The Canons of Statutory Construction and Judicial Preferences

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I. INTRODUCTION

A regrettable side-effect of Karl Llewellyn's interesting critique of the canons of statutory construction[1] was that intellectual debate about the canons was derailed for almost a quarter of a century. In his critique, Professor Llewellyn purported to show that the canons of statutory construction were useless as rules for guiding decisions. His claim, that every canon could be countered by an equal and opposite counter-canon, transformed the canons from exalted neutral principles into "conclusory explanations appended after the fact to justify results

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1. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521-35 (Little, Brown, 1960).

reached on other grounds."[2]

This Article's first goal is to demonstrate that Karl Llewellyn's critique was largely beside the point. It simply doesn't matter whether or not the canons of statutory construction effectively constrain judges. Even if the canons do provide meaningful information about the meaning of statutes, a court in every case faces a prior decision about whether to invoke the canons in resolving the dispute.[3] If the judge elects not to invoke the canons, the decision will be made on other grounds. The most obvious use for our theory is in predicting when a judge will use a canon to decide a particular case, and when she will decline to invoke a canon, and choose instead to decide the case on some other grounds. A second use for our theory is in explaining the recent revival of intellectual interest in techniques of statutory interpretation in general and in the canons of statutory interpretation in particular.[4]

Part I of this Article attempts to accomplish the first goal. Our argument is simple. Whether or not Professor Llewellyn is correct that the canons are indeterminate because they tend to cancel one another out, no "meta-canon" exists to instruct judges when to invoke the canons in general and when to use some alternative source of authority for deciding the case. In other words, even if the canons were entirely outcome determinative in every case, the existence of the canons as a source of judicial authority would not constrain judges, because judges who did not like the outcome prescribed by invoking the canons could choose to ignore the canons and invoke some other source of authority, such as precedent, legislative history, efficiency, or "fairness," as the basis for deciding the case a particular way.

Thus, Part I suggests that the interesting issue in the debate over the canons of statutory construction is not whether the canons as a

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2. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179, 1180.

3. See id.

4. The success of this Symposium in attracting such a distinguished group of legal scholars, all of whom are interested in the canons, is strong evidence of the renewed interest in what heretofore had heen a moribund topic. For a smattering of recent literature, see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Georgetown L. J. 281 (1989); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in an Administrative State*, 89 Colum. L. Rev. 452 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 532 (1983); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986). For articles dealing more specifically with the canons of statutory construction, see Miller, 1990 Wis. L. Rev. 1179 (cited in note 2), arguing that the canons embody legitimate inferences about legislative intent, and Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277 (1990), using the canons to resolve choice-of-law issues.

whole control judicial conduct. Even if they do in cases where they are invoked, judges remain free to decline to invoke any canon, and to decide the case purely on policy grounds. Rather, the more interesting issue in the debate over the canons concerns the determination of why judges decide to invoke the canons in the first place. Part II of this Article addresses this issue.

The existing literature ignores the fact that the canons of statutory construction are judicial inventions. The literature instead seems to assume that the canons are constitutional rules that predate judges and guide their behavior in mysterious and unarticulated ways. By contrast, we argue that, as judicial creations, the canons can be understood best as devices that were designed to serve the self-interest of their inventors—the judiciary.

Thus, at least to some extent, the use of the canons can be viewed as manifestations of the fact that judges are agents of the people, and as with any agency relationship, agency costs arise due to the inability of the principals to monitor and control their agents. Consistently with this analysis, we show that the canons can be used to serve judicial interests—sometimes at the expense of aggregate social welfare. We wish to emphasize, however, that as with other manifestations of self-interested behavior, not all invocations of the canons are antithetical to societal interests. Often judges' self-interested use of the canons is perfectly consistent with society's interests.

II. THE IRRELEVANCE OF KARL LLEWELLYN'S CRITIQUE

As noted at the outset, even if Professor Llewellyn is wrong, and the canons of statutory construction do serve as a meaningful guide for deciding cases, the fact remains that judges can "opt out" of the decisional framework provided by the canons simply by deciding a particular case without invoking a canon of construction. Instead of using the canons, a judge could decide a case on the basis of precedent, or by reasoning by analogy from a similar statute, or on grounds such as public policy, intrinsic fairness, economic efficiency, or wealth maximization.

Perhaps a useful way of contemplating a judge's decision about using the canons in a particular case is to imagine three levels of analysis. The first, most general level involves the question of whether any of the canons should be invoked as the basis for deciding a particular case.[5]

5. For simplicity, we are assuming that judges hase their decisions in a particular case solely on one source of authority, such as the canons or precedent. In reality, of course, judges often invoke multiple sources of authority to support their conclusions. This fact does not effect our analysis hecause a judge who invokes a canon along with other justifications for a decision still is

The second level of analysis assumes that—for whatever reason—a judge has decided to invoke the canons and deals with the questions of how a judge decides which canon to employ. The third level of analysis assumes that—for whatever reason—a judge has decided to invoke a particular canon and asks whether using that canon will influence the outcome of the case.

Llewellyn's critique presumes that the decision at the first level of this analysis, whether to invoke any canon, has been made and that the judge has decided to employ the canons in a particular case. Llewellyn begins his inquiry at the second level of analysis and asks whether the decision to use the canons necessarily constrains judges. It does not. If she wanted to, a judge could employ the canons willfully by appending the appropriate canon to a decision already made in order to justify a result reached on other grounds.[6] But why should a judge do this? More specifically, why should a federal judge employ this particular sort of subterfuge when there are a host of other ways of legitimating the decision? What makes the canons a superior form of subterfuge?

Interestingly, whether or not Professor Llewellyn is correct about the indeterminacy of the canons as a group, the decision by a judge to invoke a particular canon in a given context often will be outcome determinative. For example, once a judge decides—for whatever reason—to invoke the canon "the same words used in the same statute should be taken to have the same meanings,"[7] she has made a decision that, in all likelihood, will influence if not determine the outcome of the case.

Of course, a judge can "peek behind the curtain" to observe the outcome that invoking a particular canon will yield and decide whether to use that canon on the basis of whether she likes the outcome. But this only means that judges can be willful. That would be true regardless of whether the canons had ever been invented. The canons present no greater opportunity for judicial willfulness than do other techniques of statutory interpretation. And, importantly, to say that the canons can be used by judges in a willful manner is not to say that they will inevitably be used in such a fashion. Rather, in a wide array of situations, common sense or practical wisdom will inform judges' decisions

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relying on the canon, at least to some extent.

6. This is not to say that the canons lack content as guides to legislative intent, but rather that judges can often use the canons opportunistically to support outcomes reached on other grounds.

7. Cases utilizing this canon include *Washington Metropolitan Transit Authority v. Johnson*, 467 U.S. 925, 935-36 (1984); *BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980); *Northcross v. Board of Educ. of Memphis*, 412 U.S. 427, 428 (1973); *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972).

about which canon to employ in a given context. For example, one may tell a person standing on the edge of a deep gorge "he who hesitates is lost." One also might say "look before you leap." But, of course, common sense dictates that the latter maxim is more appropriate than the former in this context. Common sense similarly will inform the decision in other situations. Thus, while it is true that no meta-rule or formal model is available to instruct judges in picking and choosing among canons, in the same way that people who do not know the rules of grammar can employ grammatically correct language when speaking English, it seems plausible that judges can select among canons in a sensible and coherent fashion even in the absence of known rules to guide them.

Thus, Professor Llewellyn's critique of the canons of statutory construction would be of some value if one were deciding whether to *require* judges in every case to use the canons as the basis for their decisions. His apparent demonstration that every canon has an equal and opposite counter-maxim suggests that such a policy would be ill-advised, given the relatively wide (although not unlimited) range of cases in which the choice of which canon to invoke may be relatively indeterminate. But even if the canons did serve as a clear, dispositive mechanism for reaching decisions in all cases, it would not follow that they invariably ought to be used as the basis for reaching results. Coin flipping would generate clear and dispositive outcomes as well, but nobody would suggest that coin flipping be used as a means for deciding legal disputes. This is because "public policy" goals clearly should guide legal outcomes.

As used here, the term "public policy" refers to justifications for legal outcomes that are derived from sources exogenous to the legal system itself. These justifications may stem from a judge's sense of morality, from economic analysis or from other, instrumentalist rationales. "Public policy" is, however, broad enough to embrace concepts like the separation of powers, and the idea that legislatures, not courts, should take the lead role in making law. Thus, the justification for the use of interpretive methods such as the canons, stare decisis, or legislative history rests in functional considerations of public policy, not in any intrinsic legitimacy or authority of these techniques in and of themselves.

Those who argue, as Professor Cass Sunstein does, that the canons of construction serve a role analogous to "a set of principles filling contractual gaps when the parties have been silent, or when the meaning of their words is unclear,"[8] are almost surely incorrect. Judges interpreting a contract look to whether the contract deals directly with the contin-

8. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 453 (1989).

gency at issue. If it does not, then the judge seeks to figure out, as best she can, what the parties would have agreed to had they focused on the problem at hand. This most decidedly is not what judges do when interpreting statutes with the canons of statutory construction.[9] In principle at least, there are no parties to a statute. Congress, at least ostensibly, passes statutes to serve the public interest, and would almost invariably deny any intention to benefit particular special interests. Thus, the analogy between statutory interpretation and "gap-filling" analysis in the law of contracts is inexact and inappropriate.

Professor Llewellyn argued that the canons were flawed as a guidepost for judges because of the multitude of canons from which to choose. After Professor Llewellyn's critique, the canons, therefore, were no longer viewed as informing judges' decisions. Rather, they were branded as "mechanical, after-the-fact recitations disguising the reasons for decision."[10] But even if there were a meta-rule to guide judges about which canon to select, there is no meta-rule to guide judges in the decision about whether to use *any* canon in a particular case.

A recent Supreme Court case, *Breininger v. Sheet Metal Workers*,[11] provides a useful illustration of this point. In *Breininger* the Court used the canon of construction *ejusdem generis*—general terms in a list should be interpreted with reference to the particular terms in the list—to aid its interpretation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[12] The plaintiff, Breininger, was a member of the Sheet Metal Workers Union. Pursuant to a multi-employer collective bargaining agreement, the Sheet Metal Workers Union operated a hiring hall, which essentially was a list of sheet metal workers, including both members and nonmembers of the union. When an employer contacted the union for workers, if it did not request a particular worker by name, the union was supposed to begin at the top of the list and attempt to contact each worker in order until the employer's hiring needs were met.[13]

Breininger, who previously had opposed the union's leadership, filed suit alleging that the union, in retaliation for his political opposition, had refused to honor specific employer requests for his services and had passed him over when making job referrals.[14] The gravamen of his complaint was that this retaliation constituted a violation of the

9. See Macey, 86 Colum. L. Rev. 223 (cited note 4).

10. Sunstein, 103 Harv. L. Rev. at 451 (cited in note 8). *See also* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805 (1983).

11. 493 U.S. 67 (1989).

12. Id. at 91-92. This statute is codified at 29 U.S.C. § 401 et seq. (1988).

13. 493 U.S. at 71.

14. Id. at 72-72.

LMRDA's provision forbidding unions to fine, suspend, expel, or "otherwise discipline" members for exercising rights secured under the LMRDA.[15] The Court rejected Breininger's LMRDA claim, in part on the grounds that fines, expulsions, and suspensions, the retaliatory acts specifically enumerated in the statute, "imply some sort of established disciplinary process rather than ad hoc retaliation by individual union officers."[16]

Professor Llewellyn's characterization of canons as "conclusory explanations appended after the fact to justify results reached on other grounds"[17] is wholly inapplicable to the *Breininger* Court's decision. The Supreme Court in *Breininger* reached the same result as the Court of Appeals, which also denied the petitioner's LMRDA claim. However, the Court specifically declined to embrace the Court of Appeals' rationale.[18] If the Supreme Court had wanted a convenient justification for its result, it simply could have adopted the Court of Appeals' reasoning, which was that because the hiring hall was not the exclusive source of employment for sheet metal workers, the plaintiff did not suffer discrimination on the basis of his union membership.[19]

Even more decisive proof that the Supreme Court in *Breininger* was not engaged in an after-the-fact recitation to disguise the reasons for its decision lies in the fact that it gave the petitioner precisely the relief he wanted. While rejecting the petitioner's LMRDA claim, the Court found that Breininger could bring a suit against the union for breaching its duty of fair representation under the National Labor Relations Act (NLRA)[20] by discriminatorily refusing to refer him to employers using the union's hiring hall because of his political opposition to the union's leadership.[21] Thus, in *Breininger*, the Court did not invoke the canons as an ex post justification of its preferred outcome. Indeed, if anything, the Court's invocation of the canon *prevented* the Court from obtaining its desired outcome, which was to grant relief to the plaintiff on the LMRDA claim.[22]

Similarly, Professor Llewellyn's argument that for each canon there is an equal and opposite canon finds little support in *Breininger*. As Justice Stevens' concurrence and dissent pointed out, if one were to

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15. Id. at 72.

16. Id. at 91-92.

17. Miller, 1990 Wis. L. Rev. at 1180 (cited in note 2).

18. Id. at 90 (stating that "[w]e affirm the Court of Appeals' conclusion, although we do not adopt its reasoning").

19. Id.

20. 29 U.S.C. § 151 et seq. (1988).

21. 493 U.S. at 87-90.

22. Here the term "preferred outcome" simply refers to the outcome actually reached by the Court. It seems reasonable to infer that the outcome they reached is the outcome they prefer.

search for a canon to serve as counterpoint to the *ejusdem generis* canon invoked by the majority, it would be the plain meaning rule, which leads to the same conclusion as the canon invoked by the majority.[23] The difference between Justice Stevens and the majority did not result from the fact that they use different canons, but rather from the fact that they disagreed over whether the system of hiring hall referrals was attributable to the union. Unlike the majority, the dissent believed that the term union "discipline" included an administrator's use of a hiring hall system to punish a member for his political opposition.[24]

Thus the *Breininger* case provides support for the argument that Professor Llewellyn's claim of indeterminacy and mutual contradiction was greatly overstated. As the definition of "discipline" offered by Justice Stevens indicates, the term connotes punishment by one in authority. But, as the majority observed, Mr. Breininger was not alleging that he had been punished by one in authority.[25] Thus, the decision by the majority to employ the canons of statutory construction as a source of authority in deciding *Breininger* was, in fact, outcome-determinative. It is also clear that there was no obvious reason for the majority to invoke the canons. More importantly, the majority may not have reached the correct conclusion as a result of using the canons.

It does not stand to reason that workers should enjoy protections when they are disciplined formally, but not when they are punished informally. That result would enable unions that inappropriately discipline their members to avoid legal sanctions by simply using informal rather than formal disciplinary procedures. As Justice Stevens observed in *Breininger*, by holding that informal punishments are not covered by the LMRDA, the Court deprived union members of the most necessary protection of the Act's procedural safeguards "when the union or its officers act so secretly and so informally that the member receives no advance notice, no opportunity to be heard, and no explanation for the

23. Justice Stevens stated that "[a]s a matter of plain language, 'discipline' constitutes 'punishment by one in authority . . . with a view to correction or training.' " 493 U.S. at 97 (Stevens concurring in part and dissenting in part) (citing *Webster's Third New International Dictionary* 644 (1976); *Random House Dictionary of the English Language* 562 (2d ed. 1987); 4 *Oxford English Dictionary* 735 (2d ed. 1989)). Somewhat predictably, Justice Scalia, the Court's greatest proponent of the plain meaning rule, joined Justice Stevens' opinion.

24. Id.

25. Justice Brennan wrote for the majority:

> In the instant case, petitioner alleged only that the union business manager and business agent failed to refer him for employment because he supported one of their political rivals. He did not allege acts by the union amounting to "discipline" within the meaning of the statute. According to his complaint, he was the victim of the personal vendettas of two union officers. The opprobrium of the union *as an entity*, however, was not visited upon petitioner.

Id. at 94. (emphasis in original)

union's action."[26] Furthermore, Justice Stevens also noted, neither the legislative history of the LMRDA nor common usage within the labor law community supported the majority's result.[27] Union officials testifying about the LMRDA before Congress freely acknowledged that disciplinary proceedings "are usually wholly informal."[28]

It is instructive that the Court's reasoning on the LMRDA issue was surprisingly formalistic, while its reasoning on the issue of whether the union breached its duty of fair representation under the NLRA was full of policy. For example, the Court noted that Section 9(a) of the NLRA "serves as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' "[29] Moreover, in a passage that could apply as easily to the LMRDA portion of the opinion as to the NLRA portion of the opinion, the Court reasoned that:

> When management administers job rights outside the hiring hall setting, arbitrary or discriminatory acts are apt to provoke a strong reaction through the grievance mechanism. In the union hiring hall, however, there is no balance of power. If respondent is correct that in a hiring hall the union has assumed the mantle of employer, then the individual employee stands alone against a single entity: the joint union/employer. An improperly functioning hiring hall thus resembles a closed shop, "with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union."[30]

Thus, after parsing *Breininger*, we are left with more questions than answers concerning statutory construction. In particular, why did the majority invoke principles of statutory construction to decide the LMRDA portion of its opinion but not the NLRA portion? This question is particularly interesting in light of the fact that the Court's efforts to construe the LMRDA appear to have been meaningless from the plaintiff's perspective. He obtained the relief he was seeking under the NLRA. His loss under the LMRDA thus was practically irrelevant to him.

The broader question that remains unanswered is whether the canons have any effect on the behavior of American judges. If the canons do not constrain judges (because judges aren't compelled to invoke them), then they cannot be said to limit the delegation of legislative power to the courts. By the same token, the canons cannot be said to expand the autonomy of judges, since judges have plenty of other ways

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26. Id. at 100 (Stevens concurring in part and dissenting in part).
27. Id.
28. AFL-CIO Legislative Department Analysis of Provision in McCellan Amendment, 105 Cong. Rec. Appendix A3293, A3294 (1959) (extension of remarks of Rep. Pat McNamara).
29. 493 U.S. at 87 (quoting *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)).
30. Id. at 89 (citations omitted).

to reach their preferred outcomes besides invoking the canons. Part III of this Article attempts to address these unanswered questions by presenting a positive theory for the use of the canons of statutory construction.

III. The Canons of Construction and the Economics of Judging

As noted above, judges have many ways to decide cases. Cases may be decided on the basis of public policy, legislative history, or community values, as well as the canons of statutory construction. All of these justifications are not equal. Policy justifications clearly trump other justifications in any meaningful hierarchy of judicial values.

It makes sense to invoke nonpolicy justifications for deciding cases only when judges are unable to determine the policy implications of a particular decision, or where the nonpolicy justifications actually serve to advance legitimate public policies (such as ensuring legislative supremacy in lawmaking).[31] The following example illustrates this point. Suppose a judge could decide a case one way by invoking a canon of statutory construction, or another way by invoking some public policy rationale. Suppose further that societal wealth and human flourishing would increase dramatically if the decision were made on the basis of public policy, but would diminish dramatically if the case were decided on the basis of the canons. Quite clearly, the public policy justification should trump the canon.[32] Additionally, it is not sufficient to respond by saying the canon should be used in place of the public policy justification if, in fact, the canon improved societal wealth and human flourishing. If that were the case, then the decision would not have been made on the basis of the canon standing by itself, but on the basis that invoking the canon would serve the policy favoring increasing societal wealth and human flourishing.

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31. Included within the scope of policy justifications is the public policy that instructs judges to respect legislative preferences, and to avoid exalting their own view of the good over that of the legislature or to intrude on the legislature's prerogative to make law. As one of the Authors has noted in an earlier work, the canons of statutory construction can be used to mask judicial willfulness under a "cloak of legitimacy." Macey, 86 Colum. L. Rev. at 264 (cited in note 4). But it is also true that "the canons can be ranked and ordered by judges," which makes legislation more public-regarding by serving as a check on legislative excess without intruding on the constitutional authority of the legislature to make law. Id. at 225, 264.

32. A much different question arises when judges are confronted with a situation in which a public policy justification, such as efficiency or income redistribution, conflicts with legislative intent. Here, of course, courts will resolve the difference with reference to the constitutional principles of separation of powers, and perhaps to some extent on the basis of the strength of their own preferences. The argument here is that, when two different readings of a statute—one based on a public policy, and one based on a canon of statutory construction—are consistent with the available legislative history and statutory language, a judge will select the reading that furthers the public policy over the one that is consistent with the canon.

The legal realists' complaint about the canons of statutory construction was that the canons were rigid, mechanical rules that should have been replaced by "a more pragmatic and functional inquiry into statutory purposes and structure."[33] Their concern suggests a reason why judges might invoke the canons in some situations but not in others. If a judge has a clear point of view, based on some form of consequentialist reasoning, about how a case ought to be decided, then she will invoke that justification. Thus, it seems the canons of statutory construction often are used by judges, whether consciously or unconsciously, as a stop-gap to permit an instant case to be decided *in the absence* of a policy-based justification.

This theory about when judges will use the canons of statutory construction differs from Frederick Schauer's recently advanced hypothesis concerning the use of the plain meaning rule.[34] Professor Schauer has formulated what might be described as the "ennui theory" of plain meaning. After canvassing all of the cases involving statutory construction from the Supreme Court's 1989 term, Professor Schauer discussed a number of cases in which the justices invoked the plain meaning rule. These cases involved a diverse array of complex areas of the law, including among others, ERISA,[35] social security,[36] taxation,[37] and the Freedom of Information Act.[38] Professor Schauer opined that all of the cases invoking the plain meaning rule had one thing in common:

> That plain meaning seemed in the aggregate to dominate political inclination for this sample of cases should come as little surprise. For there was one factor that (to me) was present in every one of these cases: None of them was interesting. Not one. Compared to flag burning or affirmative action or separation of powers or political patronage, these cases struck me as real dogs. That is not to say they were socially unimportant. Far more of the public welfare of the United States turns on questions of qualification for AFDC benefits than on the question of flag desecration.[39]

What Professor Schauer really seems to be saying is that all of the cases invoking the plain meaning rule involve statutes, and he finds cases involving statutory construction boring, at least when compared to cases involving constitutional issues. Of course, since the plain meaning rule is a technique of statutory construction, it is not surprising to find it employed disproportionately in cases involving statutes.

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33. Sunstein, 103 Harv. L. Rev. 452 (cited in note 8).

34. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231, 247.

35. Id. at 239, discussing *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

36. Id., discussing *Sullivan v. Zebley*, 493 U.S. 521 (1990).

37. Id. at 240, discussing *United States v. Dalm*, 494 U.S. 596 (1990).

38. Id. at 242-43, discussing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

39. Id. at 247.

Nor does Professor Schauer's argument fit well with cases such as *Breininger*, which do not involve constitutional issues. As noted above, in *Breininger*, the canons were used to decide the portion of the case involving the LMRDA, but not the NLRA. The basic issues and the underlying constellation of facts for the LMRDA portion of the opinion were identical to the issues and facts in the NLRA portion of the opinion. It is, therefore, unreasonable to think that the justices somehow were more bored with issues presented in the LMRDA portion of the opinion, but not with those same issues when presented in another context.

Professor Schauer's claim that the cases invoking the plain meaning rule tend to be boring may say more about Professor Schauer's personal preferences than about the cases themselves. The unifying aspect of these cases is that they are difficult and highly technical, and do not deal with subject areas that fall within the particular expertise of any of the justices. Similarly, Professor Schauer's observation that the cases employing the plain meaning rule tended to be decided early in the term and by decisive margins (7-2, 8-1, 9-0),[40] in no way supports the assertion that these cases were dull. Rather, these facts support the conclusion that the content-independent decision methodology being used (i.e., the plain meaning rule) was one that the justices felt comfortable with by and large.

Thus, Professor Schauer, in his otherwise penetrating essay on statutory construction and the function of plain meaning, appears to confuse the interesting with the accessible. The justices do not retreat to the canons of statutory construction to save themselves for more interesting issues, as Professor Schauer would have us believe. Rather, often judges use the canons to avoid having to immerse themselves in highly complex, technical areas of the law where the probability of error is particularly high.

Judicial reliance on canons such as the plain meaning rule does not indicate that the justices have reached "some minimal mutual understanding that guards something that is shared in the face of widely disparate political views and social experiences."[41] The recent increase in judicial reliance on the canons certainly has not followed any new "mutual understanding" among the justices. Rather, the increasing reliance on the canons is an inevitable consequence of the increasing technical complexity of the law. The justices must justify their decisions in some way. Their inability to master the details of every area of law that comes before them makes reliance on a generic decision-generating de-

40. Id.
41. Id at 254-55.

vice such as the canons inevitable.

Professor Schauer recognized the specialization function served by the canons when he noted that "the desirability of reliance on plain meaning is a function of the desirability of . . . the Court's marshaling its human resources in such a way that it is undesirable for the justices and their clerks to become truly internally expert in every subject that comes to their attention."[42] Unfortunately, the term "desirable" has no clear meaning in this context.

From the judges' perspective, it is "desirable" to use the canons when doing so enables them more easily to decide—and then justify their decisions on—complex cases. Using the canons also is desirable from the judges' perspective for generating results in cases in which the limits of human understanding are such that no content-dependent rationales are available.

On the other hand, in a world of unlimited resources in which knowledge was not a finite commodity, the canons would never be used for the purpose of deciding cases that would better be decided on explicit public policy considerations. Such cases would be decided on the basis of content-dependent principles in such a way as to promote human flourishing. And even in our imperfect world, the canons of statutory construction would be used less if judges worked harder to master more substantive areas of the law, or were willing to take more risks when deciding cases.[43]

This Article's theory for when the canons of statutory construction are used might be described as a hierarchical account of judicial decisionmaking. When judges are certain about the policy consequences of their decisions, their confidence with respect to their predictive capabilities will enable them to decide cases on the basis of public policy. Canons will be utilized in such cases only when doing so advances some public policy (including separation of powers). When there is no way of knowing what the societal consequences of a judgment will be (or what legislative preferences were at the time the underlying statute was passed), then there is no way to decide the case on the basis of public policy, and judges must retreat to the canons of statutory construction, or some other decision rule grounded not in pragmatics, but in internal rules developed by the legal system itself.

Several aspects of our judicial system give added texture to the analysis presented here. These aspects will be explored in the following sections. First, Section A considers the implications of the fact that federal judges sit as judges of general jurisdiction. Second, Section B con-

42. Id. at 255.

43. See notes 43-44 and accompanying text.

siders the role of the canons as mechanisms for reducing error costs. Section C uses the theory to shed some light on why the canons are enjoying a resurgence in recent years. Finally, Section D reexamines *Breininger* in light of our analysis of the canons of statutory interpretation.

A. Specialization

Federal judges in this country are, by and large, judges of general jurisdiction. In a single sitting, a judge on one of the circuit courts of appeal will be called upon to decide cases involving a complex mix of federal and state laws. A typical sitting will require a judge to construe the detailed and highly technical federal laws dealing with admiralty, banking, securities regulation, bankruptcy, labor law, and civil rights, to mention just a sampling. Moreover, the well documented explosion in statute making has enormously increased the demands on judges to expound definitively on all sorts of subjects they may know—or care—precious little about.[44]

The theory of the canons of statutory construction that we present here contains a ready solution to the problems caused for judges by statutorification. The use of a canon in deciding a particular case relieves the judge of the necessity for acquiring expertise in the general area of law at issue in that case. In other words, as with precedent and other interior legal rules, the canons allow judges to substitute the necessity of detailed and specialized knowledge about a whole range of legal issues with the more realistic requirement of developing generic skills at employing the canons.

When common law dominated the legal landscape, the role currently played by the canons was played by the weak form of stare decisis practiced by judges in the United States. Under this system of stare decisis, judges can elect to be bound by prior decisions when it suits them to do so, or alternatively can choose to decide cases on more instrumentalist public policy grounds. With the modern statutorification of law, canons increasingly serve the same alternative function as precedent does in the weak form of stare decisis.

Thus, judges with expertise or strong views in a particular area will refrain from using the canons of statutory construction, and instead apply their own reasoning to decide cases that fall within that area.[45] By

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44. See Henry J. Friendly, *Federal Jurisdiction: A General View* 4 (Columbia, 1973); Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard, 1982).

45. Some scholars might argue that judges with strong views on a subject might decide cases pertaining to that subject on the basis of stare decisis in order to avoid having to articulate those views. While this is a possibility, for several reasons, it is improbable that this inclination to obfuscation will dominate. First, judges with strong views on a particular matter are likely to believe

contrast, where a judge lacks special interest or expertise in an area, she can use the canons to avoid having to acquire detailed knowledge of a new area of the law.

But the use of the canons of statutory construction is an imperfect substitute for the use of stare decisis. As one of us has explained elsewhere, an advantage of precedent is that it allows judges to

> free-ride on the expertise of other judges in those areas in which they do not specialize, and create new law in those areas in which they feel they have expertise. This phenomenon is particularly obvious in multi-judge panels such as those that exist on federal circuit courts of appeals. Judges will hear cases in panels of three, and opinions often will be assigned to judges on the basis of their experience, interest, and expertise. Thus, judges can trade their expertise with the expertise of other judges.[46]

Important differences between the canons of statutory construction and the principle of stare decisis indicate that the canons cannot be used to facilitate "expertise-trading" among judges quite in the way that stare decisis can be used to this end. Stare decisis is a decisional tool that allows judges to decide cases presenting similar fact patterns and analogous institutional arrangements in the same way as prior judges have decided those cases. This decisional tool results, by definition, in similar situations being treated similarly. By using precedent, a judge can utilize the wisdom of other judges whose substantive knowledge in a particular area may be greater than the judge deciding the instant case. Although invoking precedent is not the same thing as invoking policy, it is only one step removed because by relying on a precedent that was decided on policy grounds, a judge who lacks expertise in a particular field can apply the public policy justifications formulated by colleagues and predecessors.

By contrast, the canons of statutory construction sometimes may result in similar cases being treated differently than they have been in the past, or than they would have been treated by other judges. Thus, unlike the use of precedent, the use of the canons does not permit judges to free-ride on the expertise of other judges. Nevertheless, using the canons, like invoking precedent, permits judges to reduce a certain kind of judicial error, and thereby leads to more cases being "correctly"

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that those views are logical and coherent and that they can be substantiated in the form of a well-reasoned, written opinion. Judges with life tenure have no reason to refrain from articulating their views. Moreover, judges with strong views about how a law should be construed or implemented inevitably will want to persuade others that those views are correct. This can be done only by articulating those views and explaining how they lead to a certain result in a particular case. Thus, it seems that a judge with a strong view on a legal issue will usually express that view when given the opportunity.

46. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi. Kent L. Rev. 93, 103 (1989).

decided.

B. *Error Costs: Avoiding the Risk of Being Proved Wrong in the Future*

As the preceding discussion explained, the straightforward argument that stare decisis helps to reduce error costs cannot be applied so easily to the canons of statutory construction. Stare decisis allows judges to reduce the probability of error because it permits them to check their results against those of other judges trying similar cases. The ability of judges to form impressions of other judges reinforces the value of precedent because judges can choose to be guided more by the decisions of some judges than others.

The canons serve a different function than stare decisis within the legal system. This different function can be understood best by recognizing two points. The first point is that any particular judge will be both more interested and more competent in some areas of the law than in others. The second point is that society generally may have more information at its disposal about some areas of the law than others.

Where a judge has (or thinks she has) particular expertise in a particular area of the law, she is less likely to be influenced by outside authorities. But when a judge lacks expertise in an area, she is likely to welcome guidance from outside authorities. A judge, however, will often lack confidence, not only in her own expertise in a particular area, but also in the reliability of outside authorities. Indeed, a judge will lack confidence in a particular area precisely because no general consensus exists among the supposed experts in the field. Judges likely would not feel confident of their ability to decide issues about which society generally lacked answers.

Suppose, for example, that a judge assembles relevant precedent on a particular issue. The judge may find that these prior cases are of little value for a variety of reasons. The precedents may be quite old, and subsequent exogenous technological changes may have rendered their insights largely irrelevant. Alternatively, the prior cases may have been written by judges generally regarded as result-oriented ideologues of a radically different philosophical orientation than the judge in the instant case. Similarly, the available precedential authority simply may be unconvincing in the sense that the substantive arguments they contain do not meaningfully support the conclusions reached by the earlier judges. Finally, of course, the prior cases may conflict with one another, in which case they will provide little guidance to the inquiring judge.

Under these circumstances, the canons of statutory construction can help judges avoid one particular type of error cost: the error cost associated with being proved wrong in the future. The fact that there is

no reliable authority or generally accepted paradigm in a particular area at a particular point in time does not mean that one will not emerge in the future. Under these conditions of great uncertainty, a judge is likely to find welcome refuge in the canons. The canons allow a judge to reach results in particular cases without running the risk of being proved substantively foolish in the future.

This analysis is consistent with Joseph Raz's idea that arguments from authority are, in general, content-independent.[47] An argument is content-independent if:

> There is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently 'extraneous' fact that someone . . . has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones.[48]

When a judge invokes a principle of stare decisis or some other argument from authority to decide a case, she can justify the result reached by the source of her authority rather than its content.[49] Where doubts exist as to the validity or trustworthiness of the content of the available authority, content-independent justifications will appear particularly attractive to judges.

Put simply, when a judge invokes a canon of statutory construction, she avoids the need to rest her decision on what, at the time, may appear to be a dubious substantive basis. If a new substantive paradigm subsequently emerges, the judge deciding the earlier case need not be embarrassed by her invocation of some principle of justice that, in hindsight, appears misguided, silly, or even downright harmful.

Viewed as a content-independent justification, the canons can be seen to function in many cases as a means of protecting legislators as well as judges from future embarrassment. By invoking a canon to decide a case, a judge is not saying "this is an optimal public policy." Instead, the judge is saying "I am not sure what the optimal policy is, but the legal culture has supplied me with a sophisticated tool that generates a result in this case, and I am going to abide by the outcome generated by that tool." By contrast, where judges use legislative history to decide a case, they are, by definition, attributing a particular purpose or intent to the action of the legislature. This judicial clarification of legislative intent may be deeply embarrassing to the legislature because the court's conclusion may offend some group that the legisla-

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47. Joseph Raz, *The Authority of Law* 16 (Clarendon, 1979); Joseph Raz, *The Morality of Freedom* 35-37 (Clarendon, 1986) ("*Morality*"). See also Heidi M. Hurd, *Challenging Authority*, 100 Yale L. J. 1611, 1618 (1991); Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. Pa. L. Rev. 1003, 1005 (1991).

48. Raz *Morality* at 35.

49. Schauer, 139 U. Pa. L. Rev. at 1005 (cited in note 47).

ture does not wish to offend.

The canons thus have an advantage over both legislative history and stare decisis in that they provide a nontraceable, authority-based (content-independent) justification for particular results. Generally, where a content-based justification is lacking and a judge wants to invoke a content-independent justification, the judge must, in effect, shift the blame for the decision from herself to the source of the authority. As seen above, where stare decisis is invoked as the basis for a decision, the judge shifts responsibility for her decision to other judges. Where legislative history is invoked, the judge shifts responsibility for her decision to the legislature. By contrast, where a judge invokes the canons of statutory construction, the blame for any erroneous decision is not shifted to any other readily cognizable group. Rather, the canons themselves provide a legitimate, albeit amorphous and anonymous, source of content-independent authority.

If the canons were unavailable to judges as a device for justifying judicial outcomes, more cases would be decided on the basis of substantive policy arguments. Canons are attractive to judges when they wish to avoid invoking substantive, content-dependent justifications that may cause subsequent embarrassment. A judge who invokes a content-dependent justification to explain a result runs the risk that that justification will look silly in the future as the limits of human understanding expand. A judge who invokes the canons of statutory construction as the basis for his decisions avoids this risk.

While this risk-avoidance feature of the canons is desirable from the perspective of judges, the strategy may not be desirable from a societal perspective. Writing content-dependent decisions, while risky, attracts the interest of economists, political scientists, legal scholars, and of course, interested parties. These outsiders will scrutinize and evaluate the judges' substantive, content-dependent rationale, thereby providing future judges deciding similar cases with additional information.

Thus, content-dependent results, even by judges who are not experts in a particular subject area, are often more useful to society than decisions based on interior legal rules, such as the canons, because they foster intellectual debate about the decisions. This intellectual debate is useful in clarifying issues, and, ultimately, in advancing the frontiers of knowledge in particular areas. The Supreme Court implicitly has recognized this point in its own policies and procedures for selecting cases brought on petitions for certiorari. Where a lower court has issued a decision of interest to the Court, the justices often will refrain from granting certiorari until other courts have decided cases with similar facts and issues. The decisions by these other courts provide new information, help clarify the issues, and aid the justices in rendering the fi-

nal decision on these issues. Clearly, the lower courts that decide cases on the basis of a canon of statutory construction provide less guidance for the Court than courts that decide cases on the basis of a substantive principle of policy.

C. *Telling Right from Wrong: The Rise of Pluralism*

As suggested in the introduction, our theory about judges' use of the canons of statutory construction provides an explanation for why the canons are particularly popular today. Our theory predicts that the canons will be used most during times of general moral and intellectual uncertainty, when no single paradigm or world-view dominates the legal landscape. When outcomes generally are uncertain, judges will rely more on the canons: if judges are unsure of what the "right answer" to a particular legal question is, they will have no choice but to retreat to content-independent reasons for their decisions.

This observation finds support both in the work of pluralists schooled in the theory of public choice and in Critical Theory. Critical Theorists, particularly Mark Kelman, have attempted to catalogue the ways in which the United States ("liberal capitalist") legal system has been unsuccessful at suppressing the inherent contradiction between "core privileged liberal values" like property rights and individualism on the one hand, and "dissident" values like progressivism and paternalism on the other.[50] Obviously, a legal culture that contains the core internal contradictions described by Professor Kelman will make it exceedingly difficult for judges to reconcile the competing claims of these contradictory traditions in specific cases. The canons offer a useful device by which judges actually can reach results in cases without having to confront these competing claims.

Interest group pluralism has created a similar problem for judges. Over time, more and more groups have gained access to the political process. Most obviously, women and African-Americans have gained access to the ballot box. In addition, special interest groups of all kinds have become increasingly narrow in focus. As a result, an increasingly diverse array of special interest groups have been able to make their views felt by policymakers. As new groups with different interests and objectives than existing groups have gained political power, it has become increasingly difficult for policymakers in the middle of these conflicting groups to reach consensus on important issues:

> The increasing political power of special interest groups conspires with the increasingly heterogeneous nature of society to make the more subtle, aspirational ele-

50. Mark Kelman, *A Guide to Critical Legal Studies* 258 (Harvard, 1987). See also id. at 15-113 (detailing internal contradictions inherent in all liberal capitalist legal systems).

> ments of the framers' republican vision [a vision based on the premise that a common vision of the public good was obtainable] appear no more than a distant dream. Through a gradual process of political evolution and adaptation, we have come to accept and even value diversity and dissent, while we no longer see such republican "virtues" as homogeneity and cooperation as particularly valuable goals to which to aspire.[51]

In earlier eras when all people could agree on certain values, like the sanctity of contract, judges were less likely to ground their decisions in content-independent reasons. Judges now are more likely to ground their decisions on content-independent justifications, like the canons of statutory construction. This allows judges to avoid taking sides among the competing claims of interest groups when the "right answer," if one even exists, appears increasingly indeterminate.

In other words, as the arguments of Critical Legal Studies scholars, feminist scholars, and others have gained force within the legal world, and as society has become more diverse and pluralistic, two things have happened. First, it has become more difficult to define with any degree of precision what is meant by the term "public interest." Second, Congress has become less willing to articulate clearly the basis for its decisions, because doing so has become increasingly risky as a political matter. As a consequence, courts have found it increasingly difficult to find consensus. These phenomena manifest themselves in an increased use of the canons of statutory construction.

These factors also have led to statutes that are increasingly complex, ambiguous, and difficult to interpret. As interest groups have become more specialized and as more interest groups have succeeded in gaining voice in the policymaking process, consensus has become more difficult to achieve. Congress has adopted, therefore, the strategy of passing increasingly broad and amorphous enabling legislation that delegates controversial matters to administrative agencies. Congress thus insulates itself from the political fallout associated with dealing directly with high stakes issues.[52] As statutes have become increasingly vague, techniques of statutory interpretation, such as use of legislative history, that traditionally have served as substitutes for the canons as methods of interpreting statutes, have become relatively less attractive. For example, judges traditionally have approached statutes by beginning with the statutory language and applying that language to a particular set of facts in a way that is consistent with the publicly articulated purpose of

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51. Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 Yale L. J. 1673, 1675 (1988).

52. Morris P. Fiorina, *Legislative Choice of Regulatory Forums: Legal Process or Administrative Process?*, 39 Public Choice 33, 55-57 (1982); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 Am. Pol. Sci. Rev. 555 (1972).

the statute.[53] As it has become increasingly difficult to find a publicly articulated purpose that meets any sort of generalizable public interest standard, this traditional mechanism for construing statutes has become less valuable. Using the canons allows judges to avoid having to find a public purpose in a complex statute that is, more often than not, no more than a hodge-podge of private deals among competing interest groups. In other words, contrary to Professor Schauer's arguments,[54] judges tend to invoke the canons not because they wish to get along, or to appear to get along with one another, but because using the canons allows them to avoid the burden of finding and operationalizing the public policies underlying statutes that may in fact have no public interest underpinning.

Many scholars have noted that judges oddly continue to invoke the old-fashioned canons of construction despite the fact that these decision-rules are "routinely derided in contemporary legal scholarship."[55] Interestingly, the rise in the use of the canons of statutory construction has coincided with the rise of interest-group pluralism during the post-war period. The certainty of the era of substantive due process is gone. Locating the public purpose underlying a statute, or even identifying the relevant legislative history behind a statute are techniques of statutory constructions that presuppose some degree of certainty and consensus in the legislative process. By contrast, the canons are an ideally suited technique of statutory construction in an era of moral and intellectual uncertainty.

D. Breininger *Revisited*

The above analysis provides a new way of looking at *Breininger v. Sheet Metal Workers.*[56] Previously we showed that the existing theories of statutory construction do not adequately explain the use of the canons in *Breininger*, where the canons were used to decide the portion of the case involving the LMRDA, but not the NLRA.[57] We think our theory does better.

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53. See Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale, 1921); United States v. Constantine 296 U.S. 287, 298-99 (1935) (Cardozo dissenting).

54. See Schauer, 1990 S. Ct. Rev. 231 (cited in note 34)

55. Id. at 231 (describing the treatment accorded the plain meaning rule by such luminaries as Foucault, Derrida, Gadamer, Rorty, and Heidegger).

56. 493 U.S. 67 (1989). For the *Breininger* facts and holding, see text accompanying notes 12-16.

57. See notes 19-32.

1. Specialization

Our theory holds that judges find the canons of statutory construction useful, in part because they allow judges to specialize. In *Breininger*, the fact that the justices were willing to decide the NLRA portions of the case is unsurprising in light of our analysis. The justices have much more exposure to the NLRA than to the LMRDA. Consequently, they have developed expertise in NLRA issues, but not in LMRDA issues.

The majority analysis began by noting that the Court has "long recognized that a labor organization has a statutory duty of fair representation under the National Labor Relations Act."[58] The Court expounded at length about the substantive policy underpinnings of the NLRA, and cited and distinguished the relevant precedents with confidence and authority. The Court at one point opined that "fair representation claims often involve matters 'not normally within the Board's unfair labor practice jurisdiction.' "[59]

By contrast, the Court was not on such terra firma with respect to the portion of the decision dealing with the LMRDA. The Court declined to describe the substantive policies that gave rise to the LMRDA because the Court was far less familiar with that act. The Court distanced itself, not only from the reasoning of the Court of Appeals,[60] but also from the available precedent. The Court's treatment of the most directly applicable precedent, *Finnegan v. Leu*,[61] is instructive. The Court stated that it "need not decide the precise import of the language and reasoning of *Finnegan* . . . because . . . by using the phrase 'otherwise discipline,' Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA."[62] In other words, by invoking a canon of statutory construction, the Court apparently believed that it had obviated the need to resort to substantive policy analysis or even to a careful examination of precedent.

The difference in the Court's treatment of the LMRDA and the NLRA stems from the simple fact that the Court knew more about the NLRA and, thus, felt confident enough to ground its decision of this aspect of the case in substantive reasoning rather than in a content-independent rationale such as the canons of statutory construction. *Breininger* thus illustrates the way in which the canons allow the justices to specialize. The justices in *Breininger* had made the rational de-

58. 493 U.S. at 73.
59. Id. at 74, citing *Vaca v. Sipes*, 386 U.S. 171, 181 (1967).
60. Id. at 90.
61. 456 U.S. 431 (1982), cited at 493 U.S. at 90-91.
62. 493 U.S. at 91.

cision to devote their time and energy to mastering the NLRA, which they encounter quite frequently. By contrast, when confronted with the LMRDA, the justices retreated to the canons.

It is difficult to know with certainty whether this specialization is socially desirable or not. The question is surprisingly complex, and the answer is probably indeterminate given the available data. On the benefits side of the equation, specialization allows the Justices to develop expertise that enables them to refine and improve certain areas of the law beyond what they could do if they had to render substantive judgments on every statute before them. On the negative side of the equation, the canons of statutory construction enable judges to avoid important substantive issues. In other words, the specialization allowed by use of the canons of construction causes some areas of the law to flourish, as judges are able to devote more time to developing expertise in these areas, but causes other areas of the law to languish, as judges retreat to the canons rather than attempt to apply substantive policy judgments to the problems at hand.

2. Error Costs

The majority in *Breininger* apparently was interested above all in avoiding error costs of the kind described above.[63] In particular, the Court went out of its way in the LMRDA portion of the opinion to avoid grounding its decision in content-dependent reasons. The Court of Appeals grounded its decision in a substantive rationale, holding that the petitioner had failed to show that he was disciplined within the meaning of the LMRDA. But, interestingly, while the Supreme Court reached the same result as the Court of Appeals, it rejected the Court of Appeals' substantive reasoning.

Notably, the Supreme Court did not explain why the Court of Appeals' reasoning was wrong. Moreover, as noted above,[64] the Supreme Court offered nothing of substance in its place. Instead, the Court reasoned that it need not decide the case on the basis of a substantive reason because it could decide the case on the basis of techniques of statutory construction. The Court thus suggested, astonishingly, that when the canons of statutory construction can be used to decide a case, then the guidance provided by the canons should trump precedent and content-dependent reasons.[65] But the Court's approach in the preceding NLRA portion of its opinion was squarely at odds with that suggestion. The Court could have decided the NLRA portion of the case on the

63. See notes 47-49 and accompanying text.
64. See notes 18-22 and accompanying text.
65. 493 U.S. at 90-91.

basis of the canons, but it did not do so because of its confidence in its own expertise in the NLRA. Thus, the Court's invocation of the canons in *Breininger* is consistent with the theory that the Court will use the canons to reduce error costs, when error costs are defined not as the societal costs of making erroneous judgments, but rather as the costs to the justices themselves of being proven wrong in a substantive area of law.

3. Pluralism

The Court's approach to the canons in *Breininger* also is consistent with our arguments that the canons become more attractive to judges in an age of interest group pluralism in which it is increasingly difficult to reach consensus or to defend successfully any particular vision of the public good. Indeed the most striking aspect of the Court's opinion may be its refusal to deal with the substantive merits of the issues presented in *Breininger*. The Court was bold in asserting that the Court of Appeals was wrong to find that the District Court lacked jurisdiction. But the Court went out of its way to avoid making any substantive judgment on the case, claiming to "express no view regarding the merits of petitioner's claim."[66]

It is surprising, to say the least, that the Court was unwilling to confront the most basic substantive issues involved in the case and even more surprising that the Court found that the plaintiff failed to state a claim under the LMRDA. After all, the LMRDA, which "was the product of congressional concern with widespread abuses of power by union leadership," was supposed to have been a "Bill of Rights" for labor union members.[67] And, as Justice Stevens noted, the result reached by the majority's use of the canon of statutory construction *ejusdem generis* seems to conflict with plain common sense.[68]

Indeed, the Court's decision threatens to gut the LMRDA itself. That statute was designed to protect union members from improper discipline for engaging in dissident political activities. If the statutory term "discipline" is defined narrowly, the Act's supposed protections for union members will be of no moment, as unions will be free to subject dissident members to a host of informal punishments and sanctions for any attempt to exercise their rights to dissent from positions taken by the leadership.

The result reached by the majority can only be explained on the basis of its lack of conviction about the nature and meaning of the

66. Id. at 95.
67. *Finnegan*, 456 U.S. at 435.
68. 493 U.S. at 97-98 (Stevens concurring in part and dissenting in part).

LMRDA. This lack of conviction does not reflect hostility towards labor. As noted earlier,[69] Justice Brennan, the author of the majority opinion, hardly could be accused of that. Instead the opinion reflects a deeper lack of conviction about the substantive goals of the law, and a firm commitment to avoid difficult, unfamiliar areas of law.

IV. CONCLUSION

The canons of statutory construction are used by judges, in part, because it makes their jobs easier. It allows judges to decide cases that involve increasingly technical legal issues on the basis of familiar, if content-free, generic legal rules that can be transported from case to case and from legal problem to legal problem like a set of handy, all-purpose tools. Thus Karl Llewellyn's inquiry about whether the canons of statutory construction actually constrain judges is, to a large extent, beside the point. The more pertinent question is why judges invoke the canons in some situations but not in others. That is the question this Article has attempted to explore.

We have offered three reasons to explain why judges use the canons. First, the canons permit judges to specialize in certain areas of the law. Judges' ability to decide cases on the basis of a generic, multi-purpose rule of thumb like the canons frees them to spend more time in those areas of the law in which they would like to specialize.

Second, the canons allow judges to reduce error costs, as we have defined that term above. In particular, while precedent allows judges to check their results against the answers generated by other judges deciding similar kinds of cases, the canons permit judges to decide cases that are "correct," as that term is used within the legal culture, even though the actual result reached may reduce overall societal well-being. Put another way, the canons can be used as a risk-avoidance strategy by cautious judges.

Finally, the canons provide useful tools for judges who have no views on a particular issue. The canons are attractive judicial tools simply because they permit judges to decide cases without invoking substantive principles of right and wrong. In a world in which everything increasingly seems to be a value judgment, dependent upon our ability to know what is "right" or "wrong," and when the interests of most people are increasingly subject to doubt, the canons have turned out to be popular indeed. The legal philosopher Joseph Raz has called arguments based purely on legal authority "content-independent" because they focus on the source of an argument rather than on its content.[70]

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69. See text accompanying note 58.

70. See text accompanying notes 48-49. See also Schauer, 139 U. Pa. L. Rev. at 1005 (cited in

We have seen that not all content-independent rules are the same. There is no bright line dividing content-dependent rules from content independent rules. Instead, rules should be seen as lying along a continuum. The canons are at one end of the scale, in that they are almost purely content-independent. By contrast, arguments from precedent, which have been described as content-independent, are only partially independent of content, since the precedents themselves generally contain substantive justifications for the results they reach.

In the end, it seems all we can hope is that courts will use the canons wisely and in moderation. At one extreme, complete abandonment of the canons would have judges deciding complex issues of law over which they have no expertise or experience and might reduce judicial respect for the norm of legislative supremacy in lawmaking. At the other extreme, if cases were decided solely on the basis of the canons, and substantive rules of law took a back seat to the sometimes artificial, and always technical results generated by the canons, judges would have abandoned their role as arbiters of right and wrong, and society's well-being will be harmed. To paraphrase Grant Gilmore, in heaven there will be no canons, and the lion will lie down with the lamb. In hell there will be nothing but canons, and each one will be meticulously observed.[71]

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note 47).

71. Grant Gilmore, *The Ages of American Law* 111 (Yale, 1977).