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Daniel Farber[1] and Stephen Ross,[2] in separate contributions to this Symposium, raise the most crucial question in modern statutory interpretation, a question that exposes the profound triviality of the canons of statutory construction that Karl Llewellyn so effectively attacked.[3] Ross points out that the legislature can control, or at least attempt to control, the judicial use of the canons by the way it drafts the statute and by effective use of supplementary materials such as mark-ups, committee reports, and floor debates.[4] Farber, in his critique of formalism, demonstrates that formalist interpretation is an impediment to effective statutory drafting.[5] Inherent in both propositions is an emphasis on the process of statutory construction. This leads to the basic insight that a statute is not a received text, like the Bible or a Shakespearean play. It is a directive issued by the legislature. Statutes are the instrumentalities by which our primary policymaking institutions carry out their mission. They determine how our society is organized and, to a disturbingly large extent, whether it prospers or declines.

Courts are not the audience for a statute, cheering at its triumphs and groaning over its vicissitudes. They are not the statute's critics, weighing its aesthetic qualities and guiding us through its profundities of meaning. Rather, they are mechanisms for implementing statutes, and thus active participants in our modern scheme of statutory governance. The crucial question in statutory interpretation is how courts should fulfill this role, a question that can be answered only by a com-

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

2. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 Vand. L. Rev. 561 (1992).

3. 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).

4. Ross, 45 Vand. L. Rev. at part V (cited in note 2).

5. Farber, 45 Vand. L. Rev. at part III.B. (cited in note 1).

prehensive theory of policymaking and implementation in the modern administrative state.

Canons of statutory construction are premised on a mistaken notion of the judiciary's role. They presume that the courts are observers rather than participants, and that a statute is primarily a linguistic artifact, rather than a mechanism for allocating resources and deploying force. These misimpressions, serious even when the canons were first formulated, become fatal in the modern administrative state. As the instrumental, regulatory aspect of a statute becomes more pronounced, the decontextualized, linguistic approach that characterizes the canons becomes increasingly irrelevant.

A. The Character of Modern Statutes

The legislature is our dominant policymaking body, but it does not implement the policies it formulates; that task belongs to the executive and the judiciary. While we usually conceptualize this as the separation of powers doctrine, it is, in fact, a specialization of functions that the sheer size of modern government demands. As a result of this specialization, statutes are essentially the legislature's instructions to implementation mechanisms. They tell these mechanisms—courts and administrative agencies, for the most part—how to allocate resources, deploy state power, issue information, and organize their internal operations. For example, at the most basic level, a statute forbidding murder tells the police to arrest anyone suspected of the defined activity and instructs the courts to convict anyone proved to have committed it. A statute requiring banks to make funds deposited by customers in their checking accounts available to those customers within a given period of time tells bank regulators to impose sanctions on any bank that fails to observe the time limits.

This view of legislation was originally articulated by the legal positivists, most particularly Hans Kelsen. Kelsen argued that statutes are instructions to other governmental units, consisting entirely of rules for imposing sanctions rather than rules for proper conduct by the general citizenry.[6] On this point, he has been properly and persuasively attacked.[7] The value of Kelsen's approach, however, is obscured because he focused almost entirely on statutes that are enforced by the judiciary. In this traditional, nonadministrative context, Kelsen's approach is

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6. See Hans Kelsen, *General Theory of Law and State* 58-64 (Harvard, 1945). For a precursor, see Jeremy Bentham, *Of Laws in General* 140-44 (Athlone, H.L.A. Hart ed. 1970); for an elaboration, see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 70-112 (Clarendon, 2d ed. 1980).

7. See, e.g. H.L.A. Hart, *The Concept of Law* 35-41 (Oxford, 1961); Raz, *The Concept of a Legal System* at 85-91, 111-20 (cited in note 6).

at its weakest and is, in some sense, irrelevant. Nothing particular follows from treating a statute forbidding murder as an instruction to courts, rather than a rule of conduct for citizens, except a justification for other parts of Kelsen's theory.

The real significance of Kelsen's approach becomes apparent in a context that neither Kelsen nor most other jurisprudential writers have considered—the administrative state, that is, the world we actually inhabit. In this context, the directive theory of legislation offers important conceptual returns because many modern statutes consist exclusively of instructions to an administrative agency; they articulate no rules for private persons at all. Consider, for example, the Expedited Funds Availability Act of 1987,[8] which was designed to eliminate extended "hold" periods on funds deposited in checking accounts. The Act establishes an explicit availability schedule and requires banks to disclose that schedule to customers, but it clearly contemplates that an administrative agency, the Federal Reserve Board, will promulgate the implementing regulations. Many of its provisions do not even become operative until those regulations are promulgated.[9] In effect, the statutory requirements are instructions to the Federal Reserve Board stating the minimum content of its regulations. This point is emphasized by the relative size of the two promulgations; the Act's availability and disclosure rules are stated in eight admittedly long pages of the U.S. Code, but the implementing regulations occupy forty-five densely worded pages in the Code of Federal Regulations. Moreover, the Act contains additional provisions which are pure administrative instructions.[10] They state no rule of behavior whatsoever, but simply instruct the Federal Reserve to consider certain types of regulations or operational approaches.

Thus, the directive character of legislation can be regarded as a matter of degree. Some statutes, while admittedly operating as instructions to implementation mechanisms such as courts, contain explicit rules that apply to private persons as well. Other statutes, however, consist largely or exclusively of instructions to a governmental actor. I previously have referred to this feature of legislation as its degree of transitivity.[11] A transitive statute passes through its implementation mechanism and speaks directly to private persons; an intransitive stat-

8. Pub. L. No. 100-86, 101 Stat. 635 (1987), codified at 12 U.S.C. §§ 4001-4010 (1988).

9. 12 U.S.C. §§ 4002(b)(4), 4003, 4004, 4008 (1988).

10. It states, for example: "In order to improve the check processing system, the [Federal Reserve] Board shall consider (among other proposals) requiring, by regulation, that . . . (2) the Federal Reserve banks and depository institutions provide for check truncation." Id. § 4008(b).

11. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 Colum. L. Rev. 369, 380-85 (1989).

ute speaks exclusively to the implementation mechanism and instructs that mechanism to make the rules. Many statutes contain a mixture of provisions, which can be ranged on a continuum from the high transitivity of a simple criminal prohibition to the high intransitivity of the Expedited Funds Availability Act's recommendations to the Federal Reserve.

By and large, administrative rulemaking is the feature that distinguishes intransitive from transitive legislation. An intransitive statute instructs an agency to make rules rather than stating the applicable rules itself. Before the rise of the administrative state, when courts were the primary implementation mechanism, most statutes were highly transitive because courts did not possess rulemaking power. Meir Dan-Cohen has shown that even statutes addressed to courts are not fully transitive since courts have a more sophisticated understanding of rules than ordinary citizens.[12] High levels of intransitivity, however, are characteristic only of a modern state with administrative agencies that articulate the bulk of the operative governmental rules.

No theory of statutory interpretation can be coherent unless it recognizes basic features of our governmental scheme, such as the varying degrees of transitivity that modern statutes possess. To begin with, agency rulemaking under an intransitive statute can be regarded as a basic interpretation of that statute. But this is clearly a very different type of interpretation than the interpretation undertaken by a court. It occurs prospectively, rather than in response to a contested case; it generally requires independent fact finding by the agency and often envisions significant extension of the statutory requirements based upon the facts discovered; it allows much greater room for discretion and demands much greater detail. The difference between judicial adjudication and agency rulemaking is well known, of course; the important point is that both processes involve interpretation of a statute.

Even if we restrict ourselves to the judicial interpretation of statutes, the relative degrees of transitivity that characterize contemporary statutes will make an enormous difference. It is one thing for the court to interpret a statute that states transitive rules, applicable in terms to private persons. It is quite another thing for the court to interpret a statute that instructs an administrative agency to formulate the applicable rules. Two differences are particularly notable. First, the type of language that is appropriate for imposing obligations on private persons

12. Meir Dan-Cohen, *Decision Rules and Conduct Rules; On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984). The judge may understand a certain categorically stated rule as representing a complex doctrine of exceptions and qualifications, while the public perceives nothing but a blanket prohibition.

is quite distinct from the language appropriate for issuing instructions to a government agency. Second, the role of the court is different; in one case, it is the primary implementation mechanism, responsible for imposing the statutory obligations on private persons; in the other case, the court is evaluating the implementation strategy of a separate governmental unit and deciding whether that unit has exceeded the bounds of its instructions.

Perhaps someone could articulate an overarching theory of statutory interpretation that would apply to every type of statute, but such a grand generalization must be grounded on a thorough understanding of the various categories that it is designed to unify. To venture forth into the realm of general theory while oblivious to the differences that exist within the subject matter is a losing strategy. It is a method worthy of the ancient Greek physicists who concluded that all physical materials could be categorized as air, water, earth and fire, without any understanding of the differences between elementary particles and atoms, elements and compounds, or metals and nonmetals.

B. The Problem of Loose Canons

The fact that modern statutes are instructions to implementation mechanisms which operate within a larger scheme of governance indicates why the standard canons of statutory construction are generally useless and occasionally harmful. The canons are decontextualized; they are general statements about the interpretation of statutory language with no consideration of the different types of statutes or the different roles that courts play in relation to these statutes. They are loose canons, showing up at unpredictable times and rolling about in unpredictable directions. Worse than their unpredictability is their oppressive noise and the ever-present danger of explosion. They distract judges from the real task at hand—the determination of the statute's role, and their own role, in the complicated task of modern governance.

A statute's structural features, such as its degree of transitivity, will control the applicability of many standard canons of interpretation. One of the most familiar canons is *ejusdem generis*: "where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned."[13] Jonathan Macey and Geoffrey Miller, in their contribution to this Symposium,[14] give the example of the Labor-Management Reporting and Disclosure Act (LMRDA), which forbids unions to "fine, sus-

13. Llewellyn, 3 Vand. L. Rev. at 405 (cited in note 3).

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

pend, expel, or otherwise discipline" members for exercising certain labor-related rights.[15] In *Breininger v. Sheet Metal Workers*,[16] the issue was whether the union, by discriminating against the plaintiff in making job referrals through its hiring hall, was engaged in discipline forbidden by the Act. Applying the rule of *ejusdem generis*,[17] the Supreme Court held that "discipline" referred to sanctions authorized by the union, not "personal vendettas" by union officials.[18] Justice Stevens dissented from this holding, relying on the usage of the term "discipline" in prior Supreme Court cases.[19] This, of course, is another canon of statutory construction; as might be expected, it often leads in an opposite direction from *ejusdem generis*.

Both canons of statutory construction that the Justices invoked in *Breininger* are loose canons. They are incoherent without an understanding of the statute's position in our administrative structure. The initial questions to ask are what implementation mechanism is the legislature addressing and in what terms is that mechanism being addressed. These issues do not turn on legislative intent or any metaphysical assumptions about the thought processes of a collective body. They are determined by the structural features of the statute itself.

The LMRDA is addressed to both the courts and an administrative agency. Although the National Labor Relations Board has exclusive jurisdiction over certain labor issues, complainants may bring suits under the LMRDA directly in federal court. As a statute addressed to courts, the LMRDA is transitive; it states rules that are meant to be understood and applied by private persons. The LMRDA also is addressed to the Board, of course, but since the Board is notorious for relying on adjudication, not rulemaking—a fact well known to Congress when the Act was passed[20]—this does not alter its transitive character.

For a transitive statute, *ejusdem generis* is a sensible rule. Private parties need to know what conduct the statute proscribes, and a phrase forbidding unions to "otherwise discipline" a member is incomprehensibly vague unless it takes its meaning from a preceding list. The dissent's canon is much less preferable because judicial constructions of

15. 29 U.S.C. § 529 (1988); see also id. at § 411(a)(5).

16. 493 U.S. 67 (1989).

17. Id. at 92 (citing C. Dallas Sands, 2A *Statutes and Statutory Construction* § 47.17 (Callaghan, 4th ed. 1984)).

18. Id. at 94.

19. Id. at 96-98 (Stevens concurring in part and dissenting in part).

20. See, for example, Bernard Schwartz, *Administrative Law* 215-18 (Little, Brown, 3d ed. 1991); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 430-33 (1981).

the same term in widely different contexts are not particularly accessible to private parties who will tend to look to the statute for guidance.

If the same words were part of an intransitive statute—if they were instructing an administrative agency to promulgate a regulation—the mode of interpretation would be quite different. The concern with predictability would greatly diminish because the statutory language would not affect private parties until the agency had adopted the intervening regulation. Instructions to make rules can be stated much more loosely; more important, they can include an example that is intended to clarify the sort of rules that the agency is instructed to adopt without necessarily setting limits on the scope of those rules as they operate over time.[21] In other words, the legislation might tell the agency to make rules forbidding retaliatory discipline, mentioning fines as a dramatic example, without implying that the agency could reach only analogous behavior.

One could go through much of Llewellyn's battery of canons and illustrate how their relevance depends upon structural features of a statute such as transitivity. For example, it is much more important to give words their ordinary meaning in a transitive statute;[22] intransitive statutes can rely heavily on technical usages, particularly when the legislators know that such usages are familiar to the rulemaker. Similarly, the rule against implying unstated exceptions makes sense only for a transitive statute;[23] the power to make exceptions is an inherent feature of rulemaking, and a court should not construe a statute to deny a rulemaker that power unless the statute states an explicit prohibition.[24]

The plain meaning canon recently proposed by Frederick Schauer[25] is no better than the ones Llewellyn criticized. According to Schauer, plain meaning is the medium that enables him to "converse with an English speaker with whom I have nothing in common but our shared language."[26] While that is an empirically false assumption about the relationship of an American legislature and its citizens (it may be true for an American legislature and an English-speaking citizen of Pakistan) it

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21. See Rubin, 89 Colum. L. Rev. at 418-23 (cited in note 11).

22. Llewellyn, 3 Vand. L. Rev. at 404 (cited in note 3).

23. Id.

24. See Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 Duke L.J. 163. This is not meant to suggest that exceptions are always beneficial; in his study, Schuck points out their disadvantages as well as their advantages. The point is that exceptions, discretionary and "unruly" though they may be, are a basic administrative tool, one that any theory of statutory interpretation in a modern state should take into account.

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

26. Id. at 250.

is conceivably a useful device for construing transitive legislation.[27] With respect to intransitive legislation, however, it is not only empirically false, but genuinely disruptive of our governmental system. Far from being in the position of two people who share nothing but language, a legislature and the administrative agencies within the same jurisdiction are linked by an incredibly dense network of relationships and shared activities. A much better analogy than two English-speaking strangers would be two members of a single family. The legislature and the agencies spend their entire lives supporting, attacking, cajoling, commanding, resisting, annoying, deceiving, upsetting, consoling, protecting, correcting, and wounding each other. Like family members, they develop a shared and specialized set of linguistic understandings based on this continuous, intense relationship. To restrict them to the discourse of strangers would distort and constrain modern governmental processes.[28]

Llewellyn correctly stated that canons of statutory construction fail as decision rules because of their contradictory and indeterminate nature. He was partially correct to ascribe reliance on the canons to the need for post hoc rationalization and the desire to substitute recipes for judgment. But he overlooked the principal reason why the canons are indeterminate. Whatever the moral and intellectual failings of modern judges, the basic reason why the canons do not work is that they are stated in general terms and, thereby, ignore crucial differences in structure that characterize modern legislation. These differences always have been present but have become more pronounced in the modern administrative state. Statutes now speak to different kinds of government actors in a variety of different voices. They are instruments of governance,

27. Even so, it presents some serious problems. As Geoffrey P. Miller has suggested, the traditional canons of statutory interpretation can be related to the pragmatic analysis of ordinary conversation developed by Paul Grice. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179, 1194. The canon that words are to be construed according to their ordinary meaning, for example, corresponds to Grice's observation that speech acts generally are construed to avoid ambiguity and obscurity. H. P. Grice, *Studies in the Way of Words* (Harvard, 1989). Thus, even the canons, disconnected though they are from the realities of governmental structure, rest upon a context of shared cultural meanings. Schauer apparently is prepared to dispense with those and rely upon the language itself. He bases this on the institutional features of the judiciary, particularly their lack of expertise and lack of interest about the content of the statutory cases they decide. While this may be an excessively jaundiced view of judges, it is certainly limited to judges, and inapplicable to other types of government decisionmakers.

28. Of course, Schauer is writing only about judicial interpretation, not interpretation of a statute by an administrative agency. He does not distinguish, however, between judicial interpretation of transitive and intransitive statutes. Thus, his plain meaning rule would authorize judges to overrule agency interpretation because they have perceived the "plain meaning" of a statute that was addressed to, and interpreted by, an administrative agency. By authorizing a court to revise agency interpretation, Schauer's plain meaning rule is in fact a rule for agency interpretation of the statute.

not linguistic puzzles, and no coherent approach to their interpretation is possible until we understand their role, and the role of their interpreters, in our contemporary governmental system.

C. *Farber, Ross, and The Limits of Practical Reason*

Both Ross and Farber explore promising avenues for developing a more realistic approach to the interpretation of modern statutes. Both oppose judicial reliance on canons of statutory construction. Ross views the canons as a *sub rosa* device for political opposition to the legislature, while Farber characterizes them as an emanation of the formalist illusion that a set of coordinated rules can yield definitive and desirable judicial outcomes. In place of the canons, Ross recommends that legislatures communicate with the judiciary by producing more precise supplementary materials. He recognizes that no language can be completely canon-proof, but he suggests that published mark-ups, signed committee reports, and attributed floor statements would serve as ramparts against the canons' more antagonistic assaults on legislative intent.[29] Farber recommends that judges rely on practical reason, an overall "situation sense" that cannot be reduced to formulae or maxims.[30] He suggests that the legislature could communicate more effectively with judges who adopt that approach than with judges who declare their fealty to the canons.[31]

These insights are important, but both writers are limited by their lack of a conceptual framework for the modern governmental system. The devices Ross proposes for legislative communication with the judiciary are, by his own account, somewhat marginal to the legislative process. Yet that entire process is, in fact, a mode of communication with the judiciary and other implementation mechanisms. The qualitative distinction between statutory language and legislative history is an attribute of transitive legislation, that is, legislation drafted in a manner that allows for judicial enforcement. With intransitive legislation, legislation that instructs an agency to issue regulations, the distinction begins to disappear. The legislature can include declarations of intent, examples, explanations, and supplementary information in the statute itself. This might facilitate the agency's interpretation of the statute in its rules, and would certainly provide better information to the public, and better guidance for courts that review challenges to the rules' validity.

More significantly, the basic architecture of the statute itself can be

29. Ross, 45 Vand. L. Rev. at part V (cited in note 2).
30. Farber, 45 Vand. L. Rev. at part IV (cited in note 1).
31. Id. at part III.B.

regarded as a mode of communication, that is, a directive issued to the courts or agencies that enforce the legislation. This suggests that legislatures should become conscious of their choices and strive to develop a new methodology or vocabulary to effectuate those choices. The choice of implementation mechanism, the level of transitivity, the amount of detail, the use of examples, the instructions about enforcement strategy and compliance levels, and ultimately, the type of oversight that the legislature exercises are not simply supplementary features of the statute—they are the statute itself, particularly when the implementation mechanism is a modern administrative agency.

Farber urges judges to develop a situation sense, an expert's ability to grasp a complex set of relationships in their totality. But we need a comprehensive theory of that situation, a theory of modern governance that can be communicated to these judges. Once again, the goal is to enable a decisionmaker—here a judge—to become conscious of the choices being made and to develop a methodology to effectuate those choices. When interpreting statutes, judges should distinguish statutes enforced primarily by the judiciary from those enforced by an administrative agency and reviewed by the judiciary. In the latter case, moreover, they should be conscious of the various design features, like the statute's transitivity, that are characteristic of administratively enforced legislation. But Farber's article raises a philosophic issue that seems to oppose the effort to develop such a theory. Farber not only attacks formalism, with its enthusiasm for decision rules that are claimed to yield unambiguous results, but also foundationalism, and perhaps any general theory of the state.[32] In his view, analogical thinking, derived from previous experience, is a more reliable source of expertise than systematic theory. The implication of this view is that we should abandon the quest for a theory of the modern state and focus on methods by which decisionmakers can develop situational thinking.

Farber is almost certainly correct in looking to practical reason as a model of judicial thought processes. The point is a general one, but it is particularly applicable to American judges, who receive no special training for their role and have no comprehensive legal code upon which to rely. But as Farber acknowledges, focusing on practical reason may be "inconsistent with the academic mission."[33] His response is that this criticism applies only to "practical reason's critique of foundationalism as a preferred form of legal scholarship."[34] He continues: "Significant (or not) as this dispute may be, the subject at hand is how judges

32. Id. at part II.
33. Id. at part II.A.
34. Id.

should apply statutes, rather than how professors should write articles."[35]

The difficulty is not so easily dismissed, however, because Farber is a professor writing an article. His apparent purpose is to engage in a normative debate about the rules that judges should employ when they construe statutes. Farber argues against formalism and against the canons because they are unreliable guides to statutory interpretation; consequently, he must think that his own approach represents an improvement. This raises the question whether opposing foundationalism or noting the pragmatic tendencies of judges is an effective way for an academic to improve the decisionmaking process. Certainly, this position represents a start in a particular direction, but it seems insufficient, by itself, to fulfill the purpose of normative scholarship.

Farber's basic point is that judges should develop a sense of the situation; for him that constitutes the core of a practical reasoning approach to statutory construction. But a situation is not an object to be grasped, like a brass ring. It is the individual's relation to a social and professional context. To be guided by one's situation cannot mean only that one is immersed in that context, for everyone is so immersed. If that is all that one intended, then advising judges to be guided by their situation would be like advising them to breathe, or to think in their native language. Rather, the recommendation that judges should be guided by their situation must mean that they should become aware of their situation and should identify the salient features of their task.

The scholar's role in normative writing is to aid the decisionmaker's self-awareness, to enable that decisionmaker to grasp the salient features of the situation and respond to them in appropriate ways. This generally requires a theory. By means of a theory, the scholar can provide a cognizable conceptual shape to the decisionmaker's situation. A theory enables the decisionmaker to stand away from her situation—not to free herself from it, which is undesirable, and probably meaningless, but to regard it from a conceptual distance that fosters self-awareness and control. Such a theory is certainly not foundationalism; it does not constitute an effort to construct one's entire world from a few basic principles. It recognizes the situated nature of the individual and develops a comprehensive framework that will speak to people within the context they inhabit.

For example, the relative transitivity of legislation is a basic aspect of the judge's situation when she is construing modern legislation. Yet judges are generally unaware of this feature, although they may indeed possess a situation sense that enables them to avoid mistakes. A theory

35. Id.

of administrative legislation can illuminate features such as transitivity, enabling judges to recognize them and understand their implications in a more consistent, reliable way. It also enables judges to control their own reactions to this feature and decide the case according to consciously adopted normative positions.

The canons of statutory construction, which Farber properly condemns, illustrate the pitfalls of rules without theory, rather than of rules per se. They obscure real distinctions, focus attention on subsidiary issues and conceal or displace normative choices. Several of the contributors to this Symposium note this phenomenon. Eskridge and Frickey observe that the Supreme Court has developed a set of substantive canons of construction that it regularly invokes, rather than declaring an offending statute unconstitutional.[36] While they are generally sympathetic to this approach, they note that it tends to conceal the judge's normative choices from public scrutiny. Macey and Miller, in their contribution, view the canons as providing judges with a means of avoiding substantive judgments.[37] They view the canons as content-neutral, rather than content-obscuring, and point out that content-neutral judgments of this sort preclude social debate about the normative basis of social policy. Social theory, when properly developed, provides a conceptual tool for isolating, clarifying, and delineating normative debate.[38]

A theory of the modern administrative state should not be regarded as an all or nothing phenomenon. Rather, it is a developing awareness of the central and unique features of our current governmental scheme. As a more general, epistemological point, practical reason is certainly correct; all our thought processes, including our general theories, are products of our social context. This may deny us access to transcendental truth, but it promises the possibility of incremental theory. The theorist need not begin from first principles or the nullity of Cartesian doubt, but can build a conceptual structure through a critique and reinterpretation of existing understandings.

The opposite of theory is not practical reason but "mechanical jurisprudence," cookbook rules and loose canons of statutory construction. Practical reason, apart from its role as a description of judicial behavior, serves as a useful caution in the development of theory, a warning against flights of fancy in the name of knowledge, like Greek

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36. William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

37. Macey and Miller, 45 Vand. L. Rev. at part III (cited in note 14).

38. See also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407 (1989) (recommending a series of substantive canons based on constitutional and institutional concerns, in place of the preexisting linguistic canons).

physics. Ultimately, however, statutory interpretation requires a conceptual framework that identifies the basic governmental scheme in which the statute exists. This has always been the case, but it is especially true now, when the entire structure of our government has changed, and we must cope with a world that has become unfamiliar to us. Thus, Farber's practical reason is a correct point as a matter of general epistemology, and a useful caution at the level of political theory, but it is not enough, as an independent conceptual framework. To avoid being confused by the noise of loose canons, if not wounded by their unpredictable and undirected firings, we need a political theory of the modern state.