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## Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?

Stephen F. Ross

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# Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?

Stephen F. Ross\*

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## I. INTRODUCTION

Over forty years ago, in the Symposium we commemorate today, Professor Karl Llewellyn wrote a devastating critique of the canons of statutory construction.<sup>1</sup> For virtually every canon of construction, he demonstrated that there was another canon that could be employed to reach the opposite result.<sup>2</sup> His point was not to be critical, but to argue

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\* Professor of Law, University of Illinois. A.B., J.D., University of California (Berkeley). Some of the suggestions made in this article appeared previously as part of testimony I gave to a congressional hearing. See Statutory Interpretation and the Uses of Legislative History, *Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 2d Sess. 97-127 (1990). In addition to many helpful comments by the participants at the *Vanderbilt Law Review* Symposium, the author wishes to thank Kit Kinports for her typically tremendous editing job on an earlier draft, and J. Pieter van Es for research assistance.

1. 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).

2. *Id.* at 401-06.

proscriptively that the process of statutory construction requires an interpretation in light of a judicial determination of "some assumed purpose."<sup>3</sup>

Other commentators, both before and after the publication of Llewellyn's magnificent contribution to the *Vanderbilt Law Review*, have taken a different approach. These observers have focused, in a critical way, on judicial abuse of the canons whose indeterminacy Llewellyn so brilliantly exposed. Over a century ago, British jurist Sir Frederick Pollock wrote that canons "cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds."<sup>4</sup> At the height of conservative judicial activism colloquially known as the *Lochner* era, Professor James Landis warned that the "real difficulty" in statutory interpretation was that "strong judges prefer to override the intent of the legislature in order to make law according to their own views."<sup>5</sup> More recently, Judge Patricia Wald's careful survey of the Supreme Court's interpretive behavior concluded that "legislative history is often rejected in favor of, or at least filtered through, canons, presumptions, or principles considered overriding by a majority of the Court."<sup>6</sup> Focusing specifically on the jurisprudence of Justice Antonin Scalia, Professor William Eskridge likewise concluded that Scalia's selective use of canons "will often be more arbitrary and less constraining than that of the traditional approach."<sup>7</sup>

In sum, these observers do not merely confirm Llewellyn's view that canons of statutory interpretation are subject to abuse; they suggest in addition that canons have actually been abused as part of the judiciary's systematic attempt to frustrate legislative policy preferences. As I have written elsewhere, we are currently witnessing another period characterized by a conservative judiciary and a Congress dominated by more liberal legislators.<sup>8</sup> The purpose of this paper is to explore what, if anything, Congress should do about the canons to prevent judges who are more conservative (or perhaps, in a future era, more progressive) than the majority of the legislature from employing those canons to distort or frustrate legislative policy preferences.

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3. *Id.* at 400.

4. Frederick Pollock, *Essays in Jurisprudence and Ethics* 85 (MacMillan and Co., 1882).

5. James M. Landis, *A Note on "Statutory Interpretation,"* 43 *Harv. L. Rev.* 886, 890 (1930).

6. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 *Iowa L. Rev.* 195, 207 (1983).

7. William N. Eskridge, Jr., *The New Textualism,* 37 *UCLA L. Rev.* 621, 676 (1990).

8. Stephen F. Ross, *Reaganist Realism Comes to Detroit,* 1989 *U. Ill. L. Rev.* 399. See also Abner J. Mikva and Jeff Bleich, *When Congress Overrules the Court,* 79 *Cal. L. Rev.* 729 (1991).

## II. THE USE OF NORMATIVE CANONS

Many commentators have correctly observed that the canons serve a number of functions,<sup>9</sup> but I believe they are best understood as falling into two discrete categories: descriptive canons and normative canons. Descriptive canons are principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language. These canons may be directed to the judiciary expressly by statute or created by the courts themselves. Rules of syntax or grammar, principles that statutory provisions should be read to avoid internal inconsistency or conflict with other enactments, or canons such as *ejusdem generis*<sup>10</sup> are examples of descriptive canons. A judge deploying a descriptive canon is attempting to act as an agent to effectuate congressional intent.<sup>11</sup>

In contrast, normative canons are principles, created in the federal system exclusively by judges, that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective.<sup>12</sup> Judge Wald provided a classic example of a normative canon when she observed that judges often presume "that Congress did not intend to interfere with the traditional power and authority of the states unless it signaled its intention in neon lights."<sup>13</sup>

Especially today, normative canons require careful consideration. They clearly reflect *judicial*, not congressional, policy concerns; nowhere in the United States Code is there any congressional endorse-

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9. See Reed Dickerson, *The Interpretation and Application of Statutes* 228 (Little, Brown, 1975); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 454-59 (1989); Wald, 68 Iowa L. Rev. at 207 & n.92 (cited in note 6).

10. This canon states that general language following a list of specific terms should be interpreted in light of the specific terms.

11. An example of this approach to judging was articulated by Judge Patricia Wald: "When a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: *I want to advance rather than impede or frustrate the will of Congress.*" Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 301 (1990). See also *Schooner Paulina v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (stating that "[i]n construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature").

12. Some canons may both accurately describe congressional behavior and reflect judicial norms of how legislation should be read. For example, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191-92 (1978), the Supreme Court held that appropriations measures will be presumed not to amend substantive statutes. This presumption reflects both an understanding of Congress's intent, based on House and Senate rules prohibiting substantive legislation on appropriations bills, and normative arguments that statutes should be construed to limit casual, ill-considered, or interest-driven measures that may be easier to attach to appropriations statutes.

13. Wald, 68 Iowa L. Rev. at 208 (cited in note 6).

ment of these canons.<sup>14</sup> They can, however, be justified under theories expounded by several of today's leading jurisprudential theorists.

In a series of articles, for example, Professor William Eskridge has advocated that courts should approach statutory interpretation in a dynamic manner, giving effect to contemporary public values.<sup>15</sup> Eskridge catalogues a host of normative rules of interpretation that openly and candidly reflect the perspectives of the Supreme Court's contemporary majority. When a judge of today reads a statute passed yesterday, using these canons furthers the inevitable interpretive process, contributes to the moral worth of society, fulfills the republican ideal of achieving the common good through practical reason and dialogue between the courts and legislatures, and corrects what Professor Cass Sunstein has called "statutory failure."<sup>16</sup> Thus, the hostility of the English law lords to actions of Parliament led to a normative canon that statutes in derogation of the common law should be construed narrowly, a normative canon that is no longer widely employed.<sup>17</sup> Today's judiciary, for example, espouses values solicitous of states' rights and thus narrowly construes statutes in derogation of traditional state prerogatives.<sup>18</sup>

Another leading scholar, Professor Jonathan Macey, has advocated what I call "strategic interpretation," in response to considerable criticism of the legal process theory—that theory calls for construction consistent with the public purpose that can be discerned from a statute. Macey argues that construing statutes consistently with their apparent public purposes will promote Madisonian notions, embodied in our con-

14. Title 1 of the United States Code lists a few interpretive canons. The first section provides general definitions of commonly used words. The other sections define "county," "vessel," "vehicle," "company," "association," and "products of American fisheries." 1 U.S.C. §§ 1-6 (1988).

15. Professor Eskridge is so prolific that I hesitate to slight his canon by omission. My two personal favorites are William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989) ("*Public Values*") and William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

16. *Public Values*, at 1019-61 (cited in note 15). See Sunstein, 103 Harv. L. Rev. at 466-67, 476-89 (cited in note 9).

17. Compare *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) with *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879). In *Isbrandtsen*, a seaman sued for unpaid wages pursuant to a federal statute permitting such suits in federal court. 343 U.S. at 783. The Supreme Court held that the employer's effort to apply a set-off for damages caused by the seaman, which clearly existed under the common law of admiralty, was implicitly barred under a federal statutory scheme designed to change the common law "so as to improve the lot of seamen." *Id.* In contrast, in *Shaw*, the Court held that a state statute equating bills of lading with negotiable promissory notes did not change the common law's denial of title to holders of bills of lading when the true owner of the property contested the title of the holder. 101 U.S. at 565. The case arose because a prior seller of the bill of lading had obtained it by fraud. *Id.* at 558. The Court reached its decision in *Shaw* without any examination of the legislative purpose in enacting the statute, which was to promote the marketability of bills of lading by giving them full negotiability. (My thanks to my colleagues Steve Harris and John Dolan of the Wayne State University School of Law for these insights).

18. Wald, 68 Iowa L. Rev. at 208-09 (cited in note 6).

stitutional system, of how legislation *should* work. For example, construing ambiguous statutory provisions in ways that do not permit private interest groups to gain more, at the public expense, than they clearly received from the statutory text serves these Madisonian values.<sup>19</sup>

Combining Eskridge's and Macey's normative arguments with the practical assertions that language "by itself" lacks meaning and that gaps and ambiguities in statutes are inevitable, Professor Cass Sunstein<sup>20</sup> argues that "[i]nterpretation cannot occur without background principles that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands."<sup>21</sup> Sunstein also catalogues a host of normative principles that improve the lawmaking process by minimizing judicial and administrative discretion or by asserting a desirable influence on the process itself. Some of these principles also advance a number of substantive goals that courts identify as desirable.<sup>22</sup> These "substantive" norms, a major subset of what I have called the normative canons, roughly track Eskridge's public values and are drawn from constitutional principles, institutional concerns, and the desire to "combat characteristic pathologies in regulatory legislation."<sup>23</sup>

What is ironic, however, about this exploration of normative canons is that their justification must be rooted in a sense of the judicial role that is, on today's ideological spectrum, at least moderately activist. Professor Sunstein, for example, who has endorsed a plethora of normative canons, expressly rejects the metaphor of the judge as an agent carrying out Congress's will.<sup>24</sup> Presidents Reagan and Bush have insisted, however, that their judicial nominees must faithfully interpret and not legislate. Their most recent Supreme Court nominee, now Justice Clarence Thomas, espoused his adherence to this philosophy that statutory interpretation only involves faithfully carrying out what Congress means.<sup>25</sup> Justice Thomas followed Justices Scalia and Souter, who, at their confirmation hearings, pledged their fealty to legislative intent.<sup>26</sup> Yet there is absolutely no evidence that the use of normative

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19. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986).

20. Fittingly, Professor Sunstein is the University of Chicago's Llewellyn Professor of Jurisprudence.

21. Sunstein, 103 Harv. L. Rev. at 504 (cited in note 9).

22. *Id.* at 457.

23. *Id.* at 476.

24. *Id.* at 437.

25. See Joan Biskupic, *Minuet With Congress*, Cong. Q. Weekly Rep. 2622 (Sept. 14, 1991).

26. See Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 130 (1990) (remarks of Sen. Dennis DeConcini) (quoting Justice-designate David Souter's answer to a committee questionnaire, stating that the "foundation of judicial responsibility in statutory inter-

canons has declined as the Court has become more conservative. Indeed, Judge Wald's empirical studies demonstrate that this is not the case.<sup>27</sup> Moreover, Professor Eskridge has appropriately derided the Court's aggressive application of a newly developed normative canon, requiring an express statutory abrogation of state sovereign immunity, to statutes passed prior to the promulgation of this canon. Eskridge describes this action as "bait-and-switch."<sup>28</sup> It is difficult to see how those who ascribe to the philosophy of judicial restraint advocated by President Bush at press conferences and by Republican nominees at their confirmation hearings can continue to use normative canons at all.

### III. POTENTIAL LEGISLATIVE RESPONSES TO SOME NORMATIVE CANONS

The only way for Congress to prevent the continued use of normative canons with which it disagrees is to enact an amendment to Title I of the United States Code that expressly provides for different rules of construction.<sup>29</sup> In earlier days legislatures responded with statutory action to the now defunct normative canon that narrowly construed statutes in derogation of the common law. The California legislature, for example, adopted a statutory provision expressly rejecting this maxim and instead directing courts that the Civil Code was "to be liberally construed with a view to effect its objects and to promote justice."<sup>30</sup> Pennsylvania similarly has enacted a comprehensive set of rules for statutory construction, including rules that direct courts on materials to be used to divine legislative intent,<sup>31</sup> establish normative presumptions for courts to use,<sup>32</sup> and dictate when courts should engage in liberal or strict construction.<sup>33</sup>

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pretation is respect for the enacted text *and for the legislative purpose that may explain a text that is unclear*") (emphasis added); id. at 132-33 (testimony of Justice-designate Souter) (agreeing with Sen. DeConcini that a judge who disregards dispositive legislative history to create his own definitions exemplified "bedrock activism"); Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 66 (1986) (statement of Justice-designate Scalia) (asserting that use of legislative history depends on "how genuine a representation of the congressional intent it seems to be").

27. Wald, 39 Am. U. L. Rev. at 305 (cited in note 11); Wald, 68 Iowa L. Rev. at 207-13 (cited in note 6).

28. Eskridge, 37 UCLA L. Rev. at 683 (cited in note 7).

29. Even this approach is not guaranteed to be effective. See Jefferson B. Fordham and J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 Vand. L. Rev. 438, 450-51 & nn.74-75 (1950) (cataloguing judicial disregard of statutes directing courts to avoid strict construction of legislation in derogation of the common law).

30. Cal. Civ. Code § 4 (1872) (cited in *Li v. Yellow Cab Co.*, 119 Cal. Rptr. 858, 532 P.2d 1226, 1234 (1975)).

31. 1 Pa. Cons. Stat. Ann. § 1921 (Purdon Supp. 1991).

32. Id. § 1922.

33. Id. § 1928. Whether these statutes result in greater judicial sensitivity to legislative policy

Although a full exploration of the merits of particular normative canons is beyond the scope of this essay, a Congress controlled by moderate-liberal Democrats may well find that several of the normative canons most aggressively employed by the Rehnquist Court warrant statutory modification. For example, the Court's 1985 innovation requiring Congress to specify clearly in the statutory text when it intends its directives to be applied to state governments<sup>34</sup> may prove to be so contrary to what Congress actually intends that sponsors of legislation affecting states will rally behind a modification of the Supreme Court's standard. The Court's standard may prove particularly offensive as applied to statutes enacted prior to 1985 when prevailing Supreme Court decisions suggested that less positive indicia of congressional intent would be sufficient.<sup>35</sup>

William Eskridge and Philip Frickey have also called for reconsideration of the canon narrowly construing grants from the government to private parties. Although there is merit in preventing narrow special interests from obtaining any more of the public largesse than Congress has clearly authorized, Eskridge and Frickey question why the same canon should be applied to poor recipients of public welfare.<sup>36</sup> Professor Sunstein has echoed this concern with a proposed canon to ensure against irrational or arbitrary deprivations of welfare benefits so as to effectuate a normative position that society ought to provide a "social safety net" for the economically disadvantaged.<sup>37</sup>

Congress also might focus its attention on the controversial trend toward almost complete deference to agency interpretations of their own statutes. In 1980, when the federal judiciary was dominated at the inferior level by appointees of Democratic presidents, the Senate overwhelmingly adopted the Bumpers Amendment, which prohibited the courts from deferring to administrative constructions of statutes.<sup>38</sup>

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preferences in Pennsylvania is beyond the scope of this essay.

34. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

35. See *Statutory Interpretation and the Uses of Legislative History*, Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of The House Committee of the Judiciary, 101st Cong., 2d Sess. 71-72 (1990) (testimony of Professor William N. Eskridge, Jr.).

36. William N. Eskridge, Jr. and Philip E. Frickey, *Legislation: Statutes and the Creation of Public Policy* 657-58 (West, 1989). This canon is particularly suspect in light of its inconsistent application. For example, in *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979), the Court declined to apply the canon to a statute favoring wealthy and powerful railroads. Instead it broadly construed the statutory grant of land to those railroads.

37. Sunstein, 103 Harv. L. Rev. at 474 (cited in note 9).

38. Technically, the Senate rejected a motion to table (kill) the proposal, which was offered as an amendment to S. 1477, the Federal Courts Improvements Act. 125 Cong. Rec. 23,499 (Sept. 7, 1979). The amendment provided that courts reviewing administrative regulations shall "interpret constitutional and statutory provisions . . . [with] no presumption that any rule or regulation



Since then, Republicans have taken over both the White House and political control of administrative agencies and have appointed an overwhelming majority of sitting federal judges.

Moreover, the administrative deference that the Senate found so objectionable in 1980 is nothing compared to the deference given by courts today. Indeed, Judge Carl McGowan opined that he saw nothing in the Bumpers Amendment that "would stop me or any other judge from going about our interpretive job in the way we always have."<sup>39</sup> At that time, the view of moderate and nonideological judges such as Judge Edward Tamm was that reviewing courts would defer to agencies when special administrative expertise was actually present or when the judges believed that Congress actually delegated or acquiesced in the interpretation.<sup>40</sup>

The role played by Judge Ruth Bader Ginsburg in the development of this area of law demonstrates how far we have come since 1980. Judge Ginsburg used the occasion of the University of Georgia's 1981 Sibley Lecture to criticize the Bumpers Amendment, defending judicial deference to agency interpretations as appropriate in many circumstances.<sup>41</sup> Within the same year, she wrote an opinion reversing the Federal Election Commission, carefully explaining why the inconsistent and ill-considered interpretation by the Commission was not entitled to deference.<sup>42</sup> She was unanimously reversed by the Supreme Court which ruled that courts must uphold any reasonable administrative interpretation, even those involving pure questions of statutory interpretation.<sup>43</sup> Several years later, Judge Ginsburg wrote a decision reversing an Environmental Protection Agency regulation as contrary to law. The statute, the Clean Air Amendments of 1977, had been passed by a Democratic House and Senate and signed by President Carter.<sup>44</sup> Judge Ginsburg concluded that Ann Gorsuch, President Reagan's environmental administrator, erred in reversing a Carter administration regulation that required factories in areas with poor air quality always to use the

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of any agency is valid." *Id.* at 23,478. The vote on the motion to table was 27 to 51. *Id.* at 23,499. The bill ultimately passed the Senate but died in the House Judiciary Committee. See Index, 125 Cong. Rec. pt. 29, at 2006 (1979).

39. Carl McGowan, Remarks to the Section of Administrative Law, Ass'n of Am. Law Schools 7 (Jan. 4, 1981) (quoted in Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 Ga. L. Rev. 539, 552 n.72 (1981)).

40. See, for example, *Action on Smoking and Health v. Harris*, 655 F.2d 236, 238 (D.C. Cir. 1980).

41. Ginsburg, 15 Ga. L. Rev. at 550-53 (cited in note 39).

42. *Democratic Sen. Camp. Comm'n v. Federal Election Comm'n*, 660 F.2d 773, 776-77 (D.C. Cir. 1980).

43. *Federal Election Comm'n v. Democratic Sen. Camp. Comm.*, 454 U.S. 27 (1981).

44. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977), codified at 42 U.S.C. § 7401 (1988).

best available technology in cleaning the air. Despite what Judge Ginsburg and the D.C. Circuit found was that statute's overall *raison d'être* of *improving* air quality,<sup>45</sup> Gorsuch's regulation allowed factories in dirty-air areas to install new equipment that fell short of the best available technology as long as there was no net increase in pollution from the factory.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>46</sup> the Supreme Court reversed Judge Ginsburg's ruling. Once a reviewing court determined that the construction was not contrary to clear congressional intent because Congress "has not directly addressed the precise question at issue," the Supreme Court indicated that a court's interpretive skills should be put aside and the agency interpretation should prevail as long as it is plausible.<sup>47</sup>

More recently, Supreme Court decisions have upheld administrative constructions even when they are contrary to rules of syntax and grammar that normally indicate congressional policy preferences.<sup>48</sup> Reagan and Bush judicial appointees have demonstrated aggressive deference to administrative constructions developed by Reagan and Bush administrators even though those constructions may be contrary to the policy preferences expressed in the statutes and debates of Democratic Congresses. This situation may well suggest that the time is ripe for Congress to revisit this issue.

On balance, however, it is unlikely that even these more extreme normative canons will be overturned by statute. There is little to be gained politically by abstract amendments to the United States Code. Moreover, any effort to amend legislatively a normative canon is likely to encounter organized opposition. Whether the opposition is politically powerful<sup>49</sup> or is limited to moral appeals,<sup>50</sup> it has the powerful force of

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45. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 726-27 (D.C. Cir. 1982), rev'd as *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

46. 467 U.S. 837 (1984).

47. *Id.* at 843-44, n.9.

48. See, for example, *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986). *Young* concerned the Federal Food, Drug, and Cosmetic Act, providing that when dangerous substances are required in food preparation, the Food and Drug Administration "shall promulgate regulations limiting the quantity therein or thereon to such extent as [it] finds necessary for the protection of public health." 21 U.S.C. § 346 (1988). As Professor Sunstein observed, the syntax of the statute suggests that the FDA has discretion to decide on the tolerance level for dangerous substances but not to decline to promulgate regulations at all. Sunstein, 103 Harv. L. Rev. at 465 (cited in note 9). Yet *Young*, citing the principle of deference to administrators, upheld the FDA's decision to promulgate no regulations.

49. The President, who institutionally favors deference to his agencies' interpretations, and the various representatives of state governors and legislators are politically powerful interest groups. Compare Wash. Rev. Code Ann. § 1.16.080 (West 1961) (overriding a canon interpreting ambiguities against application of a statute interfering with state sovereignty).

inertia on its side. Moreover, the opposition often will be able to find some cases where reliance on the challenged canon led to a result favorable to most legislators.<sup>51</sup>

Finally, Democratic legislators should be wary of passing a modern-day Bumpers Amendment in today's interpretive environment. True, abolition of the extreme deference to administrative agencies would be preferable to these legislators if combined with a "reader-friendly" interpretive regime where judges truly sought to give effect to congressional intent. But today, repeal of the *Chevron* doctrine would leave judges free either to give their own personal interpretation to the "plain meaning" of the statutory text regardless of the existence of reliable indicia of congressional intent,<sup>52</sup> or to frustrate both congressional and administrative constructions by interpreting the statute in light of other normative canons based on the judiciary's policy preferences.<sup>53</sup>

With respect to many other normative canons, one can predict with even greater confidence that Congress will not and should not legislatively overrule them. It is probably true that, in the heat of politically charged consideration of a new crime bill, members of Congress do not intend for particular provisions to be construed narrowly,<sup>54</sup> likewise, as members line up to gain political advantage in complex tax legislation, they may well not intend their exemptions to be read strictly.<sup>55</sup> But if confronted with the question, outside the heat of the particular battle, of whether the rule of lenity and the rule of narrow construction of tax exemptions are desirable interpretive principles, most members probably would respond affirmatively. The values of due process and concern

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50. Native American rights groups, who would oppose any modification to the normative canon construing statutes against diminishment of Native rights, often assert influence on Congress through moral appeals.

51. The same "federalism" public values underlying the normative canon that requires a clear statement before federal statutes will be deemed to apply to state governments also underlie the normative canon requiring a clear statement before federal regulatory statutes will be deemed to preempt state or local regulation. Thus, although liberal legislators may complain about decisions such as *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which refused to apply a federal statute to victims of wrongdoing by a state hospital, they may cheer decisions such as *Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1 (1987), which refused to read ERISA or the National Labor Relations Act as preempting a Maine statute requiring plant-closing employers to provide severance pay.

52. Ross, 1989 U. Ill. L. Rev. 399 at 421-25 (cited in note 8).

53. For a catalogue and critique of these normative canons that serve to trump all but the clearest expressions of Congressional intent, see William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Super Clear Statement Rules as Backdoor Constitutional Lawmaking?*, 45 Vand. L. Rev. 593 (1992).

54. Compare *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (recognizing that uncertainty in criminal statutes should be resolved by the rule of "lenity" in favor of the defendant).

55. Compare *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) (recognizing the "principle that exemptions from taxation are not to be implied").

about unwarranted imposition of criminal sanctions are widely held "background values." Legislators also share with Maceian academics an understanding of the ways that special interest groups can distort legislation like tax bills.<sup>56</sup>

The fact that Congress is unlikely to enact statutes reversing normative canons does not mean, however, that Congress can do nothing to protect itself from judicial abuse of those canons. Keep in mind that normative canons are all presumptions, or "clear statement rules." If Congress speaks clearly enough, the courts will give effect to its intent to diminish Native rights, violate international law, intrude into state governmental responsibilities, withdraw traditional discretion from courts of equity, or impose significantly increased burdens on the federal judiciary despite normative canons to the contrary.<sup>57</sup> Thus, one way to minimize, if not avoid entirely, situations in which congressional intent is frustrated by normative canons is for legislative drafters to be more fully cognizant of how judges are likely to interpret their handiwork. One workable approach would be for the Congressional Research Service's American Law Division to compile and publish periodically a list of normative canons being employed by the courts. This "checklist" could then be used by attorneys on the staff of the House and Senate Legislative Counsels.<sup>58</sup> For example, when draft legislation appears to

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56. One could argue that the federalism canons enforced with vigor by the Rehnquist Court similarly reflect Congress's long-term values. I would disagree with the notion that Congress prefers that courts require it to express in statutory text any intent to apply its mandates to states notwithstanding clear legislative history. Compare *Dellmuth v. Muth*, 491 U.S. 223 (1989) (imposing such a super-strong clear statement rule). But I confess to having only my personal impressions as a former Senate staffer to support my view. The key point to Part I of this paper, however, is that it seems quite hypocritical for those who reject the Eskridge/Sunstein/Macey public values approach to statutory interpretation to embrace such a restriction on Congressional prerogatives without positive evidence that Congress really does prefer such an interpretive norm.

Although I am still researching the issue, it seems that the justification for these "super-strong" clear statement rules protecting states' rights can also be criticized as fundamentally inconsistent with the insights of Dean Jesse Choper that the national political process is fully capable of protecting state interests. See Jesse H. Choper, *Judicial Review and the National Political Process*, ch. IV (U. Chi., 1980). The endorsement of Choper's insights was critical to the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Auth'y*, 469 U.S. 528 (1985) in which the Court refused to use the Tenth Amendment to invalidate federal laws affecting states' rights.

57. The first three normative canons are among those catalogued in Eskridge and Frickey, *Legislation* at 655 (cited in note 36) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (discussing Native rights); *Weinberger v. Rossi*, 456 U.S. 25 (1982) (discussing international law); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (discussing state prerogatives)). The latter canon was identified in Wald, 68 Iowa L. Rev. at 210 (cited in note 6) (citing *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 581-82 (1982)).

58. I unfortunately cannot claim credit for originating the idea of the increased use of the legislative counsel's office to improve statutory interpretation. See Robert A. Katzmann, *The Continuing Challenge*, in Robert A. Katzmann, ed., *Judges and Legislators: Toward Institutional Comity* 183-84 (Brookings Institution, 1988).

impose duties on state governments, these attorneys could notify the author of the bill that express abrogation of state sovereign immunity will be necessary to secure judicial enforcement of these duties, and the legislator then would be able to make a judgment about the political viability of such an express provision.

#### IV. THE USE OF DESCRIPTIVE CANONS

Descriptive canons of statutory interpretation raise different issues. By and large, descriptive canons are somewhat accurate generalizations of the way legislators communicate through statutory text. Perhaps commentators are correct that the most controversial descriptive canon—*inclusio unius est exclusio alterius*—is so inaccurate in describing how members of Congress draft legislation<sup>59</sup> that Congress can be persuaded to disavow it by statute. As for the canon that nothing in statutory text can be treated as surplusage, even if Congress were too embarrassed to admit to its sloppy drafting habits by overturning the canon itself, perhaps this canon too is so contrary to real life experience that courts should simply stop using it.<sup>60</sup>

Judge Posner also has criticized other descriptive canons on accuracy grounds, including the one disfavoring repeals by implication.<sup>61</sup> Posner is surely right that congressional drafters do not comb the United States Code for possible inconsistencies and explicitly repeal all those that they find. But it may well be accurate to suppose that a busy Congress of limited prescience might fully support judicial use of this canon, precisely to avoid the political embarrassment of accidentally re-

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59. The *inclusio unius* canon states that when Congress includes some things in a statutory list it has excluded everything not named in the statute. See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* 282 (Harvard, 1985). Professor Sunstein notes that “[t]he failure to refer explicitly to the group in question may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts, rather than an implicit negative legislative decision on the subject.” Sunstein, 103 Harv. L. Rev. at 455 (cited in note 9).

60. As Judge Posner correctly observes, this canon is based on the “improbable proposition” of “legislative omniscience.” Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812-13 (1983). Some courts seem to have caught on to the existence of surplusage caused by sloppy drafting. See, for example, *Montana Wilderness Ass’n, Nine Quarter Circle Ranch v. United States Forest Serv.*, 655 F.2d 951, 954-55 n.4 (9th Cir. 1981).

Even if legislative drafters were omniscient, a number of scenarios exist in which language that appears to most readers to be superfluous winds up in enacted statutes. A hyper-sensitive drafter, perhaps spurred on by a special interest group, might insist on inserting a provision that does no more than restate the terms of another provision using language that appears to be clearer to the drafter. Alternatively, a legislator, either for herself or for the benefit of a friendly lobbyist, may insist that a superfluous phrase that originally appeared in her bill remain in compromise legislation, so she can claim credit for securing passage of this particular provision. (I thank my classmate Ed Weil for this insight.)

61. Posner, 50 U. Chi. L. Rev. at 812-13 (cited in note 60).

pealing desirable legislative provisions.<sup>62</sup> This is particularly true when one considers the increasing specialization and turf fights within Congress, and the members' interest in not having legislation enacted by another committee inadvertently affect statutes previously enacted under their watchful eye.

In any event, as Llewellyn noted, virtually all descriptive canons are subject to refutation by counter-canons that call for a different result when a contrary legislative purpose appears. Llewellyn's remarks demonstrate how at least five of the most commonly used descriptive canons are disregarded when they would result in an interpretation contrary to congressional purposes. First, statutes *in pari materia* are to be construed together, but not "where a legislative design to depart from the general purpose or policy of previous enactments may be apparent."<sup>63</sup> Second, judges are generally to give words their ordinary meaning unless they are technical terms, but ordinary words may have a technical meaning and technical words should be construed in ordinary terms if necessary to conform to congressional intent.<sup>64</sup> Third, words should be interpreted according to principles of grammar unless such an interpretation would undermine the statute's purpose.<sup>65</sup> Fourth, *ejusdem generis* "is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended."<sup>66</sup> Finally, permissible and mandatory words are interpreted differently, but permissible words may be read as mandatory and mandatory words may be read as permissible when congressional intent requires such a construction.<sup>67</sup>

These canons could, of course, be converted into normative ones. The federal judiciary could decide to act as Congress's kindergarten teacher and insist, for example, that the desirability of having Congress use proper grammar to communicate justifies judicial refusal to give effect to a meaning that Congress clearly intended in order to force Congress to clean up its act. At least to date, though, no serious effort has been made, even by the textualists, to convert the descriptive canons into normative ones. As long as these canons remain descriptive, by definition they will be subject to modification by reliable indicia of legislative intent. Thus, the key strategy for Congress in ensuring that its policy preferences are not frustrated by judicial abuse of descriptive ca-

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62. Mexico's legislature has expressly adopted an interpretive statute codifying this canon. *Codigo Civil para el Distrito Federal [C.C.D.F.] art. 9.*

63. Llewellyn, 3 *Vand. L. Rev.* at 402 (cited in note 1).

64. *Id.* at 404.

65. *Id.*

66. *Id.* at 405.

67. *Id.* at 406.

nons is to manifest unequivocally its purpose.

#### V. POTENTIAL LEGISLATIVE RESPONSES TO DESCRIPTIVE CANONS

One workable way of ensuring that Congress's purposes are clear is to minimize situations where statutory language invokes a descriptive canon contrary to the legislative intent because of the drafters' ignorance of the canon.<sup>68</sup> Suppose, for example, that a modern day trade committee approves legislation imposing a tariff on fruits but not vegetables, and it wishes to protect homegrown tomatoes. The sponsors might leave the text as drafted, knowing that, botanically speaking, tomatoes are fruits of the vine. This decision would reflect, however, an ignorance of the venerable canon that words are to be given their ordinary meaning.<sup>69</sup> As with normative canons, each chamber's legislative counsel could use a checklist of canons developed by the Congressional Research Service to notify drafters of how their statutes are likely to be interpreted by judges.<sup>70</sup>

Despite attacks on the use of legislative history by Justice Scalia and some lower court judges, each of the other justices signed Justice White's majority opinion in *Wisconsin Public Intervenor v. Mortier*, which pointedly rejected Scalia's critique and insisted that courts would continue to use legislative history.<sup>71</sup> Thus, it is inconceivable that, to use the tomato tariff illustration, the courts would insist on applying the ordinary meaning canon in the face of clear language in a commit-

68. Judge Abner Mikva once remarked that when he served in Congress, "the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight." Abner J. Mikva, *Reading and Writing Statutes*, 48 U. Pitt. L. Rev. 627, 629 (1987).

69. Indeed, legisprudes will recognize that the hypothetical is drawn from *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893), which applied the ordinary meaning of tomato to classify it as a vegetable.

70. Professor Eric Lane suggests that "even if the bill drafters were aware of the rules of construction, they could not abide by them." Eric Lane, *Legislative Process and its Judicial Renderings: A Study in Contrast*, 48 U. Pitt. L. Rev. 639, 657 (1987). He applies this suggestion with some accuracy to the normative canon that remedial statutes are broadly construed, arguing that legislators might find compromise more difficult if they really understood how judges might broaden the enacted text. *Id.* But he errs when it comes to descriptive canons. A drafter's resolution of the tomato-as-fruit illustration cited in the text is one clear example.

Professor Lane's critique of the use of the *in pari materia* canon also misses the mark. See *id.* at 657-58. Lane, of course, is correct in noting that consistency among statutes is not a dominant concern for many bills. But this canon is only properly invoked when the text and background of a more recent statute indicate (often through identical wording of key provisions) that the legislature intended its later work to reflect its intent as expressed in the earlier legislation. Although legislative drafters cannot be expected to be fully cognizant of the entire statutory corpus juris, it is unlikely that drafters will use virtually identical language from related statutes by accident. For an example of a sound use of this canon, see *Lorillard v. Pons*, 434 U.S. 575 (1978) (holding that the right to a jury trial permitted in the Fair Labor Standards Act also applied to the Age Discrimination Act because the text, structure, and history of the two statutes were *in pari materia*).

71. 111 S. Ct. 2476, 2485 n.4 (1991).

tee report or a sponsor's floor statement indicating that tomatoes were to be considered fruits. Nevertheless, there is widespread agreement that official congressional documents are replete with deceptive statements that suggest a congressional intent that does not in fact exist. The following modifications in congressional practices would significantly reduce the likelihood that courts will be deceived by inaccurate legislative history or will ignore legislative history for fear of such deception.

A. *Publish the Transcript of Mark-ups*

Although the majority of words enacted into the United States Code are no doubt originally drafted during private meetings, far more consideration of statutory text occurs at committee and subcommittee mark-ups than on the floor of either House. These mark-ups are not published—a circumstance which perhaps reflects a time when mark-ups, unlike hearings and general debate, usually took place in closed session.<sup>72</sup> Today, drafting of statutory language often occurs during mark-ups; in addition, the sponsor or chief committee staff counsel often explains in plain English the meaning of words in the working draft. Similarly, members offering amendments usually provide explanations for their proposed additions or deletions to the draft. Because committee members frequently rely on these explanations, they could, should, and would be given considerable weight were they publicly available.

B. *Have Members Sign Committee Reports*

Justice Scalia has criticized judicial reliance on committee reports because their contents, he alleges, are “inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist.”<sup>73</sup> However, committee staffers draft virtually all statutory *text* as well, often at the suggestion of a lawyer-lobbyist, and members rarely read the statutory text. In my own experience as an attorney for the Senate Judiciary Committee, matters inserted in a committee report at the initiative of a committee staffer usually reflected either a consensus among staffers about the committee's intent or the interests of the staffer's boss. When lawyer-lobbyists succeed in adding favorable language to committee re-

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72. Mark-up sessions were opened to the public in the mid-1970s as part of a general reform of procedures, especially in the House of Representatives. Reformers believed that open mark-ups would reduce the influence of special-interest groups. See Abner J. Mikva and Patti B. Saris, *The American Congress: The First Branch* 294 (1983).

73. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia dissenting).



ports, it is often because a *member*, not a staffer, has decided to support whatever details the particular special interest desires.

Unlike statements of the managers of a conference committee, committee reports are unsigned, except by the Chair and those offering additional views. As a result, some committee reports are published without the concurrence of a majority of the committee members; these reports may not coincide with the full committee's intent. Although Justice Scalia's harsh criticism reflects an unrealistic view of the legislative process, obtaining members' signatures on a committee report will mean that the members either (a) read the report; (b) were assured that the report was acceptable by staff who read the report and who had the trust and confidence of members; or (c) consciously decided that any matters acceptable to the chair, ranking member, or other colleague with greater expertise in the area were acceptable to them. This change should increase the authoritative weight of committee reports. Moreover, securing these signatures should not pose more difficult logistical problems than securing signatures on the statements of managers of conference committees.

*C. Expressly Indicate Why Committee Hearings and Floor Statements Should Be Authoritative*

Certain floor statements should be given substantial weight by courts in interpreting statutes. Other statements are less reliable. Legislators can, however, assist judges in separating the wheat from the chaff by leaving probative, relatively tamper-free clues in the record. The most reliable statements fall into two major categories: (1) statements by the sponsor of the legislation or the particular provision at issue when it appears that members who might otherwise desire to amend the bill have relied on those statements; and (2) colloquies between the "major players" concerning a legislative provision when it appears that the majority of members are prepared to follow any consensus reached by these individuals.

To aid courts in distinguishing reliable from unreliable legislative history, those in a position to make authoritative statements should include in their remarks information about the context to give courts confidence that the remarks accurately reflect the legislative intent. Sponsors and major players should identify themselves as such. When floor statements are made that represent a consensus, one of the leaders of each party or the chair and ranking minority committee member should so indicate. Those who now create false legislative history are unlikely to misstate their own role in the legislative process without affronting committee and House leaders with whom they must continue

to work.<sup>74</sup>

The Senate seemed to have recognized the usefulness of this proposal in connection with deliberations concerning recent civil rights legislation.<sup>75</sup> When the Senate agreed to a compromise which was introduced as an amendment to the pending legislation by Senator John Danforth (and cosponsored by the other major "players," including Senators Edward Kennedy, Robert Dole and George Mitchell), Danforth also introduced, with the apparent acquiescence of the other cosponsors, a three paragraph statement entitled "Exclusive Legislative History" to explain the significance of some key phrases in the Act.<sup>76</sup> Subsequent efforts by all partisans to put their own personal gloss on the "exclusive legislative history" are likely to be less authoritative, and the agreed-upon statement is likely to be more reliable than would otherwise be the case.

#### *D. Specify Which Remarks Are Directed at the Courts*

Judge James Buckley has observed that instructions contained in legislative history often are directed to agencies rather than courts. The expectation is that inconsistent agency action will lead not to judicial reversal but to political retribution at the next budget cycle or at some other convenient opportunity.<sup>77</sup> When an explanation of textual meaning is given for the purpose of explaining what the bill means *legally* (i.e., how it should be interpreted in the judicial system) rather than politically, the speaker should expressly say so.

These four changes would have only a minimal effect on the current operation of either House. Yet they would give guideposts to

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74. For example, the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1988), requires the Attorney General to find that a newspaper was failing prior to authorizing an antitrust exemption. The Act defined a failing newspaper as one that "is in probable danger of financial failure." *Id.* § 1802(5). This phrase was added to the bill as an amendment during the House Judiciary Committee mark-up by Representative Thomas Railsback (R-Illinois). Railsback was a particularly important "player" concerning this statute because he had reservations about the legislation. See 116 Cong. Rec. 23,146 (July 8, 1970) (remarks of Rep. Robert Kastenmeier, the bill's floor manager, explaining Rep. Railsback's role in the process). On the House floor, Rep. Railsback explained his view that the bill as reported by the Judiciary Committee was a "substantial improvement[]" on the bill as introduced, in part because of his amendment which, in his words, "sharply restricted" the scope of the exemption "by circumscribing [the Attorney General's] power to consent through the use of a strict definition of 'failing newspaper.'" *Id.* at 23,154. Perhaps misled in part because the explanation of Railsback's role was separated from his remarks in the record, a reviewing court gave no credit to this history and instead upheld a broad definition of the term "probable danger of financial failure." *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1285 (D.C. Cir. 1989), *aff'd per curiam*, 110 S. Ct. 398 (1989) (affirmed by an equally divided court).

75. Civil Rights Act of 1991, 102 Pub. L. No. 166, 105 Stat. 1071.

76. 137 Cong. Rec. 15,276 (Oct. 25, 1991).

77. *International Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 716-17 (D.C. Cir. 1987) (Buckley concurring).

judges and make the process of legislative interpretation more reliable.

## VI. CONCLUSION

In one of the most important contributions to the legal literature from the *Vanderbilt Law Review*, or any journal for that matter, Karl Llewellyn's critique of the canons of statutory construction is as accurate and insightful today as it was in 1950. Llewellyn emphasized that a statute "must be read in the light of some assumed purpose" if it is to make any sense.<sup>78</sup> Llewellyn, however, did not deal with many of the normative canons employed by courts today. Those canons do not purport to reflect congressional intent; instead they are canons which direct courts to construe ambiguities in some particular way to further judicial policy objectives. Ironically, even justices who rail against judicial activism seem to use these canons to impose their own political values. Congress, therefore, must contribute to the creation of the "public values" that shape statutory interpretation. Greater congressional contribution to this area may prevent the purpose of a statute from becoming a judicially "assumed purpose" rather than a legislatively created one.

As for descriptive canons, Llewellyn deftly illustrated how courts can easily abuse them to frustrate congressional policy preferences. At a time when other judicial techniques of statutory and constitutional interpretation, such as the use of plain meaning in lieu of legislative history and the constitutional rejection of legislative vetoes,<sup>79</sup> may also frustrate congressional intent, it is critical that legislators focus on how they can assure that courts give due recognition to their primacy in policymaking. Specific statutes overruling normative canons that neither accurately describe congressional intent nor reflect sound interpretive policies warrant serious congressional consideration. More feasibly, increased scrutiny of drafting by the legislative counsel's office to ensure that representatives and judges are speaking the same language and minor procedural changes that increase the reliability of certain forms of legislative history can aid both legislators and judges of good will.

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78. Llewellyn, 3 Vand. L. Rev. at 400 (cited in note 1).

79. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 958-59 (1983).