Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation

William N. Eskridge, Jr., *Dynamic Statutory Interpretation*. Cambridge, Mass.: Harvard University Press, 1994. Pp. ix, 438 [Cloth $49.95 (US)].

Reviewed by Paul Michell*

Introductiou

The process of statutory interpretation is the unsung workhorse of the law. All but ignored by the law schools, lacking the high profile of constitutional interpretation, the interpretation of statutes is, nevertheless, the most common task of the courts and administrative tribunals. Common, yes; but essential, too. For the modern regulatory state could not operate without a system of courts and tribunals to interpret and apply its legislative and executive commands. Almost all regulation is implemented by means of statute, and the legitimacy and function of the modern state rests, in large measure, upon the proper interpretation of those commands by courts and tribunals.[1]

In Canada, as in the United States, the twentieth century has witnessed an "orgy of statute making".[2] Most lawyers, however, have only a limited understanding of the undercurrents that guide statntory interpretation.[3] In the Common law world, legal education and, to a lesser degree, legal practice continue to focus upon the judicial decision as the archetypal building-block of the law.[4] Statutes are still viewed as intruders upon the purity of the Common law. Although statute law features prominently in law schools in courses on, among other subjects, taxation, labour,

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[1] See C.R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990).

[2] G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 95.

[3] See Proceedings of the Annual Meeting of the Administrative Law Section, Canadian Association of Law Teachers, 1986, "The Teaching of Legislation in Canadian Law Faculties" (1987) 11 Dalhousie L.J. 255.

[4] See: R.A. Posner, "Statutory Interpretation — in the Classroom and in the Courtroom" (1983) 50 U. Chi. L. Rev. 800, who notes that the academic study of legislation in the law schools is moribund; R.A. Posner, "Legislation and Its Interpretation: A Primer" (1989) 68 Neb. L. Rev. 431.

bankruptcy, intellectual property, immigration, and competition, little is said about statutes themselves or the legislative process that creates them.

Statutory interpretation gives rise to a host of intricate practical and theoretical problems, and for this reason it has been a perennial topic of legal theory. Interest in the subject ebbs and flows, but it has recently experienced something of a renaissance in the United States. In no small part, this has been due to the work of William Eskridge, Jr. of Georgetown University, who over the past decade has written a flurry of seminal articles on the subject.[5] His remarkable book *Dynamic Statutory Interpretation*[6] is the culmination of this work. Although the interpretation of statutes is one of the major tasks of modern courts and administrative tribunals, the subject in Canada has been confined largely to black-letter analysis. It was not always so. At one time, Canada was a centre of statutory interpretation scholarship.[7] It has not been so for many years; happily, however, this relegation of the subject to an ill-deserved obscurity may now be changing.[8]

A major difficulty is that statutory interpretation is a subject divided. This division speaks eloquently about the broader malaise that affects the relationship between the profession and the academy.[9] At one extreme are traditional approaches to statutory interpretation which tend towards the formalistic recitation of rules.[10] Some traditional texts, it is true, are quite sophisticated and nuanced

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[5] See *e.g.*: W.N. Eskridge, Jr., "Gadamer/Statutory Interpretation" (1990) 90 Colum. L. Rev. 609; W.N. Eskridge, Jr., "The New Textualism" (1990) 37 U.C.L.A. L. Rev. 621; W.N. Eskridge, Jr., "Legislative History Values" (1990) 66 Chi.-Kent L. Rev. 365.

[6] (Cambridge, Mass.: Harvard University Press, 1994).

[7] See *e.g.*: J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 Can. Bar Rev. 624; K. Davis, "Legislative History and the Wheat Board Case" (1953) 31 Can. Bar Rev. 1; D.G. Kilgour, "The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution?" (1952) 30 Can. Bar Rev. 769; J. Willis, "Statutory Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1; J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936) 1 U.T.L.J. 286; R.A. Macdonald, "On the Administration of Statutes" (1987) 12 Queen's L. J. 488.

[8] Important recent work includes: S.G. Requadt, "Worlds Apart on Words Apart: Re-examining the Doctrine of Shifting Purpose in Statutory Interpretation" (1993) 51 U.T. Fac. L. Rev. 331; R. Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 U.T. Fac. L. Rev. 136; H.W. MacLauchlan, "Approaches to Interpretation in Administrative Law" (1988) 1 Can. J. Admin. L. & Prac. 293; H.W. MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U.T.L.J. 343; E. Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to *St. Peter's*" (1985) 35 U.T.L.J. 113.

[9] See: R.A. Posner, ed., "The Triumphs and Travails of Legal Scholarship" in *Overcoming Law* (Cambridge, Mass.: Harvard University Press, 1995) 81; A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap Press, 1993) at 165-270; H.T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich. L. Rev. 34.

[10] See: S.G.C. Edgar, *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971); C.E. Odgers, *The Construction of Deeds and Statutes*, 5th ed. (London: Sweet & Maxwell, 1967); P. St.J. Langan, *Maxwell on The Interpretation of Statutes*, 12th ed. (London: Smith & Maxwell, 1969).

and reveal a great deal of learning.[11] For the most part, however, they are resolutely non-theoretical and, thus, prone to accusations of being merely "black-letter law". They treat the subject as a mere set of rules. A generation ago, texts on statutory interpretation adhered to this framework, collecting judicial *dicta* and expounding hoary Latin maxims. The formalist influence is still strong: new texts continue to be burdened with its legacy.[12]

Many texts of this traditional school are edited by practitioners, both because there is a demand from practicing lawyers and judges for guidance when engaging in statutory interpretation, and because few academics are attracted to the subject. They are very much practitioners' works, reflecting Common lawyers' pronounced distrust of theory. The absence of academic interest may be part of a general phenomenon: fewer traditional textbooks of any kind are being produced in the law schools as a new generation of academics displays little interest in expounding doctrine and sets its sights on interdisciplinary and theoretical pursuits.[13] Statutory interpretation is, however, especially burdened; historically, the very integrity of the discipline has been subjected to stinging attacks, verging on ridicule, from proponents of the legal-realism school.[14]

At the other extreme, an influential school of legal theory has in recent years propounded the view that law is an essentially interpretive activity. Deriving insights from literary criticism and linguistic philosophy, Ronald Dworkin has developed a theory of law out of a theory of adjudication. The idea that interpretation is a central element of the judicial role is an essential feature of Dworkin's jurisprudence.[15] Although Dworkin's claim has proven controversial, its impact has been revolutionary. Nonetheless, the output of the interpretation movement has proven too abstract for use by legal practitioners, and its devotees have rarely addressed the concrete cases that make up the subject matter of statutory interpretation. Law reviews are replete with articles on interpretation, although so much activity is now lumped under the rubric of "interpretation" that the term has been

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[11] See the wonderfully idiosyncratic F.A.R. Bennion, *Statutory Interpretation*, 2d ed. (London: Butterworths, 1992).

[12] See D.J. Gifford, K.H. Gifford, & M.I. Jeffery, *How to Understand Statutes and By-Laws* (Scarborough, Ont.: Carswell, 1996).

[13] See M.A. Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus & Giroux, 1994) at 199-253.

[14] See *e.g.*: K.N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed" (1950) 3 Vand. L. Rev. 395; M. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863 at 881.

[15] See: R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) at 1-38; R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

stretched out of shape and has lost any specificity and, thus, utility that it might once have possessed.[16]

It is regrettable that there has not been more contact between these two poles; the subject has certainly suffered because of it. Indeed, just as it is difficult to see how constitutional law and constitutional theory can be separated, statutory interpretation will remain opaque without a strong theoretical grounding. The editors of more recent editions of traditional texts have come to realize that they ignore theoretical considerations at their peril.[17] Without an account of what courts and legislatures actually do and what they should do, a text on statutory interpretation is mere mechanics. Indeed, it is worse, because it perpetuates the false notion that the interpretation of statutes is merely a matter of grammar and logic, somehow apolitical and uncontroversial. The rule-bound approach to statutory interpretation, long favoured by Canadian courts, constitutes an unconscious adoption of a positive political theory. The task of revising traditional texts cannot be accomplished merely by bolting a chapter on jurisprudence or theory onto an existing structure. On the contrary, a sophisticated theoretical perspective must infuse and inform the rules themselves, how they are explained and how they are addressed.[18] Our political and legal institutions are incarnations of particular political and legal theories, and they cannot be fully understood until these theories are explored.[19]

It is one of the great strengths of *Dynamic Statutory Interpretation* that its author is well versed in both of the two solitudes of his subject. Eskridge reveals a deep understanding of the philosophical controversies that drive the modern debates over statutory interpretation and make the subject relevant to a contemporary audience. He also addresses the details and craftsman's art of legislation and interpretation, and he is unafraid to grapple with the leading cases. Eskridge argues in favour of what he calls a "dynamic" theory of statutory interpretation. By this, he means that the interpretation of a statutory provision by a court or a tribunal need not necessarily be one which the legislature that enacted the statute would have approved. Because dynamic statutory interpretation is essentially non-originalist, it is important to understand originalism, thereby defining dynamic statutory interpretation by what it is not. The book's thesis was first advanced, albeit in a less ambi-

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[16] See: D. Patterson, "The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory" (1993) 72 Tex. L. Rev. 1; M.S. Moore, "Interpreting Interpretation" in A. Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press, 1995) 1.

[17] See: J. Bell & G. Engle, *Cross[:] Statutory Interpretation*, 3d ed. (London: Butterworths, 1995); R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994); P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Qué.: Yvon Blais, 1991).

[18] Good recent examples are: D.R. Miers & A.C. Page, *Legislation*, 2d ed. (London: Sweet & Maxwell, 1990); J. Evans, *Statutory Interpretation: Problems of Communication* (Auckland: Oxford University Press, 1989).

[19] See M.J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Belknap Press, 1996) at ix.

tious form, in an article now almost a decade old.[20] In *Dynamic Statutory Interpretation*, Eskridge makes the broader claim that his thesis is not limited to a normative claim about what courts and tribunals should do but is, in fact, an accurate empirical description about how they *do* act. But how successful is his theory?

The plan of the book is simple enough, a structure which belies the book's deeper complexities. Part I is largely descriptive. Eskridge begins with an attack on originalism, the theory that claims legislation should be interpreted by reference to the original intent of the legislators at the time of its enactment. This is followed by an explanation of the main features of Eskridge's theory of dynamic statutory interpretation. Eskridge then applies his theory to a meticulous study of statutory interpretation decisions in labour injunction cases in the United States's federal courts from the end of the Civil War to the dawning of the New Deal. These labour injunction cases illustrate Eskridge's thesis that statutory interpretation is a battleground for broader political and legal struggles.

In Part II, Eskridge establishes a normative foundation for his descriptive account of statutory interpretation. He evaluates the desirability of his theory from the perspective of three leading schools of legal and political thought: liberal social-contract theory; legal process theory; and various forms of normativist theory. His conclusion is that although dynamic statutory interpretation contains important elements of all three theoretical perspectives and is immanent in each of them, support for his theory of dynamic statutory interpretation is best provided by a normative political theory he identifies as "critical pragmatism". Eskridge sketches an outline of critical pragmatism, but he makes no pretence to a full exposition. In Part III, Eskridge applies his theory — now buttressed with normative support — to concrete cases in order to illuminate some key doctrinal controversies in statutory-interpretation jurisprudence. Though the specific cases and immediate concerns are from the United States, the issues addressed re-occur across the Common law world.

Throughout, Eskridge also pursues a supplementary theme: the uniqueness and importance of statutory interpretation as a distinct area of law. *Dynamic Statutory Interpretation* is a sophisticated and nuanced study of a field which for too long has been relegated to secondary status. To truly make sense of legislation, students of statutory interpretation must understand how the legislature functions and have a theoretical account of that functioning. This is Eskridge's second sense of the term "dynamic": it describes the relationship between the courts and tribunals as interpreters and the legislature, which — in cases without a constitutional dimension — possesses the power to override the legal interpretations of the former. Obviously, legislatures also play a central role in constitutional cases, but legislative ability to

[20] See W.N. Eskridge, "Dynamic Statutory Interpretation" (1987) 135 U. Pa. L. Rev. 1479 [hereinafter "Interpretation"].

override judicial decisions is attenuated in the absence of a constitutional amendment.[21]

I. Theories of Statutory Interpretation

Defining the scope of the statutory interpretation debate requires consideration of a number of factors. Any theory of statutory interpretation must take into account the hierarchical nature of a legal system. The doctrine of parliamentary supremacy is of central importance; legislatures set out norms of general application in the form of statutes and regulations, and courts and administrative tribunals apply these norms to specific factual situations. The commands of the legislature bind courts and tribunals in two ways. First, they determine the processes by which the court or tribunal will come to its decision. Second, they govern the substantive decision at which the court or tribunal will arrive through the interpretation of statutes and their application to a particular case.

This latter statement is qualified, because in reality, the legislature can never *entirely* determine the substantive result in the individual case by way of a general command. Some degree of discretion or interpretive leeway always remains with the interpreter; this is a function of the nature of language. As a result, interpretive decisions are always subject to a certain indeterminacy, which has been the focal point for debate between competing theories of statutory interpretation.[22] Also, in the modern regulatory state, an increasing amount of legislation is framed broadly to provide courts and tribunals with a degree of flexibility in applying legislation to a wide variety of circumstances.[23] Statutory interpretation is the process by which adjudicative bodies, in applying general norms to individual cases, create law. Courts and tribunals interpret statutes in order to determine how the command of the legislature should govern a particular person or transaction. Indeed, prospective legislation necessarily entails authoritative interpreters to apply general commands to specific cases.

Yet precisely because of its law-making function, statutory interpretation in a democracy faces an acute challenge of legitimacy. In constitutional law, most attempts to establish the legitimacy of judicial review do so on the basis that courts actually enhance democracy,[24] rather than detracting from democratic constitutional-

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[21] On the "conversation" or "dialogue" that takes place between courts and legislatures in constitutional cases, see P.W. Hogg, "The Charter Dialogue Between Courts and Legislatures" *Law Times* (29 January - 4 February 1996) 10.

[22] See H. Kelsen, *Introduction to the Problems of Legal Theory*, trans. B.L. Paulson & S.L. Paulson (Oxford: Clarendon Press, 1992) c. 6.

[23] See *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 640-41, 93 D.L.R. (4th) 36.

[24] See: J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980); D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990). For a more skeptical view, see C.P. Manfredi, *Judi-*

ism. This is often accomplished by intervening to ensure that disadvantaged individuals and groups are not excluded from the political process. Does a similar argument also apply, however, to statutory as opposed to constitutional interpretation? What are the practical implications? In statutory interpretation, the debate over these issues is most heated in administrative law and, in particular, regarding judicial review of the statutory interpretation decisions of administrative tribunals.[25] This is unsurprising, given that administrative law is concerned with the regulation of the relationship between the individual and the state. That relationship is overwhelmingly governed by statute, such that judicial review is really only a specialized branch of statutory interpretation.[26]

A. The "Plain Meaning" Approach and Ambiguity

The watershed which distinguishes theories of statutory interpretation is the proper role to be ascribed to legislative intent. In Canada, as elsewhere in the Common law world, the traditional approach to statutory interpretation is to look at the "plain meaning" of statutory language. Where the plain meaning is clear, no resort to other indicia of legislative intent is required, because that intent is presumed to be reflected in the statutory language.[27] Indeed, it is said that the plain meaning must be applied even where it leads to absurd results.[28] In the vast majority of cases, the process of statutory interpretation is invisible because the plain meaning is incontrovertible. The plain meaning of a statute is not, however, always evident. Moreover, cases involving ambiguous statutory provisions are those which are litigated; plain meaning does not resolve hard cases.

Considerable controversy surrounds the question of what a court or tribunal should do when faced with ambiguous statutory language, and the statute is open to more than one plausible interpretation. Most traditional authorities suggest that courts should look to the legislative intent or purpose underlying it.[29] Of course, the declaration that a statute is "ambiguous" cannot be separated from the interpreter's

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cial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (Toronto: McClelland & Stewart, 1993).

[25] See: J.M. Evans, H.N. Janisch & D.J. Mullan, *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995) c. 9; *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [hereinafter cited to S.C.R.]: "The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal" (*ibid.* at 589).

[26] See *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048 at 1087-88, 95 N.R. 161 [reference omitted].

[27] See *R.* v. *Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at 630, 58 C.C.C. (3d) 257 [hereinafter *Multiform* cited to S.C.R.].

[28] See *R.* v. *McIntosh*, [1995] 1 S.C.R. 686 at 703, 95 C.C.C. (3d) 481 [hereinafter *McIntosh*]. Ambiguity is distinct from absurdity. Where plain meaning leads to absurdity (but not ambiguity) it must be applied; however, where plain meaning is ambiguous, then a meaning which is not absurd is preferred.

[29] See: *Willick* v. *Willick*, [1994] 3 S.C.R. 670 at 699, 119 D.L.R. (4th) 405; *Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 554 at 581, 100 D.L.R. (4th) 658; *Multiform*, *supra* note 27 at 630.

substantive views. We do not decide that a statute is ambiguous and then decide to look behind the statute to get a "proper" interpretation from legislative intention. A finding of "ambiguity" is often an interpretive conclusion, rather than an assertion that interpretation is required.[30]

Controversial or "hard" cases of statutory interpretation are those where a statute is amenable to several possible interpretations. A statute may be ambiguous either by inadvertence (because the legislature did not contemplate the concrete situation now before the court or tribunal) or by design (because the legislature deliberately left open an interpretive question in order to forestall controversy or to ensure that passage of a statute would not be stalled by disagreements over interpretation). Gaps and uncertainties are invariably present in statutes, and when statutes are applied to concrete factual situations, the need to interpret statutes so as to address these gaps becomes pressing. In this way, statutory interpretation is said to be dynamic because statutes evolve as they are applied to factual situations unanticipated by the enacting legislators.[31] Statutory ambiguity leads to gaps in the law. As time passes and the legislature that enacted the statute recedes into history, new statutes are passed, old ones are repealed, and society evolves. New gaps may emerge and existing ones may yawn.

B. Eskridge's Critique of Originalism

Originalism is a leading school of statutory interpretation, although it has become a bit of a straw man of late. Broadly speaking, the originalist thesis suggests that where the language of a statute is unclear, judges should attempt to recreate the legislative attitudes that prevailed at the time the statute was enacted and apply them to the present problem. The court's role is to determine whether the legislature intended a particular situation to be governed by a statute and, if so, to apply that statute to the case at hand. A law may prove unpopular, or lead to strange results; but it is the legislature, and not the courts, which must correct it. Similarly, if a statute has become out of touch with social conditions, it is not the job of the courts to remedy the disparity. Originalism assumes that the legislature sets a statute's meaning in stone upon its enactment, so that it is immune from subsequent developments.

Originalism's main attraction is its apparent grounding in democracy. Indeed, originalist accounts of statutory interpretation tend to begin with a theory of democratic legitimacy and then proceed to explain how a particular variant of originalist statutory interpretation inevitably follows. Proponents of originalism argue that a court must give priority to the interpretive views of democratically-elected (and,

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[30] See T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) at 91. See the dissent of McLachlin J. in *McIntosh*, *supra* note 28, finding the statutory provision, which the majority held to be unambiguous but leading to an absurdity, to be ambiguous and, thus, to be interpreted in such a way as to avoid an absurd result.

[31] See *Dynamic Statutory Interpretation*, *supra* note 6 at 52.

thus, accountable) legislators. The separation of powers doctrine stipulates that only certain institutions (legislatures) are authorised to enact laws, and the institutions that enforce or implement laws (courts or administrative tribunals) must fulfil the legislative will, so long as it complies with constitutional requirements. If the legislative intent behind the statute is not readily apparent, the court must search for that intent through other evidence, usually — but perhaps not limited to — legislative history. The great allure of originalism is its promise that current interpretations can be proven to have a democratic pedigree by tracing them back to past legislative majorities. Upon closer analysis, however, the evidentiary and methodological barriers to the originalist project are frequently insurmountable.

Eskridge argues against originalism on both descriptive and normative grounds. First, he claims that courts and tribunals simply do not decide statutory interpretation cases according to originalist theories. He also contends that beyond its empirical inaccuracy, originalism rests upon a normatively undesirable account of political morality. More broadly, Eskridge wants to free statutory interpretation from the "archeological" paradigm, the idea that statutory interpretation is an exercise in retrieval and recovery.[32] Statutory interpretation, while not oblivious to the past, must be forward-looking and contemporary. The archeological paradigm implies that meaning is fixed, and that courts should act as mere agents of past legislatures. Dynamic accounts, by contrast, contend that the bare-agency analogy is inaccurate.

Originalism is a broad church, and the term lumps together different theories which are best examined independently. Eskridge identifies and criticizes three strains of originalism: intentionalism, purposivism, and textualism.

1. Intentionalism

Intentionalism demands that interpreters discover or replicate the original intent of the enacting legislature and use this intent to interpret the statute before them. Proponents of this theory contend that it is the original intention of the legislature which should govern as the "true law", and a judge should use the statute to retrieve that intent. Legislative intent is primary: the statute is only a piece of evidence leading the court back to the legislature's intent. Ideally, supporters of intentionalism would prefer judges to have direct access to the legislative intent without the need for the intermediate step of the statute. As this is impossible, they accept the statute as a necessary step in the process of retrieving the legislature's original intent. Yet, is retrieving the legislature's original intent really the objective endeavour that originalists suggest? Eskridge contends that although intentionalism has a long history and some prominent contemporary supporters, it cannot explain the actual practice of courts.

The intentionalist variant of originalism runs aground on several shoals. First, it has long been argued that the actual intent of the legislature is a fiction, due to the

[32] See J. Raz, "Interpretation Without Retrieval" in Marmor, ed., *supra* note 16, 155.

problematic nature of attributing intention to a collective.[33] Statutes, as the "end product" of the legislative process, are dependent upon a number of extrinsic factors and may have little or nothing to do with the intentions of the individual legislators. Assuming that there is something called "legislative intention", how would it be determined? Where the meaning of a statute is unclear, some resort to legislative history is probably inevitable.[34] It must be done with care, however, because the dangers of unconstrained recourse to legislative intention are legion.[35] Legislative history provides notoriously malleable evidence of legislative intent.

Second, there is the question of whether the subjective intentions of individual legislators should be accorded any weight in interpreting a statute. Few individual legislators have more than a general intent in voting for a bill and may not have turned their minds to the effect of specific provisions. Even where there is specific intent concerning individual provisions of a statute, it is rarely recorded. Where it is recorded, it may be unreliable as an indicator of actual intent, because it may merely evidence strategic behaviour. Individual legislators may vote for a provision for any number of reasons, many of which will be unconnected to the actual content of the provision; that a majority of legislators voted in favour of a bill tells us little about their intent. Where legislation is passed by a bicameral legislature, problems of determining intent are further compounded. Actual intent is a by-product of agenda setting, strategic behaviour, and problems of aggregation. As such, it is rarely reliable.

Given the difficulties of retrieving original intent, intentionalists may be forced to rely upon conventional intent, that is, presumed conventions about legislative intent.[36] Conventional intent assumes that what a leading figure (authoritative

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[33] See: R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 38; Radin, *supra* note 14 at 881.

[34] See *Pepper* v. *Hart* (1992), [1993] A.C. 593, [1992] 3 W.L.R. 1033 (H.L.) [hereinafter *Pepper* cited to A.C.]. The Canadian position as to the admissibility of legislative history in statutory interpretation cases is less clear (see G. Bale, "Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process" (1995) 74 Can. Bar Rev. 1). *R.* v. *Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 [hereinafter *Heywood* cited to S.C.R.], concerned the allegedly unconstitutional degree of vagueness in the loitering "near a school ground, playground, public park or bathing area" offenee under the *Criminal Code*, R.S.C. 1985, c. C-46, s. 179(1)(b). Cory J., writing for the majority, expressed doubt that legislative debates (and legislative history more generally) are admissible to determine legislative intent in statutory construction. In the end, the point did not fall to be decided, but Cory J. conceded that legislative history may be admissible in order to demonstrate the mischief that Parliament intended to remedy with the legislation. Cory J. explained the Court's reluctance to admit legislative debates or history as evidence of legislative intent on the basis of two arguments. First, legislative debates or history are evidence of the intent only of those particular members of the legislature making comments, not of the legislature as a whole. Second, Cory J. noted: "[T]he political nature of Parliamentary debates brings into question the reliability of the statements made" (*Heywood, ibid.* at 788).

[35] See G.C. MacCallum, "Legislative Intent" in R.S. Summers, ed., *Essays in Legal Philosophy* (Oxford: Blackwell, 1968) 237 at 239.

[36] See J.M. Landis, "A Note on 'Statutory Interpretation'" (1930) 43 Harv. L. Rev. 886.

speakers, committee chairs, and government ministers) said about a statute is an accurate reflection of what the legislature as a whole intended, unless there is evidence otherwise. Once such a rule attains the status of a convention, it will then influence legislative behaviour. Legislators will know that if they wish to indicate intent other than that set out by the leading speaker, they must influence what that speaker says or find some other way to make their voices heard. Reliance upon conventional intent may minimize vote-counting and preference aggregation problems associated with actual intent, but it does not eliminate the problems arising from strategic behaviour. There is no accurate way for a court or tribunal to determine whether an authoritative speaker on a statutory provision was engaging in strategic behaviour or actually speaking his or her mind. Opponents of bills are likely to exaggerate their controversial features; but even supporters cannot always be relied upon to present their actual intent in speeches or reports in the legislature.

A final variant of intentionalism relies upon imaginative reconstruction of the original intent of the enacting legislature. Judge Learned Hand was often said to be the exemplar of this approach.[37] The goal is to attempt to recreate what the original legislature would have intended had it turned its mind to the question at issue. Courts may take into account the values and attitudes present when the statute was enacted, but they must also make allowances for present circumstances. According to the theory's modern standard-bearer, Judge Richard Posner, courts should attempt an imaginative reconstruction of how the legislature "would have wanted the statute applied to the case".[38] Judge Posner analogizes the judge's role to that of a platoon commander cut off from his or her superiors. The theory, however, neglects to provide an account of the values relevant to statutory interpretation. The most damning argument against imaginative reconstruction is that it is far more imaginative than reconstructive.[39] The exercise of posing counter-factual questions to past legislators is cloaked with an air of unreality. At the very least, the hypothetical nature of the exercise casts doubt upon the originalists' stated goal of tying current interpretations to past legislative majorities.

2. Purposivism

The second variant of originalism, purposivism, argues that a court or tribunal should begin the process of statutory interpretation with an examination of the pur-

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[37] See *e.g. Guiseppi* v. *Walling*, 144 F.2d 608, 155 A.L.R. 761 (2d Cir. 1944) [hereinafter *Guiseppi* cited to F.2d]:

> As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by far the most decisive evidence of what they would have done, they are by no means final (*Guiseppi, ibid.* at 624).

See also A. Cox, "Judge Learned Hand and the Interpretation of Statutes" (1947) 60 Harv. L. Rev. 370.

[38] R.A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge, Mass.: Harvard University Press, 1985) at 287.

[39] See *Dynamic Statutory Interpretation, supra* note 6 at 23.

pose of a statute and, then, choose a particular interpretation as being most congruent to that purpose.[40] Purpose is distinct from intent. The focus is less upon specific intent and more upon broader purposes. The virtue of purposivism, most famously set out by Hart and Sacks,[41] is that it attempts to preserve the democratic pedigree element of intentionalism, while allowing statues to evolve and respond to changing conditions. Law is a purposive activity, the goal of which is to address social problems. Accordingly, all statutes have a purpose, and the court's role is to find it.

A key difficulty with purposivism is that it assumes that in most cases there *was* a purpose. Yet purposivist accounts must resort to fictions, such as an attributed purpose, and it becomes easy for courts to reach any result they desire, unconstrained by statutory language. In cases in which the legislature did not anticipate the issue now under adjudication, the court cannot actually know the legislature's purpose. In Eskridge's view, purposivism is susceptible to many of the same objections that hound intentionalism. Most damning is its inability to deliver on its promise of locating a determinate legislative majority to support a particular interpretation in hard cases, because in those cases purposivism provides no neutral way to identify the purpose of a statute.[42] Intentionalism cannot pose neutral counterfactual questions; purposivism can ask nothing but the most general questions, which will yield indeterminate answers.[43]

Ironically, the search for legislative purpose may itself be inconsistent with the separation of powers. Recourse to legislative history as evidence of legislative purpose places a degree of interpretive power in the hands of judges that may be incompatible with their role in a democracy. Courts must show deference to properly-constituted legislative commands. Allowing courts to look behind the words of a statute and explore committee reports, Hansard, and other sources of legislative history may empower them with a degree of discretion and law-making power that cannot be reconciled with their institutional role. Such sources should only be relied upon with great caution and the limits of their reliability made clear. At the same time, as statutory language is often ambiguous, courts and tribunals will necessarily exercise discretion in their interpretations. It is difficult to see how reliance upon obvious indications of legislative intent should be ignored. Generally, however, legislative history should be viewed with a healthy degree of scepticism.

A parallel concern is that the rules of legislation must constrain legislatures. The sources of law should be predictable, transparent, and stable. Statute law must

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[40] See F. Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 Colum. L. Rev. 527.

[41] See H.M. Hart, Jr. & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Tentative ed. (Cambridge, Mass.: Harvard University, 1958) at 1411.

[42] See *Dynamic Statutory Interpretation*, *supra* note 6 at 29.

[43] See *ibid.* at 30. There are also ancillary complaints relating to purposivism's sacrifice of important values in its pursuit of a democratic basis for a given interpretation (see *ibid.* at 26).

be created only through compliance with certain procedural requirements.[44] Only certain materials qualify as statute law, that is, a written indication of the intention of the legislature to enact. If courts are permitted to look behind the words of a statutory text and search for legislative intention or purpose, laws may be enacted through strategic "winks and nudges" by members of the legislature as opposed to properly enacted written statutes. This subverts predictability and accountability and undermines the rule of law.

3. Textualism

The final variant of originalism is textualism, which is an approach to legislative intent that is strongly critical of both intentionalism and purposivism and gives priority to the statute itself rather than going behind it in search of legislative intent. In other words, the statute is *not* merely evidence of legislative intent but must be the focus of interpretive efforts. Textualism does not seek the legislature's meaning, but the meaning of the statutory language it used. Textualism, thus, rejects the concept of legislative purpose and downplays extrinsic evidence of intent or context in statutory interpretation. Rather, textualists rely upon so-called "canons of construction", a default set of assumptions about how the legislature uses language, grammar, punctuation, and structure.

Textualism has become ascendant in the United States, largely due to the efforts of Supreme Court Justice Antonin Scalia and his erstwhile University of Chicago counterpart, Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, although it has few defenders in academia. In its most recent incarnation, textualism is grounded in public choice theory, which argues that legislators react to economic incentives and do not act as a deliberative body in the public interest. To the contrary, legislation embodies "deals" between rent-seeking interest groups and legislators. Regulators and legislatures are susceptible to "capture". Textualism places clear limits on legislative power, by refusing to condone judicial gap-filling. It rejects an expansive conception of the interpretive process which would allow courts to go beyond their institutional role and legislate under the guise of interpretation. Courts must follow legislative commands (within constitutional limits), so far as they go; but they must do no more.

This insight, if correct, has profound implications for statutory interpretation because it undermines the traditional view that there can be a coherent legislative purpose. On the contrary, it suggests that statutes are merely the product of an unstructured, chaotic legislative process and bear little relationship to the individual intentions of legislators. As legislative intent is incoherent, courts must rely upon the wording of the statute alone. Courts cannot construct an original meaning be-

[44] See *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, 2 Lloyd's Rep. 446 (H.L.) [hereinafter *Black-Clawson* cited to A.C.]: "Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed" (*ibid.* at 638, Lord Reid).

cause it is often simply non-existent (or if it did exist, courts could not determine it with any accuracy).[45] The meaning of a statute should, thus, be determined, as much as possible, on the basis of the ordinary meaning of statutory language.[46] Textualists complain that dynamic approaches to interpretation give insufficient weight to such rule-of-law values as stability, predictability, and uniformity.

Textualists are sceptical as to the reliability of legislative history and the predilection of courts to find support for any particular interpretation by reference to it. Textualists contend that legislative intent simply means that the majority of legislators voted in favour of a statutory text. Much emphasis is placed upon the "structural" view of a statute, namely, that the statute must be read as a whole. Textualists appeal to rule-of-law values in two senses. First, by referring only to the statutory text, textualism is the sole theory that establishes a coherent connection between present interpretations and past legislative majorities, a concern that unites all variants of originalism. Current values should be confined to electoral politics. Second, by precluding reference to all but the statutory text, textualists maintain that the law is made more accessible to the average citizen, who — it is said — can determine the law simply by reading the relevant statutory provision.[47] Opponents argue that textualists assume a higher degree of care went into producing the legislative product than empirical evidence (and textualists' own claims of legislative chaos) indicate.

Textualism rests upon an admittedly bleak conception of the legislative process. Is it an accurate one? There is conflicting evidence that legislatures suffer from the instability and incoherence sketched by public choice theorists. Statutes often seem to be the result of purposive activity rather than random output. Indeed, there is no reason to despair that legislation is the result of debate, the clash of interests, and compromise.[48] Thus, if legislation is not overwhelmingly the result of special-interest lobbying, and the legislative process is not hopelessly incoherent, the conclusions of public choice theory no longer follow. Even if one accepts the premises of public choice theory — that interest groups dominate the legislative process, and that legislative intent is incoherent or non-existent — it could be argued that the proper response of the courts should be to construct a public-interest intent. By interpreting legislation according to a more benign public interest, courts might ame-

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[45] See: F. Easterbrook, "Statutes' Domains" (1983) 50 U. Chi. L. Rev. 533 at 547; F. Easterbrook, "The Role of Original Intent in Statutory Interpretation" (1988) 11 Harv. J.L. & Pub. Pol'y 59.

[46] See A. Scalia, "Originalism: The Lesser Evil" (1989) 57 U. Cin. L. Rev. 849.

[47] Appreciation of these values is not limited to the United States (see Lord Oliver of Aylmerton, "A Judicial View of Modern Legislation" [1993] Stat. L. Rev. 1 at 2). See also Lord Oliver of Aylmerton's reluctance to admit evidence of legislative history in *Pepper*, *supra* note 34 at 619-21.

[48] See *Black-Clawson*, *supra* note 44: "In essence, drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves" (*ibid.* at 651, Lord Simon of Glaisdale).

liorate some of the negative effects identified by public choice theory.[49] Kent Roach has recently argued that public choice theory provides an unhelpful model for the interpretation of limitation period statutes, because it is devoid of normative content and its prescriptions are indeterminate.[50]

II. Features of Dynamic Theories

The central doctrinal battle today is between textualism and dynamic theories. Dynamic accounts of statutory interpretation — of which Dworkin's is perhaps the leading example — use the metaphor of the statute as a living document.[51] Instead of attempting to discern the original intent of a statutory text and tying present interpretations to a past legislative majority, dynamic accounts contend that statutory interpretation is a dynamic process.[52] The meaning of and interpretations ascribed to a statute may (Eskridge would say *must*), and usually do, evolve over time. A judge interpreting a statute may consider events and values that have come into play subsequent to the statute's enactment. Current meanings and understandings should be used to interpret past legislative enactments and to give effect to original legislative intentions. Dynamic statutory interpretation views statutes as the first stage in a larger process of law-creation, which encompasses legislation, private interpretation, interpretation by administrative tribunals, litigation, judicial review by courts, and, perhaps, amendment or other legislative response. Courts play an important role in the process: they update statutes in response to changing conditions and the responses of other participants in the law-making process.

Dworkin's chain-novel analogy — the idea that judges, like authors writing a chain novel, simultaneously possess great discretion even as they are bound by the constraints of form, coherence, and integrity — suggests that judges must continue as well as possible the "story" begun by the legislature.[53] The goal is to produce a

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[49] See: E.R. Elhauge, "Does Interest Group Theory Justify More Intrusive Judicial Review?" (1991) 101 Yale L.J. 31; J.R. Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model" (1986) 86 Colum. L. Rev. 223.

[50] See K. Roach, "The Problems of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall L.J. 721.

[51] Parenthetically, the relationship between Dworkin's theory and Eskridge's is an issue that receives little attention in *Dynamic Statutory Interpretation*. Although at one point Eskridge emphasizes the differences separating his theory from Dworkin's (see *Dynamic Statutory Interpretation*, *supra* note 6 at 146-48), there are great similarities between the two, and it is surprising that he does not undertake a more sustained effort to bring himself out from Dworkin's shadow. The two approaches may be distinguished. First, Eskridge espouses critical pragmatism, which Dworkin does not share. Second, Eskridge views Dworkin's theory of "law as integrity" as too romantic (see *ibid.* at 148). Third, Eskridge believes that statutory interpretation must be grounded in a political theory of the modern regulatory state (see *ibid.* at 149).

[52] Other leading dynamic approaches are: T.A. Aleinikoff, "Updating Statutory Interpretation" (1988) 87 Mich. L. Rev. 20; G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982).

[53] See *Law's Empire*, *supra* note 15 at 313.

coherent text which is faithful to the existing story while adapting to new conditions. The law on this account emerges from a perpetual process of correction and revision as social and political circumstances change. Judges do not possess unbridled discretion: they are constrained by the legal and political history of their community. Yet at the same time, they are free to interpret that tradition to reflect their own vision of the community's political morality.[54] Interpretations will depend partly on what appears in the legislative history and partly on judges' own notions of the best answers to specific political questions related to the community's principles of political morality. A statute is best viewed as a principle upon which to base further reasoning rather than as a fixed rule. As conditions and attitudes change, a statute's meaning evolves.

III. The Theoretical Foundation of Eskridge's Approach

Behind every approach to statutory interpretation lurks a jurisprudential theory. In Part II, Eskridge explores liberal theory, legal process theory, and normative theory in order to establish a theoretical grounding for his approach to statutory interpretation. More precisely, he views dynamic statutory interpretation as inevitable, and he canvasses these three theoretical perspectives in order to demonstrate that dynamic statutory interpretation is at once consonant and in tension with all three. The two main objections to a dynamic theory of statutory interpretation are that it does not have democratic legitimacy, and that it leads to a degree of uncertainty that is incompatible with rule-of-law values. To a certain extent, Eskridge avoids these points by arguing that "there is no consensus in our polity as to the precise value and implications of democratic theory and the rule of law,"[55] although his statement is probably accurate. True to his critical pragmatic approach, Eskridge does not claim to have unearthed a grand theory to buttress his account of statutory interpretation. Rather, he contends that something may be learned from each theoretical approach, and that the exercise reveals as much about the scope of democratic legitimacy and the rule of law as it does about the interpretation of statutes.

A. Three Leading Theoretical Approaches

1. Liberal Anglo-American Social-Contract Theory

Liberal Anglo-American social-contract theory emphasizes the consensual, contractual nature of the liberal state. Liberals emphasize the need for laws to be determinate and tied to democratic majorities. Because of this, one might think that liberalism would be inimical to dynamic statutory interpretation. Eskridge argues, however, that these dynamic approaches are consistent with liberal premises. Early liberals, including Blackstone and many of the framers of the United States Constitution, advocated an approach to statutory interpretation that is recognizably dy-

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[54] See *ibid.* at 256.

[55] *Dynamic Statutory Interpretation*, *supra* note 6 at 108.

namic.[56] Eskridge also claims that a complex approach to legislative intention reveals its content-based origins: the doctrine of legislative supremacy means that statutory interpretation must be linked to past legislative majorities because only then can the people be said to have bound themselves to a course of action through legislation.

In Eskridge's view, a number of other imaginative approaches to statutory interpretation are entirely consistent with a dynamic, evolutive approach and, indeed, can only be explained by it. These approaches include analogizing statutes to long-term relational contracts, or suggesting that courts should apply statutes in the same way that they operate the *cy-près* doctrine in charities law, or applying agency theory, or, finally, analogizing statutory interpretation to translation. Eskridge claims the analogy that best describes the role of the interpreter of statutes is the "relational agent", according to which an interpreter should be regarded as being under a long-term obligation to exercise his or her best efforts to accomplish an objective. The various liberal analogies indicate that a dynamic theory of statutory interpretation is essential when changed circumstances render the legislature's assumptions about a statute obsolete. Courts should have the freedom to adapt statutes to new conditions.[57] Alternatively, courts can adopt default rules of interpretation which allocate the burden of interpretive uncertainty in accordance with liberal principles.[58] A number of liberal interpretive precepts emerge: presumptions against the extension of statutes to cover private relations (over-enforcement); presumptions in favour of continuity over change in legal obligations; and presumptions favouring the protection of reliance interests. In this way, liberalism provides normative support for a dynamic theory of statutory interpretation.

2. Legal Process Theories

Legal process theories place emphasis upon interdependence, community, and deliberation. They are more receptive to dynamic approaches to statutory interpretation but are concerned that the political and moral choices inherent in statutory interpretation be made by the most appropriate and legitimate institution. The best substantive results are likely those reached through the appropriate process because on the legal process view, process is intimately tied to legitimacy. The legal process school is particularly hospitable to a dynamic approach to statutory interpretation, on the basis that statutes should be interpreted to carry out their public purposes and values over time. Legal process proponents also emphasize the value of coherence and integrity in the law. A legal process theory of statutory interpretation would serve its substantive goals by: presuming in favour of public interests; avoiding interpretations that lead to unreasonable results; presuming against the political exclusion of minorities and disadvantaged groups; and minimizing rent-seeking and

[56] See *ibid.* at 116-17.
[57] See *ibid.* at 130.
[58] See *ibid.* at 135.

capture by narrow interest groups. Interpretation should take place against a coherent background of public values.

Legal process theorists' main objections to dynamic approaches to statutory interpretation are related to the counter-majoritarian problem and the relative institutional competence problem. The counter-majoritarian problem stems from legal process theorists' reluctance to allow unelected courts and tribunals to make law. Eskridge argues that interpretation is more like a partnership between courts, legislatures, and other participants. He also disputes the force of the counter-majoritarian argument by suggesting that: the legislature can always override curial interpretations that it dislikes; interpretive presumptions in favour of the public interest are majoritarian; and, in the end, important facets of liberal-democratic government are not majoritarian so that perhaps statutory interpretation need not be either.

Legal process theories also emphasize the issue of institutional competence, which arises most often in the context of administrative law. If statutes are to be interpreted dynamically, who should do the interpreting? A deferential standard of judicial review of decisions by expert administrative tribunals is prevalent in the United States. Legal process theory welcomes interpretive leeway for tribunals but is also concerned that the courts maintain jurisdictional control. A similar pair of concerns is evident in the tortured development of the appropriate standard of judicial review in Canada, where the courts have resiled from the prospect of showing as much deference to administrative tribunals (at least as a general rule) as those in the United States show to theirs.[59] Eskridge demonstrates that legal process theories support dynamic approaches to statutory interpretation, and like liberal theories, neither is able to prevent courts and administrative tribunals from making law in hard cases.

3. Normative Theories

Unlike liberal and legal process approaches, normative theories emphasize the importance of substantive rather than procedural justice. According to them — Eskridge surveys a wide range of theories, including natural law theories, feminist and republican approaches, postmodernism, and deconstruction — the best theory of statutory interpretation is that which leads to the best substantive results. Natural law theories offer accounts of the relationship between law and morality but fare badly outside a homogeneous culture, where they face the pressures of normative pluralism.[60] Feminist republicanism shares natural law's concern to arrive at the "right" answer but is sceptical of its own ability to do so. Republicanism suggests that the state exists to allow individuals to flourish through self-government. Each of these theories has attractive facets, but Eskridge views each one as inadequate as a normative foundation for a theory of statutory interpretation.

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[59] For further discussion of this point, see Evans, Janisch & Mullan, *supra* note 25.

[60] *Dynamic Statutory Interpretation*, *supra* note 6.

B. Critical Pragmatism and the Dynamic Theory

Eskridge bases his dynamic theory of statutory interpretation in the critical pragmatic philosophical tradition of the United States. Briefly, this tradition, with its Aristotelian roots, emphasizes practical reasoning and wisdom, experimentation, and approaching a problem from different angles in order to reach the best solution.[61] At the core of this approach is a healthy scepticism about all theoretical approaches and a measure of uncertainty as to whether the answer chosen is the correct one. At the same time, however, critical pragmatism is concerned to get the job done, not to equivocate or temporize. Seen from this perspective, the essential problem of statutory interpretation is to apply a general, abstract statutory provision to a concrete factual situation. Circumstances often arise which the enacting legislators did not or could not have contemplated. Interpreters, on this account, must do what works best, by reference to the "web of beliefs" that surround a statute.[62] Inelegant, perhaps; but does the theory work?

Eskridge's variant of critical pragmatism rests upon insights derived from a diverse selection of theoretical perspectives, the recognition of one's own limitations, and a mild relativism. It is a theory which in some ways purports not to be a theory at all but, rather, promotes a smorgasbord account of statutory interpretation by which the best features of other theoretical perspectives may be selected without adopting the world-views that support them. Eskridge embraces the hermeneutic insight that interpretation is relative, in the sense that it is strongly influenced by the perspective of the interpreter, and the interpreter and legislator may not share the same interpretive horizon. He accepts that the interpreter's point of view is both situated and critical.[63] But for Eskridge, temporal distance and differences in interpretive horizon can be a source of strength in statutory interpretation, not a weakness. Eskridge meets the charges of relativism by arguing that interpretive horizons are necessarily the products of history and convention; they are not merely idiosyncratic and subjective.[64] Interpretation is a process by which reader and text reach a "common understanding".[65] Eskridge is resolutely postmodern in his outlook and frank in his self-assessment:

> I cannot offer a normative theory of dynamic statutory interpretation that satisfies traditional rule of law or democratic criteria, for the criteria are themselves elusive in a postmodern world. I can only offer a theory derived from what I see as a normatively desirable conception of our polity. The theory, critical

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[61] See *ibid.* at 50. Pragmatism is explored in greater detail in: R.A. Posner, ed., "Introduction: Pragmatism, Economics, Liberalism" in *Overcoming Law*, *supra* note 9, 1; R.A. Posner, ed., "So What *Has* Pragmatism to Offer Law?" in *Overcoming Law*, *ibid.*, 387.

[62] *Dynamic Statutory Interpretation*, *ibid.* at 55.

[63] See *ibid.* at 237.

[64] See: *ibid.* at 196; S. Fish, *Is There A Text in This Class?* (Cambridge, Mass.: Harvard University Press, 1980).

[65] *Dynamic Statutory Interpretation*, *ibid.* at 5.

> pragmatism, is one that I think will be attractive to others. ... Statutory interpretation should be pragmatic, in that the interpreter has a responsibility to take practice seriously and to consider the consequences of different interpretive choices.[66]

C. *A Critical Look at Eskridge's Theoretical Foundation*

Many will find Eskridge's postmodernism strangely ethereal, a pastiche of ideas concealing the lack of a core. It is accommodating but so fluid that its elements are difficult to isolate. It will certainly be unsatisfying to those seeking a more muscular theory to provide constraints or guideposts for judges engaging in statutory interpretation. Perhaps it is best, as Professor Evans and others suggest, to think of statutory interpretation as being like riding a bicycle: it is an everyday task that becomes impossible if one thinks about it too much.[67] Pragmatism is neither relativism nor a lack of concrete ideas. Ambiguity does not entail that no interpretations are better than others, or that some interpretations cannot be demonstrated to be more reasonable than others. Pragmatism's focus on getting the job done, rather than theorizing about how to get it done, however, frustrates attempts to construct a theory of pragmatism. Although Eskridge suggests appropriate presumptions, canons of construction, and interpretive regimes, he does not make explicit the political theory that underlies his suggestions, and the reader is left to construct such a theory from the evidence which Eskridge scatters throughout his book. Judges, unlike bicycle riders, however, must provide reasons for their decisions, and if they are to adopt a method of statutory interpretation, then it must have defensible theoretical underpinnings.

Eskridge argues for an approach to statutory interpretation according to which courts would be more explicit in articulating the presumptions upon which they make statutory interpretation decisions.[68] Courts should interpret ambiguous provisions in such a way as to favour individual rights, protect disadvantaged groups, ensure that public-interest statutes are not "eroded" by interest groups, construe special-interest statutes narrowly, and allow statutes to change and evolve over time.[69] Statutes should be interpreted to be consistent with other statutes. Close cases should be decided against stronger political interests and in favour of those who have poorer access to the political process, because stronger political interests are more likely to be able to return to the legislative arena to resolve ambiguous statutory provisions in their favour.[70] He does not address the difficulties that may arise when these values conflict — as they must — in hard cases. If Eskridge's lesson is that one's approach to statutory interpretation flows inevitably from an account of political morality (and he convincingly demonstrates this to be the case),

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[66] *Ibid.* at 175-76.

[67] See Evans, Janisch & Mullan, *supra* note 25 at 680.

[68] See *Dynamic Statutory Interpretation*, *supra* note 6 at 238.

[69] *Ibid.* at 149.

[70] See *ibid.* at 294.

then it is, perhaps, surprising that he does not provide a more solid grounding for his own views on the subject. But that would be a very different book, of which statutory interpretation might form only a small part.

Eskridge makes the interesting claim that the process of statutory interpretation, as conventionally viewed, places undue emphasis upon interpretive decisions by superior courts. Regrettably, the theory is somewhat underdeveloped, but it certainly suggests new vistas for research. In Eskridge's view, the true pressure for change and evolution in statutory interpretation comes from below, where most interpretive decisions are made. New interpretations are developed by private litigants, tribunal interpretations, interest groups, and lower courts. Superior courts are presented with the opportunity to consider new interpretive decisions only through the framework provided by these lower decision-making bodies. Statutory interpretation is best viewed from the bottom up, not the top down. The sheer volume of cases means that not all can be appealed, so superior courts are unable to revisit all of the statutory interpretation decisions that might interest them.

Moreover, in the statutory interpretation process, the legislature is at the top of the hierarchy, not the courts. Any decision of the courts can (at least theoretically) be overturned by legislation, a constraint that also influences statutory interpretation.[71] There are two distinct insights to this thesis. First, the evolution of statutory interpretation is driven by social, cultural, and political developments rather than by developments in formal legal reasoning; the process is political and dynamic.[72] Second, statutory interpretation at all levels is a game of anticipated response, in which a preferred interpretation is always constrained by how the interpreter perceives what bodies further up in the hierarchy may do. Statutory interpretation decisions are made with one eye on the legislature.

Dynamic accounts reveal that the originalist separation of powers argument is self-refuting. Originalists argue that the legislature, and not the courts, should make the determination that a statute no longer fits contemporary society's understandings or needs. As many originalists themselves acknowledge, however, this argument must itself rely upon a theory of legal authority.[73] Taking the originalist claim that a theory of statutory interpretation must be derived from a theory of legal and political authority at face value, one may challenge the originalist account of statutory interpretation by attacking its underlying foundations.[74] In short, how far into the future can a past legislature's acts be said to bind its successors? Cannot reasonable limits be placed upon past legislative authority? If so, then courts could possibly make this determination. At the very least, the argument that democratic considerations undermine the claims of courts to interpret statutes in light of present circumstances must also subvert the legitimacy of obsolescent statutes. The legiti-

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[71] See *ibid.* at 69-71.

[72] See *ibid.* at 72-73.

[73] See A. Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 1992) at 176-80.

[74] See L.E. Feldman, "Originalism Through Raz-Colored Glasses" (1992) 140 U. Pa. L. Rev. 1389.

macy of courts to make such interpretations rests in their competence and sense of self-restraint in its exercise.

Dynamic accounts acknowledge legislative supremacy by conceding that when a clear statutory text and legislative history suggest an interpretation, it should be adopted despite subsequent social and legal developments. Where there is ambiguity, however, (admittedly, itself a loaded interpretive question), dynamic accounts insist that judges should construct an interpretation "that is most consonant with our current web of beliefs and policies surrounding the statute".[75] This suggests that the legislators who passed the statute intended that when the statute would be applied years later, it should be interpreted to reflect the attitudes prevalent at the time of application. Indeed, even if this contention is mistaken, so that the enacting legislators would actually have preferred that future interpretations accord with their (original) legislative intent, dynamic theories claim that society would benefit if they pretended otherwise. Thus it might be argued that dynamic accounts may be justified as an interpretive process consistent even with an (admittedly broad) intention of the enacting legislature. On this view, even dynamic accounts can be seen as a form of originalism.

Eskridge accepts some of the insights of public choice theory, particularly its insistence that a theory of statutory interpretation must be based upon an appreciation of how the legislature actually functions. It is difficult to enact statutes given the demands upon the legislature's time and attention. As a result, those that are enacted tend to last for a long time. Eskridge certainly cannot be accused of naïveté about the legislative process. This, however, leads him to a very different conclusion about the proper role of the courts and tribunals than that of the public choice theorists. Eskridge argues that adoption of a number of interpretive principles would ameliorate the process difficulties identified by public choice theorists.

A fuller picture of Eskridge's "critical pragmatism" emerges from an examination of these prescriptions. He suggests:

> In close cases the legal process interpreter ought to consider, as a tie-breaker, which party or group representing its interests will have effective access to the legislative process if it loses its case, and to decide the case against the party (if any) with significantly more effective access.[76]

Eskridge recognizes the progeny of public choice theory: scarcity, rent-seeking, decentralization of the legislative process, problems of coordination and leadership, and procedural obstacles. To counteract these forces, Eskridge advocates that "interpreters should update laws that generally distribute benefits and costs, but should approach concentrated benefit statutes more stingily."[77] Similarly, statutory

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[75] "Interpretation", *supra* note 20 at 1483.

[76] *Dynamic Statutory Interpretation*, *supra* note 6 at 153.

[77] *Ibid.* at 158 [footnote omitted].

interpreters "should presume against a construction that hurts groups marginalized by the political process".[78]

For Eskridge, the legislature's preoccupation with competing claims on its attention means that courts and tribunals should not merely confine themselves to looking at the bare text of statutes, but should engage in a process of statutory evolution. It is for this reason that Eskridge regards dynamic statutory interpretation as not only desirable, but also inevitable.[79] Public choice theory's emphasis on the indeterminacy of legislative practice proves too much. Eskridge argues that many of the public choice insights (majority cycling in voting, agenda setting, strategic behaviour, and so on) can also be said to undermine the textualist claim itself. Textualism's insight is a scepticism about the legislative process, and the recognition that statutes are often the result of compromise and bargains. As well, textualism takes texts and the process of interpretation seriously, which is also a welcome development.

More than this, Eskridge contends that textualism suffers from many of the same ailments that undermine other variants of originalism. Like them, textualism cannot always demonstrate a clear link between a particular interpretation and majority preferences. It does not lead to determinate answers in hard cases, and it is an inaccurate account of what courts actually do. Textualism's contention that the meaning of a statutory text can be determined by reference to the ordinary meaning of words, grammatical and syntactical conventions, and canons of construction is far more controversial than its supporters allow. Context is essential to understanding the meaning of a text: yet, textualists do not make sufficient allowance for this.

Nevertheless, some theorists may seriously underestimate the importance of the actual wording of a statute. Judge Henry J. Friendly recalls that when Justice Frankfurter was a professor at Harvard Law School, he told his students that there were three steps to statutory interpretation: (1) read the statute; (2) read the statute; and (3) read the statute.[80] An exaggeration, perhaps. Yet in many cases, a close reading of the text of the statute is all that is required. One of the major motivating factors of textualism is a concern that in an increasingly diverse polity there is a need for a common language of statutory interpretation. Textualism may in the end fail to achieve its goals, in large measure because it may assume (erroneously) the existence of agreement upon conventions, canons, and presumptions where there is no such agreement. The goal being sought, however, is still worthwhile.

Eskridge also underrates the practical difficulties involved in adopting the interpretive approach he advocates. He has little sympathy for the desire of judges to base their statutory interpretation decisions upon something that at least appears to be more objective and substantial than anything on Eskridge's menu. Textualism

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[78] *Ibid.* at 159-60.

[79] See *ibid.* at 10.

[80] See H.J. Friendly, *Benchmarks* (Chicago: University of Chicago Press, 1967) at 202.

appeals to this judicial instinct. Finally, Eskridge also underestimates the controversial nature of his own proposals. Textualists argue that there is simply no consensus as to the interpretive values that should replace textualism, so that we should preserve our existing, if flawed, techniques.[81] But Eskridge makes no claim to neutrality, and a central lesson of *Dynamic Statutory Interpretation* is that neutral rules of statutory interpretation are illusory. Just as many political theorists of a liberal hue have argued that a more robust form of liberalism is desirable, without the illusion of neutrality, perhaps the same phenomenon is emerging in the statutory interpretation debates.[82]

Even if one were to concede that Eskridge's proposal can be demonstrated to be theoretically more desirable than the alternatives (itself a highly controversial proposition), this proposal would likely face prohibitive difficulties in implementation, although Eskridge argues that dynamic statutory interpretation is *already* in place, because it best describes what courts actually do. A strong argument can thus be made for a plain-meaning textualism as a "second-best" approach to statutory interpretation. A diverse polity requires a common interpretive paradigm for its legislation, so that a large number of interpreters can reach determinate and reasonably consistent results. Textualism, though admittedly flawed, may be the best agreement that can be expected.[83] This is not to suggest that a plain-meaning textualism is value free; context is still essential. The real question, often overlooked, is: Given that textualism is flawed, are there any viable alternatives? Sensitivity to the imperfections of a plain-meaning approach is highly desirable, and it may be the most important practical result of the extensive academic criticism which had been levelled at textualism. Context requires a degree of expertise, which it is unrealistic to expect in judges who are generalists. Textualism may be imperfect, but to a certain degree it works, and with awareness of its flaws, it can work better.

IV. Statutory Interpretation and Doctrinal Debates

Having grappled with establishing a normative basis for dynamic statutory interpretation, Eskridge descends from the eyries of theory and enters the battlefield of doctrine. In Part III of *Dynamic Statutory Interpretation*, he revisits the theoretical debate canvassed in Part II and undertakes an exploration of the historical development of statutory interpretation doctrine in the United States, focusing upon the use of legislative history in statutory interpretation decisions and the canons of statutory construction. Eskridge traces the evolution of legal theory against the background of doctrinal disagreement over the use of legislative history as an aid to

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[81] See Scalia, *supra* note 46 at 862-63.

[82] On the emergence of "comprehensive liberalism", see S. Gardbaum, "Liberalism, Autonomy, and Moral Conflict" (1996) 48 Stan. L. Rev. 385.

[83] See: F. Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning" (1990) Sup. Ct. Rev. 231; F.H. Easterbrook, "Text, History, and Structure in Statutory Interpretation" (1994) 17 Harv. J.L. & Pub. Pol'y 61.

statutory interpretation. By following the historical path from formalism to realism to a more moderate approach, which evolved into the legal process school, and beyond, he demonstrates that statutory interpretation is tied to broader jurisprudential debates. Seen in this light, the new textualism is more a cultural and political phenomenon than a legal one.

Eskridge explores the doctrinal controversies arising out of the application of *stare decisis* to statutory interpretation decisions, the status of long-standing interpretations by administrative tribunals, the retroactivity of new statutes in the face of public reliance on older interpretations, and the meaning to be attributed to legislative inaction in response to statutory interpretation decisions. Eskridge then focuses upon canons of construction as the battleground. Throughout, Eskridge's essential points are clear: that beneath traditional doctrine, dynamic approaches to the interpretation of statutes lie hidden, and that normative debate rages below the surface of dusty maxims and doctrinal devices. Eskridge demonstrates that the direction of the statutory interpretation debate is inseparable from broader theoretical struggles.

Conclusion

Dynamic Statutory Interpretation is a wonderful, if demanding, book. Its range of subject matter is immense. Eskridge demonstrates an encyclopædic knowledge of the relevant caselaw and is always eager to provide illustrations of how the competing theories of statutory interpretation actually function (or, more frequently, do not) by testing them in the cases. Eskridge is also conversant with a great mass of theoretical writing, discusses it in a balanced and nuanced manner and avoids oversimplification or rhetorical bombast. There is no modern school of interpretation that goes unaddressed. Given this range, it is surprising that the work of some leading theorists is addressed only tangentially. Dworkin and Fish receive rather cursory treatment, and the important recent contribution of Marmor[84] is entirely ignored. But Dworkin and Fish are in many ways fellow travellers in Eskridge's dynamic movement, and it is perhaps unsurprising that he should focus his efforts upon defining his theory in relation to existing schools rather than indulging in hair-splitting within it.

Eskridge writes competently, though not brilliantly. This is unfortunate in a field where many of his counterparts (Posner, Easterbrook, Schauer, and others) write very well. While *Dynamic Statutory Interpretation* is impressive analytically, it makes for difficult reading in many sections, even as it ensures that the discussion of the theoretical debates does not reach a level of uncomfortable abstraction. At times, the reader can appreciate the intellectual accomplishment of the book rather than enjoy reading it. The many cases cited make it difficult to keep track of the facts of any one under discussion, and the lack of cross-referencing in the endnotes often frustrates attempts to follow the argument.

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[84] See *Interpretation and Legal Theory*, *supra* note 73.

But, these are minor quibbles. *Dynamic Statutory Interpretation* is a major contribution to scholarship and a model of how legal theory can be integrated with legal doctrine. It opens new fields for further study. Eskridge's scholarship is pitched at a high level. Given his premise that statutory interpretation is an outgrowth of one's normative inclination, *Dynamic Statutory Interpretation* is as much a leading work of legal theory as it is a narrower work on statutory interpretation. It will surely consolidate Eskridge's reputation as the leading modern scholar on statutory interpretation, and by placing his subject matter at the cutting edge of legal theory, he has made that quite an accomplishment.