been settled nor reduced to judgment" by the date of its enactment. That language does not appear in the enacted version. A court may examine changes made in proposed legislation to determine intent. Here, such evidence is consistent with the strong presumption of prospective application in the absence of a clear statement concerning retroactivity.220

It is hard to gauge the significance of this decision, as it is not mentioned again in other subsequent cases.

The New York Court of Appeals' attention to executive-legislative history is problematic. Simply put, if the bill is not vetoed, it allows a statute's meaning to be shaped without legislative participation. The court's attention to executive-legislative history does not appear to reflect a purposeful favoring of executive perspectives, nor a judicial in temperament for legislative lawmaking, nor ignorance of the legislative process. Rather, such attention results from the fact that the New York State Legislature produces almost no legislative history. As Judge Kaye has politely observed: "In New York ... legislative history is relatively sparse with legislative intent evidenced primarily by the language of the statute itself."221 A less circumspect observation might be that the leadership-dominated New York legislative process is conducted almost entirely in closed nonrecorded forums. While it does produce bills, some introductory memoranda, votes, and transcripts of debates the debates are meaningless because the passage of every bill on a house floor in unamended form is preordained. More importantly, for legislative history purposes, New York Legislature's committee system is moribund. As I have written elsewhere:

In healthy legislative bodies ... committees do much of the heavy lifting. They introduce legislation, debate it, amend it in

220. Id. at 981-82 (alterations in original) (citations omitted).
221. Kaye, supra note 1, at 30.
markup sessions, hear the opinions of outside experts and the public . . . describing their intent [in reports] . . .

Such a division of labor, and authority, is largely unknown in Albany. As a former legislative staffer has neatly summarized the Legislature’s committee life: “Nothing ever happens. A leadership-created agenda is followed and bills are voted on, always favorably. No debates or markup sessions are held, no amendments permitted. Nothing except votes are recorded.” Against that background the court is essentially faced with the choice of declaring its view of what the law ought to be, or to search for some outside source contemporaneous with the enactment of the statute in question which sheds some light on the statute. And it is on executive-legislative history that the court most often relies.

VI. SHOWDOWN QUESTIONS

Even under New York’s very broad definition, legislative history does not provide the answer to many cases. Nor should it be given the erratic and non-probative nature of most of the material found in bill jackets. This means that many of the cases resolved by the Court of Appeals are what Professor Harry W. Jones has characterized as a “‘serious business’ situation[]” or “show-down question,” one for which statutory sources or legislative procedures cannot provide an answer and yet the court must. It is in these cases that the court must “speak the language of the common law.” As Judge Kaye has said about this type of case: “I think it clear that common-law courts interpreting statutes and filling the gaps have no choice but to ‘make law’ in circumstances where neither the statutory text nor the ‘legislative will’ provides a single clear answer.” The court is not always explicit in this endeavor. Many of the cases in which legislative history of any type is noted seem more the product of “interstitial common-law adjudication,” than ju-

223. See Harry W. Jones, An Invitation to Jurisprudence, 74 COLUM. L. REV. 1023, 1041 (1974). The phrase “serious business” is drawn from Justice Cardozo: “It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.” BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21 (1921).
224. See MIKVA & LANE, STATUTORY INTERPRETATION, supra note 8, at 41; Jones, supra note 223, at 1041.
225. Kaye, supra note 1, at 20.
226. Id. at 33-34.
dicial deference to legislative meaning as expressed through legislative history of any type.\textsuperscript{228}

Sometimes, on the other hand, the New York Court of Appeals will lay its cards on the table and signal that it is faced with a show-down question and basically confront it head on. One example of such an endeavor is \textit{Mowczan v. Bacon}.\textsuperscript{229} In that case, the court was asked to resolve a third-party practice question of whether the primary defendant, the owner and operator of a tractor trailer in which the plaintiff was a passenger, could implead the owner of the trailer portion of the vehicle with which defendants' tractor-trailer collided.\textsuperscript{230} The answer depended upon the interpretation of a particular provision of the Vehicle and Traffic Law.\textsuperscript{231} The court stated:

\begin{quote}
Partly because of the temporal misalignment of enactments affecting the question here, we are charged with trying to discover and discern the intent of the Legislature in enacting a statute in 1924 (and subsequently recodifying it in 1929 and 1959) as it meets a separate species of statute that emerged only in 1974 from the common-law cocoon of \textit{Dole v. Dow Chemical Co}. . . . .
\end{quote}

The Legislature in the early decades of this century did not foresee or provide for the circumstance that the courts, by common-law evolutions, would alter liability standards with a more progressive fairness distribution. . . .

\textsuperscript{228} This is consistent with another of Professor Jones' observations:

Why is it so hard to tell, on a first reading of the court's opinion in a "serious business" case, that the controversy was originally a stand-off, as concerns formal legal doctrine, and was decided as it was chiefly in accordance with the court's views—informed judgment, intuitive impression or largely unconscious predilection, depending on judge or judges involved—of what is sound public policy? The source of the analytical difficulty is in the syllogistic form characteristic of judicial opinions, which operates, as often as not, to obscure policy decision in a wrapping of essentially secondary doctrinal explanations. For courts must not only reach decisions, they also have to justify them, and, as John Dewey wrote a long time ago, there is always danger that the logic of justification will overpower and conceal the logic of search and inquiry by which a decision was actually arrived at.

Jones, \textit{supra} note 223, at 1041.

\textsuperscript{229} 703 N.E.2d 242 (N.Y. 1998); \textit{see also} People v. Kramer, 706 N.E.2d 731, 734 (N.Y. 1998) (indicating that the resolution of statutory standing required the synthesis of provisions in the CPL, the CPLR and the Penal Law); Whalen v. Kawasaki Motors Corp., 703 N.E.2d 246, 247 (N.Y. 1998) (noting that the reduction of Plaintiff's verdict would have to be determined by the comparative fault provisions of CPLR 1411 or by the settlement set-off rule codification in General Obligations Law section 15-108(a)).

\textsuperscript{230} \textit{See Mowczan}, 703 N.E.2d at 243.

\textsuperscript{231} \textit{See id.} (analyzing § 388 of the New York Vehicle and Traffic Law).
Not surprisingly, this effort by human agents in all branches of government to effect a scheme of comprehensive symmetry left interstices. The language of the preexisting Vehicle and Traffic Law § 388 neither precludes nor authorizes the remedy of third-parties to seek contribution pursuant to it under circumstances such as are presented here. The question this Court faces, therefore, is whether the overarching policy of CPLR 1401 should fill the gap of this permutation in third-party practice, unimagined as of the time of enactment of the predecessor to Vehicle and Traffic Law § 388. We think it should.

An exemplar of common decision making within a statutory framework, but from an earlier term, is Braschi v. Stahl Associates Co.232 In Braschi, New York’s highest court, the Court of Appeals, was required to interpret the term “family” in a rent-control statute.233 The statute regulated the amount of rent that could be charged for certain apartments and the landlord’s right to evict tenants.234 Braschi had lived with another man, Leslie Blanchard, in a rent-controlled apartment.235 Their lives were completely socially and economically intertwined and both considered the apartment they lived in their home.236 However, at the time of Blanchard’s death, the lease was still in Blanchard’s name.237 Under the statute, if Braschi was a member of Blanchard’s family, he could not be evicted from the apartment; if he was not, he could be.238 The statute contained no definition of the term family nor was one discernible from the statute’s legislative history.239 Also, as the plurality pointed out, the dictionary allowed for both definitions of family.240 For example, according to Webster’s Dictionary, “family” could be defined as: (1) “all the people living in the same house” or (2) “a social unit consisting of parents and [their] children.”241 The purpose for which the statute was enacted was, as the court agreed, indisputable.242 The act was passed both to protect a narrow group of occupants, “familial” tenants, from eviction and to gradually return rent control apartments to the free
Based on the above, for a majority of the court, as declared by Judge Bellacosa in a concurring opinion, the “legislative intent [was] completely indecipherable.” The court opted for the broader definition, protecting Braschi’s tenancy. In doing so a plurality of the court wrote:

[W]e conclude that the term family, as used in [the statute], should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.

VII. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS

In New York, as throughout the nation, a frequent task of the courts is the review of the interpretation of statutes by administrative agencies. Agencies, like the courts, are required to follow the plain meaning rule and the failure to do so is reversible by a court. But over at least the last two decades there has been a debate over the respective roles of agencies and courts in the interpretation of an unclear statute. On the federal level, that debate has been, at least in theory, resolved by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources De-

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244. See id.
245. Id. at 56 (Bellacosa, J., concurring).
246. See id. at 54 (Bellacosa, J., concurring).
247. Id. at 53. Judge Bellacosa, in concurrence, was clearly more circumspect:

The plurality opinion favors the petitioner’s side by invoking the nomenclature of “nuclear”/”normal”/”genuine” family versus the “traditional”/”legally recognizable” family selected by the dissenting opinion in favor of the landlord. I eschew both polar camps because I see no valid reason for deciding so broadly; indeed, there are cogent reasons not to yaw towards either end of the spectrum.

... Traditionally, in such circumstances, generous construction is favored.

... We just do not know the answers or implications for an exponential number of varied fact situations, so we should do what courts are in the business of doing—deciding cases as best they fallibly can. Applying the unvarnished regulatory word, “family”, as written, to the facts so far presented falls within a well-respected and long-accepted judicial method.

Id. at 56-57 (Bellacosa, J., concurring).

fense Council, Inc., 249 which held that federal courts must defer to interpretations by the agencies to which Congress has delegated the power to apply the statute. 250 The Court’s reasoning is as follows:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

... If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

State courts have generally not adopted the Chevron canon. While state courts will give weight in various circumstances to agency inter-

250. See id. at 843-44.
251. Id. at 843-44 (footnotes omitted). This doctrine is not without its critics. Such a rule is quite appealing, especially when Congress has delegated law-interpreting power to the agency or when the question involves the agency’s specialized fact-finding and policymaking competence....

For several reasons, however, a general rule of judicial deference to all agency interpretations of law would be unsound. The case for deference depends in the first instance on congressional instructions. If Congress has told courts to defer to agency interpretations, courts must do so. But many regulatory statutes were born out of legislative distrust for agency discretion; they represent an effort to limit administrative authority through clear legislative specifications. A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion. An ambiguity is simply not a delegation of law-interpreting power. Chevron confuses the two.

Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 445 (1989) (footnotes omitted); see, e.g., Peter L. Strauss, When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 CHI.-KEN T L. REV. 321, 331-32 (1990) (claiming that although courts can invoke the delegation doctrine when statutes are ambiguous, they often find other means of ensuring that agencies act within the law).
pretations of their enabling statutes, they tend to reserve to themselves, in some form or another, the authority to impose their interpretations of statutes which do not call for the application of an agency’s particular expertise.\textsuperscript{252}

New York has adopted this approach, sometimes choosing to defer to reasonable agency interpretations, and other times choosing to reverse them. This is good news because a blanket rule of deference is inconsistent with a search for legislative meaning. As Professor Cass R. Sunstein has accurately observed:

The case for deference depends in the first instance on congressional instructions. If Congress has told courts to defer to agency interpretations, courts must do so. But many regulatory statutes were born out of legislative distrust for agency discretion; they represent an effort to limit administrative authority through clear legislative specifications. A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion. An ambiguity is simply not a delegation of law-interpreting power. \textit{Chevron} confuses the two.\textsuperscript{253}

This appears to be the New York approach despite a number of cases in which deference to agency interpretation is noted and followed. Agency deference is exemplified by \textit{Nunez v. Giuliani}.\textsuperscript{254} Faced with a question concerning an agency’s narrow interpretation of the phrase “eligibility date,” the court declared that “‘[a]n administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious.’”\textsuperscript{255} “On the other hand, ‘[t]he challenger must establish that a regulation “is so lacking in reason for its promulgation that it is essentially arbitrary.”’”\textsuperscript{256} An example of the court reserving interpretive

\textsuperscript{252} See generally ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 9.2 (1989) (discussing the scope of review that federal and state courts use for issues of legal interpretation).

\textsuperscript{253} Sunstein, supra note 251, at 445 (footnotes omitted).

\textsuperscript{254} 693 N.E.2d 746 (N.Y. 1998); see also Golf v. New York State Dep’t of Soc. Servs., 697 N.E.2d 555, 560 (N.Y. 1998) (“[G]iven the fundamental ambiguity of the relevant statutory provisions, deference is appropriately given to the State agency’s interpretation in this case.”); Village of Scarsdale v. Jorling, 695 N.E.2d 1113, 1117 (N.Y. 1998) (quoting Harris & Assocs. v. deLeon, 646 N.E.2d 438, 442 (N.Y. 1994)) (“[T]he practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts.”).

\textsuperscript{255} Nunez, 693 N.E.2d at 747 (quoting New York State Ass’n of Counties v. Axelrod, 577 N.E.2d 16, 20 (N.Y. 1991)).

\textsuperscript{256} Id. at 747-48 (quoting Axelrod, 577 N.E.2d at 20-21 (quoting Marburg v. Cole, 36 N.E.2d 113, 117 (N.Y. 1941))) (alteration in original).
authority to themselves is *Seittelman v. Sabol.* In *Seittelman*, the court overruled an agency’s narrow interpretation of a statute providing for Medicaid reimbursement, in certain cases, for medical services rendered prior to an individual’s application to the program.

It is settled law that an agency’s interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness. However, where the “question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.” In such a case, courts are “free to ascertain the proper interpretation from the statutory language and legislative intent.”

VIII. SETTLING THE LAW

One of the most noticeable things about the New York Court of Appeals is the extent to which the court renders unanimous decisions in cases involving clear or unclear statutes. Of the cases reviewed for this article thirty-nine were unanimous, two had one dissenter and none had more than one dissenter. There seems to be a conscious effort on the part of the court to distill cases to elements on which all members can agree in order that the court may at least appear to serve the law rather than make it. As Judge Kaye has written: “Indeed, on our court we especially strive for consensus in statutory interpretation cases as a matter of policy.”

IX. CONCLUSION

Justice Antonin Scalia has recently complained about the absence of a theory of statutory interpretation, under which objective standards for determining the meaning of a statute presumably could be extracted. “Surely this is a sad commentary. We American judges have no intelligible theory of what we do most.” And to make matters worse, the

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257. 697 N.E.2d 154, 157 (N.Y. 1998); see also New York Botanical Garden v. Board of Standards and Appeals of N.Y., 694 N.E.2d 424, 426 (N.Y. 1998) (explaining that where the question is one of pure legal interpretation of statutory terms, deference to the Board of Standards and Appeals is not required).


259. *Id.* (internal citations omitted).


"American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory." As an answer to his perceived dilemma, he posits textualism—the use of the text and, if unclear, the use of certain canons that address the logic of language, such as expressio unius est exclusio alterius, noscitur a sociis and ejusdem generis. But the signature piece of his theory is the self conscious avoidance of legislative history.

New York jurisprudence demonstrates the weakness of both his observation and theory. Indeed New York does have an intelligible theory of statutory interpretation, but its applicability is limited by the number of cases in which legislative meaning is simply undeterminable, except through common law decision making. In these cases, the court has no choice but to adopt what Justice Scalia sarcastically labels a "Mr. Fix-it mentality." No text based theory, like Scalia's, or text and process based theory, like mine, can avoid the problem. But even in those cases, the New York Court of Appeals appears to extend itself to reach a consensus in order to guard against the contentious political decision making often found on the Supreme Court.

New York's theory does provide for the use of legislative history. As with all courts, its impressment for determining meaning is so natural that its avoidance would seem odd. The court's particular use of legislative history is somewhat problematic. First, it uses it in support of clear text, an unnecessary and potentially dangerous practice. Second, the legislative history it uses is most often executive-legislative history because of the dearth of legislatively-generated history. But, contrary to Justice Scalia's view, this use of executive, legislative history allows the court to avoid judicial lawmaking, not to cover for it.

On balance, despite the richness of its common law tradition, the New York Court of Appeals is a court that seems comfortable with its constitutional obligation to honor legislative efforts and to limit its own lawmaking efforts to cases in which answers can only be found through such efforts.

262. Id. at 14.
263. See id. at 25-26.
264. Id. at 14.