HOW TO WIN THE READ VOTE: A PROFILE OF THE STATUTORY INTERPRETATION METHOD OF ASSOCIATE JUDGE SUSAN P. READ FROM A PRACTICAL VIEWPOINT

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I. INTRODUCTION

Text, intent, and purpose. Judges rely on one or more of these tools whenever they begin to construe a statute with ambiguous language.[1] But what do judges do when, on occasion, these tools fail to resolve the ambiguity? Judges must of course resort to *some* method or methods in order to apply the law and decide difficult cases. Although it is typical to start with one of the three interpretive touchstones stated above, the ensuing process and decision can vary greatly from judge to judge and case to case. As Judge Cardozo once said, a judge interpreting a statute is like "a wise pharmacist who from a recipe so general can compound a fitting remedy."[2]

This article is an attempt to gauge the method of statutory interpretation employed by Associate Judge Susan P. Read of the New York Court of Appeals. This article will consider—among other subjects—Read's interpretive tendencies, whether she uses a method consistently, and her view on the proper role of the courts with regard to the separation of powers. Why is this subject important? For one thing, New York's high court resolves dozens of questions of statutory and constitutional law every year, and these

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[1] *See, e.g.*, Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 285–86, 918 N.E.2d 900, 990, 890 N.Y.S.2d 388, 394 (2009); DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660, 860 N.E.2d 705, 708, 827 N.Y.S.2d 88, 91 (2006); *In re* Yolanda D., 88 N.Y.2d 790, 795, 673 N.E.2d 1228, 1230–1231, 651 N.Y.S.2d 1, 3–4 (1996).

[2] Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 93 (1992) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 162 (1921)).

decisions have a great impact on virtually every aspect of life for New Yorkers.[3] Second, attorneys want to win cases. Understanding how judges reach interpretive decisions is important for any attorney arguing before a court. Finally, Judge Read makes for an interesting study since she herself is a student of statutory interpretation and has in fact written on the subject.[4]

Part II of this article summarizes the background surrounding Judge Read's nomination and confirmation to the Court of Appeals. Part III briefly introduces several methods of statutory interpretation that have developed over time. The goal is not to get over-involved in theory, but rather to provide a backdrop before considering some examples of Judge Read's own method of interpretation. Only the more established and recognized theories of construction will be introduced. Part IV of this article examines several of Judge Read's opinions in various areas of law. Included are analyses of cases involving rent regulation, administrative agency action, limited liability companies, criminal procedure, and workers' compensation. Ultimately, through a synthesis of these opinions, Part V strives (1) to develop at least a few common trends in Judge Read's method of interpretation and (2) to determine whether her method fits into one or more of the recognized theories—not for an extensive trek down a path of theoretical analysis, but to provide practitioners and advocates before the Court of Appeals with a better idea of how to win her vote.

A foreword should be made about the method of analysis in this article. The focus is on dissenting opinions. Judge Read has sat on the Court of Appeals for approximately seven years and has written many dissents. Among those dissents are several that involve a lengthy discussion of statutory interpretation. For this article, five of Judge Read's more prominent dissents have been selected for study.

Lost in majority opinions—of which Judge Read has obviously also written many—is a judge's pure analytical or theoretical viewpoint. This is naturally so because the majority opinion writer must draft it in a way that holds the votes of her colleagues. By contrast, with a dissent—particularly a one-judge dissent—there is no such constraint. This article will show that Judge Read has a well-developed method of statutory interpretation in which she places much confidence and conviction—illustrated by her

[3] DAVID D. SIEGEL, NEW YORK PRACTICE § 10, at 14–15 (4th ed. 2005).
[4] *See* Susan P. Read, *Statutory Resolution*, 12 GREEN BAG 2d 85 (2008).

willingness to write dissenting opinions.

II. APPOINTMENT AND CONFIRMATION

On January 22, 2003, the New York State Senate confirmed Susan Phillips Read as an associate judge of the New York Court of Appeals.[5] Before her confirmation, Judge Read was a legal adviser to Governor George E. Pataki, and later served as presiding judge of the New York Court of Claims.[6] Pataki nominated Read to the high court after she had served on the Court of Claims for approximately six years.[7] Although she had no background in criminal law as an attorney or a judge at the time of her nomination, there were no serious doubts about her legal expertise or ability as a judge among scholars and her peers.[8] In fact, she received praise from several of the top members of the New York judiciary, including former Chief Administrative Judge and current Chief Judge of the Court of Appeals Jonathan Lippman.[9] Because Court of Claims cases do not often involve issues regarding constitutional law or civil liberties, it was difficult for experts to predict Judge Read's judicial philosophy.[10] The general feeling, however, was that her elevation to the Court of Appeals would keep the court headed in a conservative direction since she was a Republican appointee.[11] Upon Judge Read's nomination, Governor Pataki described her as "brilliant" with "knowledge and experience in the law, and . . . as a judge."[12] Anyone interested in formulating Judge Read's views of statutory interpretation would have to wait for her opinions from the high court. At the announcement of her nomination, Read herself offered this note about the judicial role: "Technique without morals is a menace and morals without technique is a mess."[13]

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[5] *Senate OKs Judge for Top Court*, TIMES UNION (Albany, N.Y.), Jan. 23, 2003, at B3 [hereinafter *Senate OKs*].

[6] Al Baker, *Pataki Names Ex-Adviser to State's Highest Court*, N.Y. TIMES, Jan. 7, 2003, at B5.

[7] *Id.*

[8] *Senate OKs*, *supra* note 5.

[9] *Id.*

[10] Baker, *supra* note 6.

[11] *Id.*

[12] *Id.*

[13] *Id.*

III. THEORIES OF STATUTORY INTERPRETATION

A. Intentionalism

Perhaps the most popular traditional theory of statutory interpretation is intentionalism.[14] Proponents of this model see the Court's role as applying the original intent of the enacting legislature.[15] Judges on the federal and state level frequently approach statutory construction with canons rooted in intentionalism,[16] and New York courts are no different. As set forth by one Court of Appeals case: "When construing a statute, we seek to discern and give effect to the Legislature's intent."[17]

Intentionalist theory claims legitimacy in the fact that enacted laws in America are the product of a representative democracy.[18] The rationale is based on a fixed view of separation of powers among the branches of government: the legislature is the lawmaker and the courts serve to merely give effect to those laws; thus, "requiring the courts to follow the legislature's intentions disciplines judges by inhibiting judicial lawmaking, and in so doing seems to further democracy by affirming the will of elected representatives."[19] This foundation underlies the reason why so many courts construe statutes based on legislative intent. For attorneys arguing and attempting to persuade an intentionalist judge, an additional point should be made. Legislative history is fair game, even if the statutory text is unambiguously clear.[20] Unlike supporters of other theories—discussed later—intentionalists believe that the text is merely one indicator of the

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[14] William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–26 (1990).

[15] *Id.* at 326.

[16] *See, e.g.*, Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426, 432 (1986) (holding that circumstances surrounding particular legislation may indicate that Congress did not intend for its words to have their literal meaning); Goodson-Todman Enters., Ltd. v. C.I.R., 784 F.2d 66, 74 (2d Cir. 1986) ("[A court's] duty . . . is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" (quoting Comm'r v. Engle, 464 U.S. 206, 217 (1984))); Burgess v. Moore, 685 S.E.2d 685, 691 (W.Va. 2009) (recognizing the familiar rule that interpretation of an ambiguous statute begins with ascertaining legislative intent).

[17] Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 285, 918 N.E.2d 900, 906, 890 N.Y.S.2d 388, 394 (2009); *see also* Carney v. Philippone, 1 N.Y.3d 333, 339, 806 N.E.2d 131, 134, 774 N.Y.S.2d 106, 109 (2004).

[18] Eskridge, Jr. & Frickey, *supra* note 14, at 326.

[19] *Id.*

[20] Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 45 (2008)

statute's meaning, and evidence contained in legislative history, such as committee reports, can shed light on original intent.[21]

Critics of intentionalism posit that it rests upon a skewed view of the legislative process.[22] Intentionalism contains an underlying presumption that what is said in a committee report or floor debate represents the "intent" of the entire legislature regarding a given law.[23] But this is not true. Such reports and statements are often representative of the views of a faction within the legislature.[24] Legislative history therefore often flows not from the entire process of enactment of a law, but from a small portion of the lawmakers involved.

A second criticism is that legislative history is often cumbersome and resistant to the discovery of a single "intent."[25] That is, a shrewd judge can parse through legislative history to find statements or evidence that supports her position.[26] If the end goal is to discover the legislative intent of ambiguous statutory language, how can that be achieved if the legislative history is also ambiguous?[27] Yet another negative aspect of intentionalism is that there simply may be no clear evidence in the legislative history of a statue as to what the enacting legislature meant.[28] In those situations, intentionalism adds nothing to the discussion, and the court is left to give effect to ambiguous text. These negative critiques are reasons why most courts, including the Court of Appeals, adhere to the familiar common-law doctrine that legislative history—or *any other* extrinsic evidence for that matter—should not be used for interpretation purposes if unnecessary.[29]

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[21] *See* Green v. Block Laundry Mach. Co., 490 U.S. 504 (1989) (using legislative history to reach the same interpretive result as Justice Scalia's concurring opinion that used none).

[22] Eskridge, Jr. & Frickey, *supra* note 14, at 327.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 328.

[26] New York courts are not free from this occurrence. *See, e.g.*, Dalton v. Pataki, 5 N.Y.3d 243, 252, 835 N.E.2d 1180, 1184, 802 N.Y.S.2d 72, 76 (2005) (showing an example of a case in which both the majority and dissent referred to the legislative history to construe the effect of a federal statute but reached opposite conclusions).

[27] As one harsh critic of any use whatsoever of legislative history phrased it, "[T]he use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[28] Redish & Murashko, *supra* note 20, at 46.

[29] *See* Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583, 696 N.E.2d 978, 980, 673 N.Y.S.2d 966, 968 (1998) ("[I]f [statutory words] have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." (quoting Tompkins v. Hunter, 149 N.Y. 117, 122–123, 43 N.E. 532, 534 (1896))).

B. Purposivism

From the critiques of intentionalism stemmed a new method of statutory interpretation in the twentieth century: purposivism. At its roots, purposivism accepts the intentionlist idea that the legislature occupies a place above the judiciary with regard to interpretation.[30] It differs, however, in that it does not undertake a rigid approach but rather opts for more flexibility.[31] The presumption underlying the purposivist view is that the legislature must have a specific purpose or goal in enacting *every* statute.[32] Met with an ambiguity in text, a judge should try to ascertain the purpose of the statute and arrive at an interpretation that best serves—or is at least consistent with—that purpose.[33] Like intentionalism, purposivism has elements that have been adopted by most courts—including those in New York—when interpreting unclear statutory language.[34] It should be noted that legislative history does not disappear from the landscape for purposivists; it has a role to play—though not as crucial a role as with intentionalism.[35] By examining the text, history and "legal landscape" surrounding legislation, a purpose should be formed.[36]

Of course, purposivism has its critics as well—critics who argue that purposivism fails to offer a comprehensive method of interpretation for similar reasons that make intentionalism an imperfect theory: "unrealistic assumptions, indeterminacy, and competing values."[37] That is, purposivism relies on the assumption that legislation is *always* passed by rational lawmakers in the interest of the public good.[38] But we know from empirical studies that this assumption is questionable with respect to most enacted

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[30] Eskridge, Jr. & Frickey, *supra* note 14, at 332.

[31] *Id.* at 332–33.

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, People v. Santi, 3 N.Y.3d 234, 242–243, 818 N.E.2d 1146, 115, 785 N.Y.S.2d 405, 410 (2004) ("In implementing a statute, the courts must of necessity examine the purpose of the statute." (quoting Williams v. Williams, 23 N.Y.2d 592, 598, 246 N.E.2d 333, 337, 298 N.Y.S.2d 473, 478 (1969))); People *ex rel.* Wood v. Lacombe, 99 N.Y. 43, 49, 1 N.E. 599, 600 (1885) (holding that a court's function is to determine the legislative intention which "is to be ascertained from the cause or necessity of making the statute"); *In re* Estate of Oestrich, 61 A.D.3d 1317, 1319, 877 N.Y.S.2d 754, 756 (App. Div. 3d Dep't. 2009) ("The interpretation and application of the statute must be made consistent with the purpose for which it was enacted.").

[35] Redish & Murashko, *supra* note 20, at 51.

[36] *Id.*

[37] Eskridge, Jr. & Frickey, *supra* note 14, at 333.

[38] *Id.* at 335.

laws that are passed, not because of bad motives by legislators, but due to economic gamesmanship occurring in the legislature.[39] Also, statutes can be envisaged to accomplish multiple purposes—sometimes conflicting—since they are the result of a complicated bargaining process.[40] Therefore, a case involving a statute with more than one discernible purpose could potentially split a court whose judges are all purporting to employ purposivism.

This very event occurred in a famous case that was decided by the Court of Appeals in 1995. In *In re Jacob*,[41] the court was presented with the issue of whether New York's adoption statute permitted the unmarried partner of a child's biological mother—who was at the same time raising the child with the biological mother—to adopt the child as a second parent.[42] The statute consisted of several sections that had been incrementally amended for over a century, and thus had become ambiguous when read together.[43] Writing for a 4–3 majority, Chief Judge Kaye ascertained the purpose of the statute broadly: to create a "means of securing the best possible home for a child."[44] With this purpose in mind, Judge Kaye reasoned that a child's best interests would be served by allowing two parents, already acting as parents in a functional home, to become legal parents of the child; thus, in the majority's view, despite the ambiguity in the language, the persons attempting to adopt had standing to do so under the statute.[45] In contrast, Judge Bellacosa's dissenting opinion examined the text and history of the statute and found its purpose to be much narrower than fostering the "best interests of the child."[46] Instead, he concluded that the statute clearly set forth the policy "that a stable familial entity is provided by either a one-parent family *or* a two-parent family when the concentric interrelationships enjoy a legal bond."[47] Under this formulation, the prospective adoptive parents would not have had standing to adopt.[48] *In re Jacob* demonstrates how purposivism—like intentionalism—can be manipulated by judges in a manner

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[39] *Id.*

[40] *Id.*

[41] 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995).

[42] *Id.* at 656, 660 N.E.2d at 398, 636 N.Y.S.2d at 717; *see also* N.Y. DOM. REL. LAW § 110 (McKinney 2008) ("An adult unmarried person or an adult husband and his adult wife together may adopt another person.").

[43] *In re Jacob*, 86 N.Y.2d at 659, 660 N.E.2d at 400, 636 N.Y.S.2d at 719.

[44] *Id.* at 657–58, 660 N.E.2d at 399, 636 N.Y.S.2d at 718.

[45] *Id.* at 658, 660 N.E.2d at 399, 636 N.Y.S.2d at 718.

[46] *Id.* at 673, 660 N.E.2d at 408, 636 N.Y.S.2d at 727 (Bellacosa, J., dissenting).

[47] *Id.* (emphasis added).

[48] *Id.* at 683, 660 N.E.2d at 414, 636 N.Y.S.2d at 733.

that leaves doubts about its effectiveness as a method of interpretation.

C. Textualism

Given the defects in each of the above-mentioned methods that tend to look beyond the statutory language in the first instance, it is no surprise that the third major theory of interpretation focuses on text.[49] In fact, for the textualist, the ideal method of statutory construction would begin and end by simply giving effect to the meaning of the words written by the legislature without looking any further.[50] Proponents of textualism have the rule of law on their side: ordinary citizens should be able to read laws and know what they mean, so judges should approach statutes the same way when interpreting them.[51] Not being able to rely on statutory language, the theory declares, leaves an unpredictable mess for the citizenry. Some textualists even go so far as to argue that ignoring the clear language enacted by a legislature is fundamentally anti-democratic and a violation of separation of powers.[52] In addition, textualists argue that the method is easier in application for judges since no outside sources are necessary and common sense understanding of words is central; judicial restraint is a natural result.[53] Although strict textualism would completely disregard any extrinsic sources of meaning—including of course legislative history—even if it produces ambiguous results, the textualism found in modern opinions usually avoids such a rigid approach.[54] Under this "less ambitious" version, the statutory language is one's best—but not sole—guide in attempting to discern purpose and intent.[55] Although use of extrinsic materials such as dictionaries or legislative history is discouraged under this "lighter" form of textualism, it is not condemned.[56] Like the other two theories described above, textualism has maxims that have been adopted by

[49] Eskridge, Jr. & Frickey, *supra* note 14, at 340.
[50] *Id.*; Redish & Murashko, *supra* note 20, at 43.
[51] Eskridge, Jr. & Frickey, *supra* note 14, at 340.
[52] *See, e.g.*, William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1164 (1992) (analyzing the rationale of Justice Scalia's textualism).
[53] *Id.*
[54] *Id.* at 340–41.
[55] *Id.*
[56] WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY 792 (4th ed. 2007).

New York courts.[57] Absolutely strict textualism—i.e., a method that would apply a literal interpretation even in the face of absurd results—has virtually disappeared from usage by American judges.[58]

Detractors of textualism identify a few imperfections in its belief that language conquers all. First, they fault textualists for making it seem as if statutes always have a definite meaning that can be readily discerned from the words on the page.[59] Statutes often contain terms that are susceptible to multiple plausible meanings.[60] Additionally, opponents argue that the context of particular statutory language is ignored when too much emphasis is placed on the text of a statute alone.[61] That is, the circumstances surrounding enactment of a statute can shed important light on an ambiguity that cannot otherwise be resolved.[62] Still another problem with the textualist method, opponents assert, is that it ignores the fact that the interpreting judge's own values will naturally affect the "plain meaning" that she attributes to the words of a statute.[63]

D. Pragmatism

In recent years—the latter part of the twentieth century and the early part of the twenty-first century—several scholars have developed new methods of interpretation that vary to some degree, but have a common thread: they accept that law is "not (entirely) separate from politics and that interpretation carries with it

[57] *See, e.g.*, DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660, 860 N.E.2d 705, 708, 827 N.Y.S.2d 88, 91 (2006) ("The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning."); Patrolmen's Benev. Ass'n of New York v. City of New York, 41 N.Y.2d 205, 208, 359 N.E.2d 1338, 1340, 391 N.Y.S.2d 544, 546 (1976) ("[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used.").

[58] *See, e.g.*, Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotations and citations omitted); Long v. State, 7 N.Y.3d 269, 273, 852 N.E.2d 1150, 1153, 819 N.Y.S.2d 679, 681 (2006) ("Although statutes will ordinarily be accorded their plain meaning, it is well settled that courts should construe them to avoid objectionable, unreasonable or absurd consequences.").

[59] Eskridge, Jr. & Frickey, *supra* note 14, at 341.

[60] *Id.*

[61] *Id.* at 342.

[62] *Id.*

[63] *Id.* at 343.

discretion and policy choice."[64] These theories are popularly classified as pragmatic.[65] Pragmatists see a fundamental defect in the three traditional methods described above—namely, that those theories fail to account for the politics involved in the legislative process.[66] Pragmatists posit that a statute does not have a meaning *until* it is interpreted; that is, the judge—the interpreter—cannot ascertain a meaning without applying the language to a specific problem.[67] Leading proponents of the pragmatic approach argue that judges should—and in fact do—engage in a "funnel abstraction," whereby the interpretive inquiry of an ambiguous statute begins first with text but moves on to legislative history, legislative purpose, the evolution of the statute, and the current legislative policy.[68] Using all of these tools, judges can make a choice—a policy decision. Because pragmatists argue that statutes are constantly evolving, their view rests on an assumption that judges are in a better position than others—administrative agencies, for example—to gauge the direction of a statute and its policy.[69]

Opponents of the pragmatic methods assert that such methods of interpretation are antimajoritarian and threaten the separation of powers.[70] That is, a judge should not arrive at an interpretation of a statute that is contradictory to the text and intent of law passed by a majority of an elected legislature.[71] Also, legislatures and administrative agencies are in a much better position to implement statutes and to make policy because they have the capacity to do so.[72]

IV. JUDGE READ'S METHOD OF STATUTORY INTERPRETATION

Volumes can be (and have been) written about each of the four theories introduced above, as well as several others. This brief survey of the primary forms of statutory construction provides an appropriately limited background for the remainder of this article. It is now possible to examine several of Judge Susan P. Read's

[64] *See* ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 56, at 830.
[65] *Id.*
[66] *Id.*
[67] Eskridge, Jr. & Frickey, *supra* note 14, at 346.
[68] *See* ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 56, at 834–35.
[69] R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 99 (1995).
[70] *Id.* at 100, 116.
[71] *Id.* at 100.
[72] *Id.* at 116–17.

opinions for the purpose of deciphering any trends that appear. With each case, a brief account of the relevant facts and law is offered. Following that description, the analyses conducted by the majority and dissent—written by Judge Read—are compared. Finally, each case study seeks to discover what if any common tendencies or characteristics exist in Judge Read's method of interpretation. The first case involved an interpretation of the Rent Regulation Reform Act of 1993.

A. Roberts v. Tishman Speyer Properties, L.P.[73]

Rent control and rent stabilization laws have allowed tenants in New York to enjoy regulated rent charges for decades beginning in the early part of the twentieth century.[74] In New York City, property owners can qualify for tax exemptions and other benefits under certain conditions. Pursuant to the authority of the Real Property Law, New York City allows building owners to get tax exemptions—known as J-51 benefits—if certain improvements and/or rehabilitations are made that develop the buildings into multiple dwellings.[75] Rental units that qualify for J-51 benefits are subject to rent stabilization for the period of benefits.[76] In an effort to reign in rent regulation, the New York Legislature passed the Rent Regulation Reform Act of 1993 ("RRRA").[77] The RRRA provided for the deregulation of rent for certain rent-stabilized apartment buildings, but the legislation included an important exception: the deregulation did *not* apply to properties that were subject to the rent stabilization law as a result of receiving J-51 benefits.[78] Specifically, the law stated that the deregulation "shall not apply to housing accommodations which *became or become* subject to this law by virtue of receiving tax benefits" such as those provided by J-51.[79]

Roberts involved a claim against several property owners by nine tenants who alleged that the defendants were not permitted both to enjoy the J-51 benefits and benefit from the deregulation enacted by

[73] 13 N.Y.3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388 (2009).

[74] Guy McPherson, Note, *It's the End of the World as We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1131–51 (2004).

[75] *Roberts*, 13 N.Y.3d at 280, 918 N.E.2d at 902, 890 N.Y.S.2d at 390. *See* N.Y. REAL PROP. TAX LAW § 489 (McKinney 2008 & Supp. 2010).

[76] *Roberts*, 13 N.Y.3d at 280, 918 N.E.2d at 902, 890 N.Y.S.2d at 390.

[77] *Id.*

[78] *Id.*

[79] 1993 N.Y. Laws 676 (emphasis added).

the RRRA.[80] The defendants had applied for the J-51 benefits in 1992, but the apartment buildings in question had been rent-stabilized since 1974.[81] The Division of Housing and Community Renewal ("DHCR") issued an advisory opinion, interpreting the language of the RRRA to mean that the deregulation did not apply to property that became subject to rent stabilization *solely* because of the inclusion of J-51 benefits.[82] With this advisory opinion in mind, the defendants started charging the plaintiff tenants market rent—significantly higher than the stabilized rent—and continued to enjoy the J-51 benefits.[83] The plaintiffs sought rent stabilization for the properties at issue and damages in the form of rent overcharges and attorneys fees; because the case involved property located in Manhattan, hundreds of millions of dollars were at stake.[84] Supreme Court agreed with the DHCR's construction of the statute and granted defendants' motion to dismiss the complaint.[85] The appellate division reversed, giving no deference to the DCHR's advisory opinion and "conclud[ing] that building owners who receive J-51 benefits forfeit their rights under the luxury decontrol provisions even if their buildings were already subject to the RSL."[86]

The issue before the court was one of statutory interpretation: did the fact that the defendants' properties were rent-stabilized *prior to* the receipt of the J-51 benefits mean that it had not "become subject" to the RRRA exception to deregulation "by virtue of" the J-51 benefits?[87] A 5–2 majority affirmed the appellate division's decision reinstating the plaintiff's complaint.[88] The majority used elements of textualism and purposivism in order to discern the intent of the legislature. It reasoned that the defendant's argument that the text established two categories of properties subject to rent-stabilization—those included through J-51 and those included prior to ever receiving benefits—was unfounded based on "a natural reading of the statute's language."[89] Although the majority claimed

[80] *Roberts*, 13 N.Y.3d at 279–280, 918 N.E.2d at 902, 890 N.Y.S. at 390. Plaintiffs sued on behalf of a putative class. *Id.*

[81] *Id.* at 280, 918 N.E.2d at 902, 890 N.Y.S.2d at 390.

[82] *Id.* at 281–82, 918 N.E.2d at 903, 890 N.Y.S.2d at 391.

[83] *Id.* at 282, 918 N.E.2d at 903, 890 N.Y.S.2d at 391.

[84] *Id.* at 282, 918 N.E.2d at 903–04, 890 N.Y.S.2d at 391–92.

[85] *Id.* at 283, 918 N.E.2d at 904, 890 N.Y.S.2d at 392.

[86] *Id.*

[87] *Id.* at 282–83, 918 N.E.2d at 904, 890 N.Y.S.2d at 392.

[88] *Id.* at 283, 918 N.E.2d at 904, 890 N.Y.S.2d at 392.

[89] *Id.* at 286, 918 N.E.2d at 906, 890 N.Y.S.2d at 394.

that it had no trouble defining "become" to include achieving a particular status—in this case, rent stabilization—for a second time, it implied recognition of the statute's ambiguity by relying on a piece of legislative history for support of its position.[90] Finally, the majority would not accept the defendants' argument that legislative inactivity indicated acquiescence to the DCHR advisory opinion's interpretation of the statute.[91] Based on the text of the RRRA and its underlying purpose—the purpose receiving more consideration than one might think at first glance—the Court held in favor of the plaintiffs.

Judge Read's dissent began by criticizing the majority for failing to give effect to every word of the statute.[92] As she stated, if the legislature meant to preclude *all* properties receiving J-51 benefits from obtaining deregulation, it could have easily said so.[93] She also found merit in defendants' dictionary definition of "become"—which in her view literally supported their position—and objected to the majority's choice of a colloquial meaning of the word.[94] Staying with a textualist analysis, Judge Read pointed out that the two categories of rent-stabilized properties—J-51 recipients and non-J-51 recipients—were not implied by the defendants; they existed by the nature of the RRRA's reference to J-51, a benefit program that specifically refers to already-existing rent-stabilized properties *and* properties that are not rent yet rent-stabilized.[95] Again, she argued, it would have been simple for the legislature literally to create the scenario generated by the majority's interpretation.[96] Although satisfied with a textual basis for her interpretation of the statute, Judge Read also spent a few paragraphs rebuking the majority for using a mere "snippet" of a senate floor exchange in support of its position.[97] She submitted that the majority had taken a few lines out of context that seemingly shored up its view of the purpose of the statute.[98] She pointed out that the passage did not strengthen the majority's conclusion when taken in context.[99]

[90] *Id.*

[91] *Id.* at 287, 918 N.E.2d at 907, 890 N.Y.S.2d at 395.

[92] *Id.* at 288, 918 N.E.2d at 908, 890 N.Y.S.2d at 396 (Read, J., dissenting) ("The majority's interpretation necessarily supposes that the Legislature inserted pointless words into the statute.").

[93] *Id.*

[94] *Id.*

[95] *Id.* at 291, 918 N.E.2d at 910, 890 N.Y.S.2d at 398 (Read, J., dissenting).

[96] *Id.*

[97] *Id.* at 291–92, 918 N.E.2d at 910–11, 890 N.Y.S.2d at 398–99.

[98] *Id.*

[99] *Id.*

Finally, unlike the majority, Judge Read was persuaded that legislative inactivity regarding this statute was relevant and in fact indicated that defendants' interpretation was proper; she was persuaded of this in part because this issue had been a controversial one for years, and because, by the terms of the statute, the legislature was required to renew its terms periodically.[100]

From this dissenting opinion, a few observations about Judge's Read's method of interpretation can be made. She makes a powerful textual argument in support of her position, using only the words of the statute and a dictionary definition of one term. One gets the feeling that she would have stopped at that, but wanted to demonstrate the flaws in the majority's method of analysis. Other than to demonstrate the weakness in the court's argument, no mention of legislative history or purpose can be found in the dissent. Judge Read does, however, attempt to strengthen her interpretation with a "legislative inaction" argument—i.e., that the fact that the legislature was silent in the face of the DCHR's advisory opinion indicated approval. Overall, this opinion exhibits several characteristics of a textualist judge. Judge Read refused to go beyond the statute's words—because there was no need to, given the language of the statute—and was completely opposed to the court's reliance on a small piece of legislative history.

At the same time, her willingness to consider the entire legal landscape surrounding the statute probably places her outside the box of the strictest form of textualism.[101] A statement appears in this dissent that illustrates the judicial philosophy found in many of Judge Read's opinions: "[T]he Court does not, in my view, fulfill its duty to safeguard the stability of the laws when it tosses out a reasonable and long-standing statutory interpretation made by a specialized agency."[102] Whether or not this agency interpretation was "long-standing" is debatable—the agency made its interpretation only approximately ten years prior to the plaintiffs' commencement of the action—but the more remarkable aspect of the comment is the importance Judge Read places on judicial restraint in the face of administrative action and predictability in the law. These are of course fundamental principles of textualism.[103] It should be noted that Judge Read would have reversed the appellate division and affirmed the trial court's

[100] *Id.* at 292–93, 918 N.E.2d at 911, 890 N.Y.S.2d at 399.
[101] *See supra* notes 53–55 and accompanying text.
[102] *Id.* at 295, 918 N.E.2d at 913, 890 N.Y.S.2d at 401.
[103] *See supra* notes 51–53 and accompanying text.

dismissal of the complaint; thus her decision would have benefitted the property owners in the case.

B. IG Second Generation Partners L.P. v. Division of Housing and Community Renewal[104]

Staying within the realm of rent regulation, the second case selected for this study presented the issue of whether the DCHR has the authority to cancel rent arrears owed by a tenant caused by the DCHR's resolution of a lengthy fair market rent appeal.[105] A 5–2 majority of the court agreed with the property owner that, based on its governing regulations, the DCHR lacked the authority to cancel the rent arrears.[106] The Court rested its decision on the fact that the agency's interpretation of its regulations, which allowed it to cancel the arrears, lacked a rational basis.[107] Judge Read dissented and would have exercised deference to the DCHR's decision.[108] Her opinion was not lengthy and does not lend itself to a deep analysis of her interpretive method. But it is noteworthy for two reasons. First, it displays the characteristically broad deference she gives to an agency determination that is common to many of her opinions.[109] Second, and unlike in *Richards*, Judge Read's interpretation of the statutes at issue would have favored the tenant in the case.

C. Tzolis v. Wolff[110]

In 1994, New York passed an act allowing the formation of limited liability companies ("LLCs") within the state.[111] The law contained no provision for derivative lawsuits, which exist in other areas of New York's corporation law.[112] In *Tzolis*, twenty-five percent owners of an LLC brought a suit individually and on behalf of the company against company fiduciaries for alleged mismanagement of the company's primary asset.[113] The narrow issue for the Court of Appeals was whether a derivative action on

[104] 10 N.Y.3d 474, 479, 889 N.E.2d 475, 477, 859 N.Y.S.2d 598, 600 (2008).
[105] *Id.* at 479, 889 N.E.2d at 477, 859 N.Y.S.2d at 600.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 485, 889 N.E.2d at 481, 859 N.Y.S.2d at 604 (Read, J., dissenting).
[109] *Id.*
[110] 10 N.Y.3d 100, 884 N.E.2d 1005, 855 N.Y.S.2d 6 (2008).
[111] *See* 1994 N.Y. Laws 1347.
[112] *Tzolis*, 10 N.Y.3d at 105, 884 N.E.2d at 1007, 855 N.Y.S.2d at 8.
[113] *Id.* at 102–03, 884 N.E.2d at 1006, 855 N.Y.S.2d at 7.

behalf of an LLC was permitted under New York law.[114] In a 4–3 decision, the majority held in the affirmative: despite its nonexistence in the statute, the derivative suit brought by the plaintiffs was recognized.[115] The majority based its decision on "the long-recognized importance of the derivative suit in corporate law, and on the absence of evidence that the Legislature decided to abolish this remedy."[116] Perhaps the most intriguing interpretive aspect of this case is the dialogue regarding legislative history between the majority opinion, written by Judge Smith, and the dissenting opinion, written by Judge Read. Both sides agreed that the LLC statute contained no mention of derivative suits.[117] Once again, Judge Read probably would have ended the discussion there if possible. In such a contentious case, however, it is likely that she wrote her opinion with the goal of persuading her colleagues to join; after all, with one more vote, hers would have been the majority opinion for the case. In any event, Judge Read engaged in a lengthy discussion of the history of the act in order to bolster her position.[118] She found very persuasive the fact that the LLC bill originally contained a provision for derivative actions that was later deleted before passage.[119] She viewed this deletion as a clear statement of legislative intent: no derivative actions for LLC members.[120] The majority derived no such statement of intent. The lack of a provision was not evidence of the legislature's intent; the omission was intended to leave the issue of derivative actions to the courts.[121] The fact that "the legislative history [showed] that no one, in or out of the Legislature, ever expressed a wish to *eliminate,* rather than limit or reform, derivative suits" was strong evidence for the majority.[122] Having found no express intent by the legislature, the court relied on precedent to reach its ultimate conclusion in favor of the derivative plaintiffs.[123]

Leaving aside the arguments made by each opinion regarding the relevant precedent, *Tzolis* presents an example of two

[114] *Id.* at 103, 884 N.E.2d at 1006, 855 N.Y.S.2d at 7.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 105, 884 N.E.2d at 1007, 855 N.Y.S.2d at 8 (majority opinion); *id.* at 109, 884 N.E.2d at 1010, 855 N.Y.S.2d at 11 (Read, J., dissenting).

[118] *Id.* at 110–15, 884 N.E.2d at 1010–14, 855 N.Y.S.2d at 11–15 (Read, J., dissenting).

[119] *Id.* at 109, 884 N.E.2d at 1014, 855 N.Y.S.2d at 15.

[120] *Id.*

[121] *Id.* at 103, 884 N.E.2d at 1006, 855 N.Y.S.2d at 7 (majority opinion).

[122] *Id.* at 106, 884 N.E.2d at 1008, 855 N.Y.S.2d at 9.

[123] *Id.* at 109, 884 N.E.2d at 1010, 855 N.Y.S.2d at 11.

manipulations of intentionalist theory. The majority and dissent each sought to discern the legislature's intent regarding the LLC statute by looking at text and history. For Judge Read, the intent was plain based on the text: no reference to derivative actions meant *no* such causes of action.

This analysis is consistent with a textualist interpretation. Unambiguous language leads to only one result. Not stopping there, however, and proceeding through the history of the statute shows—as was observed above—Judge Read's willingness to break free of the text to see the larger picture.[124] In this case, the original inclusion and subsequent deletion of the derivative suits provision was strong evidence of legislative intent. Judge Read agreed with Justice Powell that the omission of the language from the statute "'strongly militate[d] against a judgment that [the Legislature] intended a result that it expressly declined to enact.'"[125] The conclusion to the dissenting opinion emphasizes that Judge Read found it very troubling that the Court decided to providing a right to bring a derivative action that was "unable [to be] achieve[d] democratically" and that would now frustrate businesses that "relied on what the [statute] says."[126] Her comments once again display a strong belief in a minimalist role for the courts with respect to legislative and administrative action. Her emphasis on the predictability of language and judicial restraint are textbook tenets of textualism and permeate her jurisprudence.[127]

D. People v. Zimmerman[128]

New York's Criminal Procedure Law allows New York's courts to exercise criminal jurisdiction in certain instances where the conduct at issue transpired outside the state. Specifically, the courts have criminal jurisdiction in cases in which the defendant's criminal conduct—as defined in the penal law—"was performed with [the] intent that it would have [a particular effect that the relevant penal] statute defining the offense is designed to prevent."[129] Additionally, a *county's* courts have criminal jurisdiction if the defendant's conduct—occurring outside the state—"had, or was

[124] *See supra* text accompanying note 98.

[125] *Tzolis*, 10 N.Y.3d at 114, 884 N.E.2d at 1014, 855 N.Y.S.2d at 15 (Read, J., dissenting) (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974)).

[126] *Id.* at 121, 884 N.E.2d at 1019, 855 N.Y.S.2d at 20.

[127] *See supra* notes 51–53, 91–92 and accompanying text.

[128] 9 N.Y.3d 421, 422, 881 N.E.2d 193, 194, 851 N.Y.S.2d 97, 98 (2007).

[129] N.Y. CRIM. PROC. LAW § 20.20(2)(b) (McKinney 2003).

likely to have, a particular effect upon such county . . . and was performed with [the] intent that it would, or with knowledge that it was likely to, have such particular effect therein."[130] For the purposes of these statutes, "particular effect" is defined, inter alia, as "hav[ing] a materially harmful impact upon the governmental processes or community welfare of a particular jurisdiction."[131] Together, these laws provide an avenue of prosecution in New York—commonly known as "particular effect" jurisdiction—that is available whether the elements of a particular offense are committed in multiple counties of the state or in *no* county of the state.[132]

In *People v. Zimmerman*, the Court of Appeals was presented with a case involving the interpretation of these statutes. The defendant was charged with perjury that allegedly occurred during his examination by the New York Attorney General regarding an antitrust investigation—an examination that took place in Ohio.[133] The prosecution asserted "particular effect" jurisdiction in New York County under the theory that (1) the defendant's conduct was likely to have a materially harmful impact on the county—by negatively affecting its judicial processes—and that (2) the defendant had knowledge that his "alleged perjurious statements . . . were likely to have a" negative impact on the county's judicial processes.[134] The lower courts rejected this argument.[135] Affirming the decision to dismiss the complaint, a 4–3 majority of the Court of Appeals relied on a textual analysis.

The Court held that the statutory scheme left a "gap [whereby] the State has jurisdiction but no county does."[136] The "gap," the majority claimed, included the situation where alleged criminal conduct might affect New York as a whole but *not* some smaller unit of government such as a county.[137] Because a state criminal prosecution must be brought in one county or another, no "particular effect" jurisdiction would be possible under this scenario since no county would have been affected by the conduct at issue. The court reasoned that Zimmerman's conduct fell into this "gap."[138]

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130 § 20.10(4).
131 *Id.*
132 *Zimmerman*, 9 N.Y.3d at 427, 881 N.E.2d at 196–97, 851 N.Y.S.2d at 100–01.
133 *Id.* at 423, 881 N.E.2d at 194, 851 N.Y.S.2d at 98.
134 *Id.* at 426, 881 N.E.2d at 196, 851 N.Y.S.2d at 100.
135 *Id.* at 425, 881 N.E.2d at 195, 851 N.Y.S.2d at 99.
136 *Id.* at 429, 881 N.E.2d at 198, 851 N.Y.S.2d at 102.
137 *Id.*
138 *Id.*

That is, the defendant's alleged criminal conduct may have been performed with the intent that it would have a harmful effect on *New York as a whole*, but there was no evidence of intent to have a harmful impact on *a particular county in New York*.[139] Therefore, no jurisdiction could lie in New York County.[140] In construing the statute and facts in this manner, the majority did not consider any legislative history or purpose, but based its interpretation upon on a narrow reading of the text. The court recognized the consequence of its holding—that the statute created a "Catch-22" in a *Zimmerman* scenario, whereby New York State has jurisdiction but none of its counties do—but resisted an alternative conclusion under the rationale that it was deferring to the legislature to address the matter.[141]

Judge Read's dissent began with the text but—based upon recognition that the Criminal Procedure Law's scheme contained several undefined terms—delved into legislative history in order to ascertain what "the Legislature would have intended."[142] Recounting the legislative history of the statute, Judge Read found very persuasive a statement made by a commission—appointed by the legislature to advise the revision of the criminal law—that expressly prescribed a broad reading of county jurisdiction.[143] The legislature, in her view, had set a general policy in favor of broad county jurisdiction in criminal cases; therefore, she found no reason to construe the statute so strictly where there was "the existence of geographical jurisdiction in the *State*."[144] Judge Read argued that the majority ignored this legislative policy and history in favor of a literal reading that "rendered [the statute] meaningless."[145] With a broad understanding of "particular effect" jurisdiction in mind, she reasoned that there was enough evidence of the defendant's intent and knowledge regarding his conduct's effect on New York County to sustain the indictment.[146]

One might argue that Judge Read employed a pragmatic method of interpretation in the *Zimmerman* dissent. She had no reluctance in using legislative history and discerning a general legislative

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 430, 881 N.E.2d at 199, 851 N.Y.S.2d at 103.
[142] *Id.* at 431–32, 881 N.E.2d at 199–200, 851 N.Y.S.2d at 103–04 (Read, J., dissenting) (emphasis omitted).
[143] *Id.* at 432–33, 881 N.E.2d at 200–01, 851 N.Y.S.2d at 104–05.
[144] *Id.* at 434, 881 N.E.2d at 202, 851 N.Y.S.2d at 102 (emphasis added).
[145] *Id.*
[146] *Id.* at 435, 881 N.E.2d at 203, 851 N.Y.S.2d at 107.

purpose to reach her construction of the law. These are of course elements of pragmatism.[147] But a careful reading of her opinion shows that it is consistent with the prior examples of her interpretive method, i.e. starting with the text and looking elsewhere only if necessary.

Regardless of the theory in which her analysis fits, advocates appealing for her vote should be aware of the following important observations. Judge Read looked to the text first, but when faced with unclear and undefined language, she was willing to consider the context and history of the law. Furthermore, she was willing to try to ascertain a general policy of the legislature and reach a result in line with that policy. Therefore, her dissenting opinion in the case is faithful to the broad deference to the legislature that she consistently promotes. Rather than undertaking a judicial revision of the statute, she instead found merit in the argument that the legislature's intent was for county jurisdiction to lie in the case. It is important to note that she was willing to accept a broad reading of the statute, but only because a key piece of legislative history indicated that such a reading was appropriate in this circumstance.

E. Greenberg v. New York City Transit Authority[148]

Section 120 of the Workers' Compensation Law makes it "unlawful for any employer" to discharge or discriminate against an employee "because such employee has claimed or attempted to claim compensation from such employer."[149] A violation of the statute involving discrimination by discharge obliges the employer to restore the employee to his or her position and to "compensate [the employee] for any loss of compensation arising out of such discrimination."[150]

In *Greenberg*, the Workers' Compensation Board had previously found the New York City Transit Authority to be in violation of section 120 regarding the firing of an employee in 1994.[151] The employee was reinstated in 1997 and sought an award from the board for the three years of lost compensation.[152] A damages hearing did not occur until 2003, at which time a Workers'

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[147] *See supra* note 68 and accompanying text.
[148] 7 N.Y.3d 139, 851 N.E.2d 1135, 818 N.Y.S.2d 784 (2006).
[149] N.Y. WORK. COMP. LAW § 120 (McKinney 2006).
[150] *Id.*
[151] *Greenberg*, 7 N.Y.3d at 141, 851 N.E.2d at 1136, 818 N.Y.S.2d at 785.
[152] *Id.*

Compensation Law Judge granted the employee's award, including more than $35,000 in interest running from the date wages should have been paid (in 1994) up to the date of the hearing (in 2003).[153] The Transit Authority appealed to the board, contending that the award of interest was improper, and the board agreed.[154] After a failed appeal to the Appellate Division, Third Department, the employee sought review from the Court of Appeals.[155]

The issue before the high court was whether the inclusion of interest running from a date prior to a damages award was permissible under section 120.[156] A 5–2 majority ruled in favor of the employee and ordered a reinstatement of the judge's award of pre-decision interest.[157] The court conceded that the text of section 120 did not explicitly include interest in an award under that section.[158]

In addition, the court held that section 20 of the same statute, which provides that interest on "all awards of the board shall [run] from thirty days after the making thereof,[159]did not apply to a claim not involving an employee's disability or death.[160] Despite the fact that the general intent and purpose of the Workers' Compensation Law is *not* necessarily to make the aggrieved party whole, the majority found section 120 to have a unique intent and purpose.[161] Section 120, the majority decided, was a special section of the statute that the legislature enacted to ensure "that victims of discrimination . . . be made whole."[162] The court's rationale rested primarily on (1) section 120's similarity to another anti-discrimination statute in the Human Rights Law that the court previously ruled to be inclusive of pre-decision interest; and (2) a broad definition of "compensation."[163]

Judge Read began her dissent by arguing that the plain language of section 20 disposed of the case: the words "*all awards* of the board shall draw simple interest from thirty days after the making thereof" negated the possibility of pre-decision interest in her

[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] N.Y. WORK. COMP. LAW § 20 (McKinney 2006).
[160] *Greenberg*, 7 N.Y.3d at 144, 851 N.E.2d at 1138, 818 N.Y.S.2d at 787.
[161] *Id.* at 144–45, 851 N.E.2d at 1137–38, 818 N.Y.S.2d at 786–87.
[162] *Id.* at 143, 851 N.E.2d at 1137, 818 N.Y.S.2d at 786.
[163] *Id.* at 142–44, 851 N.E.2d at 1136–38, 818 N.Y.S.2d at 785–787.

view.[164] Once again, it appears that she would have ended the analysis here, content to base her decision solely on what was—in her opinion—unambiguous text. Nevertheless, Judge Read engaged in an examination of the context and history of the legislation in order to support her argument—and possibly to persuade her colleagues, one of whom joined her dissent.[165] A point of emphasis in the dissent was the fact that the board itself had drafted the relevant language in section 120—language that the legislature later adopted without revision in a 1987 amendment.[166] Because the board was now interpreting language that *it* had drafted only a few years earlier, Judge Read believed deference was owed to that interpretation.[167]

In further support of her conclusion about the case, Judge Read proffered a piece of legislative history—a letter from the board's counsel to the governor's counsel—that showed no indication that the words "compensated" and compensation were intended to "encompass predecision interest."[168] Examining the future application of the statute, Judge Read criticized the majority for reaching an interpretation ripe with uncertainty.[169] As she explained, section 120 provided that employees "*shall* be compensated."[170] Did that now mean that all awards under the statute were required to include predecision interest or was such an award discretionary? The majority failed to clarify this facet of its decision.[171]

The dissenting opinion is full of elements that are common to Judge Read's method of statutory interpretation. She yet again began with the text, but considered extrinsic evidence to strengthen her argument. Underlying her analysis in this case are familiar philosophical views on judging that shape her construction of legislation: broad judicial deference to legislative policy and administrative agencies along with great respect for predictability in the law. As she has done in several other cases, Judge Read chastises the court for (1) leaving an area of law in an unworkable fashion for the citizenry, and (2) "rewriting the statute to achieve

[164] *Id.* at 145, 851 N.E.2d at 1138–39, 818 N.Y.S.2d at 787–88 (Read, J., dissenting); N.Y. WORK. COMP. LAW § 20 (McKinney 2006) (emphasis added).

[165] *Greenberg*, 7 N.Y.3d at 151, 851 N.E.2d at 1143, 818 N.Y.S.2d at 792.

[166] *Id.* at 149, 851 N.E.2d at 1141–42, 818 N.Y.S.2d at 790–91.

[167] *Id.*

[168] *Id.* at 149, 851 N.E.2d at 1141, 818 N.Y.S.2d at 790.

[169] *Id.* at 150, 851 N.E.2d at 1142, 818 N.Y.S.2d at 791.

[170] *Id.* at 150–51, 851 N.E.2d at 1142, 818 N.Y.S.2d at 791.

[171] *Id.*

more 'fairness' than the Legislature chose to enact."[172] Attorneys attempting to persuade Judge Read should be on notice that any interpretive argument founded on a broader or narrower purpose than an agency or legislative body intended or in fact expressed will fall on deaf ears.

F. Conclusions Regarding the Read Dissents

At the outset of this article, it was stated that the ultimate goal is to develop common trends in Judge Read's method of statutory interpretation. After careful scrutiny of several of her opinions, what quickly becomes apparent is not necessarily one theory of interpretation, but instead a particular judicial philosophy. That judicial philosophy is one that envisions a limited role for the judiciary with respect to the legislature and to administrative agencies. It is a judicial philosophy that holds in high esteem predictability and stability in the law. Instances of this manner of thinking appear repeatedly in Judge Read's opinions.

For example, in both *Roberts*[173] and *IG Second Generation*,[174] the court was faced with DHCR's interpretation of a governing statute. In both cases, a majority of the court construed the statute differently than the DHCR. Judge Read dissented in both cases and would have deferred to the agency's determinations. Similarly, in *Greenberg*, as the court overturned an interpretation of the Workers' Compensation Law urged by the Workers' Compensation Board, Judge Read's dissent strongly argued for the opposite result.[175] Again, she submitted, broad deference is owed to an agency when it is interpreting its governing statutory language. Deference to the legislature is evident in the other cases selected for review in this article as well. *Tzolis*,[176] *Zimmerman*,[177] and *Greenberg*[178] evince a pattern in Judge Read's decisions. The pattern includes the criticism of her colleagues who she claims are willing to read into statutes results not intended by the lawmakers. Judge Read also staunchly denounces any result upsets a settled

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[172] *Id.* at 151, 851 N.E.2d at 1143, 818 N.Y.S.2d at 792 (quoting Bello v. Roswell Park Cancer Inst., 5 N.Y.3d 170, 173, 833 N.E.2d 252, 254, 800 N.Y.S.2d 109, 111 (2005)).

[173] *See supra* Part IV.A.

[174] *See supra* Part IV.B.

[175] *See supra* Part IV.E.

[176] *See supra* Part IV.C.

[177] *See supra* Part IV.D.

[178] *See supra* Part IV.E.

area of law. In *Tzolis*[179] and *Roberts*,[180] for example, she chided the majority for upsetting interpretations of laws that had been relied upon by citizens for several years.

The judicial philosophy presented in Judge Read's opinions likely places her in the textualist camp.[181] Her method of interpretation *always* directs attention to the words of the statute in the first instance. Judge Read's opinions, however, certainly cannot be characterized as strictly textualist. Although she relies on text in the first instance, she does not shy away from examining legislative history, context, and policy to support her conclusions. Her contemplation of such extrinsic sources are evident in several of the cases discussed above.

In addition, Judge Read is usually willing to discern an overriding purpose of a statute where the language is ambiguous. This approach shaped her opinion in *Zimmerman*.[182] Judge Read's method of interpretation is not strictly confined to the text like, for example, Justice Scalia's.[183] Judge Read's method is more like Judge Posner's—i.e., grounded in text but willing to probe outside sources like legislative history and context when there is a lack of clarity.[184] Judge Read's interpretation therefore may be categorized best as a pragmatic textualism. She looks to text first and attempts to resolve the issue at that step, but without fail, she looks to purpose, history, and context for evidence to form a basis of interpretation.

V. HOW TO WIN THE READ VOTE

Supposing an attorney is involved in a case that turns on an important issue of statutory construction, what is her best course of action for her brief and for her argument if she wants to earn Judge Read's vote? The attorney must at the very least focus on text first. Plain and clear language is very likely to be decisive, and any step beyond the statutory language is probably superfluous if the text's meaning is apparent. On the other hand, if the text is ambiguous, the attorney should attempt to find and use relevant legislative history to support her construction of the statute. Evidence of the

[179] *See supra* Part IV.C.
[180] *See supra* Part IV.A.
[181] *See supra* Part III.C (discussing common rationales given in support of textualism).
[182] *See supra* Part IV.D.
[183] *See* ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 56, at 792.
[184] *See id.* at 811—12.

statute's purpose will be helpful as well. Any interpretation that strays too far from the language will be rejected by Judge Read as judicial lawmaking or statute rewriting. Likewise, a reading that ignores the general purpose of a statute, in light of context and circumstances, will also fail. If the case involves an interpretation offered by an administrative agency with expertise in the area of law, the attorney would do well to construe the agency interpretation in her favor because an agency's determination will carry great weight with Judge Read. Perhaps most importantly, the attorney's construction must not change already settled law if such a change was not expressly warranted by the lawmaking body. Predictability and stability in the law are touchstones of Judge Read's method of interpretation.

Every case is different. Every case has a unique set of facts. Every case before the Court of Appeals involves a complicated question. There is simply no way to correctly predict a judge's opinion in every case she decides. With the stated principles in mind, however—principles derived from an analysis of several of Judge Read's dissenting opinions—an attorney trying to win her vote stands in a much better position than an opponent who is only relying on the traditional mantra of text, intent, and purpose.