

# Vanderbilt Law Review

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Volume 45  
Issue 3 *Issue 3 - Symposium: A Reevaluation of  
the Canons of Statutory Interpretation*

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Article 1

4-1992

## A Reevaluation of the Canons of Statutory Interpretation

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### Recommended Citation

Joseph H. Bates, *A Reevaluation of the Canons of Statutory Interpretation*, 45 *Vanderbilt Law Review* 529 (1992)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol45/iss3/1>

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## SYMPOSIUM

### A Reevaluation of the Canons of Statutory Interpretation

This Symposium has its genesis in the *Vanderbilt Law Review's* inaugural symposium, *A Symposium on Statutory Construction*, published in 1950.<sup>1</sup> Although the 1950 Symposium included a Foreword by Justice Felix Frankfurter and contributions by several preeminent scholars in the field, Karl Llewellyn's clumsily titled but succinctly written *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*<sup>2</sup> has eclipsed the Symposium which brought it to light and has persevered as a highly influential, if not definitive, critique of the canons of statutory construction.

Llewellyn's article, in general, attacks legal formalism and advocates judicial reliance on what he calls a "situation sense." The most influential part of this article, however, is not the body proper but the appendix which lists twenty-eight well-worn canons often "thrust" at a court and, for each of the twenty-eight, an equally legitimate canon convenient for "parry." Were Llewellyn a physicist he might have hypothe-

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1. Felix Frankfurter, *A Symposium on Statutory Construction: Foreword*, 3 Vand. L. Rev. 365 (1950).

2. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 Vand. L. Rev. 395 (1950).

sized that whenever a proponent advocates a canon, there is an equal and opposite canon available to his antagonist. In sum, Llewellyn lambasted the canons and struck a near fatal blow to their legitimacy:

[T]here are two opposing canons on almost every point. . . . Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, by *tenable means, out of the statutory language*.<sup>3</sup>

In the last decade statutory interpretation has reemerged as an important topic of debate in the academic community and the courts. We have witnessed a revival of formalism and textualism and a renewed willingness of the judiciary to turn to the canons of statutory interpretation for guidance. This debate has particular relevance to the practitioner because statutes now comprise our primary source of law. Influential judicial advocates such as Justice Scalia have argued that the stability of the rule of law is grounded in a law of rules. Academic commentators have argued that the increased complexity of the administrative state has heightened the importance of the canons because of the simplicity they provide judges who must venture into areas of the law in which they have little interest or expertise. Other commentators, however, have countered that the increased complexity of the administrative state has made the canons not only less helpful but simply irrelevant in modern jurisprudence.

Undergirding the following discussion of the canons of statutory interpretation are two broad issues. First, as Justice Frankfurter stated in the Foreword to the precursor of this Symposium:

The divorce of the functions of authorship and interpretation becomes of profound importance when such divorce is one of the great safeguards of a free society. This may sound like a highfalutin way of referring to the separation of powers. Highfalutin or not, consciously kept in mind or not, this is the source of the judiciary's problems in construing legislation.<sup>4</sup>

The canons are often used by the judiciary as a means of addressing these "problems." The second major issue concerns the debate between formalism, which advocates the primacy of the text, and the more nebulously defined and less constrained theories such as the legal realism of Llewellyn or the practical reasoning advocated by several participants in the following pages.

On November 8, 1991, the *Vanderbilt Law Review* hosted a Symposium entitled *A Reevaluation of the Canons of Statutory Interpretation*. We assembled the preeminent scholars in the field to debate the legitimacy and value of the canons of statutory interpretation in mod-

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3. *Id.* at 401 (emphasis in original).

4. Frankfurter, 3 Vand. L. Rev. at 366 (cited in note 1).

ern jurisprudence. We asked each to use the Llewellyn article as a springboard to the topic of his choice. Thus, the following pages provide a variety of viewpoints on diverse but interrelated aspects of statutory interpretation, bound together by their common origin in Llewellyn's "remarks" of over forty years ago.

*Joseph Henry Bates*  
Symposium Editor\*

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\* The *Vanderbilt Law Review* would like to thank the following individuals for their valuable contributions to the success of this Symposium: Professor Nicholas Zeppos for the proposal of the topic and assistance in contacting the participants, Professor Donald Hall, Ms. Kelly Sharber, and Ms. Ann Julien.

