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Professors Jonathan Macey and Geoffrey Miller claim to have set out to provide a positivist explanation for why judges ever invoke canons in the course of interpreting statutes.[1] In truth, though, their question is a far broader one. What they really seek to explain is why judges ever use any interpretive tools in the course of interpreting statutes. Why, Macey and Miller want to know, don't judges simply decide what result in the case will best promote a good outcome on the grounds of public policy, intrinsic fairness, economic efficiency or wealth maximization?[2] This question is perplexing to Macey and Miller because they are convinced (as a normative matter) that such public policy factors (what they refer to as exogenous considerations) necessarily should trump any interpretive methodology (interior justifications) such as looking at the plain language of the statute or invoking recognized canons to help discern legislative intent or purpose. Macey and Miller are not at all shy about this premise:

> Policy justifications clearly trump other justifications in any meaningful hierarchy of judicial values.
>
> It makes sense to invoke non-policy justifications for deciding cases only when judges are unable to determine the policy implications of a particular decision. 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.[3]

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* Associate Professor, Northwestern University School of Law.

1. See Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992).

2. Id. at part II.

3. Id. at part III. At a few points Macey and Miller define public policy as "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." Id. at part II. But they treat these concepts as exogenous considerations which might affect a particular judge's attitude toward making public policy, not as con-

Working from this foundation, Macey and Miller go on to theorize that the instances in which judges do not rest their decisions on public policy are instances in which judges do not hold secure views about what result is the most consistent with good public policy.

There are two major flaws in Macey and Miller's analysis. First, it assumes that all judges share the normative view that in interpreting statutes the judge's natural desire to implement the best public policy should trump the effort to discern congressional intent or purpose through canons and other devices. Second, it supposes that the public, the Congress, and the legal community would tolerate courts whose statutory interpretation decisions make no effort to tie their results back to the statute at issue. If either of these suppositions are wrong, and I believe that they both are, then Macey and Miller's thesis necessarily fails. Instead, it is evident that judges announce their decisions by reference to interpretive principles—including canons—either because the judges actually believe that their role requires them to reach their decisions on such grounds whenever possible, or, at the very least, because the pressure created by the dominant legal culture and institutions therein requires judges to announce their decisions on interpretive grounds whenever possible.

I. JUDGE STEWARD AS A STATUTORY INTERPRETER

It is perilous to generalize, as Macey and Miller have, about how and what judges, as a class, think. It is a bit less perilous to consider how some judges are apt to think about certain fundamental issues. Thus, without expressing any normative view on whether I am sympathetic to the judicial character I am about to describe, I submit that such judges do exist, and that their existence rebuts much of Macey and Miller's analysis.

The judge I have in mind (I will call him Judge Steward) has always been inspired by the view of separation of powers that he first acquired in his eighth-grade civics class and that has been reinforced in him through the writings of courts and various legal scholars. He approaches the question of statutory interpretation with some very strong views about legislative supremacy. In Judge Steward's view, the virtue of the American system of government is the power that it gives the people (acting through their elected representatives) to do anything—including enacting bad public policy—subject only to constitutional limitations. In sum, Judge Steward believes in what Cass Sunstein has called the "most prominent conception of the role of courts . . . in statutory construction": that courts "are agents or ser-

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cepts that require the judge to decide cases on interpretive grounds whenever possible.

vants of the legislature."[4]

Judge Steward is hardly so naive as to think that he can always separate his assessment of what a statute means or what Congress intended from his political judgment and general intuition.[5] He recognizes the inevitability—especially in hard cases—that his general views on life will subconsciously affect his perspective. Indeed, in some cases the question of what Congress really wanted to accomplish is so elusive to Judge Steward that he is openly willing to base his decision on more policy-oriented grounds. But these realizations do not call into doubt Judge Steward's view of his preferred role as a faithful agent of Congress.

Thus, even if Judge Steward believes (and believes very strongly) that it is very bad public policy to subvert an eighty million dollar dam project to save the snail darter population, he nonetheless willingly will render a decision subverting that project if he believes that the statute Congress has passed requires that result.[6] For Judge Steward believes that it is up to Congress—and not up to the unelected judiciary—to decide "the order of priorities in a given area,"[7] no matter how foolish this may seem to the judge who is enforcing Congress's prioritization.[8] Similarly, even if Judge Steward believes (and believes very strongly) that it is quite senseless and inhumane to refuse to consider the hardship that deportation will inflict on nieces whom an illegal alien is raising, the judge will refuse to consider this factor if Congress has clearly provided that only hardship on an alien's children (as defined statutorily) is to be considered.[9] For Judge Steward believes (and believes very strongly) that "policy questions" such as these are "entrusted exclusively to the political branches of our Government, and [that courts] have no judicial authority to substitute [their] political judgment for that of the Congress."[10]

Interestingly, Judge Steward's intellectual commitment to legislative supremacy also may be fueled by some of the factors that Macey and Miller have described as cutting against judicial policymaking in

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4. Cass R. Sunstein, *After The Rights Revolution* 112 (Harvard, 1990). Sunstein, of course, rejects this approach as fatally flawed in its application.

5. See generally Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533 (1992).

6. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

7. Id. at 194.

8. Occasionally, Judge Steward might consider a particular result which otherwise seems to follow from accepted methods of interpretation to be so absurd that he will reject that result as one not accurately reflecting Congress's intent. Even as he rejects such a result, though, his goal remains to apply the rule that he believes Congress to have intended, not to enforce his own views of public policy.

9. See *INS v. Hector*, 479 U.S. 85 (1986).

10. Id. at 89, quoting *Fiallo v. Bell*, 430 U.S. 787, 798 (1977).

some cases. For example, Judge Steward may think that as generalists federal judges lack the kind of expertise that congressional committees and administrative agencies possess in their specific subject matters. Moreover, Judge Steward may believe that the specter of "general moral and intellectual uncertainty"[11] provides a strong justification for judges to follow the edicts of a popularly elected Congress. But unlike the judges that Macey and Miller describe, Judge Steward believes that these factors support a general rule of deference to congressional will[12]—not only a rule of deference to be invoked selectively in cases where judicial expertise is particularly low and feelings of moral and intellectual relativity particularly high.

It is Judge Steward's views about legislative supremacy and the relatively passive role the judiciary should play in interpreting statutes that prompt him to use canons among the other devices he employs in ascertaining statutory meaning or intent. This is not to say that invoking canons of statutory interpretation is always consistent with Judge Steward's view of his proper role in discerning meaning and intent. Many of the canons that have been developed—especially some of relatively recent vintage—seem, in Judge Steward's view, to be intent-frustrating devices through which judges impute many of their own substantive or ideological views to Congress.[13] But many canons do constitute rules of interpretation that, with varying levels of accuracy, evaluate a statute's words and structure in an attempt to discern statutory meaning or legislative intent.[14] It is these canons that Judge Steward feels comfortable using in his role as an interpreter of statutes.

Judge Steward also recognizes that the canons, standing alone, do not always provide him enough guidance to decide most cases. He rec-

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11. Macey and Miller, 45 Vand. L. Rev. at part III.C (cited in note 1).

12. I recognize that there is a school of textualists, led by Justice Scalia, which rejects the notion that courts are bound to follow the intent or purpose of the legislature. Instead, these textualists argue, courts are bound to apply the words of the statute. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990). For my purposes here, however, these textualists can be grouped with those who focus on legislative intent inasmuch as both schools reject the kind of policy-driven decisionmaking that Macey and Miller describe.

13. For a description of some of these canons (by authors who don't necessarily share Judge Steward's criticism of them) see William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). For a more critical appraisal of these rules, see Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 Vand. L. Rev. 561 (1992).

14. Indeed, Professor Miller's own writing forcefully supports the view that "many traditional maxims of statutory interpretation," including the *ejusdem generis* maxim, "embody legitimate and valid inferences of legislative intent." See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179, 1224. See also id. at 1199-1202 (discussing the *ejusdem generis* principle). It is odd, therefore, that he now suggests that any judge truly interested in discerning legislative intent will focus on legislative history, and not canons of interpretation. See Macey and Miller, 45 Vand. L. Rev. at part II (cited in note 1).

ognizes the power of Karl Llewellyn's classic thrusts and parries showing that for every canon there is another to contradict it.[15] But Judge Steward understands that he usually has a strong intuitive sense about which of the competing canons best fits the case before him. As Geoffrey Miller has written: "the fact that the maxims may work against each other . . . does not establish the hopeless confusion posited by Llewellyn's model. It is simply a matter of competing inferences drawn from the evidence."[16]

Could Judge Steward have signed on to the Supreme Court's decision in *Breininger v. Sheet Metal Workers International Association*,[17] the case which Macey and Miller use to support their thesis about why and when judges invoke canons? He surely could have. The portion of the opinion dealing with the Labor-Management Reporting and Disclosure Act (LMRDA) is certainly consistent with Judge Steward's approach, as it engages in a purely interpretive endeavor—using a variety of tools, such as the *ejusdem generis* canon and legislative history, to discern legislative intent. No attempt is made in that part of the opinion to discern whether the result necessarily comports with the Court's view of good public policy.

There is, then, nothing about the canon-oriented analysis in the LMRDA portion of *Breininger* that is inconsistent with Judge Steward's views. What about the major portion of the *Breininger* opinion dealing with Breininger's claim that the union breached its duty of fair representation to him? How could Judge Steward, who buys into the formalist methodology just described, be willing to sign on to an opinion that makes no effort to tie itself to the words of a statute, or to legislative intent and purpose? In the context of the *Breininger* case the answer to this question is not very difficult to ascertain. Unlike the very specific statutory claim that Breininger raised under the LMRDA, Breininger's duty of fair representation claim arose out of federal common law. Ever since the *Lincoln Mills* decision,[18] which rightly or wrongly interpreted section 301 of the Taft-Hartley Act as giving federal courts the power to create a federal common law of labor relations, the federal courts have engaged in a basically noninterpretive, policy-driven enterprise of common law adjudication in this area.[19] It is not at all surpris-

15. 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, 401-06 (1950).

16. Miller, 1990 Wis. L. Rev. at 1202 (cited in note 14).

17. 493 U.S. 67 (1989). *Breininger* is described at some length in Macey and Miller, 45 Vand. L. Rev. at parts II, III.D (cited in note 1).

18. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

19. See James E. Jones, Jr., *Time for a Midcourse Correction?*, in Jean T. McKelvey, ed., *The Changing Law of Fair Representation* 223, 225 (Cornell, 1985) (stating that a duty of fair representation is a "judicial invention mothered by constitutional necessity").

ing, therefore, that the Court in *Breininger* openly addressed policy considerations in reaching a decision about the proper forum for bringing a duty of fair representation claim. It is this critical difference between interpreting a specific statute and developing common law under a broad delegation statute that explains the very different way that the Court addressed the two distinct issues involved in *Breininger*.

In sum, Judge Steward is willing to look at exogenous policy considerations, but only when intent-seeking tools—including intent-oriented canons—are incapable of providing an answer.[20] In this sense, his hierarchy of decisional principles is completely opposite that posited by Macey and Miller. Judge Steward does not rely on interpretive canons only when he is insufficiently confident in his assessment of policy; he relies upon policy only when he is insufficiently confident in his ability to discern intent from conventional canons and other interpretive devices.

II. JUDGE MACEY AS A STATUTORY INTERPRETER

It is useless to venture guesses on how prevalent Judge Steward's views are among those who currently occupy the federal bench. I certainly would not want to challenge Macey and Miller's thesis simply by positing that all judges who invoke canons (as they all do) share Judge Steward's views. Instead, let me concede that there are many judges who, consciously or subconsciously, often reach their decisions based in whole or in large part on what Macey and Miller call exogenous policy considerations.[21] It is appropriate, therefore, to ask why and when these judges opt to invoke canons as they write some of their opinions in cases of statutory interpretation.

This question is a very different one than the question that Macey

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20. It is certainly fair to ask why Judge Steward, with his strong views about representative democracy and discomfort with lawmaking by the judiciary, is willing to engage in this common-law (quasi-legislative) enterprise. Perhaps the judge has a strong view of stare decisis which drives him to comply with *Lincoln Mills* and its progeny, including the cases developing the duty of fair representation. Or perhaps the judge sees a real difference between his narrow role in deciding cases about which Congress has specifically spoken and his broader role in deciding cases about which Congress has delegated its legislative authority to the courts. To paraphrase Justice Jackson's famous discussion of separation of powers: "When the [Court] acts pursuant to an express or implied authorization of Congress, [its] authority is at its maximum, for it includes all that [it] possesses in [its] own right plus all that Congress can delegate." On the other hand, "[w]hen the [Court] takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb, for then [it] can rely only upon [its] own constitutional powers, minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson concurring).

21. I agree with Macey and Miller that when a judge is willing to follow the canons only so long as they result in decisions that comport with the judge's policy preferences, then the judge really is following his policy preferences, not the canons.

and Miller pose. For my question focuses on why a judge who bases her decision on policy grounds then would proceed to explain the decision on the basis of canons. Macey and Miller, on the other hand, seem to reject the possibility that judges frequently write opinions that offer interpretive justifications for decisions that actually were reached on policy considerations. They claim that

> [w]hile 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 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 inevitable that a judge with a strong view on a legal issue will express that view when given the opportunity.[22]

This strong descriptive claim is a critical link in Macey and Miller's argument. For if they are wrong—if it is reasonable to assume that judges frequently will consciously or subconsciously hide their true bases of decisions behind the relatively neutral shield of the canons—then looking at judicial opinions provides very little guidance on when judges actually base their decisions on the canons of construction.

There is no shortage of insightful literature on the subject of judicial candor. For the most part, this literature tends to urge judges to be more honest in articulating the true bases of their decisions to the extent that judges are able to identify accurately their own thought processes.[23] On the other hand, some authors have sought to defend the lack of candor in judicial decisions, arguing that its absence helps to promote a variety of important values,[24] and avoids the need for debilitating introspection.[25] No matter how these writers come down on the normative question though, they all seem to agree that judges often have some very strong incentives to hide the fact that they are reaching their decision on policy-oriented grounds, and that judges routinely issue decisions that do not disclose the actual decisional factors.

It is true, of course, that federal judges do not have to hide their

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22. Macey and Miller, 45 Vand. L. Rev. at n.45 (cited in note 1).

23. Some of the more recent literature on this age-old subject includes David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987); Guido Calabresi, *A Common Law for the Age of Statutes* 172-81 (Harvard, 1982); Williams N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reason*, 42 Stan. L. Rev. 321, 353-362 (1990); Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979). Karl Llewellyn's work, of course, remains a classic. See Karl N. Llewellyn, *The Common Law Tradition* (Little, Brown, 1960).

24. See generally Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Georgetown L. J. 353 (1989); Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L. J. 411, 424-25 (1981).

25. See generally Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296 (1990).

true bases of decisions in order to keep their jobs. It hardly follows, though, that the judge who is willing to reach her decision on noninterpretive, policy-oriented grounds will always be willing to advertise this approach and to ignore conventional tools of statutory interpretation. For whether or not one believes that the Judge Steward character that I have described is a prevalent figure on the federal bench, it remains true that our current political/legal culture is deeply committed to some form of an agency view of statutory interpretation.[26] As Cass Sunstein, hardly an adherent of the potted plant view of judges' roles in the interpretation of statutes, explains:

> The agency view, and formalism itself, contain some important truths. It would be improper for courts to interpret statutes to mean whatever the judges think would be best. No one could defend an approach to statutory construction that would license judges to say that a statute means whatever they think a good statute would say. This basic understanding derives from the lawmaking primacy of the legislature—a product of the legislature's superior democratic pedigree and its correlative power to do as it chooses, at least where there is no constitutional doubt.[27]

Given this widely held view of the impropriety of judges focusing on purely exogenous considerations, it is fair to assume that a judge who uses the job security of life tenure to openly ignore the words and intent of Congress is likely to experience a variety of negative consequences.

Assume, for example, that Professor Macey were the district court judge who was asked to rule on Brian Weber's claim that the United Steelworkers Union and Kaiser Aluminum violated Title VII when they entered into an agreement containing a race-conscious affirmative action program.[28] Assume hypothetically that Judge Macey has strong personal views that affirmative action plans are very poor social policy, and that he generally welcomes the opportunity to make articulate arguments on why he believes this. Assume further that his beliefs on this subject are so strong and secure that he is willing to reach his decision on these grounds.[29] It certainly does not follow from these assumptions that Judge Macey would think it wise or prudent to couch his decision in *Weber* in policy-oriented terms instead of trying to explain the decision as one compelled by the intent of Congress, as evidenced by either statutory language, legislative history, or canons of construction. Among the downsides of explaining his decision on broad policy terms are: the increased likelihood that reviewing judges will reverse the decision if

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26. Sunstein, *After the Rights Revolution* at 133 (cited in note 4).

27. Id. (footnote omitted).

28. See *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 (E.D. La. 1976).

29. Recall that in Macey's view "[p]olicy justifications clearly trump other justifications in any meaningful hierarchy of judicial values." Macey and Miller, 45 Vand. L. Rev. at part III (cited in note 1).

they do not agree that explicit policy-oriented statutory interpretation is appropriate in this case; the increased likelihood that reviewing judges will reverse the decision if they do not agree with Judge Macey's particular policy preferences; the potential for criticism from members of the bench, academy, and general public who disagree with Judge Macey's willingness to base his decision on policy grounds; the chance that the impact of Judge Macey's opinions in general will be decreased, as he risks being branded an ideologue who does not follow the generally accepted rules of the game (i.e., judges should *interpret* statutes); and the potential negative effects that the decision may have on Judge Macey's career, in terms of potential promotions within the judiciary or to other positions both because of his method of analysis as well as the substantive views that he has articulated.

I make no attempt to be exhaustive in this listing, or to speculate on which, if any, of these factors might seem relevant to Judge Macey or any other judge.[30] The point is that these considerations surely demonstrate the weakness of Macey and Miller's claim that judges have no reason to hide behind canons when they have strong views on what the best result would be based on policy grounds.[31]

The list of factors that inhibit candor about decisions would be enhanced somewhat if Judge Macey were to become a circuit court judge. As a judge of an intermediate court, he would still have concerns about possible review of the case by a higher court, but also would have to be concerned with the impact his explicitly policy-oriented decision would have on his ability to "get a court" to join his decision in this and future cases.[32]

The list of factors changes once again when Justice Macey is deciding the case as an Associate Justice of the United States Supreme Court. In this role, there is no longer any immediate concern with how some other set of judges will react to his opinion on direct review. There is, however, room for concern about how future Courts will treat the precedent, and about whether Congress is likely to react if the Su-

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30. For a bit more elaborate discussion of this issue, see Lawrence L. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 Nw. U. L. Rev. 832, 842-44 (1990).

31. Justice Roger Traynor summed it up well when he wrote that a judge's policy-oriented decisions must not only "persuade his colleagues, make sense to the bar, pass muster with the scholars, [but] if possible allay the suspicion of any [person] in the street who regards knowledge of the law as no excuse for making it." Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157, 166 (1960).

32. Defending Justice Holmes against a professor's charge that one of his opinions was question-begging, Justice Frankfurter said that Holmes had tried to deal with the issues but discovered after consulting with his fellow justices that "the boys wouldn't stand for" a good opinion. Shapiro, 100 Harv. L. Rev. at 742 (cited in note 23), quoting Harlan B. Phillips, ed., *Felix Frankfurter Reminisces* 293-99 (Reynal, 1960).

preme Court begins to explicitly enact the justices' policy views instead of at least pretending to be interpreting the work of Congress.[33] There is also deep concern with the dynamics of the nine-member Court who must interact constantly as a group and have a strong interest in convincing each other that they are following the generally accepted job description. And, of course, the intense public scrutiny of the Court's work may well heighten a justice's concern about the way she is likely to be treated in the annals of legal history. Not every judge strives to be thought of in the way that so many think of William O. Douglas.

The best rebuttal to Macey and Miller's point, however, is not any hypothetical speculation about what they might do as judges in a case like *Weber*. The best rebuttal is the Supreme Court's actual decision in *Weber*.[34] If Macey and Miller are correct, then Justice Brennan should have been expected to announce his decision upholding the plan by explaining exactly why, in his view, affirmative action is so useful a tool in eradicating the effects of past societal discrimination. Surely there can be no doubting the level of Justice Brennan's conviction that affirmative action is good social policy, a conviction that does not seem to be overly affected by the kind of moral and intellectual uncertainty that Macey and Miller describe. Furthermore, it is difficult to think of a statute with which the judiciary has more expertise and familiarity than Title VII.

The fact is, though, that Justice Brennan's opinion for the Court struggles mightily to find support for the decision in the legislative history of Title VII. He took pages to elaborate on his claim that "the prohibition against racial discrimination in . . . Title VII must . . . be read against the background of the legislative history of Title VII and the historical context from which the Act arose."[35] And he went to great lengths to support his contention that "[i]t plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem."[36]

The cloak of interpretive neutrality may have been quite transparent in *Weber*, as it often is. In the context of *Weber*, it seems widely accepted that Title VII is quite susceptible to differing interpretations and that Justice Brennan hardly succeeded in showing that the Court had accurately discerned the intent of the Congress that enacted Title

33. See Walter Murphy, *Elements of Judicial Strategy* 31 (Chicago, 1964) (stating that even a judge who has little respect for technical rules would find it prudent to assume such respect before some of the popular, bureaucratic, or political checks were applied against his trihunal).

34. See *Steelworkers v. Weber*, 443 U.S. 193 (1979).

35. Id. at 201.

36. Id. at 203.

VII. But the perceived need for both the majority and the dissent[37] to use this kind of interpretational rhetoric in *Weber* seems to run entirely counter to the position advanced by Macey and Miller about judges' eager desire to couch their decisions primarily on grounds of good public policy.

Notwithstanding all of the cases in which obviously ideologically-driven judges defend their positions in terms of neutral canons, Macey and Miller rail against the notion that canons often are used simply to support a decision that was reached on a ground which the judge is unwilling to publicly admit. Relying again on the *Breininger* case, they argue that the Court's canon-based holding that the union had not violated Sections 101 and 609 of the LMRDA "can only be explained on the basis of its lack of conviction about the nature and meaning of the LMRDA."[38] The purportedly canon-based decision could not, in their view, have reflected a policy-based decision defended through the canons because such a decision would reflect hostility toward labor and "Justice Brennan, the author of the majority opinion could hardly be accused of that."[39]

The initial problem with this analysis of the *Breininger* holding is that this was a case of a union member suing his union. There is, therefore, no obvious "pro-labor" position. A ruling for Breininger (the union member) would, necessarily, constitute a ruling against the union and vice versa. Indeed, Justice Brennan's track record on cases filed by union members against unions reflects a level of ambivalence that is quite consistent with the split-the-baby approach that the Court adopted in *Breininger*.[40]

More generally, even if Macey and Miller could prove that *Brein-*

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37. Interestingly, Justice Blackmun's concurring opinion comes a lot closer to the kind of approach that Macey and Miller have described:

> While I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent, . . . concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its judgment.

Id. at 209 (Blackmun concurring).

38. Macey and Miller, 45 Vand. L. Rev. at part III.D.3 (cited in note 1).

39. Id.

40. For a flavor of the tension that these cases create in the minds of traditional liberals, see *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), in which the Court, by a 5-4 vote, held that punitive damages may not be assessed against a union that breaches its duty of fair representation by failing to pursue a grievance properly. In an opinion authored by Justice Marshall and joined by Justice Brennan (both generally supporters of punitive damages) the Court recognized the values served by punitive damages, but concluded that "offsetting these potential benefits is the possibility that punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." Id. at 48.

inger was an example of judges making their decisions, as opposed to announcing their decisions, purely on the basis of canons, they still would not have come close to proving their thesis that the factors that prompt judges to rely on canons are lack of expertise, risk of error, and relativity. It seems to me that a much more important factor is the judge's tactfulness in picking her fights.

This tactfulness is critical because many of the same negative effects that confront a judge who explicitly announces her decision on policy grounds also confront a judge who earns a reputation of consistently reaching decisions that comport with her policy views, even if she always articulates the decision on neutral, interpretive grounds. One way for a judge to avoid developing this reputation and to maintain a high level of goodwill with her colleagues is for the judge to be willing to sacrifice some cases by suspending policy preferences and reaching a decision by following neutral canons to the extent they are dispositive. If this is true, then the cases in which Macey/Miller-type judges are willing to be guided by canons depends far more on how passionate the judge feels about the issue involved; how passionate a colleague on the court may feel about it; and how interested the judge is in earning capital to be used in some future case in which the judge is especially interested. In sum, it depends on issues that we have no hope of articulating clearly, much less identifying in operation.

If it is assumed that many judicial decisions invoking canons of statutory interpretation are simply after-the-fact neutral justifications for decisions reached on other grounds, then it is not difficult to answer Macey and Miller's question as to why a judge might opt to employ a canon as opposed to another interpretive tool (such as plain meaning or legislative history) to justify a particular decision. One answer is that the judge will use whatever tool sounds the most convincing in justifying the decision.[41] Another answer is that a judge's choice of whether to address canons in the course of a decision is not always as wide open as Macey and Miller have described it. In a very real sense judges take cases as they find them. If a litigant has written a brief claiming that she is entitled to relief primarily because of the clear applicability of the *ejusdem generis* canon, ignoring that canon is not always an altogether acceptable option. Moreover, the costs of decisionmaking decrease considerably if the judge can incorporate the analysis provided in the briefs, which means, of course, relying on the decisional grounds

41. Of course the judge might eschew reliance on a canon that is persuasive in a particular case but which in most cases will lead to results that the judge would prefer to avoid. Demands of consistency make it difficult for the judge to invoke a canon on Tuesday only to ignore its clear application on Wednesday.

that the parties have provided.[42]

III. Conclusion

Karl Llewellyn described the appellate court's "high task of so applying and so reshaping doctrine as to marry its duty to justice with its duty to the rules of law as it has received them."[43] In the case of statutory interpretation, the "duty to the rules of law" is generally recognized to carry with it the obligation for the judge to do her best to interpret what Congress has said before she moves on to decide a case explicitly on her own policy preferences. The canons are one of many tools in this task. Whether or not a judge personally accepts this view of her role, the dominant legal culture that restrains and evaluates judges forces judges to adhere to it, at least in form. The interesting question is, therefore, not why judges invoke canons to justify their decisions. The question is why the legal culture continues to insist that they do.

42. This hypothesis could be tested by examining the briefs in cases where judges rely on varying tools of statutory interpretation. I would expect that the incidence of judges following the winning parties' choice of interpretive tool is at its greatest at the district court level where there is much less time for the judges and their staffs to conduct independent research.

43. Llewellyn, *The Common Law Tradition* at 6 (cited in note 23).