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# Only a Sith Thinks Like That: Llewellyn's Dueling Canons, Eight to Twelve

Michael B.W. Sinclair

*New York Law School*, [michael.sinclair@nyls.edu](mailto:michael.sinclair@nyls.edu)

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MICHAEL SINCLAIR

## “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” Eight to Twelve

ABOUT THE AUTHOR: Michael Sinclair is a Professor at New York Law School. The author wishes to thank Jessica Ventarola for her excellent research assistance and editorial advice, and Professor Karen Sinclair for her sharp eyed editorial review. The frailties that survived their scrutiny are entirely the author’s.

*Of course there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends upon context and that contexts vary, how could it be otherwise?*<sup>1</sup>

## I. INTRODUCTION

This is the second installment in a planned series of articles examining each of the pairs of “dueling canons” left to us by Karl N. Llewellyn in 1950.<sup>2</sup> After more than half a century, Llewellyn’s assault on the legitimacy of canons remains an imposing landmark in statutory interpretation scholarship.<sup>3</sup>

In the first installment I examined Pairs 1 through 7.<sup>4</sup> Llewellyn’s “fiendish deconstruction”<sup>5</sup> of these fourteen canons proved quite innocuous. In all but one instance, looking at the reasons underlying the canons in each pair<sup>6</sup> and the appropriate context for their use completely dissolved the superficial contrariety.<sup>7</sup> In all it was a disappointing exercise. The canons came through with colors flying.

Two great and fundamental principles underlie any argument to do with statutory interpretation. First is the principle of legislative supremacy.<sup>8</sup> It is a structural feature of our system of separation of governmental powers in which

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1. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1191 (William N. Eskridge, Jr. & Phillip K. Frickey eds., 1994).
  2. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) [hereinafter Llewellyn, *Canons*].
  3. For example: “Karl Llewellyn largely persuaded two generations of academics that the canons of construction were not to be taken seriously. . . . [H]is critique of the canons is one of the most influential realist works of the last century.” John F. Manning, *Legal Realism & the Canons’ Revival*, 5 THE GREEN BAG 2D 283, 283–84 (2002). Also: “Professor Karl Llewellyn’s classic critique, which listed a counter-canon for each of twenty-eight canons, highlighted what he viewed as the canons’ radical indeterminacy.” James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 8 (2005).
  4. Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2005–2006).
  5. See Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 535 (1992).
  6. “To apply a canon properly one must understand its rationale.” *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).
  7. The exception, Pair #5, included as “Thrust” — supposedly the base of the pair — an ambiguous formulation for which Llewellyn provided neither provenance nor support in either case law or secondary sources and which seemed contrived solely for the purpose of opposing Parry #5.
  8. See *Township of Orvil v. Borough of Woodcliff*, 45 A. 686, 687 (N.J. 1900) (“Now, the fundamental principle is that the object of all judicial interpretation of a statute is to determine what intention is conveyed by the language used therein so far as it is necessary for determining whether the particular case or state of facts presented fall within it.”); *Edwards v. Morton*, 46 S.W. 792, 793 (Tex. 1898):  
The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act.

allocation of the power to make law is delegated to the legislative branch.<sup>9</sup> Thus, should the wishes of the judge and the intention of the legislature differ, the judge must defer.<sup>10</sup> Legislative intent is thus central to the resolution of interpretive problems; the essence of statutory construction is to determine and apply the intention of the enacting legislature.<sup>11</sup> Absent an intent to legislate, to make law, the legislature would not produce “a working instrument of government . . . [but] merely . . . a collection of English words.”<sup>12</sup>

The second principle underlying statutory interpretation is the principle of notice. It is fundamental to law, and has been held so for more than two millennia, that a person cannot be bound to comply with a law of which she could not

9. “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” U.S. CONST. art. I, § 1. Nevertheless, this principle has been under fire in academic writing. The extreme proposed re-allocation of power to the judiciary came from then-Professor Calabresi (now a federal circuit court judge) in his 1977 O.W. Holmes Lectures, where he argued that courts should have the power to “sunset” statutes they found maladaptive. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); see also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 54 (1988) (“The task is not to make current policy judgments or to ask how the current legislature would decide the issue today, but to make sense of a statute’s language and structure in light of the current social and legal context.”). Professor Eskridge, only slightly more moderate in his proposed re-allocation of power, suggests that statutes should be interpreted according to the values and principles found by the judge at the time of decision. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). More recently, and only marginally more moderately, Professor Elhauge argues that a court should interpret a statute to reflect its estimation of the will of the present legislature were it to address the problem. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002). This is not the place to present their arguments or refute them, but for their sensible and effective demolition, see Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U.L. REV. 1389 (2005).
10. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 8 (1975) (“[A]ny conflict between the legislative will and the judicial will must be resolved in favor of the former.”); see also 59 C.J. *Statutes* § 568, at 948 (1932) (“As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall . . . ascertain and give effect . . . to the intention or purpose of the legislature as expressed in the statute . . .”); THE FEDERALIST NOS. 78, 81, 83 (Alexander Hamilton); THOMAS HOBBES, *LEVIATHAN* 176–77 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651).
11. 2 J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (John Lewis, ed., Callaghan and Co. 1904) (1891) § 363, at 693. Section 363 is given the caption “The intent of a statute is the law,” with over two pages of cites including: “The intent is the vital part, the essence of the law, and the primary rule of statutory construction is to ascertain and give effect to that intent.” *Id.*; see also *id.* at § 364, at 696 (“To find out the intent is the object of all interpretation.”). The idea of legislative intent itself has come under fire periodically since Max Radin’s article, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). For a general discussion of the arguments see MICHAEL SINCLAIR, *A GUIDE TO STATUTORY INTERPRETATION* 85–102 (2000).
12. See Justice Frankfurter in *United States v. Dotterweich*, 320 U.S. 277, 280 (1943):  

The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.

“Intent” and “purpose” and “will” are sometimes given slightly different meanings, “purpose” being said to be at a higher level of generality. Very seldom does anything hang on the distinction.

have notice.<sup>13</sup> Statutes are the vehicle by which the government disseminates control data to the governed; statutes properly enacted are the *only* authoritative legislative voice.<sup>14</sup> A corollary is that statutes must be promulgated, that is, be made accessible to the governed.<sup>15</sup>

These two principles underpin most of the arguments that follow. But, as in the first installment, I shall have occasion to question the canonical status of some of Llewellyn's formulae. As a preliminary, therefore, I shall say something about the nature of canons.

Canons of construction are established wise saws of statutory interpretation, "background norms and conventions,"<sup>16</sup> "'rules of thumb' which will sometimes 'help courts determine the meaning of legislation.'"<sup>17</sup> They have been called "off-the-rack" gap-filling rules,<sup>18</sup> but this can be misleading, suggesting that a judge can simply choose as she sees fit from an array of "rules" waiting on a shelf. Such a view suits those who argue that canons merely disguise, or give an air of respectability to unfettered judicial discretion.<sup>19</sup> But nobody doubts that canons are, at a minimum, interpretive formulae of relatively stable verbal form and of sufficiently frequent use to give them a reliability, a validity independent of the reasoning on which they rest. A formula without at least these qualities can

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13. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lambert v. California*, 355 U.S. 225, 228 (1957); ST. THOMAS AQUINAS, *TREATISE ON LAW (SUMMA THEOLOGICA, QUESTIONS 90-97)* 9-11 (Regency Publ'g 1996) (1273); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* 75-76 (Prometheus Books 1986) (1690); SIR WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 75-79 (William Carey Jones, ed., Bancroft-Whitney Co. 1915) (1765); 1 JEREMY BENTHAM, *Essay on the Promulgation of Laws, and The Reasons Thereof; with Specimen of a Penal Code*, in *THE WORKS OF JEREMY BENTHAM* 155 (Bowring ed., 1962); LON L. FULLER, *THE MORALITY OF LAW* 34-35, 39 (1964). See generally SINCLAIR, *supra* note 11, at 7-8.
  14. Max Radin, *A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot*, 33 CAL. L. REV. 219, 223 (1945) ("[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes.").
  15. BENTHAM, *supra* note 13, at 157 ("That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated."); see also AQUINAS, *supra* note 13, at 9-11; LOCKE, *supra* note 13, at 75-76.
  16. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 8 (2005).
  17. *Varsity Corp.*, 516 U.S. at 511 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).
  18. William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994) (arguing that canons give stability to decisions because they are presumptions about how to read statutes); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 453 (1989) (drawing an analogy between canons and "implied terms, or 'off-the-rack' provisions, is a familiar part of the law of contract").
  19. Even were this suggestion correct, we have recently been reminded that judicial discretion does not mean whim. Chief Justice Roberts: "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).

scarcely be called canonical: If you can't quote it, or something very like it, from several authoritative sources, then you probably do not have a canon.<sup>20</sup>

In this installment I shall start with Pair 12; I should have started the first installment with Pair 12; indeed Llewellyn should have placed it first on his list. Pair 12 is Llewellyn's formulation of the Plain Meaning Rule: Roughly, if the statute is (1) clear, unambiguous and determinate, and (2) not absurd or manifestly unjust as applied to the facts at hand, then the court may look no further, interpretation is out of place.<sup>21</sup> It is not so much a canon of construction as a condition on construction: Unless one or both of its conditions obtains, no interpretive questions arise.

Pairs 8 through 11 form a natural group. They are about interpretive controls or aids that are enacted, or, if not enacted, at least promulgated along with the statute in question. Pair 8 is about statements of purpose; Pair 9 is about interpretation clauses, including both definitions and interpretive instructions; and Pair 10 is about interpretive instructions. Pair 11 treats titles, preambles and section captions together. Thus, Pairs 8 through 10 and Pair 11 form two natural subgroups.

In *Canons*, Llewellyn gives only his statement of each of the canons in the pair — calling one the “thrust” and its contrary the “parry” — citing a case and two or more secondary sources. I follow that pattern, only with secondary sources first, as these sometimes give explanations. Llewellyn relies on four secondary sources: Sutherland in its 1904 edition,<sup>22</sup> *Corpus Juris Statutes* from 1932,<sup>23</sup> Black's *Handbook on the Construction and Interpretation of Laws*, 1911,<sup>24</sup> and *Ruling Case Law*, 1919.<sup>25</sup> After this general introduction to the thrust or parry of the pair, I summarize Llewellyn's cited case and how it supports the canon. These cases are sometimes not quite adequate as support, or support the canon in only one of its aspects. So I provide further illustrative cases. Out of respect for the justifiedly high regard in which Llewellyn is held, I have relied on only materials available in 1950. Bringing the list of canons up to date is another project.

After analyzing both thrust and parry, I offer a “Resolution” or not, according as the conflict in Llewellyn's pair of canons is genuine or pseudo. In some cases, I query whether Llewellyn's choice of dueling thrust and parry should properly be called “canons.” It is an aspect of Llewellyn's *Canons* that must be addressed.

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20. See Sinclair, *supra* note 4, at 921–23.

21. See *infra* notes 27–28 and accompanying text.

22. SUTHERLAND, *supra* note 11.

23. 59 C.J. *Statutes*, *supra* note 10.

24. HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF LAWS* (2d ed. 1911).

25. 25 *RULING CASE LAW Statutes* § 213, at 957–58 (1919) [hereinafter 25 R.C.L. *Statutes*].

## II. LLEWELLYN'S PAIRS

### *Pair Twelve*

THRUST #12: "If language is plain and unambiguous it must be given effect."

PARRY #12: "Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose."<sup>26</sup>

Pair 12 is Llewellyn's version of the Plain Meaning Rule:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.<sup>27</sup>

Clearly the Plain Meaning Rule is not so much a canon of construction as a canonical condition on construction; canonical nevertheless: "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."<sup>28</sup>

The Plain Meaning Rule is, in essence, the expression of legislative supremacy in statutory interpretation. Nevertheless, how exactly it conditions interpretation is subject to variation. Here are two classic statements, the first from Chief Justice Marshall in 1819, the second from Justice Brown in 1899.

Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.<sup>29</sup>

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26. Llewellyn, *Canons*, *supra* note 2, at 403.

27. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This is Justice Day in perhaps the most famous of all plain meaning cases.

28. *Swarts v. Siegel*, 117 F. 13, 18-19 (8th Cir. 1902).

29. *Sturges v. Crowninshield*, 17 U.S. 122, 202-03 (1819). Similarly, from the 1929 Supreme Court: The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

*United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 277 (1929).

The general rule is perfectly well settled that, where a statute is doubtful of meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . .

. . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to, to *solve* but not to *create* an ambiguity.<sup>30</sup>

Plainly, these two statements are not quite the same. Both would permit access to exogenous resources to determine intent if the statute is under-determinate, i.e., “doubtful of meaning and susceptible upon its face of two constructions.” But Justice Brown makes under-determinacy the *only* ground for a court’s looking further to determine a statute’s meaning, whereas Chief Justice Marshall would allow interpretation also where the statute applied to the facts generates “absurdity or injustice.” Our courts have fluctuated between these two positions since they began interpreting statutes.<sup>31</sup> The infamous *Church of the Holy Trinity v. United States*<sup>32</sup> and *United States v. American Trucking*<sup>33</sup> — decided half a century later — famously mark the low points in the Plain Meaning Rule’s United States history; *Caminetti v. United States* its astonishing zenith.<sup>34</sup> To this day, differences in judicial view can be expressed along this spectrum, though presented with great sophistication and obscurity.

30. *Hamilton v. Rathbone*, 175 U.S. 414, 419–21 (1899) (emphasis added).

31. British courts have also followed the same variations. Here are two almost contemporaneous with Chief Justice Marshall’s more generous and Justice Brown’s more literal positions:

It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.

*Becke v. Smith*, 150 Eng. Rep. 724, 726 (Ex. 1836) (Parke, B.) (cited in *McCaul v. Thayer*, 35 N.W. 353, 357 (Wis. 1887) (Cassoday, J., dissenting));

If the language of the statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.

*Vacher & Sons, Ltd. v. London Soc’y of Compositors*, [1913] A.C. 107, 121 (H.L.) (Lord Atkinson).

32. 143 U.S. 457 (1892) (holding that to count a preacher as “perform[ing] labor or service of any kind” was too absurd or unjust).

33. 310 U.S. 534, 543–44 (1940) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”) (citing *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934)).

34. 242 U.S. at 485–86; see *infra* text accompanying notes 43–52.



**Thrust #12:** "If language is plain and unambiguous it must be given effect."<sup>35</sup>

Thrust #12 is a fixture in the secondary sources. "Where the language of a statute is plain and unambiguous, there is no occasion for construction . . . ."<sup>36</sup>

The most fundamental principle of statutory law is that the intent of the legislature controls. Thus Thrust #12 needs to be linked to legislative intent by the equally fundamental, practical principle that the legislature express itself in words: "The intention of the legislature is to be obtained primarily from the language used in the statute."<sup>37</sup> Chief Justice Marshall combined the two principles:

The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.<sup>38</sup>

Or, eliding intent and words: "Where the intent is plain, nothing is left to construction."<sup>39</sup> To decide otherwise would be to subvert the democratic principle of legislative supremacy.<sup>40</sup>

Why Llewellyn should have chosen to cite *Newhall v. Sanger* to support Thrust #12 eludes me.<sup>41</sup> *Newhall* was about complicated facts under a potential clash of statutes, and the decision rested on an implication from one of the rele-

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35. Llewellyn, *Canons*, *supra* note 2, at 403.

36. 59 C.J. *Statutes*, *supra* note 10, § 569, at 953 (with maybe a thousand cases cited); *see also* 25 R.C.L. *Statutes*, *supra* note 25, § 213, at 957-58 ("Where the language of the statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."); BLACK, *supra* note 24, § 51, at 141 ("If the words and phrases of a statute are not obscure or ambiguous, its meaning and the intention of the legislature must be determined from the language employed, and, where there is no ambiguity in the words, there is no room for construction."); 2 SUTHERLAND, *supra* note 11, § 363, at 695 ("If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.") (Llewellyn cites Sutherland § 363 only for Parry #12, for which it offers no support).

37. 59 C.J. *Statutes*, *supra* note 10, § 569, at 952. This statement appears under the caption "Ascertainment of Intention — (1) Language," and with a page of citations; *see also*, 25 R.C.L. *Statutes*, *supra* note 25, § 217, at 962 (under the caption "Determination of Intention from Language Employed": "When the language of the statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning")

38. *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820) (Marshall, C.J.).

39. *United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, C.J.).

40. 25 R.C.L. *Statutes*, *supra* note 25, § 213, at 958 (If the statute is clear, "to go elsewhere . . . in order to restrict or extend the act would be an attempt to elude it . . . [if allowed], . . . there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. . . . [Interpretation would] serve only to raise doubt and uncertainty where none exist, to confuse and mislead the judgment, and to pervert the statute").

41. 92 U.S. 761 (1875).

vant statutes.<sup>42</sup> In short, not much in the way of plain meaning is apparent. Fine illustrative cases abound, perhaps the most suited to Llewellyn's purposes — i.e., to illustrate a clash with Parry #12 — being *Caminetti v. United States*.<sup>43</sup>

The facts of *Caminetti* are well known: Caminetti was one of three appellants (Diggs and Hays were the others). He had taken a young woman on a trip from California to Reno, Nevada. Of course there are many reasons for doing that, but he surely knew they included to “induce, entice, or compel such woman or girl . . . to give herself up to debauchery, or to engage in any other immoral practice,”<sup>44</sup> or, as Justice Day put it, “that the aforesaid woman should be and

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42. *Id.* at 765 (citing Act of 1811, 2 Stat., §§ 6, 10, and stating: “This provision clearly implies that no right of pre-emption previously attached to lands of that description by reason of settlement and cultivation.”).

43. 242 U.S. 470.

44. *Id.* at 488. The Court quotes sections 2, 3 and 4 of the White Slave Traffic Act, ch. 395, §§ 2–4, 36 Stat. 825, 825–26:

Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained; or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years, from any State or Territory or the District of Columbia, to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

become his mistress and concubine."<sup>45</sup> This was a crime? For this he should be imprisoned for eighteen months and fined \$1500? Indeed yes;<sup>46</sup> the White Slave Traffic Act clearly said so,<sup>47</sup> so clearly that no further investigation of legislative intent could be indulged. Caminetti's conviction, sentence of eighteen months incarceration, and fine of \$1500 were affirmed.<sup>48</sup>

In his dissent, Justice McKenna did not dispute the strict version of the Plain Meaning Rule pronounced by the majority;<sup>49</sup> nor did he exploit the absurdity or manifest injustice. Rather, he worked on the text of the statute itself, and the meanings of its terms in context: "If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty."<sup>50</sup> For example, the title suggests legislative context:

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the Act shall be known and referred to as the White-slave traffic Act. And its prominence gives it prevalence in the construction of the statute.<sup>51</sup>

Having demonstrated that the statute gave less than clear notice to the governed regarding its application to actions such as these, Justice McKenna was able to

*Caminetti*, 242 U.S. at 488 n.1.

45. *Caminetti*, 242 U.S. at 483. Justice Day:

In the *Caminetti* case, the petitioner was indicted in the United States [D]istrict [C]ourt for the [N]orthern [D]istrict of California, upon the 6th day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported, and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500.

*Id.* at 482-83.

46. *Id.* at 485-86:

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which *Caminetti* and *Diggs* were convicted . . . would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

47. *Id.* at 482 ("In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910 . . .").

48. *Id.* at 496.

49. *Id.* (McKenna, J., dissenting) ("Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive.").

50. *Id.*

51. *Id.* at 497 (citations omitted); see Llewellyn, *Canons*, *supra* note 2, at 403; see also discussion *infra* text accompanying notes 185-226.

justify the use of legislative history. After that, demonstrating that legislative intent did not reach the actions of Caminetti, Diggs and Hays was easy.<sup>52</sup>

*Caminetti* thus illustrates Thrust #12; the majority as a prohibition on further interpretation, and the dissent as a failure of the condition “if the language be plain and unambiguous.” And in ignoring the absurdity and injustice of its application, indeed in ignoring independently manifest legislative intent, *Caminetti*’s application of the Plain Meaning Rule contrasts well with Parry #12.

*Parry*#12: “Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.”<sup>53</sup>

This too is a fixture of treatises, variously formulated, although usually incorporated with “under-determinacy” as a conjoint condition.<sup>54</sup> Why? Isn’t this usurping the legislative function, defying legislative supremacy? It isn’t if the language of the statute does not appear accurately to reflect legislative intent, at least as applied to the situation at hand. If the application of the statute would be so absurd or unjust as to shock the conscience, then presumably this instance must be an inadvertent oversight, not intended by the legislature.<sup>55</sup> The device to achieve the end is the implied exception: “It will always, therefore, be pre-

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52. For example:

The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not the purpose of the bill to interfere with or usurp in any way the police power of the States, and further . . . the sections of the act had been “so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution.”

*Caminetti*, 242 U.S. at 497–98. And again:

The White Slave Trade. — A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.

*Id.* at 498 (citing H.R. REP. NO. 47, at 9–10 (1910)).

53. Llewellyn, *Canons*, *supra* note 2, at 403.

54. *E.g.*, 59 C.J. *Statutes*, *supra* note 10, § 569, at 957–58 (“Where, however, the language is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning.”); *see also*, 25 R.C.L. *Statutes*, *supra* note 25, § 224, at 972–73 (stating that a court may introduce exceptions by interpretation “only where the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts may recognize exceptions.”).

55. In *United States v. Goldenberg*, the Supreme Court explained:

It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

168 U.S. 95, 103 (1897).

sumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."<sup>56</sup>

The key is the threshold of absurdity, injustice, or oppression. Chief Justice Marshall set this threshold very high:

But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.<sup>57</sup>

Incarcerating Caminetti, Diggs and Hays for their sins was not sufficiently absurd or unjust for the 1917 Supreme Court majority; to count a preacher as "perform[ing] labor or service of any kind" was sufficiently absurd and/or unjust for the 1892 Supreme Court.<sup>58</sup> This problem looks intractable: Just as one can, if determined, find fuzziness in the scope of any (non-scientific) noun phrase, so too one can find monstrous injustice and oppression in pretty much any decision with which one disagrees.<sup>59</sup>

Examples may cast more light. Yet, in *Clark v. Murray*, Llewellyn has chosen a singularly unillustrative illustration.<sup>60</sup> It was a problem of a clash between two statutes,<sup>61</sup> both *in pari materia*.<sup>62</sup> In the course of the opinion the court says "[t]he books are full of rules for statutory construction, but they were all enunciated with the idea of determining what the legislature had in mind in enacting the acts under consideration,"<sup>63</sup> and proceeds to recite a page or so of them, including a version of Parry #12,<sup>64</sup> quoting from Black! Only thus does the case illustrate Parry #12.

56. *United States v. Kirby*, 74 U.S. 482, 486–87 (1868).

57. *Sturges*, 17 U.S. at 202–03.

58. *Church of the Holy Trinity*, 143 U.S. at 458, 460.

59. But a court cannot expect all its audience or its successors to go along. Compare Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (approving and suggesting generally justifiable approval), with Adrian Vermeule, *The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998) (disapproving and suggesting generally justifiable disapproval).

60. 41 P.2d 1042 (Kan. 1935).

61. *Id.* at 1043. See generally Llewellyn, *Canons*, *supra* note 2, at 401 (discussing Thrust #1); Sinclair, *supra* note 4, at 925 (discussing clashes between statutes).

62. *Clark*, 41 P.2d at 1044. See generally Llewellyn, *Canons*, *supra* note 2, at 402 (discussing Thrust #6); Sinclair, *supra* note 4, at 973–74 (discussing "*in pari materia*").

63. *Clark*, 41 P.2d at 1044.

64. *Id.* (quoting BLACK, *supra* note 24, § 29, at 66):

*United States v. Kirby* offers a perfect and authoritative illustration.<sup>65</sup> Kirby, the Sheriff of Gallatin County, Kentucky, stopped the steamboat “General Buell” in its passage up the Ohio River to arrest Farris, who had been indicted by a Gallatin County grand jury for murder.<sup>66</sup> But Farris was a mail carrier,<sup>67</sup> so Kirby was indicted for “knowingly and willfully obstructing the passage of the mail . . . and retarding . . . the passage of one Farris, a carrier of the mail,”<sup>68</sup> in violation of a federal statute prohibiting “knowingly and willfully obstruct[ing] or retard[ing] the passage of the mail, or of its carrier.”<sup>69</sup> Should he and the members of his posse be fined a hundred dollars each for this? Of course not.<sup>70</sup> But Justice Field gave us some rationalizing worthy of a twenty-first century justice, including even some public choice theory,<sup>71</sup> before getting to the point. “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”<sup>72</sup> And thus all laws have exceptions, intended by the legislature, for extraordinary situations such as this. It was a sensible avoidance of patent absurdity.

***Resolution:***

In Pair 12, Llewellyn has taken the Plain Meaning Rule and simply split the usual two conditions on interpretation: He has kept the general determinacy condition — that the meaning be plain and unambiguous — in the “thrust,” and he has taken the sensibility and justice condition — that it be not absurd, oppressive, or patently unjust — and turned it into a “parry.” But, the history and variability of judicial use of the Plain Meaning Rule cannot be changed by such a device nor can the rule be made either more or less canonical than it always has been in judicial thinking.

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When the interpretation of a statute according to the exact and [literal] import of its words would lead to absurd or mischievous consequences, or would thwart or contravene the manifest purpose of the legislature in its enactment, it should be construed according to its spirit and reason, disregarding or modifying, so far as may be necessary, the strict letter of the law.

65. 74 U.S. 482 (1868).

66. *Id.* at 484.

67. *Id.* at 483–84 (stating that Farris was “engaged in the performance of this duty . . . [aboard] the steamboat General Buell, which was then carrying the mail of the United States from the city of Louisville, in Kentucky, to the city of Cincinnati, in Ohio”).

68. *Id.* at 483.

69. *Id.* at 485.

70. *Id.* (“There can be but one answer, in our judgment, to the questions certified to us.”).

71. *Id.* at 486 (“The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends.”).

72. *Id.*

There is some justification for treating the two conditions separately. In cases of ambiguity, obscurity, or other under-determinacy of expression in the statute, a court cannot avoid interpretation — it must make a decision. Even though under-determinacy is not a perfectly non-judgmental statutory trait, where it is found, judges and commentators alike allow interpretation, whether based on canons, legislative history or both.<sup>73</sup> Cases like *American Trucking*, relying on legislative history even in the absence of significant under-determinacy in the statute, reduce the Plain Meaning Rule and Thrust #12 to irrelevance.<sup>74</sup>

Nevertheless, there is an inevitability to the determinacy condition that there is not with the sensibility and justice condition. In a case of absurdity or manifest injustice, a court could plead legislative supremacy — “[i]t is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense”<sup>75</sup> — or righteously leave it to the legislature to amend the statute — “[t]he remedy for a harsh law is not in interpretation, but in amendment or repeal”<sup>76</sup> — and make an absurd or unjust decision. The judgmental quality of the sensibility and justice condition is also more interpersonally variable. Today’s prevalent attitude toward the White Slave Traffic Act’s application to a commonplace weekend’s vacation, as in *Caminetti*, would send all but the most anachronistically prudish judges to legislative history and the acquittal it mandates.<sup>77</sup> Thus, it is not surprising that as a condition, “sensibility and justice” is occasionally omitted from statements of the Plain Meaning Rule.<sup>78</sup> So Llewellyn’s making it into Parry #12, thus creating the appearance of conflict, may be justifiable. As recitation of something like a canonical form, however, it smacks of artifice.

Where the intent of the legislature is clearly and unambiguously manifest in the statute, legislative supremacy and notice to the governed are in sympathy. One cannot doubt that the reasonable reader’s understanding is that which the

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73. See Manning, *supra* note 3, at 285 (arguing that canons and exogenous resources such as legislative history are substitutes, not complements).

74. 310 U.S. 534, 543–44 (1940) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”) (quoting *N.Y. Trust Co.*, 292 U.S. at 465).

75. 2 SUTHERLAND, *supra* note 11, § 367, at 705; *accord id.*, § 363, at 697 (“Courts are not at liberty to speculate upon the intentions of the legislature where the words are clear, and to construe the act upon their own notions of what ought to have been enacted.”).

76. *State v. Duggan*, 6 A. 787, 788 (R.I. 1886); *accord Missouri Pac. R.R.*, 278 U.S. at 277–78 (“Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.”).

77. See *supra* notes 43–52 and accompanying text.

78. See *Hamilton*, 175 U.S. at 421; *Vacher*, [1913] A.C. at 121 (“If the language of the statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.”); see also *supra* text accompanying notes 25–26.

legislature intended. But where there is uncertainty in the statutory language, the promulgated expression of legislative intent, the fundamental principles of legislative supremacy and notice to the governed part company. Then it is merely happenstance if the reader chooses the same meaning as intended by the legislature. In cases like *American Trucking*, the court ignored the principle of notice in favor of the supremacy of legislative intent, even though this was different from the plain meaning of the statute.<sup>79</sup>

A statute that is absurd or patently unjust suggests the same response one would have to ambiguity: "Surely it cannot mean that!" What, for example, would the reasonable reader say on reading the statute prohibiting Kirby from delaying mail carrier Farris by arresting him for murder? "It can't be! It must be an oversight!" By interpretation we must be able to imply an exception. Otherwise, getting a job as a mail carrier would make a criminal immune from arrest. Where a statute as written is too implausible to be believed if taken literally, then it won't be taken literally by reasonable readers. A reasonable reader will either ignore the statute or seek interpretive advice. Parry #12.

In some cases, legislative supremacy, insofar as it requires the implementation of discoverable legislative intent, and the principle of notice may pull in opposite directions. Should the court follow the meaning that would be given the statute by a reasonable reader, the person governed? Or should it determine and follow the author's meaning, the intent of the enacting legislature?<sup>80</sup>

Until the recent, limited retreat by the House of Lords in *Pepper v. Hart*,<sup>81</sup> British courts followed the former, arguing that the requirement of notice mandates that the reasonable reader's meaning should prevail.<sup>82</sup> In the United States

79. This ought only be justified in cases where the governed will surely have expert advice in taking notice of the statute and planning behavior according to it, as for example in estate planning or issuing securities. See SINCLAIR, *supra* note 11, at 127–28.

80. As with so much else in our jurisprudence, the distinction can be found in the works of Sir Francis Bacon: The exposition of all words resteth upon three proofs; the propriety of the word, and the matter precedent and subsequent.

Matter precedent concerning the intent of those that speak the words, and matter subsequent touching the conceit and understanding of those that construe and receive them.

7 FRANCIS BACON, THE WORKS OF FRANCIS BACON 587 (London, Longmans 1879); DANIEL R. COQUILLETTE, FRANCIS BACON 151 (1992).

81. See *Pepper v. Hart*, [1993] A.C. 593 (H.L.). In Lord Browne-Wilkinson's speech, in which the House of Lords decided that, after many years of exclusion from judicial (and hence lawyers') reasoning, legislative history should again be admitted. *Id.* at 630–40. In 1769, the British courts adopted an "exclusionary rule" prohibiting use of legislative history in judicial decision making (and thus strongly favoring the reader's meaning). See *id.* at 630 (citing *Millar v. Taylor*, (1769) 4 Burr. 2303, 2332). However, the decision rested not on the principle of notice but on the split between commons and Lords, one house not knowing the legislative history, or the intent, of the other.

82. Justice Oliver Wendell Holmes made a similar argument:

Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our



we have followed the latter course, seeking to find and implement the author's — that is the legislature's — meaning. Our faith in democracy and the structural separation of powers requires the principle of legislative supremacy. Legislators are elected; the legislature's view, the author's meaning, thus has a certain democratic legitimacy. To allow the reader's meaning to prevail over a different meaning founded in the legislative intent would be anti-democratic and allow the triumph of non-elective lawmaking over the normal, elective lawmaking.

Pair 12, the Plain Meaning Rule, is a gatekeeper: Unless one finds uncertainty, or absurdity, etc., there is no need for interpretation; the statute provides the requisite guidance or the sought resolution of the problem. An overwhelming preponderance of occasions of resort to statutory law must meet this result. Issues of interpretation arise only in those few cases where the statute both applies to the problem and is unclear or absurd in its requirement.

### *Pairs Eight, Nine and Ten*

Communicating control data can be difficult, and communicating determinate controls for all possible situations in a finite number of words is impossible. Justice Frankfurter:

Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. . . .

. . . .  
 . . . The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction.<sup>83</sup>

Legislatures, which surely should seek clarity and determinacy insofar as reasonable, sometimes help limit the range of "doubts and ambiguities" by enacting interpretative instructions as part of the legislation.

Interpretive instruction clauses come in three general kinds. The most familiar are definitions of key words and phrases that occur in the act, but also familiar enough are statements of purpose and of interpretive strategy. The Uniform Commercial Code gives us examples in Article 1. In section 1-102(1), it

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old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.

Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

83. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528-29 (1947); accord JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* 83 (New York Evening Post Job Printing Office 1884); H.L.A. HART, *THE CONCEPT OF LAW* 124-26 (1961). See generally Isaiah Berlin, *Logical Translation*, in *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* 56, 78 (Henry Hardy ed., 1978) ("We cannot speak without incurring some risk, at least in theory; the only way of being absolutely safe is to say absolutely nothing . . .").

gives instructions as to interpretation: “This Act shall be liberally construed and applied to promote its underlying purposes and policies.”<sup>84</sup> Then immediately it tells us those purposes and policies:

- Underlying purposes and policies of this Act are
- (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of parties;
  - (c) to make uniform the law among the various jurisdictions.<sup>85</sup>

And in section 1-201 it defines words and phrases from “action”<sup>86</sup> to “‘written’ or ‘writing’.”<sup>87</sup>

Does the legislature have the power to do this? Does it have dominion over such intrinsically judicial functions as interpretation and determining word meanings? In a word, yes.<sup>88</sup> Interpretive instructions are binding on users of the legislation, be they judges, lawyers or denizens, and are as subject to interpretive difficulties as any other statute. That is what Llewellyn’s Pairs 8, 9 and 10 are about. Together they map the territory and its difficulties; describing the parameters of the process of implementing legislative intent under interpretive statutes and dealing with inconcinnities between interpretive provisions and other parts of the act.

Pair 8 is about statements of purpose, called “design” in Llewellyn’s chosen formulation. Pair 9 is about both definitions and interpretive instructions, and Pair 10 is about interpretive instructions. Thus Pair 10 is but a limited case of the more general Pair 9. The conflation in Pair 9 of two kinds of interpretive rules, although common enough in treatises, does not work very well. It is probably used because there is so little to be said about definitions, and even a superficial contrariety is difficult to come up with.

THRUST #8: “Where design has been distinctly stated no place is left for construction.”  
 PARRY #8: “Courts have the power to inquire into real — as distinct from ostensible — purpose.”<sup>89</sup>

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84. U.C.C. § 1-102(1). Other U.C.C. sections also give interpretive instructions, for example “§ 1-104. Construction Against Implicit Repeal,” “§ 1-106. Remedies to Be Liberally Administered,” and the prince of them all, “§ 1-109. Section Captions: Section captions are parts of this Act.”

85. U.C.C. § 1-102(2).

86. U.C.C. § 1-201(1).

87. U.C.C. § 1-201(46).

88. *State v. Standard Oil Co.*, 123 P. 40, 43 (Or. 1912) (“We find, as to the rule for the construction of interpretation clauses, that any provision in a statute which declares its meaning or purpose is authoritative.”); see BLACK, *supra* note 24, § 89, at 269; 59 C.J. *Statutes*, *supra* note 10, § 567, at 948; 25 R.C.L. *Statutes*, *supra* note 25, § 275, at 1047, 1049.

89. Llewellyn, *Canons*, *supra* note 2, at 402.

LLEWELLYN'S "DUELING CANONS," EIGHT TO TWELVE

THRUST #9: "Definitions and rules of construction contained in an interpretation clause are part of the law and binding."

PARRY #9: "Definitions and rules of construction in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested."<sup>90</sup>

THRUST #10: "A statutory provision requiring a liberal construction does not mean disregard of unequivocal requirements of the statute."

PARRY #10: "Where a rule of construction is provided within the statute itself the rule should be applied."<sup>91</sup>

None of Llewellyn's Pairs 8, 9 and 10 serves his purpose of demonstrating canons of construction to be contradictory or inconsistent or a matter of judicial selective whim.

**Thrust #8:** "Where design has been distinctly stated no place is left for construction."<sup>92</sup>

The wording of Thrust #8 appears to have come from *Corpus Juris*: "Ordinarily, where the law-making power distinctly states its design, no place is left for construction."<sup>93</sup> But this is copied from *Coulter v. Pool*, the 1921 California case that Llewellyn cites for Parry #8, with a one word change ("place" instead of "room").<sup>94</sup> What is meant here by "design"? It does not mean "overall plan/pattern" or similar, but rather "intent" or "purpose" as in contrast with accident ("Whether by accident or design, her . . .").

Llewellyn's cited case, *Federoff v. Birks Bros.*, is not very helpful.<sup>95</sup> It was a dispute over the mileage to be paid to a witness under a statute,<sup>96</sup> but the only statement of legislative purpose came from a prior case.<sup>97</sup> The opinion concludes

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90. *Id.* at 403.

91. *Id.*

92. *Id.* at 402.

93. 59 C.J. *Statutes*, *supra* note 10, § 570, at 960.

94. 201 P. 120 (Cal. 1921). The court in *Coulter* states: "[W]hen the lawmaking power distinctly states its design in the enactment of a particular statute, no room is left for construction . . ." *Id.* at 122. Both sources immediately back off. 59 C.J. *Statutes*, *supra* note 10, § 570, at 960 ("[B]ut a legislative declaration that a law was intended to promote a certain purpose is not binding on the courts. . . ."); *Coulter*, 201 P. at 122 ("[L]egislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts . . ."). Justice Lennon, writing for the California Supreme Court, seems to have won the attention of and most sincere form of flattery from the *Corpus Juris* editors, doesn't he?

95. 242 P. 885 (Cal. Dist. Ct. App. 1925).

96. *Id.* at 886-87 (construing section 208 of the California Political Code which states: "When mileage is allowed by law to any person, the distance must be computed as herein fixed," and section 4300g of the Political Code which provides for witness fees as follows: "For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases. . . . Mileage actually traveled, one way only, per mile, ten cents.")).

97. *Id.* at 887 ("Appellants rely upon *Hegard v. California Ins. Co.*, 11 P. 594 (Cal. 1886), where it is said: 'The sections of the Political Code established the legal distances therein set out without any qualification, and hence they are established for any and all purposes.'" But the *Federoff* opinion immediately explains

with four quotes about legislative purpose — Thrust #8 is the third, copied from and citing to *Coulter v. Pool* — and announces a decision without further ado.<sup>98</sup> After the argument that precedes, none of the four quotations have determinative relevance. In Sutherland, the other source Llewellyn cites for Thrust #8, only a general, introductory paragraph about statements of legislative intent or purpose comes close.<sup>99</sup>

A better illustration is *Smith v. State*, the case Llewellyn chose to cite for Thrust #9.<sup>100</sup> Indiana had passed a statute defining embezzlement; prior to it, Smith's crime would have looked like larceny,<sup>101</sup> but with a defense. He was convicted of embezzlement. The key point came up on the Indiana Supreme Court's rehearing of his appeal. Chief Justice Frazer made it clear:

[T]he second section contains precisely as clear an indication of the legislative intent, when, in assigning a reason for the emergency clause, putting the act into immediate effect, it is declared that "there is no law punishing the offense" defined. If it had been intended to embrace offenses already punishable, this would have been simply a falsehood. The legislature certainly knew its own intent, and to the majority of the court, this language is conclusive that it was meant by the act to provide for cases not previously punishable.<sup>102</sup>

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why *Hegard* is not controlling: "Section 208 of the Political Code does not relate to the mileage fees which a witness may collect, because he is entitled to such fees for only the 'mileage actually traveled.'").

98. *Federoff*, 242 P. at 887. The quotes are first: "Where a statute is amended, the parts which are not altered are to be considered as having been the law from the time when they were enacted." *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson*, 128 P. 924 (Cal. 1912). Second: "To arrive at the legislative intent the original purpose and object of the legislation must be considered." *Mackey v. Mott*, 142 P. 1082, 1084 (Cal. Ct. App. 1914). Third: "[O]rdinarily it is the rule that, when the law-making power distinctly states its design in the enactment of a particular statute, no room is left for construction . . . ." *Coulter*, 201 P. at 122. And fourth: "The statute, like all statutes, must be read in view of the evident purpose of the legislature in its enactment." *Dillingham v. Welch*, 178 P. 512, 514 (Cal. 1919)).

99. Sutherland states:

Where the law-maker declares its own intention in the enactment of a particular law, or defines the sense of the words it employs in a statute, it not only exercises its legislative power, but exercises it with a plausible aim; for it professes to furnish aid to correct understanding of its intention, and thus to facilitate the primary judicial inquiry in the exposition of the law after it is finished, promulgated, and has gone into practical operation.

2 SUTHERLAND, *supra* note 11, § 358, at 684. So we may properly take the occurrence of "design" in Thrust #8 as a rhetorical accident, and not significantly different from other sources on the same subject. That certainly fits with the idea that this is plausibly a candidate canon. *E.g.*, 25 R.C.L. *Statutes*, *supra* note 25, § 253, at 1014 (which puts it in the negative: "[a]n interpretation which defeats any of the manifest purposes of the statute cannot be accepted") (numerous citations omitted). An esoteric formulation such as used in Thrust #8 does not specially fix the meaning of an interpretive canon. We shall see this reinforced in *Coulter v. Pool*. See *infra* text accompanying notes 112–20.

100. 28 Ind. 321 (1867).

101. *Id.* at 325 ("The case made by the evidence would have been larceny, before the enactment of the act of 1865, defining the crime of embezzlement.").

102. *Id.* at 325–26.

Despite — or perhaps *because of* — the simplicity of Thrust #8, one does not find many good examples. Many cases — like Llewellyn's chosen illustration, *Federoff v. Birks Bros.* — are cited only for their clear statements,<sup>103</sup> even if merely part of a statement of interpretive principles. For example, in *S. S. White Dental Manufacturing Co. v. Commonwealth*, the constitutionality of a tax hinged on whether it was an excise tax or a property tax.<sup>104</sup> The court tells us: "It is expressly declared by the terms of the statute to be an excise. The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect."<sup>105</sup> But then it gave us pages of differentia and historical tradition to establish that this was, indeed, an excise tax.

Parry #8 is more interesting and fertile.

**Parry #8:** "Courts have the power to inquire into real — as distinct from ostensible — purpose."<sup>106</sup>

The secondary sources are much more sympathetic to Parry #8 than Thrust #8. Corpus Juris, the only secondary source cited by Llewellyn, begins a section captioned "Other Guides to Intent"<sup>107</sup> with an approximation of Thrust #8,<sup>108</sup> then continues: "but a legislative declaration that a law was intended to promote a certain purpose is not binding on the courts, and they have the power to inquire its real, as distinguished from its ostensible, purpose."<sup>109</sup> R.C.L. includes a similar qualification in its approximation of Thrust #8: "The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect."<sup>110</sup>

The reasoning here is transparent. The express language of a statute particularly applicable to a situation in dispute, should not be revised to suit a general, overarching purpose even if stated in the act of which the statute is a part. When the legislature chose the words of the statute in question, it was focusing on their particular application, not on a general purpose; thus giving the words their clear effect should further legislative intent more accurately. "[T]he words of a statute

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103. See, e.g., *Amos v. Conkling*, 126 So. 283, 288 (Fla. 1930) ("The intent of a valid statute is the law, and the purpose to be accomplished within constitutional limitations is to be considered as controlling and effect given to the act as a consistent and harmonious whole."). Of course! But it hardly figures significantly in the decision, and not as implementing a legislated statement of intent. See also *Lajoie v. Milliken*, 136 N.E. 419, 423 (Mass. 1922) ("The declared purpose of a legislative enactment is to be accepted as true unless incompatible with its meaning and effect."). See generally *Federoff*, 242 P. at 887.

104. 98 N.E. 1056, 1057–58 (Mass. 1912).

105. *Id.* at 1059.

106. Llewellyn, *Canons*, *supra* note 2, at 401–02.

107. 59 C.J. *Statutes*, *supra* note 10, § 570, at 958.

108. *Id.* at 960 ("Ordinarily, where the law-making power distinctly states its design, no place is left for construction . . .").

109. *Id.*

110. 25 R.C.L. *Statutes*, *supra* note 25, § 253, at 1015.

cannot be stretched beyond their reasonable import to accomplish a result not expressed.”<sup>111</sup>

*Coulter v. Pool*, Llewellyn’s chosen illustration, is the originator of the language of Thrust #8, but it too follows the pattern of the secondary sources in immediately stepping back: “[L]egislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute . . . .”<sup>112</sup> “[I]nquire into the real, as distinguished from the ostensible, purpose of the statute”<sup>113</sup> appears also to be the origin of Parry #8.

*Coulter v. Pool* was about the constitutionality of California’s “County Engineer Act.”<sup>114</sup> Under the act, if the county engineer was a county officer then the act was unconstitutional,<sup>115</sup> if an employee then not. The act expressly deemed the county engineer an employee,<sup>116</sup> but then all the remaining provisions fit the role of a county officer as contemplated in the relevant section of the California constitution.<sup>117</sup> Accordingly, “we are satisfied that the act in question contemplates the creation of a county office and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer.”<sup>118</sup>

This is not especially helpful as an illustration of Parry #8, even if it is the source of the language. Rather than a decision between a general statement of design and an incompatible particular statement, it is between a particular classificatory statement and a whole set of general provisions, the requirements of the role in question.<sup>119</sup> The court, quoting the district court, decided that “[t]he label placed by the legislature upon its work cannot be permitted to give it a meaning

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111. *Id.*

112. *Coulter*, 201 P. at 122.

113. *Id.*

114. *Id.* at 121–22. The court stated that this act was “[a]n act providing for a county engineer for each county in this state, . . . his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain powers, functions and duties heretofore vested in and performed by the county surveyor and members of the board of supervisors; . . . to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes.” *Id.* at 121. The court went on to say that “[s]ection 13 of this act provides that it shall be known and designated as the County Engineer Act, and . . . . We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be unconstitutional, then it does not invalidate the plaintiff’s claim.” *Id.* at 121–22.

115. *See id.* at 122 (referring to CAL. CONST. art. XI, § 4).

116. *Coulter*, 201 P. at 122 (“[T]he verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors ‘shall be deemed an employee and not a county officer . . . subject to the control and supervision of the board of supervisors.’”).

117. *Id.* at 122–24.

118. *Id.* at 122.

119. The opinion provides some five pages of review of provisions of the act requiring the job be classified as a county office. *Id.* at 122–24.

not fairly contemplated within its terms."<sup>120</sup> This is hardly characterizing the "labeling" provision as a governing expression of legislative intent.

In passing, we should note that despite the *Coulter* majority's work at establishing the "real" as opposed to ostensible legislative intent as to the nature of the job, the decision still is contrary to another canon, sometimes called "the *Ashwander* principle":<sup>121</sup> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."<sup>122</sup> This makes sense. It is reasonable to presume that our legislature would never intentionally make an unconstitutional law; therefore an interpretation without constitutional problems must have been intended. In *Coulter v. Pool*, one might guess that the court thought the only reason the legislature sought to classify county engineers as employees rather than officers was to avoid making an otherwise unconstitutional law; thus the intended effect was unconstitutional, the classification provision a mere ruse. The *Ashwander* principle also enhances the legal system's resilience, its methods of damage control. A constitutional decision is terribly difficult to correct; outside the Court, only an amendment will turn the trick. So finding another ground — e.g., an interpretation of a statute or a common law decision — that can be overruled through the legislative process preserves flexibility and adaptability in the system.

### *Pairs Nine and Ten*

Pair 9 and Pair 10 are paraphrases of each other in converse order: Parry #10 is a sub-part of Thrust #9, and Parry #9 includes Thrust #10. They are about the other two categories of legislated interpretive instructions: definitions and interpretive strategy. Treatises tend to conflate them in their captions<sup>123</sup> — as does Llewellyn in Pair 9 — and, after an initial generalization, to have little or nothing further to say about definitions.

Definitions and instructions on interpretive strategy ("rules of construction," as they are called in Thrust #9) should be taken separately; the levels of control

120. *Id.* at 122.

121. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (Brandeis, J., concurring).

122. *Id.* at 347. Justice Brandeis continued: "This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* (citing *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191 (1909); *Light v. United States*, 220 U.S. 523, 538 (1911)). The principle has indeed received a "most varied application." For example, it was reiterated then ignored by a Supreme Court majority in 1985: "[T]his Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided." *United States v. Locke*, 471 U.S. 84, 92 (1985); see also *Rust v. Sullivan*, 500 U.S. 173, 207 (1991) (Blackmun, J., dissenting).

123. *E.g.*, 25 R.C.L. *Statutes*, *supra* note 25, § 275, at 1047 (under the caption: "Legislative Construction Generally; Statutory Definitions and Interpretation Clauses").

that can be exercised by each, and thus their effectiveness for communication and determinacy in interpretation, are rather different. Definitions of words made part of an act should be more difficult to avoid than general, overarching statements of interpretive policy.

I shall treat them separately, but conflate Pairs 9 and 10:

THRUST #9: "Definitions and rules of construction contained in an interpretation clause are part of the law and binding."<sup>124</sup>

PARRY #10: "Where a rule of construction is provided within the statute itself the rule should be applied."<sup>125</sup>

Parry #10 is contained in Thrust #9, so they can be treated together. Llewellyn took Thrust #9 from Black: "The definitions and rules of construction contained in an interpretation clause are a part of the law and binding on the courts. . . ."<sup>126</sup> Parry #10 is quoted from Llewellyn's illustrative case, *State ex rel. Triay v. Burr*: "Where a rule of construction is contained in the statute itself, that rule should be applied if it is necessary to use any rules of construction in determining the meaning or effect of the law."<sup>127</sup>

### Definitions:

Only symbols or signs, such as words, can be defined; you cannot define a thing, even though you can talk about it. But worse, we cannot even define words except for extremely limited purposes. I can with authority define a term as I use it within a particular text that I write, but I do not have power or authority to do more.<sup>128</sup> Language is public; to communicate with others, I have to use public language with its public meanings. A dictionary is like a report of those public usages, an empirical compendium of a linguistic culture.<sup>129</sup>

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124. Llewellyn, *Canons*, *supra* note 2, at 403.

125. *Id.*

126. BLACK, *supra* note 24, § 89, at 269 (under the caption "Interpretation Clause") (emphasis added).

127. 84 So. 61, 74 (Fla. 1920) (emphasis added).

128. Of course you will often hear people ask speakers to define their terms. And you will sometimes hear speakers — or read writers — defining their terms. When that happens, it is wise to put your hand over your intellectual pocket: two to one an attempt to pick it is about to be made.

129. This paragraph is intentionally dogmatic. The contrary has long been advocated, in fun, by Lewis Carroll in the mouth of Humpty Dumpty: "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less." LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 130 (Macmilland & Co., Ltd. 1928) (1872). It has been advocated in serious philosophy: "The indeterminacy that I mean . . . is that rival systems of analytical hypotheses can conform to all speech dispositions within each of the languages concerned . . . ." WILFORD VAN ORMAN QUINE, *WORD AND OBJECT* 73 (1960). And recently, it was advocated in legal theory by writers professing "postmodernism." See, e.g., J.M. Balkin, *What is Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992). But these arguments have long been known fallacious. See, e.g., HOBBS, *supra* note 10, at 176–77. I addressed some arguments made particularly about constitutional interpretation in M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. SCH. L. REV. 451, 490–98 (1999).



Even legislatures do not have the power to dictate the meanings of words to speakers of the language.<sup>130</sup> But just as a writer or speaker may define a term for a limited text and purpose, legislatures also have the power to define the terms to be used in their statutes. When they do so, it is imperative to pay attention; that special definition controls for that legislation.<sup>131</sup>

Definitions do not inspire much attention from the treatise writers; perhaps their validity and effect are too obvious, the challenges to them too few. The New Hampshire Supreme Court in *Jones v. Surprise* made a very clear statement, and therefore became a favored citation.<sup>132</sup> Plaintiffs were trying to enforce an illegal contract for the purchase and delivery of "spirituous liquor,"<sup>133</sup> claiming primarily that it should be under Massachusetts law, thus legal and enforceable, but also arguing that wine, the subject of the contract, was not a spirituous liquor.

One question in this case is, whether intoxicating wines are included within the terms of this statute. The legislature has defined intoxicating liquor as follows: "By the words spirit, spirituous, or intoxicating liquor, shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared." G. L., c. 1, ss. 1, 31. As intoxicating wines and other intoxicating fermented liquors are not expressly excluded from the operation of ss. 13, 18, 19, c. 109, of the Gen. Laws, the only conclusion is that they come within the prohibition of its terms.<sup>134</sup>

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130. This is not new. See 2 SUTHERLAND, *supra* note 11, § 360, at 687 ("Such definitions [in statutes] can, in the nature of things, have no effect except in the construction of the statutes themselves. The meaning of language depends on popular usage, and cannot unless in very slight degree, be effected by legislation.") (citing *State v. Canterbury*, 28 N.H. 195, 228 (1854)). In mid-19th century New Hampshire, certain persons were required to maintain portions of highway; did that include bridges on that portion? In *State v. Canterbury*, defendant Canterbury was charged with failing to maintain a bridge. 28 N.H. 195. However, "[t]o charge a party with neglect to make or repair a highway, according to the natural and usual meaning of words, is not to charge neglect of building and repairing a bridge, but it is essentially a different thing." *Id.* at 231. This flows from the requirement of notice for a statute to be effective: "By the constitution, 'no citizen shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him.' And it is, therefore, indispensable that an offence should be described in the appropriate language, according to the ordinary and correct usage . . ." *Id.* at 228-29.

131. BLACK, *supra* note 24, § 89, at 269-70; 59 C.J. *Statutes*, *supra* note 10, § 567, at 948.

132. 9 A. 384 (N.H. 1886).

133. *Id.* at 385 (citing G.L. c. 109, ss. 13, 18):

It is made a criminal offence for any person, not an agent, to sell, or keep for sale, spirituous liquor, or for any person within this state to solicit or take an order for spirituous liquor to be delivered at any place without this state, knowing, or having reasonable cause to believe, that, if so delivered, the same will be transported to this state, and sold in violation of our laws.

134. *Jones*, 9 A. at 385.

Plaintiffs lost on their choice-of-law argument too, but not in a single, short paragraph. Courts may often provide quotable language, but seldom, as in this case, where there is a genuine issue over definition.<sup>135</sup>

PARRY #9: “Definitions and rules of construction in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested.”<sup>136</sup>

This too comes straight from Black, separated from Thrust #9 only by a semi-colon.<sup>137</sup> But Black, like Llewellyn’s other cited secondary source, Corpus Juris, pays little further attention to definitions.

Treatises find one quote doubting a legislated definition to their liking. “[T]he rule applicable to defining clauses is that they should be used only for the purpose of interpreting words that are ambiguous or equivocal and not so as to disturb the meaning of such that are plain.”<sup>138</sup> However, the case had to deal with a clash of definitions, one of which had to give way, so it tells us little about problematic applications of definitions in substantive statutory clauses. Following the standard procedure for such problems, the Alabama Supreme Court chose the more particular.<sup>139</sup>

A definition applies generally throughout the act of which it is part, while a particular substantive provision of the act constrains particular behavior. On this ground Sutherland makes an argument for the possibility of negating a statutory definition.

Where positive provisions are at variance with the definitions which it  
[the act in question] contains, the latter, it seems, must be modified by

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135. For example, the Supreme Court of Nebraska: “This definition is furnished by the act itself, and the [definition is] as much a part of the act as any other portion. The right of the legislature to prescribe the legal definitions of its own language must be conceded.” *Herold v. State*, 31 N.W. 258, 259–60 (Neb. 1887). And New York’s Court of Appeals:

[T]he right of the legislature enacting a law to say in the body of the act what the language used shall, as there used, mean, and what shall be the legal effect and operation of the law, is undoubted. If they have mistaken the meaning of the words they have used, when read in their ordinary and popular sense, or as legally and technically understood, still they may, in terms, declare what the law shall be for the future, under and by virtue of the terms employed.

*Farmers’ Bank of Fayetteville v. Hale*, 59 N.Y. 53, 62–63 (1874).

136. Llewellyn, *Canons*, *supra* note 2, at 403. Thrust #10 is about only one kind — albeit the most common — of interpretation clause.

137. BLACK, *supra* note 24, § 89, at 269 (captioned “Interpretation Clause”): “but [definitions and rules of construction contained in an interpretation clause] will not be extended beyond their necessary import, nor will they be allowed to defeat the intention of the legislature otherwise clearly manifested in the act.”

138. *Ivey v. Ry. Fuel Co.*, 118 So. 583, 584 (Ala. 1928), *quoted in* 59 CJ *Statutes*, *supra* note 10, § 567, at 948.

139. *Ivey*, 118 So. at 584 (“[W]here there is a conflict in sections or provisions in *pari materia*, one dealing specially with a subject and the other doing so generally, the special section must prevail. ‘Generalibus specialia derogant.’”).

## LLEWELLYN'S "DUELING CANONS," EIGHT TO TWELVE

the clear intent of the former on the principle that the special controls the general.<sup>140</sup>

The case cited in support, *Egerton v. Third Municipality*, shows a remarkable, but perhaps in the circumstances understandable, hostility to definitions.<sup>141</sup> Egerton was a creditor of the defendant municipality and wanted to garnish the tax obligations of residents, apparently arguing that by the statutory definitions his debtor was not a civil or political corporation, so lacked sovereign immunity.<sup>142</sup> His argument failed.

Other than isolated forays such as these, legislated definitions have commanded their fields.<sup>143</sup> With respect to definitions, then, support for Llewellyn's Parry #9 is scant at best.

### *Rules of Construction:*

"Where in an act it is declared that it shall receive a certain construction, the courts are bound by that construction, though otherwise the language would have

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140. 2 SUTHERLAND, *supra* note 11, § 360, at 687; see also BLACK, *supra* note 24, § 89, at 272-73.

141. 1 La. Ann. 435 (1846). (The only other cited case, *Farmers' Bank v. Hale*, does not support the argument; it deals with resolving the relationship between state and national banking limitations when they are required to treat state and national banks equally. 59 N.Y. 53, 56 (1874).) Much of the Louisiana Code of the time had been translated from French, generating peculiar jurisprudential problems:

The definition relied on from the English side of one of the articles of the Code, proves nothing but the ignorance of the person who translated it from the French. Definitions are, at best, unsafe guides in the administration of justice; and their frequent recurrence in the Louisiana Code, is the greatest defect in that body of laws. . . . [T]he former Supreme Court said that, the statutory provisions of the Code were often at variance with the definitions it contains, and that, in those cases, it was a sound rule of interpretation to consider the definitions as limited or modified by the clear intent of the positive enactments.

*Egerton*, 1 La. Ann. at 437.

142. *Egerton*, 1 La. Ann. at 437 ("It has been argued that the defendants are not a civil or political corporation, under the definition given by the Civil Code.").

143. Even the English courts, generally hostile to interpretation clauses, see *supra* note 80, acquiesce in definitions. *Standard Oil*, 123 P. at 43 (citations omitted):

Where the interpretation clause is that a particular word shall include a variety of things, not within its general meaning, it is a provision by way of extension, and not a definition by which other things are excluded. When the meaning is thus extended, the natural and ordinary sense is not taken away. . . where an act provided that the word "ship" shall include every description of vessel used in navigation not propelled by oars." On the question whether a fishing boat 24 feet long, partially decked over, and fitted with two masts and a rudder, and also with four oars, which were sometimes used, was a ship, within the meaning of the act, Mr. Justice Blackburn said: "The argument against the proposition is one which I have heard very frequently, viz., where an act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars."

been held to mean a different thing.”<sup>144</sup> This is categorical as to the authority of rules of construction, but in application it may not be so clear.<sup>145</sup>

Sutherland, in a useful passage quoted in full by Black, distinguishes definition and interpretation clauses in application by relative generality:

There is a manifest difference between definitive or interpretation clauses which are special and those which are general; the former always have the most controlling effect where it is obvious that the legislature, without misconception of the effect of other legislation, have precisely in view the particular words or provisions to which the clause in question ostensibly applies.<sup>146</sup>

A definition has a particularity in point that is unlikely in an interpretation clause. Not surprisingly, therefore, interpretation clauses have met with more equivocation — and in England, with outright hostility<sup>147</sup> — than have definitions. Especially is this so where the scope of the construction rule is general.

The terms of a general construction act should be read into every statute subsequently enacted, but it is not intended to dispense with the usual rules of interpretation.<sup>148</sup>

Parry #9 and Thrust #10 thus have some grip here.

PARRY #9: “Definitions and rules of construction in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested.”<sup>149</sup>

THRUST #10: “A statutory provision requiring a liberal construction does not mean disregard of unequivocal requirements of the statute.”<sup>150</sup>

144. *Smith v. State*, 28 Ind. 321, 325 (1867).

145. In *Smith v. State*, the clause in question was about intent, not interpretation as such; the quote is quotable, but dictum. See *supra* pp. 24–25.

146. 2 SUTHERLAND, *supra* note 11, § 360, at 686; see also BLACK, *supra* note 24, § 89, at 274.

147. *Standard Oil*, 123 P. at 43:

They have been discussed with marked disfavor in England, as they embarrass, rather than assist, the courts in their decisions. “It has been very much doubted,” says Lord St. Leonards, L.C., “and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided; for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various parts of an act of parliament.”

See also BLACK, *supra* note 24, § 89, at 270–72 (stating that interpretation clauses in England “have been regarded with great disfavor” and are strictly construed, and quoting *Midland Ry. Co. v. Ambergate, etc., Ry. Co.*, 10 Hare, 359 (stating that “an English Vice chancellor is reported as saying: ‘With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the act opposed to the particular interpretation.’”)).

148. 59 C.J. *Statutes*, *supra* note 10, § 566, at 947 (citations omitted).

149. Llewellyn, *Canons*, *supra* note 2, at 403.

150. *Id.*

Thrust #10 is a subcategory of Parry #9; it appears to be a paraphrase of Corpus Juris.<sup>151</sup>

Llewellyn's illustrative case, *Los Angeles County v. Payne*,<sup>152</sup> is also the only case Corpus Juris cites. Payne claimed, *inter alia*, that notice of a proposed municipal waterworks project was improper.<sup>153</sup> Wrong, said the court, albeit that "[w]e proceed to the inquiry with the mandate of the statute in mind that it shall be liberally construed to effect the purposes thereof."<sup>154</sup> The words of the statute were clear and had clearly been complied with,<sup>155</sup> if only just.<sup>156</sup>

Llewellyn's illustrative case for Parry #9, *In re Bissell*, is not especially illustrative.<sup>157</sup> Milton Bissell wanted to be a candidate in the Jamestown mayoral election but failed to file the proper petition.<sup>158</sup> He argued that sound jurisprudence and the statute itself required a liberal interpretation of election law, allowing him onto the ballot. But this general interpretive policy could not defeat the clearly expressed requirements of the statute:

While it is provided in the law that the law itself is to receive a liberal construction, this does not authorize us to disregard any of its provisions. Here we have no reason offered as to why the law was not complied with and we feel that the terms of the law are conclusive against the contention of the appellant.<sup>159</sup>

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151. 59 C.J. *Statutes*, *supra* note 10, § 567, at 948 ("Where the language of the statute is clear, it must be complied with, even though the statute contains a provision for liberal construction.").

152. 255 P. 281 (Cal. Ct. App. 1927).

153. *Id.* at 282: "The County Water Works District Act (Deering's Gen. Laws of 1923, p. 3784) requires that: 'The said clerk shall also cause a notice . . . to be published at least once a week for two consecutive weeks in a newspaper of general circulation.'"

154. *Id.*

155. *Id.* ("We find no room for doubt or uncertainty in the requirement that the notice shall be 'published at least once a week for two consecutive weeks.'").

156. "[N]otice thereof was given by the clerk by posting in three public places and also by publication in the Compton News-Tribune on January 19, 1926, and January 26, 1926." *Id.*

157. *In re Bissell*, 282 N.Y.S. 983 (1st Dep't 1935).

158. *Id.* at 984:

It appears that the local law of the city of Jamestown adopted in 1927 as Local Law No. 2 of that year, provided in subdivision (a) of section 4 as follows: 'A candidate for the office of mayor shall be designated by a separate petition and the names of candidates for other public offices shall not be included in that designating petition.' In the petition nominating the appellant for the office of mayor there were included the nominations of three other persons for the city office of supervisor at large and four other persons for the city office of councilman at large.

159. *Id.* at 985; *see also* *People v. Zito*, 86 N.E. 1041, 1043 (Ill. 1908):

[T]he rules of construction fixed by the statute are only to be observed where such construction would not be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. It would not be competent for the legislature to limit by the general act its own legislative powers, and where a contrary intent is expressed the general provisions of chapter 131 do not apply.

New Zealand has a general requirement of liberal interpretation in its Acts Interpretation Act of 1924, which, at section 5(j) reads:

Of course.

The more frequent examples are of criminal statutes, usually construed narrowly under the rule of lenity,<sup>160</sup> but specifically required by statute to be broadly construed. In these situations, the specifically legislated interpretation prevails.

But this rule [lenity] has been abolished in this State by the Penal Code, the fourth section of which provides that “the rule of the common law, that Penal Statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”

Tested by this rule of construction, it is evident, we think, that in making it a felony to steal a cow, the Legislature intended to include under that designation a heifer also, which is but a young cow.<sup>161</sup>

It makes sense. Lenity is a standard inference from accepted societal presumptions to legislative intent.<sup>162</sup> Obviously the legislature itself can expressly negate that inference.

A good example is *People v. Dobbins* from the California Supreme Court.<sup>163</sup> Two sections of the California Penal Code gave conflicting rules for how much District Attorney Dobbins could keep of the fines he collected:<sup>164</sup> The older, higher numbered section gave him half; the more recently enacted section (the “fish commission fund”) gave him and the state a quarter each.<sup>165</sup> The Cali-

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Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate import is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

Acts Interpretation Act of 1924, 1924 R.S. No. 11. Of course it would be absurd to treat it as a permit to disregard inconveniently constraining substantive statutes.

160. “The doctrine of strict construction in cases of penalties has been long and uniformly established in this court. . . . The doctrine is so elementary and well recognized that it does not need other authorities for its support.” *Hankins v. State*, 106 Ill. 628, 632 (1883) (citations omitted).

161. *People v. Soto*, 49 Cal. 67, 70 (1874); see also *Hankins*, 106 Ill. at 632–33:

Although the rule of strict construction obtains in this class of cases, it must not be so strict as to defeat the intention of the legislature. This is forbidden by the first section of the chapter entitled “Statutes.” It provides that “all general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried into effect.” This rule of construction is, in express terms, made applicable to all laws then or since in force.

162. See SINCLAIR, *supra* note 11, at 142.

163. 14 P. 860 (Cal. 1887).

164. *Id.* at 861 (“[T]he only question involved is, whether the provisions of sections 634 or 636 of the Penal Code govern as to the disposition of fines collected for violations of chapter 1, title 15, of that code, the two sections being in direct conflict.”).

165. *Id.* at 861:

for California Political Code had an interpretive provision making "the section[ ] last in numerical order" prevail,<sup>166</sup> contrary to the general interpretative resolution that the more recently enacted better indicated prevailing legislative intent.<sup>167</sup> The court found a way out, narrowly construing the interpretive section of the California Political Code to apply only where the clash is between statutes enacted together as part of the same act.<sup>168</sup> Thus it saved the old maxim of priority to the temporally later, and a quarter of the fines for the state.<sup>169</sup> Legislative intent, even though not so clearly manifested, prevailed over an enacted interpretive rule.

As the interpretive goal is to determine legislative intent and apply it to the case at hand, it makes sense to construe general interpretive edicts from the legislature in such a way as not to disrupt that process or negate that goal. Parry #9, even though not a formulation of canonical stature, encapsulates exactly that sense. Thrust #10 is continuous with Parry #9 and rests on the same rationale, as the better examples make clear.

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Section 636 was amended on March 30, 1878, and until it was again amended on March 24, 1887, in so far as it related to the disposition of moneys collected for fines, reads as follows: —

'One half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to informers, and one half to the district attorney of the county in which the action is prosecuted.'

Section 634 contained no provision relating to the moneys collected for fines until March 12, 1885, but it was then amended, the amendment taking effect May 12th, so as to contain the following provision: —

'One half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to the informer, one quarter to the district attorney of the county in which the action is tried, and one quarter shall be paid into the fish commission fund.'

166. *Dobbins*, 14 P. at 861 ("[S]ection 4484 of the Political Code . . . provides as follows: — 'If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article.'").

167. *Id.*:

It is an old and well-settled rule that when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail. . . . And this was upon the theory that effect should always be given to the latest rather than to an earlier expression of the legislative will, presumption being that the latter part of the statute was last considered.

168. *Id.* ("So it has always been the rule that when different provisions of a statute, all passed at the same time, could not be reconciled, the one that came last in point of position must prevail.").

169. *Id.*:

Section 4484 ought not to be so construed as to change these old and well-established rules, unless it clearly appears that at the time of its passage such was the legislative intent. We are unable to see anything indicating such an intent; on the contrary, the section seems to be only the plain expression of what was already well-established law. In our opinion, therefore, section 634, being the latest expression of the legislative will, must be held to be the law, and must control as to the disposition of the moneys referred to therein.

**Resolution:***Statements of Purpose*

Thrust #8, “Where design has been distinctly stated no place is left for construction,” claims much too much. The legislature may state its design or purpose as distinctly as you wish, but that does not mean the application of following substantive provisions will be free from interpretive difficulties. The illustrative cases, *Smith v. State*<sup>170</sup> and *S. S. White Dental Manufacturing Co. v. Commonwealth*<sup>171</sup> amply illustrate the point: Serving the clear legislative purpose in the circumstances at issue still required interpretation and reasoning. Generally, from cases decided with reference to a legislated statement of purpose, the most that should be inferred is that statements of purpose constrain interpretive choices, eliminating those contrary to it but not determining which interpretation, among the choices remaining, must be applied. Thus the accurate contrary of Thrust #8 would be: “Where design has been distinctly stated there may still be room left for construction.”

Parry #8, “Courts have the power to inquire into real — as distinct from ostensible — purpose,” does not state the contrary of Thrust #8; it doesn’t even intersect with Thrust #8. Literally, it is about legislative duplicity: the “real — as distinct from ostensible — purpose”? Enacting a provision without intending what it says? One would hope that instances, and subsequent cases, should be exceedingly rare.

*Coulter v. Pool*,<sup>172</sup> Llewellyn’s chosen illustration and source of the language of both Thrust #8 and Parry #8, may be such a case: The legislature seems to have deemed the county engineer an employee solely for the purpose of avoiding constitutional constraints. But it is not about a general statement of purpose or design at all; it is about the clash of one provision of an act — deeming the county engineer an employee — with all the other sources on the topic that would make him or her a county officer. I have not seen another illustration of legislative sleight of hand.

Even if we were to reformulate Pair 8 into something more plausible (for example “A distinct statement of legislative purpose constrains interpretation of substantive provisions” or “The purpose of a particular provision determines its application”) there is no serious problem of incompatibility here. The courts must use the language of the legislation primarily and ordinary interpretive procedures to resolve the issue.<sup>173</sup>

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170. 28 Ind. 321; see *supra* text accompanying notes 100–02.

171. 98 N.E. 1056; see *supra* text accompanying notes 104–05.

172. 201 P. 120; see *supra* text accompanying notes 112–20.

173. *In re Bergeron*, 107 N.E. 1007, 1008 (Mass. 1915):

[N]o intent can be read into a statute which is not there either in plain words or by fair implication. There are no means of ascertaining the purpose and effect of a statute except from the words



The generally applicable argument is summarized in another canon: "The general gives way to the particular," or "If one provision is more particular, focuses more precisely on the subject matter at hand, it has to be followed rather than the more general one."<sup>174</sup> The usual justification is that the legislators are more likely to have contemplated this situation when enacting the particular than the more general statute. That makes sense. But a better reason is that if this were not the case then there would be no need for more particular provisions when a general statute applies. Llewellyn treats this canon in Pairs 27 and 28,<sup>175</sup> but it should also arise as a corollary of his Thrust #16, "Every word and clause must be given effect."<sup>176</sup> Consider two statutes applicable to the subject, one more general, one particular. Suppose they are compatible: Then there is no need for the particular as the general effects the same control. Suppose they are incompatible: Then if the general were to control, it would countermand the particular, making the latter mere surplussage. Either way, the particular provision has no function, contrary to Thrust #16. Strikingly, *Coulter v. Pool*, Llewellyn's chosen illustration of Parry #8 is a counter-example, giving the general provisions legal effect against the particular!<sup>177</sup>

### *Definitions:*

If we confine Pair 9 to definitions, there is no problem. Thrust #9<sup>def</sup>, "Definitions contained in an interpretation clause are part of the law and binding," would simply state the power of the legislature to define the terms used within an act. Parry #9<sup>def</sup>, "Definitions in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested," would be a compatible truism, literally a corollary of Thrust #9<sup>def</sup>.<sup>178</sup> If the legislature chooses to define a term, then the legislature means it, and a court has no mandate to expand the meaning of the term beyond that definition.

Sutherland's argument that a substantive provision inconsistent with a definition should take priority "on the principle that the special controls the general"<sup>179</sup> is fallacious. A definition takes as its domain of application the act of which it is part; as to that it is general. A substantive provision within the act

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used when given their common and approved meaning. They are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment.

See also *Heydon's Case*, 3 Co. 7a, 76 Eng. Rep. 637 (1584).

174. SINCLAIR, *supra* note 11, at 138.

175. Llewellyn, *Canons*, *supra* note 2, at 406.

176. *Id.* at 404. The justification is that we are entitled to presume that the legislature was not merely wasting words, but using them to some purpose.

177. Perhaps it would be kinder to construe it as an interpretation of the California constitutional provision in question — CAL. CONST. art. XI, § 4 — saying it applied to substance not merely to labels.

178. Perhaps one might add that paradigmatic canon, Llewellyn's Thrust #20: *expressio unius est exclusio alterius*. Llewellyn, *Canons*, *supra* note 2, at 405.

179. 2 SUTHERLAND, *supra* note 11, § 360, at 687.

governs a particular aspect of behavior, and thus may be called particular. But the domains of governance are utterly different: The definition governs meanings within the statute, a part of law; the substantive provision governs behavior in the world, exogenous to the law. To compare particularity and generality of the two is to compare incommensurables, a category mistake.<sup>180</sup> In Llewellyn's secondary sources, the only other quotable language hostile to definitions rested on a case of incompatible definitions; of course a choice — preferably a reasoned preference — of one over the other would be necessary.

So, you might dredge up the odd quibble, but the only generality on statutory definitions worth mentioning is that they control meanings within their prescribed domain. Of course that doesn't mean they are always clear or that they require no construction. Nor does it mean that they control meanings outside the act of which they are part. But within their limited sphere of control, definitions command.

*Interpretation clauses:*

Thrust #9<sup>stat</sup>, “[R]ules of construction contained in an interpretation clause are part of the law and binding,” and its equivalent, Parry #10, “Where a rule of construction is provided within the statute itself the rule should be applied,” are also underlyingly compatible with their supposedly contrary pairs, Parry #9<sup>stat</sup>, “[R]ules of construction in a statute will not be extended beyond their necessary import nor allowed to defeat intention otherwise manifested,” and its corollary, Thrust #10, “A statutory provision requiring liberal construction does not mean disregard of unequivocal requirements of the statute.”<sup>181</sup>

That an act includes an interpretation clause does not mean that the legislature does not intend what the words of the substantive provisions say. A rule requiring a liberal construction does not grant license to ignore or go beyond the language of a substantive statute within its scope, as Parry #9 and Thrust #10 suggest. That would make the intent of the legislature in enacting that substantive provision irrelevant, contrary to the fundamental precept of interpretation, to implement legislative intent. Worse, it would make the legislative effort in formulating the language and enacting and promulgating the substantive provision irrelevant, ineffective, contrary to Thrust #16, “Every word and clause must be given effect.”<sup>182</sup>

However, if in a particular statute within an act, the legislature intends an interpretation other than according to the general interpretation clause, why should it not have the power to implement that intent? Parry #9<sup>stat</sup>, “Rules of construction in a statute will not be extended beyond their necessary import nor

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180. See GILBERT RYLE, *THE CONCEPT OF MIND* 16–17 (1949); SINCLAIR, *supra* note 11, at 91–92.

181. Llewellyn, *Canons*, *supra* note 2, at 403.

182. *Id.* at 404.

## LLEWELLYN'S "DUELING CANONS," EIGHT TO TWELVE

allowed to defeat intention otherwise manifested," says no more than that.<sup>183</sup> Suppose the legislature tells us, for example, "generally interpret this act liberally" but in this particular section "interpret strictly." This is simply making an exception in the statute to a more general requirement.<sup>184</sup>

### *Conclusion:*

Llewellyn's list of dueling canons would have been better had Pairs 8, 9 and 10 not been included. There is no dueling going on among their thrusts and parries (although one can find inconcinnities with other canons). Indeed, there is nothing canonical about any of the selected formulae, nor much in the way of cases to illustrate or support them.

Implementing legislative intent is the goal of statutory interpretation and a legislature has power over that intent. Should the legislature choose to tell us its purposes, or how to interpret its statutes, or what key words are to mean, it has the power to do so, and interpreters are as bound by these interpretive provisions as the governed are by substantive provisions. Of course, such interpretive clauses do not solve all problems of interpretation. But one ought not to claim canonical status for corollaries or examples or intentional exceptions (especially when they lack judicial support).

### *Pair 11*

THRUST #11: "Titles do not control meaning; preambles do not expand scope; section headings do not change language."

PARRY #11: "The title may be consulted as a guide when there is doubt or obscurity in the body; preambles may be consulted to determine rationale, and thus the true construction of terms; section headings may be looked upon as part of the statute itself."<sup>185</sup>

There are three separate pairs here, the first to do with the use of titles of acts,<sup>186</sup> the second to do with preambles, and the third to do with section captions. It would have been sensible to have separated them into three, as I shall do. Common to all three is the lack of even a potential clash indicated by their verbs: If contrariety is the purpose of their selection, "control," "expand," and "change" are mismatched with "consult," and "look up."

THRUST #11a: "Titles do not control meaning."

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183. *Id.* at 403.

184. In 1950, Llewellyn must have been well aware of this in his work on the Uniform Commercial Code. Generally the U.C.C. is to be interpreted liberally (§ 1-102(1)), but some sections are clearly meant to be interpreted strictly, for example "Firm Offers" (§ 2-205) and contractual delivery risk allocation (§§ 2-319 to 2-322), and demonstrate that intent by their choice of language.

185. Llewellyn, *Canons*, *supra* note 2, at 403.

186. To maintain the contrast with the third subpart, "section headings," the first subpart must be construed as titles of whole acts.

PARRY #11a: "The title may be consulted as a guide when there is doubt or obscurity in the body."<sup>187</sup>

In ordinary usage there is no clash, no incompatibility, nor inconsistency here. But one could come up with an interpretation of "control" that might create a conflict; something like "take precedence over," or "limit" would do. That, however, would make Thrust #11a false in those states that have constitutional "one subject" provisions, in which titles do limit the scope of their subject statutes.<sup>188</sup>

Despite not serving Llewellyn's purpose in generating dueling canons, the role of titles in statutory interpretation is, nevertheless, worth a few words. In 1600, Francis Bacon wrote, accurately for the time:

[T]he statute consisteth, as other laws do, upon a preamble, the body of the law, and certain savings, and provisoes. The preamble setteth forth the inconveniences, the body of the law giveth the remedy, and the savings and provisoes take away the inconveniences of the remedy.<sup>189</sup>

He did not mention titles or section headings; in England at that time, statutes did not have titles. Titles were not part of the language enacted,<sup>190</sup> but were provided by clerks "for convenience of reference."<sup>191</sup> Judges of the time did not use them as interpretive aids.<sup>192</sup> Even in England, however, that position did

187. Llewellyn, *Canons*, *supra* note 2, at 403. The words appear to be adapted from Black in the section captioned "Title." BLACK, *supra* note 24, § 83, at 244. Black, however, builds the limitations into his general statement:

The title of a statute cannot control or vary the meaning of the enacting part, if the latter is plain and unambiguous. But if there is doubt or obscurity in the body of the act, the title may be consulted, as a guide to the probable meaning of the legislature, and should be accorded some weight in the interpretation.

*Id.* Of Llewellyn's secondary sources, Corpus Juris also uses "control," and similarly to Thrust #11a: "[I]n no event should the language of the title be permitted to control expressions in the enacting clause in conflict therewith." 59 C.J. *Statutes*, *supra* note 10, § 599, at 1007 (captioned: "Titles, Headings, and Marginal Notes"). But this is immediately following: "[T]he rule is well established that, in case of ambiguity in the purview, the title may be resorted to as an aid to the ascertainment of legislative intent." *Id.* § 599, at 1006.

188. See *infra* text accompanying notes 208–17.

189. FRANCIS BACON, THE READING UPON THE STATUTE OF USES OF FRANCIS BACON 33 (London, W.H. Rowe 1804). For an accessible account of Bacon's legal writing, see COQUILLETTE, *supra* note 80.

190. *Powlter's Case*, 11 Co.Rep. 29a, 29b, 77 Eng. Rep. 1181, 1187 (1597) ("And as to the style or title of the Act, that is no parcel of the Act").

191. 2 SUTHERLAND, *supra* note 11, § 339, at 648; 25 R.C.L. *Statutes*, *supra* note 25, § 267, at 1031. *Hadden v. Collector*, 72 U.S. 107, 110 (1866):

The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act; — 'no more,' says Lord Holt, 'than the title of a book is part of the book.' It was generally framed by the clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference.

192. *Attorney General v. Weymouth (Lord)*, (1734) 27 Eng. Rep. 11, 12–13:

[F]or the title is no part of the act, and has often been determined not to be so, . . . for originally there were no titles to the acts, but only a petition, and the King's answer; and the judges there-

not last. In 1882, Baron Huddleston was able to say "I think therefore there is ample authority for saying that the title of an Act may be looked at in order to remove any ambiguity of the words of the Act."<sup>193</sup>

In the United States, the early English position may have had an occasional following,<sup>194</sup> but, as Black puts it, "never gained any considerable recognition in this country."<sup>195</sup> To the contrary, it was quickly and generally accepted that the title was a legitimate guide to the meaning of an under-determinate statute.<sup>196</sup> Justice Marshall's pragmatic wisdom tells why: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."<sup>197</sup>

In support of Thrust #11, Llewellyn cites the relatively recent *Westbrook v. McDonald*, a dispute about the procedure for a referendum to amend Arkansas divorce law.<sup>198</sup> Petitioners had collected the necessary signatures, but had made minor errors on the forms so had been denied by the elections official. They sought a writ of mandamus. Among the errors was a slight inaccuracy in the number and date of the statute to be amended. The Arkansas Supreme Court said:

The purpose of stating the number of the act and the date of its approval was to aid in its identification, but these errors could not have

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upon drew up the act into form and then added the title . . . and the title does not pass the same forms as the rest of the act, only the speaker, after the act is passed, mentions the title, and puts the question upon it, therefore the meaning of this act is not to be inferred from the title, but we must consider the act itself.

This was in exact contrast with European practice under codes. There, the title was printed in red, thus called the "*rubric*," and was important as a guide to finding the law: "*a rubric ad nigrum*," from the title to the "black letter." BLACK, *supra* note 24, § 83, at 245. This spun off a genuine Latin canon of construction, "*Nigrum nunquam excedere debet rubrum*"; "The black should never go beyond the red," i.e. the text should never exceed the title. *Id.* It's pretty much the same as the state constitutional "one subject" constraints. See *infra* text accompanying note 208 et seq. Opposite positions are consistent with Europe's governance by codes, which presume finding the law before acting, and English common law under which for most behavior one takes notice of the law from the customs and mores of the time and place.

193. *Coomber v. Justices of Berks*, (1882) 9 Q.B. Div. 17, 33. This statement was quoted by Black, with minor textual differences. BLACK, *supra* note 24, § 83, at 246.

194. 59 C.J. *Statutes*, *supra* note 10, § 599, at 1005, finds four cites; BLACK, *supra* note 24, § 89, at 245, three, but they are not very good. The best is *State v. Welsh*, where at trial the title of the statute alone had been used as evidence: "The title of an act is not part of the act and appears to me to be inferior evidence to the act itself. On this ground I think there ought to be a new trial." 10 N.C. 404, 407-08 (1824) (citations omitted). Others include Parry #11a alongside a quotable version of Thrust #11a. See *supra* text accompanying note 187.

195. BLACK, *supra* note 24, § 83, at 246.

196. See 25 R.C.L. *Statutes*, *supra* note 25, § 267, at 1031; 59 C.J. *Statutes*, *supra* note 10, § 599, at 1005-07.

197. *United States v. Fisher*, 6 U.S. 358, 386 (1805).

198. 43 S.W.2d 356 (Ark. 1931).

been misleading when an exact copy of the act otherwise appeared on the petition. It is settled law that even the title of an act is not controlling in its construction, although it is considered in determining its meaning when such meaning is otherwise in doubt.<sup>199</sup>

The last sentence does support Thrust #11a on titles, but it is plainly dictum — a comparison — and is immediately undermined, giving equal support to Parry #11a. This barely supports Thrust #11a, let alone a clash with Parry #11a.

The reason titles deserve weight in interpretation is the role they play in communicating to those who would find the statute to guide their behavior. A title suggesting a scope narrower than the statute would be deceptive, perhaps turning away a researcher,<sup>200</sup> but a title of breadth more encompassing than the statutory text would deceive only the lazy.<sup>201</sup> A title would not, however, contain the substantive constraint provided in the body of the statute. Thus one might reasonably argue that a title cannot change the scope of a statute.

Nevertheless, the question may not be about scope so much as about the meaning of the statute itself and the intent of the legislature. Then the title could provide an interpretive clue, although it should still be treated with caution as a title is “not always or necessarily subject to the [same] scrutiny” as the statute itself (often called “the enacting clause”).<sup>202</sup>

Llewellyn cites just such a case, *Brown v. Robinson*, in support of Parry #11a.<sup>203</sup> *Brown* is also one of those rare cases in which the title seems to have made an interpretive difference, not merely lent support to clear text. The plain-

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199. *Id.* at 359.

200. “The title of the act is unquestionably limited to ‘receivers of public money;’ a term which undoubtedly excludes the defendants in the present case.” *Fisher*, 6 U.S. at 387. *Contra* *United States v. Briggs*, 50 U.S. 351, 355 (1850) (holding that where the title restricted the subject timber to that used for naval purposes, the text of the statute had no such limitation, the latter controlled).

201. For example, the court in *Eastman v. McAlpin* stated:

The great difficulty which has been felt in the minds of some in the construction of this statute, it is believed, has been in giving too much attention to the title and preamble, without carefully examining the enacting clause. The title of the act and the preamble are, strictly speaking, no parts of it. It is true they may assist in removing ambiguities where the intent is not plain, but where the words of the enacting clause are clear and positive, recourse must not be had to either of them.

1 Ga. 157, 171 (1846).

202. BLACK, *supra* note 24, § 83, at 251. *But see Caminetti*, 242 U.S. at 482 where the title, “The White-slave Traffic Act,” probably got more attention than the very detailed wording of the operative clauses of the statute. Certainly the *Caminetti* Court’s construction of the act was of broader scope than this title would lead one to believe; no slavery, nor anything mistakable for slavery, was involved.

203. 175 N.E. 269 (Mass. 1931). The general rule of interpretation recited was a very liberal Plain Meaning Rule, approximately that of *Heydon’s Case*, 3 Co. 7a, 76 Eng. Rep. 637:

The canon of interpretation applicable to said c. 187 is that its words are to be construed according to the common and approved usage of the language considered in connection with the cause of its enactment, the preexisting state of the law, the mischief to be remedied and the main object to be accomplished.

*Brown*, 175 N.E. at 270.

tiff driver clearly had right of way, and the defendant would have been defenseless except that the plaintiff's car had a new motor, not recorded in the car's registration. Was it registered according to the required formalities? The statute provided that "[a] motor vehicle . . . shall be deemed to be registered . . . notwithstanding any mistake in so much of the description thereof contained in the application for registration as relates to the engine, serial or maker's number thereof."<sup>204</sup> But the owner of the car may not have been mistaken: he understood little English — "his wife attended to most of the details concerning the automobile"<sup>205</sup> — thus was simply ignorant of the requirements. The title of the act read "An Act relative to the effect of certain misstatements in applications for registration of motor vehicles . . . ." <sup>206</sup> Thus:

Resort may be had to the title of a statute as an aid in its interpretation. . . . "Misstatements" in the title is a word of broader signification than "mistake" in the body of § 1 and has a tendency to indicate that the latter was not designed to be used in a narrow or technical sense.<sup>207</sup>

Judgment for plaintiff was affirmed.

***Constitutional limitations on titles:***

Curiously, in most states, Llewellyn's Thrust #11a is, if not wrong, certainly highly inaccurate. This is because most states have long had constitutional provisions restricting any one act of the legislature to no more than one subject or object, and requiring that it be expressed in the title.<sup>208</sup> For example: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."<sup>209</sup>

Why? What could be so wrong about "intermixing in one and the same act such things as have no proper relation to each other"?<sup>210</sup> Isn't it a commonplace of federal legislation? The Supreme Court of Illinois answered that behind this legislative constraint is not only concern for notice to denizens, but also concern for the legislative process and legislators' undistracted attention to each subject on its own merits.

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204. *Brown*, 175 N.E. at 270 (citing MASS. ANN. LAWS ch. 90, § 9).

205. *Brown*, 175 N.E. at 270 ("[S]he was well aware of the change of the old motor for the new one.").

206. *Id.*

207. *Id.*

208. Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 390 (1958) ("Today, all states except North Carolina and the New England states have some form of one-subject rule in their constitutions.").

209. N.J. CONST. art. IV, § 7, para. 4.

210. *Id.*

The purpose of the requirement is to call the attention of interested parties to the provisions of the act or of the amendment and to prevent surprise or fraud upon the legislature by inserting provisions into an act of which the title gives no intimation and which might therefore be unintentionally adopted.<sup>211</sup>

Under such a constraint, a title could indeed control the meaning of a statutory provision within the act, although courts tend not to say so directly.

In this State and in this case, the title is certainly of moment, for the Constitution provides that no local or private act — the act under consideration being a local act — shall be passed by the Legislature, unless the subject of it be expressed in the title; (Const., Art. 3, sec. 16); and the rules and practice of the two Houses of Legislature provide for the reading and amendment of the title with as much caution as of the body of the bill: surely the title, in the legislation of this State, bears upon the meaning and purpose of the act.<sup>212</sup>

For the title merely to “bear[ ] upon the meaning and purpose of the act” is quite circumspect. This is typical of cases in which the title and the text of the statute are found to be compatible.<sup>213</sup>

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211. *People v. Tibbitts*, 305 N.E.2d 152, 157 (Ill. 1973). At the time, the Illinois Constitution, art. IV, § 13, said: “No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. . . .” Similarly:

The purpose is that each distinct subject matter of legislation shall have independent consideration upon its merits, unaffected by the presence of foreign matter which may tend to distract, confuse, or improperly influence, and that the title shall conspicuously indicate the general object of the act, so that the intrusion of the irrelevant matter may be readily detected, and, if it shall remain in the law, be without effect, because inimical to the title.

*Stockton v. Cent. R.R. Co. of N.J.*, 24 A. 964, 970 (N.J. 1892).

212. *People ex rel. Cooke v. Wood*, 71 N.Y. 371, 374 (1877).

213. *See, e.g., Garrigus v. Board of Comm'rs of Parke County*, 39 Ind. 66, 71–72 (1872):

Judge Cooley, in his work on constitutional limitations, page 141, states the law the same as the above, but adds: “Titles to legislative acts, however, have recently, in some states, come to possess very great importance, by reason of constitutional provisions, which not only require that they shall correctly indicate the purpose of the law, but which absolutely makes the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not in the purpose indicated in the title. These provisions are given in the note, and it will readily be perceived that they make a very great change in the law.”

But it is not said by Judge Cooley, or any other writer that we know of, that the constitutional provisions in reference to the titles of an act have so changed the rules of construction that the title may be looked to when the words of the statute are plain and unambiguous; and we do not think that such rules have been so changed. The only effect of such provisions in reference to titles of an act is to give greater weight and consideration to the title in ascertaining “the mind of the legislature,” than was formerly given to titles, where the language of the act is ambiguous and doubtful.

*Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295, 299 (1861):

The constitution (sec. 18, art. IV) declares that “no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.” It must be presumed that due regard is paid to this provision by the legislature, and therefore that the



Incompatibility, or difference in scope between title and statutory text, provides interesting, if rare, examples. One such came from the Florida Supreme Court in 1906.<sup>214</sup> Robert J. Knight and W. C. Knight had lost their land to the state for failure to pay taxes.<sup>215</sup> Nevertheless, they reentered the property and took turpentine from the trees.<sup>216</sup> For this sin they both now languished in prison. The statute under which they were imprisoned was part of an act titled "An Act to Prevent the Cutting or Removing of any Timber from Lands Heretofore or that May Hereafter be Sold for Taxes."<sup>217</sup> Section 1 of the act provided:

If any person shall cut or cause or procure to be cut or aid, assist or be employed in cutting any cedar, juniper, cypress, oak, pine, palmetto or other timber standing, growing or being on any lands that have heretofore been sold or may hereafter be sold for taxes, . . . or shall gather or remove or cause to be gathered or removed, or aid, assist or be employed in gathering or removing any turpentine extracted from the pine timber so cut . . . he shall for every such offense be deemed and held to be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars . . . .<sup>218</sup>

Nothing in the title mentioned taking turpentine. The Knights accordingly challenged the state to justify their incarceration: The state constitution at the time required that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."<sup>219</sup> Thus they prevailed; the statute's prohibition on their taking turpentine was declared invalid.<sup>220</sup> The title did indeed control the statute.

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subject of the bill is truly expressed in the title. The title is consistent with the body of the act, and correctly recites the title of the previous act — which it professes to amend . . .

State v. Township of Northampton, 14 A. 587, 589 (N.J. 1888):

The constitutional mandate that the object of every law shall be expressed in its title, has given the title of an act a twofold effect. It has added additional force to the title as an indication of legislative intent, in aid of the construction of a statute couched in language of doubtful import, and it also operates as a constitutional limitation upon the enacting part of the law. The enacting part of a statute, however clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be excised; and, if the superaddition to the declared object cannot be separated and rejected, the entire act must fail.

214. *Ex parte* Knight, 41 So. 786 (Fla. 1906).

215. *See id.* at 787.

216. *Id.*

217. *Id.* at 788 (citing 1895 Fla. Laws ch. 4416).

218. *Knight*, 41 So. at 788.

219. *Id.* at 787 (citing FLA. CONST. art. 3, § 16).

220. *Knight*, 41 So. at 789:

As the provision prescribing a penalty for "gathering or removing any turpentine extracted from the pine timber" is not included in the restricted subject, to-wit: "to prevent the cutting or removing of any timber" from certain lands, as expressed in the title, and is not matter properly connected with such subject, the provision is inoperative and of no effect.

**Resolution:**

There is not even a superficial inconsistency between Thrust and Parry #11a; where they occur in cases, with nearly canonical regularity they occur together. The Arkansas Supreme Court in Llewellyn's exemplar, *Westbrook v. McDonald*, illustrates.<sup>221</sup> Further examples:

Although the title of an act is not a part of the enacting portion of the law, yet, by an established rule of construction, it is always to be resorted to, as throwing light, as to the intention of the legislature, upon doubtful and uncertain language used in the body of the law.<sup>222</sup>

"The character of a statute is to be determined by its provisions, and not by its title, but when its language is ambiguous and doubtful, resort may be had to its title and the occasion of its enactment, to explain an ambiguity in its terms."<sup>223</sup> This is simply a version of the Plain Meaning Rule, Pair #12,<sup>224</sup> followed by a recognition that if the meaning of the statute itself is not plain, we may turn for help to a readily apparent resource of great communicative effect and determinable authority, the title.

Thus the general position, "almost universally held,"<sup>225</sup> is that the title may be used as an interpretive aid if the relevant statutory text is under-determinate, but that it cannot contradict or change the statute.<sup>226</sup> Splitting this sensible and justified position into two creates neither a pair of canons nor a legitimate clash.

THRUST #11b: "[P]reambles do not expand scope;"

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The provisions of the act on which the charge was founded being invalid and the charge constituting no offense, the judgment of conviction based upon the charge is void and the persons held in custody under such judgment are entitled to be discharged.

The petitioners will be discharged from custody.

221. 43 S.W.2d at 356; see *supra* text accompanying notes 198–99.

222. *Bradford v. Jones*, 1 Md. 351, 370 (1851).

223. *People v. O'Brien*, 111 N.Y. 1, 59–60 (1888) (citations omitted).

224. See *supra* text accompanying note 20.

225. BLACK, *supra* note 24, § 83, at 246.

226. See *Church of the Holy Trinity*, 143 U.S. at 462 ("Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning.") (citations omitted); *Hadden*, 72 U.S. at 110:

[T]he title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

See also *State ex rel. City of Mobile v. Bd. of Revenue*, 80 So. 368, 369 (Ala. 1918) ("While the title to an act cannot serve to institute a contradiction of plain terms in the enacting clauses of an act, yet the recitals of the title are available aids to the removal of ambiguity or uncertainty in the enacting clauses of an act.").

## LLEWELLYN'S "DUELING CANONS," EIGHT TO TWELVE

PARRY #11b: "[P]reambles may be consulted to determine rationale, and thus the true construction of terms."<sup>227</sup>

Preambles are often quite elegant. Look at the first modern copyright statute in the Anglo-American tradition, the preamble of which has been tremendously influential in subsequent law, in both England and the United States. The title is: "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."<sup>228</sup> The preamble follows immediately:

Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books . . .<sup>229</sup>

As you see, it contains the reason for the statute's enactment — a phenomenon that had recently reached a grievous level — and the ends the statute aims to achieve in remedying the problem.

Not all preambles are as clear and determined, but they usually follow this pattern, giving the reasons for and aims of the legislation.<sup>230</sup> A good preamble will effectively answer the first three *Heydon's Case* questions:

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.<sup>231</sup>

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227. Llewellyn, *Canons*, *supra* note 2, at 403.

228. The Statute of Anne, 8 Ann. § 19 (1710) (Eng.).

229. *Id.*

230. See 25 R.C.L. *Statutes*, *supra* note 25, § 266, at 1030; 2 SUTHERLAND, *supra* note 11, § 341, at 652–63; BLACK, *supra* note 24, § 84, at 253. According to Black, a preamble is an introductory clause which sets forth the reasons which have led to the enactment, by reciting the state of affairs intended to be changed, the evils designed to be remedied, the advantages sought to be secured or promoted by the new law, or the doubts as to the prior state of the law which it is meant to remove.

BLACK, *supra* note 24, § 84, at 253.

231. *Heydon's Case*, 30 Co. 7a, 76 Eng. Rep. 637, 638. The famously quotable passage in its entirety is: And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.

Thus a preamble can be a great help to a judge if the statute itself is underdeterminate.<sup>232</sup> Many writers like to quote that “[t]he preamble is the key to open the understanding of the statute.”<sup>233</sup> Because they are published along with the statute, and in the contemplation of the enacting legislature, preambles also have the appearance of authority. Preambles look more authoritative than, say, a committee report.

The problem with using a preamble is that it is not enacted, it is not a part of the statute, and thus is not law.<sup>234</sup> It couldn’t be law — a statement of the factual basis for the legislation cannot be enacted as law. Even the legislature’s purpose, though fundamental to the interpretation of a statute,<sup>235</sup> is an empirical matter and a legislature cannot legislate facts. Although it may appear to have privileged access to its own intent — and thus its statement of intent in a preamble may appear incorrigible — the legislature nevertheless has no authority over such factual subject matter. Consider for example the (fortunately ill-fated) bill in the Indiana legislature of 1897 that would have made “ $\pi = 3.2$ .”<sup>236</sup> Had it passed would it have changed the value of  $\pi$  in Indiana?

Thrust #11b, “[P]reambles do not expand scope,” is, then, a truism; it follows from the nature of the preamble and the powers of the legislature.<sup>237</sup> To expand

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3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

232. It cannot, perhaps, be repeated too often that if the language of the statute itself is clear and determinate — and not absurd in application — then resort to other interpretive resources is not justified. Courts say it about preambles. For example: “A preamble is not without its uses. It is not to be entirely rejected where the statute is ambiguous, although it will not be resorted to to create a doubt or misunderstanding which otherwise does not exist.” *Huntworth v. Tanner*, 152 P. 523, 525 (Wash. 1915). This is Llewellyn’s chosen illustration for Thrust #11b.

233. For example, *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892); *Price v. Forrest*, 173 U.S. 410, 427 (1899), attributing it variously to Lord Coke (*Huntworth*, 152 P. at 525–26), Francis Bacon (*Montesquieu v. Heil*, 4 La. 51, 55 (1832)), or both (*White v. Levy*, 8 So. 563, 564 (Ala. 1890)) or to other sources such as THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 43 (2d ed. 1874) or BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2653 (8th ed. 1914) (attributing it to sources quoted in *Huntworth*, 152 P. at 525: “A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute”).

234. See *Yazoo and Mississippi Valley R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (“[T]he preamble is no part of the act.”); *White*, 8 So. at 564 (“The preamble to an act neither confers nor restricts powers, rights, privileges or duties, and, strictly speaking, is no part of the act itself.”).

235. See *supra* text accompanying notes 11–12.

236. The Indiana Pi Bill, H.R. 246, 1897 Leg. (Ind. 1897).

237. “The true powers of a preamble are to expound powers conferred, and not to create them.” *White*, 8 So. at 564.

the scope would be to legislate over a domain greater than the statute; to narrow the scope would be to take away from the domain of the statute; either would be to legislate. Writers of treatises and judicial opinions reiterate: "The preamble to a statute can neither expand nor control the scope of application of the enacting clause . . . ." <sup>238</sup>

If the statute itself is clear, interpretation is at an end; no resort to preambles (or titles, captions, interpretation clauses or legislative history) is necessary. <sup>239</sup> But if it is not clear, if its application to the problem at hand is not obvious, then the preamble is often going to be a valuable source of indicia of legislative intent. <sup>240</sup> Thus Parry #11b, "[P]reambles may be consulted to determine the rationale, and thus the true construction of terms," is also generally accepted. <sup>241</sup> The difficulty, and the potential for a genuine clash between Thrust and Parry #11b, is that the unclarity that makes resort to "the rationale, and thus the true construction of terms" of a statute necessary, very commonly comes from

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238. *Huntworth*, 152 P. at 525 (quoting BLACK, *supra* note 24, § 84, at 253); see also 2 SUTHERLAND, *supra* note 11, § 341, at 652 (stating that the preamble is "not part of the law, in the legislative sense, and hence cannot enlarge the scope of the statute"); 25 R.C.L. *Statutes*, *supra* note 25, § 266, at 1030 (the preamble "cannot enlarge or confer powers").

239. See *supra* text accompanying notes 26 et seq.; Llewellyn, *Canons*, *supra* note 2, at 403.

240. See *supra* text accompanying notes 228 et seq.

241. *Price*, 173 U.S. at 427 (citations omitted):

Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions.

See also *White*, 8 So. at 564:

We deduce from these principles, prescribing the force and effect of the preamble of an act, the following proposition: If the legislative intent is clearly expressed in the preamble, and the body of the act is so constructed as to render its meaning and intent uncertain; and if the act admits of two constructions, one in accord with the intent clearly expressed in the preamble, and the other in conflict with it, courts should adopt that construction which harmonizes with the preamble.

See also *Gemmer v. State ex rel. Stephens*, 71 N.E. 478, 481 (Ind. 1904):

The preamble of a statute may be examined for the purpose of ascertaining the meaning or proper construction of the act, but a recital of the objects to be accomplished, however desirable and meritorious those objects may be, can not cure inherent defects in the act, nor render it valid if in conflict with the organic law of the state.

See also *Huntworth*, 152 P. at 525 ("When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to. Where the intent of the law is the object of inquiry, it is said that: A preamble 'discloses the intention of the Legislature in enacting the statute.'") (citations omitted); *City of Mobile*, 80 So. at 369-70 ("In cases of doubt in respect of an ambiguous legislative context, the preamble of an act must be resorted to to ascertain the intent and to resolve the doubt."); 25 R.C.L. *Statutes*, *supra* note 25, § 266, at 1030; 2 SUTHERLAND, *supra* note 11, § 341, at 654; BLACK, *supra* note 24, § 84, at 253; 59 C.J. *Statutes*, *supra* note 10, § 598, at 1004-05. But see *Yazoo*, 132 U.S. at 188:

But as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.

under-determinacy of a common noun phrase or predicate: To whom or what does it apply? That looks like a question of scope.<sup>242</sup>

Llewellyn's case in support of Thrust #11b, *Huntworth v. Tanner*, illustrates.<sup>243</sup> Huntworth ran an employment agency for school teachers, placing them in positions throughout the Pacific Northwest for an application fee of \$2 plus a placement fee of 5% of the teacher's first year's salary.<sup>244</sup> Washington State adopted by ballot initiative a prohibition on employment agencies' charging employees in "Initiative Measure No.8, popularly known as the Employment Agency Law."<sup>245</sup> The language of the operative prohibition was:

Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.<sup>246</sup>

Did "any person seeking employment" include school teachers? The preamble, by using the word "worker" rather than "any person," gave reason for doubt:

Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

The state of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.<sup>247</sup>

Thus the dispute: Plaintiff Huntworth, seeking to enjoin his prosecution, argued that section 2 did not reach school teachers; the Attorney General argued that "any person" was completely general and school teaching was employment. The

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242. Of course this is to conflate meaning and scope. But that is a very ordinary thing to do: In basic set theoretic semantics the meaning (intension) of a common noun phrase, intransitive verb phrase (or transitive verb plus object) or adjective is a function from possible worlds into sets. In law that would be a function taking the facts of a case in context (possible world) as argument and spitting out a set of persons or actions or the like as value; the question at issue will be framed as whether some party (the plaintiff or the defendant) or some particular interaction is one of those — that is, is in the scope of that noun phrase or predicate. M.B.W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L. REV. 373, 374–82 (1986).

243. 152 P. 523.

244. *Id.* at 524.

245. *Id.*

246. *Id.*

247. *Id.*

trial court agreed with the Attorney General and sustained his demurrer. The Washington Supreme Court disagreed; it gave Huntworth his injunction.<sup>248</sup>

But to disagree, the Washington Supreme Court had to allow the preamble's "worker" to restrain section 2's "any person," contrary to Thrust #11a. One way out was available: Despite its placement and its fitting the general definition of a preamble, section 1 was not a preamble.

While it may be true that the ballot title and section 1 are in a sense preambulatory, they nevertheless go further than to declare merely an evil and a purpose to correct it by legislation. . . .

. . . .  
. . . Under these rules section 1 is as much a part of the act as sections 2 and 3.<sup>249</sup>

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248. *Id.* at 530:

We conclude, therefore, that the acts of appellant and the business conducted by him are not within the terms or intendments of Initiative Measure No. 8, and that the court has jurisdiction to restrain the threatened prosecution. Whether the law is a proper exercise of the public power as to those falling within its terms we pass no opinion.

Reversed and remanded, with instructions to enter a perpetual injunction.

249. *Id.* at 525-26. Further:

It not only defines an evil and a purpose to correct it, but also recognizes and defines a certain class, "workers," as being the object of the law's solicitude, and, as a class, entitled to the protection of the police power. The preamble is not wholly descriptive. It is a declaration of a policy that is intended to advance the police power into a new field, and to bring within its protection a certain class of men, and to make a class amendable to it which has hitherto been unaffected by any law directed specially against it.

*Id.* at 526. These rules were a set of quotations about the nature and use of preambles, ending with an applicable paraphrase of Thrust #11b:

A "preamble" is, strictly speaking, matter that is descriptive of the purpose of the law, making general reference to its objects. It is:

A clause at the beginning of a Constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished.

A preamble is not without its uses. It is not to be entirely rejected where the statute is ambiguous, although it will not be resorted to to [sic] create a doubt or misunderstanding which otherwise does not exist. Where there is a doubt, it will be given its place as a component part of the act.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute.

When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to.

Where the intent of the law is the object of inquiry, it is said that:

A preamble discloses the intention of the Legislature in enacting the statute.

It is "a good means," says Lord Coke, to find out the meaning of the statute, and is a true key to open the understanding thereof.

Without multiplying authorities or discussing those cited, we think it may be laid down as a general rule that, if there is a broader proposition expressed in the act than is suggested in the preamble, the body or enacting part of the law will prevail over the preamble; but, if the body of the act can be given a construction that is consistent with the purpose as declared in the preamble, it will be so construed.

*Id.* at 525-26 (citations omitted).

In addition, section 1, the preamble *manque*, was voted on in the referendum and, significantly, within the scope of the performative matrix “Be it enacted by the people of the state of Washington.”<sup>250</sup>

The decision’s support for either Thrust or Parry #11b is *dictum* at best. One less devoted to the thaumaturgical power of words might have acknowledged that section 1 was a preamble and gave meaning to the enacting clause, section 2, thus better reflecting legislative intent. One hostile to judicial interpretation might well say, as the dissent did, that this was using the preamble as a key, a key to unlocking and greatly reducing the clear intent expressed in section 2.<sup>251</sup>

*Tripp v. Goff*, an early (and concise) decision from the Rhode Island Supreme Court, illustrates an effective use of a preamble to give content — and scope — to an under-determinate enacting clause.<sup>252</sup> The preamble was “Whereas it hath been represented unto this assembly, that certain low grounds in the compact part of the town of Providence are covered with stagnant water, to the great prejudice of the inhabitants in the vicinity of such places; for *remedy whereof*.”<sup>253</sup> The statute itself, however, referred only to “of any such place or places.”<sup>254</sup> The court used the preamble to give content and limitation to this statute’s scope:

The act is unintelligible without reference to the preamble, inasmuch as it provides for actions only in regard to any such place or places, clearly meaning any such place or places as are designated in the preamble . . . . The operation of an act is not to be restrained by the preamble where the meaning is clear, but where the meaning is ambiguous the preamble may be resorted to, to explain it. Here the preamble not only may be, but must be, resorted to, and we think that the statute must be construed as an act which simply gives a remedy for the evils mentioned in the preamble.<sup>255</sup>

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250. *Id.* at 524. Perhaps the best definition of “preamble” may be the functional “[l]anguage published along with the statute immediately preceding ‘Be it enacted that.’”

251. *Id.* at 530 (Main, J., dissenting):

I am unable to concur in the views expressed in the majority opinion. Section 2 of the act provides that it shall be unlawful for “any employment agent” to receive or demand from “any person” a fee for furnishing such person with employment. This language is so plain as not to call for construction. It is obvious that the appellant comes within the terms of the act. It is true that section 1 of the act, which is in the nature of a preamble, and declares the general policy of the state, uses the word “workers,” but to limit the meaning of the word “work” to those who perform physical labor is not sustained by the lexicographers defining the term, nor is it the common understanding of its meaning. The word “workers,” as used in section 1, even though given the limited meaning, should not modify the plain language used in the operative section of the statute.

252. 3 A. 591 (R.I. 1886).

253. *Id.* (emphasis added).

254. *Id.* at 592.

255. *Id.*



So much should not be in dispute; nor does it create a disparity between Thrust and Parry #11b.

**Resolution:**

If the statute is less than clear in application to the problem at hand, then the preamble, like the title, is a reliable and easily accessible aid in determining the intent of the legislature. Coming as it does along with the printed text of the statute actually enacted, and like the title presumably read by the legislators who read the statute, the preamble carries a presumptive reliability. The key problem is not the use of a preamble to solve a problem of statutory under-determinacy, but to create one. Using exogenous resources to create an under-determinacy in an otherwise clear statute is exactly what the Plain Meaning Rule, Thrust #12, prohibits. The Washington Supreme Court's opinion in *Huntworth v. Tanner* did precisely that, but having first finessed the issue by deciding the preamble was not a preamble.<sup>256</sup>

THRUST #11c: "[S]ection headings do not change language."

PARRY #11c: "[S]ection headings may be looked upon as part of the statute itself."<sup>257</sup>

Among the primary and secondary sources with which Llewellyn worked, the pickings on the subject of section captions are slim. There was certainly not enough reported litigation or commentator interest or consistency to produce a canon, let alone two. Llewellyn would have done better to have left captions out of Pair 11.

As it is, Thrust #11c is trivially true; only revisionary legislation can change a statute's language. Presumably, Llewellyn meant something like "its section heading does not change the meaning of a statute," although there is nothing in his cited sources suggesting anything like canonical status for this or similar language.

Section captions are distinguishable from the titles. Although the title of an act may be required by law and may also be a part of the act itself, section captions commonly are not. Often you will find at the beginning of a compilation a disclaimer to the effect that section captions have been inserted by the editors and are for convenience only and not part of the statute. For example, in Massachusetts: "The Section and subsection headings for Massachusetts General Laws Annotated have been editorially supplied."<sup>258</sup> It is also important that captions not count as titles so that they not come under constitutional "one subject" rules.<sup>259</sup>

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256. *Huntworth*, 152 P. at 525 ("A preamble is . . . not to be entirely rejected where the statute is ambiguous, although it will not be resorted to to create a doubt or misunderstanding which otherwise does not exist.").

257. Llewellyn, *Canons*, *supra* note 2, at 403.

258. MASS. GEN. LAWS ANN. ch. 13 (1996).

259. See *Tenn. Credit Clearing Co. v. Lindsey*, 35 S.W.2d 393 (Tenn. 1930) ("The subtitle of this paragraph of the revenue bill 'Collecting and/or Adjusting Agencies or Companies' does not restrict the contents of that paragraph, as would the constitutional caption of a statute. Nor do we think the subtitle is effective

Were captions conflated with titles, they would be required and would have the power to limit — in a sense to change — statutory meaning.<sup>260</sup>

In *Gully v. Jackson International Co.*, Llewellyn found a case that supported Parry #11c, although perhaps not directly.<sup>261</sup> Plaintiff was a tax collector, seeking a \$200 tax from the defendant, which sold tractors for agricultural purposes only. The tax statute read: “Sec. 171. Road Machinery Dealers. — Upon each person engaged in the business of selling tractors and/or road machinery, a state wide tax of \$200.00.”<sup>262</sup> Was “Road Machinery Dealers” a title, restricting the scope of the statute under Mississippi’s “one subject” law? Or was it merely a caption, for convenience of reference only? The Mississippi Supreme Court finessed the problem by creative Rumpelstiltskinism, recharacterizing such sub-headings as “lead lines,” thus “part of the statute itself.”<sup>263</sup> Thus the court could find that the legislature intended to tax only sales of road machinery, not agricultural tractors,<sup>264</sup> and the defendant did not have to pay the tax.<sup>265</sup> It’s thin support for Parry #11c, but, as I said, the pickings are slim.

Yet Llewellyn might have found the California Supreme Court’s straightforward statement that section captions are part of the statute itself in *Keyes v. Cyrus*:

The chapter is itself entitled: “Of the provision for the support of the family and of the homestead,” and the heading to article I of the chapter in which this particular section is found is: “Of the provision for the support of the family.” These headings are a portion of the statute, and may be examined for the purpose of determining the particular intent of the legislature with regard to the chapters in which they are placed.<sup>266</sup>

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to enlarge the scope of the paragraph.”) (citing *Seven Springs Water Co. v. Kennedy*, 299 S.W. 792 (Tenn. 1927)); *People ex rel. Watson v. Lamphier*, 172 N.Y.S. 247, 248 (N.Y. Special Term 1918) (“These headings or inscriptions are not titles of the acts in the sense which brings them within the rule that the title of an act cannot control the words contained in the body of the statute . . .”) (citations omitted).

260. See *supra* text accompanying notes 187–89.

261. 145 So. 905 (Miss. 1933).

262. *Id.* at 906 (citing section 171 of chapter 88, Laws 1930).

263. *Gully*, 145 So. at 906 (“We hold that these headings to the various sections of the privilege tax statute are not titles, nor subtitles in a strict sense; they are lead lines, and these lead lines are a part of the statute itself.”).

264. How did it deal with the “and/or”? The court, citing a holding of the Illinois Court of Appeals, agreed that “this symbol ‘and/or’ was not a part of the English language. Laws are to be strictly construed against the taxing power. The power cannot be implied. All doubts must be resolved in favor of the taxpayer.” *Gully*, 145 So. at 906–07 (citing *Tarjan v. Nat’l Surety Co.*, 268 Ill. App. 232 (Ill. App. Ct. 1932)).

265. *Gully*, 145 So. at 906.

266. 34 P. 722, 723 (Cal. 1893).

The caption helped the wife's homestead exemption to survive an attack by her late husband's creditor. New York's Court of Appeals similarly: "These headings or inscriptions . . . are rather parts of the statute itself limiting and defining its effect."<sup>267</sup>

The Missouri Supreme Court found the exact contrary in *State v. Maurer*:

The headings of chapters, articles or sections are not to be considered in construing our statutes; these *indicia* are mere arbitrary designations inserted for convenience of reference by clerks or revisers, who have no legislative authority, and are therefore powerless to lessen or expand the letter or meaning of the law.<sup>268</sup>

Llewellyn's cited secondary source<sup>269</sup> and the United States Supreme Court take a middle road, treating captions not as part of the statute, but as a resource, potentially useful in curing ambiguities and other uncertainties in their statutes. In *Knowlton v. Moore*, the 1899 Supreme Court used a caption to rebut one of the defendant taxpayer's arguments:

On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which describes what is taxed, not as the estates of deceased persons, but as "legacies and distributive shares of personal property." This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury.<sup>270</sup>

### ***Resolution:***

There is no uniformity of opinion or expression, nor even regularity of usage sufficient to support a canon on the interpretive role of section captions. Llewellyn must have been well aware of this as he made sure to eliminate uncertainty in the Uniform Commercial Code by including:

#### **Section 1-109. Section Captions**

Section Captions are part of this Act.

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267. *Watson*, 172 N.Y.S. at 248.

268. 164 S.W. 551, 552 (Mo. 1914) (emphasis added). One of the headings and statutes was: Sec. 650. *Imitation butter defined*. For the purpose of sections 650 to 662 of this article, every article, substitute or compound, other than that produced from pure milk, or cream from the same, made in the semblance of butter and designed to be used as a substitute for butter made from pure milk, or cream from the same, is hereby declared to be imitation butter.

*Id.* at 553 (emphasis added). Defendants were convicted of selling margarine as butter. *Id.* at 555.

269. 59 C.J. *Statutes*, *supra* note 10, § 599, at 1007 ("For the purpose of explaining and clearing up ambiguities in the enacting clauses of statutes, reference may also be had to the headings of portions of statutes, such as titles, articles, chapters, and sections.").

270. 178 U.S. 41, 65 (1899).

But even if Thrust and Parry #11c were accurate reflections of general judicial views, they would not be inconsistent. Of course a caption cannot change the meaning of a statute, even in those states in which it is held to be a part of the statute or a lead line to it. At most, a caption would be an interpretive resource; at least, it would be of no relevance at all, and appropriately so where captions have been inserted by a publisher's clerk.

*Interim assessment:*

The pattern of the first seven pairs continues in Pairs 8 through 12. Too often the formulae quoted have little if any claim to be canons. Too often the cited support fails. And again the duels fail to appear; quoted thrusts and parries are merely parts of more complex, less superficial generalities from treatises.

Pair 12 is the Plain Meaning Rule with one of its conditions separated out as the parry. Of course courts' attitudes to the Plain Meaning Rule have varied, at times completely disregarding it,<sup>271</sup> and sometimes being blindly, perhaps pig-headedly, reverential.<sup>272</sup> But to take one aspect of that variation and claim it to be in contradiction with another would be an anachronistic fallacy. So Llewellyn's Pair 12 fails to tell us anything useful.

Pairs 8, 9 and 10 are about legislated interpretive controls, but none of them should count as canons. At best, they are descriptions of particular situations, not of sufficiently regular occurrence to generate a uniformity of judicial decision. And what a mix up Llewellyn has made of them!

Both Thrust #8 and Parry #8 come from the same sentence in the case Llewellyn cites to illustrate Parry #8,<sup>273</sup> and even there it is *dictum*. It's not surprising: There is no serious problem of incompatibility here.

Pairs 9 and 10 are seriously mixed up. Pair 9 crams both definitions and rules of construction in together; is it likely that there'd be a canon on such a mixture? Insofar as it is about definitions, Pair 9 is not problematic; one can find cases presenting difficulties of overlapping intentions, but if there is a generality to be had, it is simply that a legislature's definition of a term controls its meaning within that act. Llewellyn's sources show nothing to the contrary; nor are his Thrust and Parry #9 more than superficially in conflict.

Thrust #9's "rules of construction" "canon" is repeated as Parry #10: Thrust #10, insofar as it purports to the contrary, is a variation on the "rules of construction" part of Parry #9. Who would have thought any of these canonical? Even reconstructing them in some sensible pattern does not generate anything more than a description of a variety of interpretive situations. In combination, and separately, Pairs 9 and 10 provide little in the way of duels. Nor do they suggest

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271. *Church of the Holy Trinity*, 143 U.S. at 457; *Am. Trucking*, 310 U.S. at 534.

272. *Caminetti*, 242 U.S. at 470.

273. *Coulter*, 201 P. at 120.

anything one might construe as genuinely canonical, although there is a good measure of interpretive common sense in the treatises and cases cited.

Pair 11 is a combination of comments on three different subjects: titles, preambles, and section captions. Obviously it is not a canon in any book of canons; canons do not combine subjects, especially with disparate advice. To have any chance at canonical status, the parts of Pair 11 would have to be unbundled. But when the first part, "Titles do not control meaning,"<sup>274</sup> is so blatantly unhelpful without some unpacking of "control," and seems blissfully unaware of the constitutional limitations on titles found in most states, one has no grounds for optimism. The second part, on preambles, shows no hint of a clash, even though there is much that can be said about the use of preambles in interpretation. And the third part, on captions, is simply under-researched: The thrust, if not a triviality, is wrong; the parry is also commonly held to be wrong. As of 1950 when Llewellyn did this work, there was no consensus on captions to be had. To be sure, one could find conflict in decisions, but so much conflict that any generality would be false. Llewellyn's *Canons* would have been better had Pair 11 been omitted.

One comes to suspect that underlying Llewellyn's compilation of formulae as canons is a quite common fallacy. Einer Elhauge expresses it well: "[W]here the meaning of a duly enacted statute is unclear, then judges have no choice but to make some decision about what default rule to choose to resolve that unclarity."<sup>275</sup> Wrong. The judge facing an issue under the unclear statute has "no choice but to decide" that issue. But she does not have to adopt some default rule and does not have the power to create a default rule. To say the reasoning by which the judge reaches a decision is equivalent to adopting a default rule is pure hypostatization, redundant, and misleading.<sup>276</sup> Only the rules of reasoning govern reasoning, and they come with no authority but themselves.

But if one were to formulate in a rule-like statement something a court has used in a decision, followers of this fallacy might call it a "rule," a "default rule," a "background norm or convention," an "off-the-rack gap filling rule," or perhaps even a "canon."<sup>277</sup> Were this the case, canons would be a very diluted resource, scarcely worth quoting.

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274. Llewellyn, *Canons*, *supra* note 2, at 403.

275. Elhauge, *supra* note 9, at 2104.

276. Nevertheless, some have argued for a rigidification, even a legislation of this process. *See, e.g.*, Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2003-04) (arguing for a restatement as an authoritative formulation of permissible rules of interpretation); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing for the adoption of statute-like rules of interpretation.); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000) (arguing every judge should adopt and follow a fixed set of interpretive rules).

277. *See supra* text accompanying notes 16-20.



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