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LEGISLATIVE INTENT: FACT OR FABRICATION?

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REVIEW ESSAY:

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DYNAMIC STATUTORY INTERPRETATION
by William N. Eskridge. (Harvard University Press, Cambridge, 1994)[1]

I. INTRODUCTION

In 1579, following the case of *Eyston v. Studd*,[2] Edmund Plowden, court reporter, wrote a theory of statutory interpretation that has become a historical monument. When faced with an interpretive difficulty,

> it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present . . . . And therefore when such cases happen which are within the letter, or out of the letter, of a statute, and yet don't directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way to put questions and give answers to yourself thereupon, in the same manner as if you were actually conversing with the maker of such laws, and by this means you will easily find out what is the equity in those cases.[3]

Almost contemporaneously, the Exchequer Chamber in *Heydon's Case*,[4] gave similar rules for interpretation:

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* Professor of Law, New York Law School. I am indebted to Emily V. Sinclair for her remarkably insightful advice.

1. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).
2. 2 Plow. 459, 75 Eng. Rep. 688 (1574).
3. *Id.* at 467.
4. 76 Eng. Rep. 637 (1584).

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal (B)[5] or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[6]

Both of these theories of statutory interpretation are from the era in which judicial decision was held superior to legislation. As parliamentary power became more assertive, courts conversely became more deferential. Nineteenth and twentieth century English courts never doubted that their role in cases governed by statute was subordinate to the legislature. For example: "[b]ut it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious."[7]

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5. "(B)" is a footnote marker. The footnote begins:

> Penal statutes are in general to be construed strictly, and are not to be enlarged by parity of reason, nor extended by equitable construction, but even in penal laws, the intention of the Legislature is the best method to construe the law, *The King v. Gage*, 8 Mod. 65; and equity will aid remedial laws though penal, not by making them more penal, but so as to let them have their course.

Id. at 638 n.(B).

6. *Id.* at 638 (footnotes omitted).

7. River Wear Comm'rs v. Adamson, 2 App. Cas. 743, 764 (1877) (appeal taken from C.A.). The passage continues, enunciating the "golden rule" of statutory interpretation:

> and I believe that it is not disputed that what Lord *Wensleydale* used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one

Similarly, United States courts have taken as axiomatic that the intention of the legislature should govern the interpretation and application of statutes. This follows conceptually from the principle of legislative supremacy, a principle at the very foundation of our democratically ordered society.[8] A typical judicial statement is: "[t]he primary rule for the interpretation of a statute . . . is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law . . . [has] expressed therein."[9] A perspicuous equivalent by the Honorable Judge Wald of the D.C. Circuit Court of Appeals, is: "[w]hen a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: *I want to advance rather*

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which the court thinks the words will bear.

Id. at 764-65; *see* Vacher & Sons, Ltd. v. London Soc'y of Compositors, 107 App. Cas. 107, 121 (1913) (appeal taken from C.A.). Following the same trend into this century, in England an even more extreme deference evolved in the "literal rule." Lord Atkinson stated, "[i]f the language of the statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results." *Id.*

8. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7 (1975). In his landmark work on statutory law, Dickerson wrote:

> [T]he general powers of government are constitutionally allocated among the three central branches in such a way that, although it does not enjoy an exclusive power to make substantive law, the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches.

Id.; *see also* U.S. CONST. art. I, § 1 (At the federal level, legislative supremacy is based in the constitution: "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."); The doctrine of legislative supremacy is a deeply ingrained part of our society:

> From the English Bill of Rights (1689) and from John Locke's Second Treatise of Civil Government they drew the principle that for a legal order capable of promoting a strong society while respecting individual rights the legislature should be first among the principal parts of government. It should be the prime source of general policy. Legislation should treat all individuals on equal terms and should care for the common interest.

JAMES W. HURST, DEALING WITH STATUTES 8 (Columbia Univ. Press, NY, 1982). "In the country's experience statute law has had special importance in giving content to public policy and adapting the legal-social order to changing currents of interest and circumstances." *Id.* at 4.; ESKRIDGE, *supra* note 1, at 112-13, 134.

9. This formulation is taken from *Johnson v. Southern Pacific Co.*, 117 F. 462, 465 (8th Cir. 1902), but in various forms it can be found throughout our case law at all levels.

than impede or frustrate the will of Congress."[10] This principle is common in legal systems with British roots.[11]

The *legislative intent* that governs the interpretation and application has been located spatially in the legislature that enacted the statute in question and temporally at or just prior to the moment of enactment. According to the long tradition of Anglo-American judicial thought, when the applicability of the words of the statute to the case at hand is not clearly determinate, the judge must resort to relevant (and permissible[12]) indicia of the legislative intent. The above statements differ only in how they seek to find that legislative intent, and the freedom they would give to the judge in applying the intent.[13]

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10. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990).

11. The following widely quoted passage is from the court of appeals in New Zealand.

> The function of the Court in relation to a statute is to discover the intention of the legislature. The intent is to be ascertained from the words it has used. But the richness of the English language is such that the same words or phrases may convey different ideas depending upon the context and circumstances in which they are used. So it is that the words used in an enactment are to be considered in the light of the object which the statute as a whole is intended to achieve. In modern legal parlance that is called a "purposive" construction. But it has still to be stressed that the inquiry is not as to what the legislature meant to say but what it means by what it has in fact said in the framework of the Act as a whole.

Donselaar v. Donselaar [1982] 1 N.Z.L.R. 97, 114 (Court of Appeal) (Somer, J.).

12. British and United States traditions split on this point. Until *Pepper v. Hart*, 1993 App. Cas. 593 (appeal taken from C.A.), British courts, and accordingly their barristers in argument, were not permitted to resort to parliamentary history (Hansard Reports) as a determinate of legislative intent. However, the United States has always followed the opposite rule, deeming what was said in preparation for enactment a useful source of understanding. In *Pepper*, the House of Lords formally changed the British practice.

13. In passing one should note the variety of synonyms used in this context: *intent, purpose, will.* Eskridge draws a distinction between "intent" and "purpose" on levels of generality. For example, "an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions." ESKRIDGE, *supra* note 1, at 26. Arguments about the other synonyms are pretty similar, with advantages and deficiencies corresponding to generality.

Although this long and unbroken tradition in the judiciary[14] has met with some dispute in academic literature,[15] Professor William Eskridge's book, *Dynamic Statutory Interpretation*, is the first integrated, sustained attack on it. Eskridge argues that there is and can be no such thing as the intention of the legislature, and even if there were, the hypostatizations called 'legislative intent' in judicial opinions could not solve problems of statutory interpretation. Instead of interpretation grounded in a state of affairs locatable at the moment of enactment, what we have and *should* have is interpretation based on contemporaneous social, economic, and political conditions. "[T]he meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes . . . ."[16] This is *dynamic* statutory interpretation.

Although the thesis that statutory interpretation is dynamic forms the core of Eskridge's book, there is much else. Eskridge has been a prodigiously productive scholar during the last ten years and his book is in large part composed of prior articles. This has its advantages. In the course of knocking down the rivals to his *dynamic* theory of statutory interpretation, Eskridge gives an airing to many presently fashionable theories. For example, in Chapter 4 he surveys "liberal theories," in Chapter 5 "legal process theories" derived from the 1950s work of Henry Hart and Albert Sacks,[17] and in Chapter 6 "normativist theories," i.e., natural law theory,[18] "feminist republicanism,"[19] postmodernism,[20] including subsections on "Deconstruction and the Rule of Law"[21] and "Critical Pragmatism."[22] Eskridge's strategy is to take on a theory in every little detail, to leave no jurisprudential stone unturned, or perhaps, no jurisprudential earth unscorched. The detail can be numbing, eye-glazing. Yet, even if one is not convinced by the argument, the form in

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14. One has to go back to the early 17th century Lord Coke's opinion in *Dr. Bonham's Case,* 76 Eng. Rep. 637 (1584), for a significant exception.

15. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Both authors argue that a statute drafted by two or three persons, rejected by some legislators, and not read by others, cannot reflect any particular intent.

16. ESKRIDGE, *supra* note 1, at 199.

17. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

18. ESKRIDGE, *supra* note 1, at 176-83.

19. *Id.* at 183-92.

20. *Id.* at 192-204.

21. *Id.* at 193-97.

22. *Id.* at 199-204.

which Eskridge has chosen to make his case results in a work with sufficient coverage to be worthy of shelf space as a reference and source book. And it is not only a source book for high-flying theory; there is much of practical value. For example, Chapter 8 includes as useful a guidebook to the interpretation of legislative inaction as one could wish for.[23]

Eskridge is at his best in straight legal analysis; his examples are thoroughly researched and clearly presented. The presentation in Chapter 1 of the *Weber* case,[24] its history, difficulties, resolution and consequences is exemplary.[25] Other major cases, such as *Griffin v. Oceanic Contractors, Inc.*,[26] *Bob Jones University v. United States*,[27] *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*,[28] and *Patterson v. McLean Credit Union*,[29] make clearly analyzed illustrations. The account of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[30] could be a standard introduction to judicial deference. Legislation and agency interpretation are also subject to careful, detailed scrutiny. An example is the analysis of § 212(a)(4) of the Immigration and Nationality Act of 1952 as interpreted in *Fleuti v. Rosenberg*[31] and *Boutilier v. INS*[32] and later amended by Congress and reinterpreted by the INS.[33] Where Eskridge depends more on the examples than argument, it is a tribute to their clarity that they sometimes work to undermine his argument than to support it.[34]

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23. *Id.* at 241-62.

24. United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

25. ESKRIDGE, *supra* note 1, at 15-47. Eskridge continues to discuss *Weber* and its progeny, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), throughout the book.

26. 458 U.S. 564 (1982); *see* ESKRIDGE, *supra* note 1, at 32 *passim*.

27. 461 U.S. 574 (1983); *see* ESKRIDGE, *supra* note 1, at 145 *passim*. The Court in *Bob Jones University* followed the plain meaning of the statute "over objections that the literalist interpretation undermines the original intent or purpose of the Congress that enacted the statute." *Id.* at 32.

28. 536 A.2d 1 (D.C. 1987) (en banc); *see* ESKRIDGE, *supra* note 1, at 177 *passim*.

29. 491 U.S. 164 (1989); *see* ESKRIDGE, *supra* note 1, at 240 *passim*.

30. 467 U.S. 837 (1984); *see* ESKRIDGE, *supra* note 1, at 161-64.

31. 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

32. 387 U.S. 118 (1967).

33. *See* ESKRIDGE, *supra* note 1, at 51-55 *passim*. Eskridge similarly examines the Customs Service of the Treasury Department and its interpretation of a provision of the Tariff Act of 1922, recodified as § 526 of the Tariff Act of 1930, and codified as amended at 19 U.S.C. § 1526 (1988). *See id.* at 114-16.

34. *See, e.g.*, ESKRIDGE, *supra* note 1, at 48-80.

Despite these riches, and the occasional contentious analysis,[35] this essay focuses solely on Eskridge's core thesis, that statutory interpretation is or should be *dynamic*. Eskridge's strategy is first to undermine the concept of legislative intent, and then to show how *dynamic* interpretation steps into the remnant theoretical breach. Chapter 1, "The Insufficiency of Statutory Archaeology,"[36] covers the first stage. The second stage is explained in Chapter 2, "The Dynamics of Statutory Interpretation,"[37] with an extended illustration in Chapter 3, "A Case Study: Labor Injunction Decisions, 1877-1938."[38] These arguments form Part I of the book. Parts II and III, "Jurisprudential Theories for Reading Statutes Dynamically" and "Doctrinal Implications of Dynamic Statutory Jurisprudence," respectively, are intended to elaborate the theory set forth in Part I and defend it against jurisprudential usurpers. In fairness, one ought not to ignore Parts II and III, but this review unavoidably does so.

This essay follows the pattern set by Eskridge: Section II covers the first chapter of the book and its attack on the concept of legislative intent while Section III reviews the exposition of *dynamic* statutory interpretation in Chapter 2. In both sections I attempt to summarize Eskridge's arguments as fairly as possible before examining their plausibility. A conclusion follows.

II. LEGISLATIVE INTENT

Chapter 1 of Professor Eskridge's book brilliantly marshals attacks on the idea of legislative intent. It is brilliant in comprehension, in argument and in rhetorical style. After a first reading, it is difficult to see how one was ever taken in by the likes of Plowden, *Heydon's Case*, Chief Justice Marshall[39] and Judge Wald. But against all that accumulated wisdom, surely the chapter deserves a second, very careful reading.

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35. *See, e.g.*, R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 103-09 (1995) (book review). Professor Melnick examines Eskridge's analysis of the *Weber* case in the light of empirical information. Professor Melnick also provides perceptive analyses of Eskridge's theories of postmodernism, political power and statutory interpretation. *Id.* at 109-18.

36. ESKRIDGE, *supra* note 1, at 13-47.

37. *Id.* at 48-80.

38. *Id.* at 81-105.

39. The purpose of the judiciary is to "giv[e] effect to the will of the Legislature." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

A. *Nomenclature*

Eskridge is a master of Rumplestiltskinism: name it and claim it.[40] Even his title, "*Dynamic* Statutory Interpretation," is an example. "Dynamic" is a fashionable accolade: we all want to be dynamic; to be static is to be stuck in the mud.[41] Merely by choosing such a name, Eskridge guarantees many a mention in law classrooms and a substantial following among faculty and students. And it gets better. The supporting cast includes "pragmatic dynamism," "hermeneutic dynamism" and "institutional dynamism," all trenchantly deep, not to mention irresistibly euphonious.

Eskridge terms all methods of interpretation that give primacy to the enacting legislature "originalist theories" because their key determinate is original intent. Of course, we are more accustomed to the term "originalist" in the context of constitutional law, but by drawing on that custom in the use of the term, Eskridge does us a useful service. There is no harm in the realization of commonalities in statutory and constitutional interpretation as long as we don't forget the rather special content and quality of constitutions. By adopting the expression, we are in no way adopting either the political or moral positions associated with those who propound originalism in constitutional interpretation. Inescapably, however, the use of the term conjures up often stated negative feelings toward extreme conservative proponents of originalism in constitutional interpretation, such as Robert Bork. This rhetorical antipathy is more useful to Eskridge's cause than the descriptive accuracy of the word 'original.'

Eskridge calls this search for legislative intent that originalism requires of us, 'statutory archaeology.' It is curious that this too has a pejorative ring. It should not as there is nothing negative or unseemly about archaeology as a discipline and source of knowledge. Perhaps the name is rhetorically effective because it raises a specter of insecurity or speculation in results. But this too should be a reason to embrace it. The perfect determinacy that Eskridge demands of originalist theories is beyond any interpretive enterprise. To do the best we can despite merely finite data sources and with the critical thoroughness of an archaeologist, is surely a worthy enough aspiration.

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40. For an argument about the importance of apt naming, *see* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 863-64 (1981).

41. Later Eskridge writes about "the nebulous 'will of the Legislature' sometimes bruited about by static-minded liberals today." ESKRIDGE, *supra* note 1, at 118 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

B. *The Case Against Legislative Intent*

In order to show that the intent of the enacting legislature can govern the interpretation of a statute, proponents of originalism need to show that "concrete cases can be analytically connected with decisions that have been made by a majority-based coalition in the legislature . . . . "[42] Their problem, Eskridge argues, is that

> [n]one of the theories can deliver consistently on this promise . . . . [N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or the coalition "would want" over time, after circumstances have changed . . . . [N]one of the methodologies yields determinate results. Consequently, none fully constrains statutory interpreters or limits them to the preferences of the enacting coalition.[43]

Here we have, in outline, the target, its problems, and the criterion originalism must but cannot meet.

Why can legislative intent not be 'analytically connected with decisions?' First, what is legislative intent? Eskridge claims, "[t]he meaning colloquially suggested by the invocation of legislative intent is the actual intentions of the legislative coalition that enacted the statute."[44] Intent is thus an aggregation of the intents of the individual legislators who vote, or more specifically, of those who voted in the majority (the "enacting coalition"), as to the meaning of the statute in question. But the specific meaning in mind of a majority of our elected representatives is rarely revealed in the legislative record.[45] This is because: (1) "legislators usually do not have a specific intention on more than a few issues (if that) in any bill on which they vote"; (2) "[e]ven when legislators state for the record what they think a bill means for a specific issue, their statements may not be reliable because of strategic behavior," e.g., allaying the doubts of others; (3) "[p]roblems with identifying the actual intent of individual legislators become overwhelming when these hard-to-figure individual intentions must be aggregated for each legislative chamber and then matched up with the intent of the president";[46] and (4)

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42. *Id.* at 14.

43. *Id.*

44. *Id.* at 16. This seems quite wrong to me. But I shall present the argument first and criticize it second.

45. *See id.*

46. *Id.*

"even if it could be discovered, the intent of the House is not the intent of Congress[,]"[47] nor, presumably, of the President.

That seems clear enough. So what have intentionalists been talking about? "[W]hat intentionalists usually mean by the term is conventional rather than actual legislative intent . . . . Statements by authoritative speakers (bill sponsors and the reporting committee) can be an adequate surrogate for actual legislative intent . . . ."[48] "Theories of conventional intent generally fall back on the simple idea that what the sponsor or committee says about the bill is binding on the legislature."[49] But such statements are not reliable indicia of the aggregate of legislators' intentions. Statements by floor managers and committee chairs are fallible because they may be made for purposes other than giving authoritative interpretive information. And one can never be sure as to the real purpose of the statement. So, says Eskridge, we need a theory for evaluating the talk in the legislative history, and so far none has been forthcoming.[50]

There is another possibility though: "imaginative reconstruction." Imaginative reconstruction is exactly Plowden's method, but Eskridge interprets it as the attitude of the *pivotal player* or pivotal players: "those participants in the enactment process whose support was critical in helping a bill pass through the various 'veto gates' which can kill legislation."[51] There is, of course, the problem of determining who is a pivotal player given the strategic behavior of legislators to increase their power by appearing to be pivotal. But Eskridge's principal objection is more theoretical and more directly applicable to the sort of imaginative reconstruction Plowden advocates.

> [I]maginative reconstruction calls for posing counterfactual questions to a long-departed pivotal legislator . . . . The counterfactual nature of the questions tends to render the inquiry indeterminate. Every statute carries with it certain assumptions about the nature of law and society. Often those assumptions turn out to be wrong, or simplistic, or obsolescent in light of social change—change that sometimes occurs in response to the statute itself. As the assumptions prove incorrect, the statute inevitably deviates from its original course through an often imperceptible

47. *Id.* at 17.

48. *Id.* at 18.

49. *Id.* at 19.

50. *See id.* He examines promising candidates and finds them wanting, "[b]ecause most talk in Congress is some hybrid of cheap and serious." *Id.* Eskridge seems to be arguing that because the record is unreliable in *some* instances we cannot use it in *any* instance.

51. *Id.* at 22.

> process of implementation and interpretation. Once such changes have occurred, how should an intentionalist even pose the question?[52]

In this vein, the late Professor Warren Lehman called legislative intent a metaphor and a phantom:

> Put another way, behind the act of the legislature, there is no person or group of persons with whom Plowden could imagine a conversation such as he recommended, the purpose of which was to determine intent. Plowden would have to have the whole legislature there. And it would not in chorus echo either "God forbid," or "Yes, for in this respect they are to be looked upon as executors." The answer would be a babble; the issue would almost certainly have to be put to a vote. And the vote would almost certainly not be unanimous. It might well be that no solution would attract a clear majority. Indeed, that may be the reason for the silence and ambiguity in the first place.[53]

This looks rather convincing, doesn't it? Here is a good summary passage about legislative intent.

> The rhetorical force of intentionalism rests on its ability to link a current interpretation to past legislative majorities. But in hard cases an intentionalist cannot prove that her interpretation is the one actually intended by most legislators, either through rigorous vote counting, or through conventional sources, or even through reconstruction of the enacting coalition.[54]

What about legislative purpose?

In Professors Hart and Sacks' highly influential teaching materials, *The Legal Process*, the basic method of statutory interpretation is stated thus:

> [i]n interpreting a statute a court should:
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> 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then

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52. *Id.* at 23.

53. Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500.

54. ESKRIDGE, *supra* note 1, at 23.

> 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best as it can, making sure, however, that it does not give the words either—
>
> (a) a meaning they will not bear, or
>
> (b) a meaning which would violate any established policy of clear statement.[55]

Is purpose then something different from *intent*? Professor Eskridge thinks so: "legislative purpose is a more elastic concept than legislative intent . . . ."[56] "an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions . . . ."[57] Going along with this stipulation, is purpose subject to considerations different from those about legislative intent?

Eskridge's first line of attack on legislative purpose as a determinate (as *the* determinate) of the meaning of a statute is to follow the strategy he used against intent: disaggregate the purposes of individual senators and congressmen, and point out that even as individuals they "have a complex bundle of goals, most notably achieving reelection and prestige inside the Beltway, as well as contributing to good public policy."[58] Even worse, because they make bargains and back-room deals, "legislators may have incentives to obscure the real purposes of the statute. Legislators do not say, 'This is a back-room deal, distributing rents to a group.' Instead they say, 'This statute helps America.'"[59] And, because actual legislation results from bargaining, amending, compromise: "[t]he statutes that result from this process of sequential deals and trade-offs tend to be filled with complex compromises which cannot easily be distilled into one overriding purpose."[60] This generally parallels his arguments about intent, but adds a strong flavor of public choice theory.[61]

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55. HART & SACKS, *supra* note 17, at 1169.

56. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1546 (1987); *see also* William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1745 (1993) [hereinafter *Speluncean Explorers*].

57. ESKRIDGE, *supra* note 1, at 26. As stated, with the modifier "specific," this is trivially true. The comparison should be with "legislative intent" not with "specific intentions."

58. *Id.* at 26.

59. *Id.* at 27.

60. *Id.*

61. Public choice theory is "an economic view of legislation, which emphasizes the efforts of interest groups to redistribute wealth in their favor." Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 264 (1982). "Public choice scholarship applies principles of market economics

As he did with intent, Professor Eskridge argues that there is a multiplicity of legislative purposes. Elsewhere, he uses the apt example of criminal law. Consider, for example, a typical penal statute. Commonly we say it serves at least three purposes, i.e., deterrence, rehabilitation and retribution. How can a legislature, a diverse group of people with differing interests, aims, and values, have a purpose? "Even if *legislators* had purposes, the *legislature* probably does not, and the process of statutory enactment undermines any coherent purpose the proposed statute might at one point have had."[62]

Although he says his arguments about "purpose" and "intent" are similar,[63] Eskridge does make a set of arguments that could be different. They are based on the "higher level of generality" that is said to distinguish purpose from intent. "An attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, for its application depends on context and the interpreter's perspective."[64] He sets it up neatly in the form of three paradoxes, framed in terms of the opinions in *United Steelworkers of America v. Weber*,[65] the pioneer case on voluntary affirmative action.

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to explain institutional and political behavior and decisionmaking. The public choice approach assumes that people are 'egoistic, rational utility maximizers' in political as well as economic arenas." William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 703 (1987). "Public choice theory argues that legislative behavior is driven by one central goal—the legislator's desire to be reelected." William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988).

Public choice theory purports to be descriptive and for that reason is often linked with positive political theory. "Positive" is used because it purports to describe the legislative behavior that actually occurs. However it is often criticized for its failure accurately to characterize legislators and their behavior. For example, Chief Judge Mikva of the District of Columbia Circuit, a congressman for many years, writes:

> [t]he politicians and other people I have known in public life just do not fit the "rent-seeking" egoist model that the public choice theorists offer. . . . Not even my five terms in the Illinois state legislature—that last vestige of democracy in the "raw"—nor my five terms in the United States Congress, prepared me for the villains of the public choice literature.

Abner J. Mikva, *Foreword*, 74 VA. L. REV. 166, 167 (1988).

62. *Speluncean Explorers*, *supra* note 56, at 1745.

63. "Like intentionalism, purposivism does not yield determinate answers in the hard cases." ESKRIDGE, *supra* note 1, at 29

64. *Id.*

65. 443 U.S. 193 (1979) (Justice Brennan wrote for the majority opinion allowing a voluntary affirmative action program and Justice Rehnquist dissented, arguing that affirmative action was impermissible discrimination on the basis of race).

The first paradox is that two apparently opposing purposes appear to support their opposite views.[66] For example, Justice Brennan writing for the majority said "the purpose of Title VII was to get jobs for African Americans." Justice Rehnquist in dissent said "the purpose of Title VII was to provide equality of opportunity." By manipulating time frames, Eskridge demonstrates that one could use the latter to support the majority result and the former to support Rehnquist's dissent.[67]

The second paradox is that the two purposes are arguably the same. According to the empirical circumstances and the nature of proof, equality of opportunity can only be shown to exist if African-Americans obtain jobs in proportional numbers. "The purpose of a statute changes over time as the targeted problem changes, often negating the assumptions critical to the original formulations of that purpose. Statutory purpose also changes as new interpreters approach the issue, often reacting to problems they perceive in prior interpretations."[68]

The third paradox is that a judge can change her determination of purpose according to the context. Neither Brennan nor Rehnquist believed the stated purpose to be the only one, thus: "[p]urpose is dynamic even in the hands of the same interpreter because the interpreter's understanding of the statutory purpose depends in part on the context in which he or she

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66. *But cf.* ESKRIDGE, *supra* note 1, at 33. Eskridge subsequently finds the converse to be a problem when he examines *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). He comments, "[o]ne problem is that there may be two cross-cutting statutory purposes." *Id.* Eskridge made a similar point about statutory purpose in an earlier article.

> Although one advantage of grounding statutory interpretation on legislative purpose is that general purpose is more easily determined than specific intent, a corresponding disadvantage is that purpose is *too* easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations.

Speluncean Explorers, *supra* note 56, at 1744-45.

67. This "paradox" is an instance of a standard point in the philosophy of science: "an infinity of incompatible hypotheses may obviously be consistent with the evidence . . . ." CLARK GLYMOUR, THEORY AND EVIDENCE 10 (1980). The point was made over forty years ago by the philosopher Ludwig Wittgenstein:

> 201. This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything could be made out to accord with the rule, then it can also be made out to conflict with it.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201 (G.E.M. Anscombe, trans, Basil Blackwell, Oxford, 1953). Wittgenstein, of course, did not stop at that, but proceeded to demonstrate the misunderstanding underlying such reasoning. In Eskridge's argument, it is the free manipulation of time frames that creates the unreality.

68. ESKRIDGE, *supra* note 1, at 30-31.

is applying the statute."[69] Eskridge proves this point using Brennan's opinion for the Court eight years later in *Johnson v. Transportation Agency*,[70] which extended the *Weber* rational and purpose to women, a scope clearly not contemplated in the legislative history.

In summary, "[l]ike intentionalism, purposivism cannot connect its results with original legislative expectations because it has no robust positive theory of enacting coalitions."[71]

C. *Textualism*

Eskridge also categorizes the "new textualism," associated primarily with Justice Antonin Scalia, as an originalist methodology.[72] "For these 'new textualists,'" Eskridge writes, "the beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language."[73] However, for reasons similar to those brought to bear against legislative intent and purpose, this does not suffice: "[l]ike intentionalism and purposivism, textualism cannot rigorously be tied to majority preferences, does not yield determinate answers or meaningfully constrain the interpreter in hard cases, and is not an accurate description of what agencies and courts actually do when they interpret statutes."[74] Further, "even text-based interpretation is hard to link up with majority preferences because there may be several equally plausible majority-based preferences in the legislature."[75] Again Eskridge relies on contextual variation in textual meaning. But to this he adds the standard arguments from postmodernism that meanings can look different to different readers and at different times.[76] "The new textualist position is that statutory text is

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69. *Id.* at 31.

70. 480 U.S. 616 (1987).

71. ESKRIDGE, *supra* note 1, at 31-32. Legal academics are prone to this type of talk. "Theory" means some universal, talismanically applicable, causal story; "positive" means empirical; and "robust" is necessary because in the empirical world, the subject of *positive* theory is so messy. In this last respect one might note (1) how *un*-robust are the standardly accepted empirical statements of science like "copper expands on heating"; and (2) that a major problem with Eskridge's own theory of statutory interpretation is its infinite robustness.

72. *See* ESKRIDGE, *supra* note 1, at 34-47. *See also* Daniel A. Farber, *Statutory Interpretation and the Idea of Progress,* 94 MICH. L. REV. 1546, 1547-49 (1996) (providing an excellent capsule introduction to "the new textualism" and an extremely laudatory review of DYNAMIC STATUTORY INTERPRETATION).

73. ESKRIDGE, *supra* note 1, at 34.

74. *Id.*

75. *Id.* at 37.

76. *See id.* at 192-204.

the most determinate basis for statutory interpretation. That proposition, important to their theory, is questionable."[77] Further, "the interpreter's own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts . . . . A simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation."[78] So ultimately, "[f]or practical as well as theoretical reasons, textualism fails as a foundational, constraining methodology for interpreting statutes. As do intentionalism and purposivism."[79]

D. *Conclusion re Intent and Purpose and Text*

The arguments about legislative intent, legislative purpose and textualism are pretty similar. They have had an impact on academic thinking (if not, mercifully, on judges). Modern apologists tend to acknowledge the validity of the attacks and refer to legislative intent (or purpose) as a fiction, although a necessary fiction.

> No, the intent of the legislature is a phantom because the will of the legislature is a metaphor. What a legislature does when it acts is something like what a man does. And so the collectivity behind its act is something like a single man's mind. But it has a will or an intention only insofar as a certain arbitrary percentage of its members can assent to certain terms. The problem of the non-existent will is demonstrated most clearly by the case in which the subject matter to which the law is to be applied could not have been known to its draftsmen: *e.g.*, the application of a nineteenth-century statute to the airplane. The unreality of the intention that is supposed to be the real law is laid bare by the suggestion that the relevant question is what the nineteenth century legislature would have done had it only known about the airplane.[80]

The fiction is needed, for example, to "remind all who deal with a statute that they are operating in a field of law in which they are not free to

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77. *Id.* at 38.

78. *Id.* at 41. Again the reasoning here could hardly withstand even cursory scrutiny, however the general pattern will be addressed below.

79. *Id.* at 47.

80. Lehman, *supra* note 53, at 500.

define public policy simply according to their own judgment."[81] In other words, we fabricate the notion of legislative intent so that judges and others implementing statutes should feel constrained in some way.

Perhaps the best summary of what Eskridge claims to have established in Chapter 1 is at the beginning of Chapter 2: "Chapter 1 argued that originalist theories cannot limit statutory interpretation to a single factor or exclude postenactment considerations, do not yield objective and determinate answers in the hard cases, and cannot convincingly tie results in statutory cases to the expectations of original legislative majorities."[82] I don't think we have to concede.

E. *What's Wrong With These Arguments?*

Eskridge's arguments, although appealing, rest on fundamental misconceptions of three general types. First, he evaluates originalist theories according to a criterion inappropriate to a socio-cultural phenomenon such as law. Second, he fundamentally misconceives the concept of legislative intent (and its more or less general variants) as it is and has been used in originalist interpretation. Third, he fails to draw important distinctions in modes of meaning of legislative enactments. I shall explain, *seriatim*.

1. Criterion of Evaluation

When 'legislative intent' and 'legislative purpose,' the originalist concepts of statutory archaeology, are tried in the preceding arguments, they are found wanting according to some criterion of goodness, quality or explanatory excellence. We need to extract those criteria and examine their propriety to the subject. One would not judge the drafting of a statute by the criteria appropriate to a rock-and-roll song any more than one would judge Brie inferior Stilton, or a Siamese cat an incompetent shepherd. Yet a commonplace argumentative strategy is to set an impossibly high criterion of success and then point out the subject's failure to meet it. Just such a fallacy pervades Eskridge's argument.

In his introduction to Part I, Eskridge claims that he "develops the thesis as a positive, that is descriptive, theory of how courts and agencies interpret statutes."[83] Again, at the beginning of Chapter 1 he writes: "[a]s a positive matter, all originalist theories fail, and they fail in similar ways. To begin with, none of them accurately describes what American agencies

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81. HURST, *supra* note 8, at 33.

82. ESKRIDGE, *supra* note 1, at 48.

83. ESKRIDGE, *supra* note 1, at 6.

and courts do when they interpret statutes."[84] This cannot be believed. If it were, his case would be much too easy, indeed trivial. As Hart and Sacks wrote:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[85]

Eskridge's fallacy is *ignoratio elenchi*:[86] no proponent of originalism in any of its forms could claim perfect generality and one hundred percent descriptive accuracy. Eskridge seems to think that descriptive accuracy for legal decision-making is just like descriptive accuracy for empirical phenomena like chemical interactions. This is a mistake.

Throughout the argument, Eskridge uses the Supreme Court opinions in *United Steelworkers of America v. Weber*.[87] At issue was Title VII's application to a voluntary affirmative action program of § 703(a)(1) of the Civil Rights Act of 1964,[88] a statute with an unusually replete legislative history. His analysis of Brennan's majority and Rehnquist's dissenting opinions is superb;[89] the chapter is worth reading for that alone. Needless to say, there is evidence of a variety of attitudes, intentions and purposes among individual legislators, judicious selections from which fuel the

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84. *Id.* at 13. Similar examples include:

> I do not maintain that legislative intent is never discoverable or is irrelevant to statutory interpretation . . . . Instead, my thesis is that because intentionalism does not yield clear answers in cases such as *Weber*, the approach is more pliable—and therefore less constraining on agencies and courts—than its legal proponents claim. [However,] intentionalism is an incomplete theory of statutory interpretation.

Id. at 15-16.

85. HART & SACKS, *supra* note 17, at 1169.

86. *Ignoratio elenchi*? (knocking down straw men I never set up, or, as the O.E.D. puts it, "a logical fallacy which consists in apparently refuting an opponent, while actually disproving some statement different from that advanced by him").

87. 443 U.S. 193 (1979).

88. Codified at 42 U.S.C. § 2000e-2(a)(1) (1976).

89. *But see* Melnick, *supra* note 35, at 105-06 (commenting on the weakness of Eskridge's replies to Rehnquist's arguments); Farber, *supra* note 72, at 1561-64 (same).

opposing opinions. But a single example, even one as seminal as *Weber*,[90] does nothing for this debate. It makes a splendid illustration of a failure of originalist theories to determine an outcome; this was a hard case, requiring real judgment backed with reasoning. But Eskridge seems to think that the example does more than merely illustrate: He thinks it demonstrates the failure of originalist interpretation in general. This too is a mistake.

Theories of statutory interpretation are not like theories of physics or chemistry. In physical sciences universality is required: if gravity works here it works everywhere and in the same way; if copper expands upon heating today, it expanded upon heating yesterday and will again tomorrow. For laws governing the behavior of inanimate material, complete generality is required and a counter-example is disastrous.[91] But legal decision-making is not that sort of subject. It is difficult, perhaps impossible, to claim of any proposition descriptive of law the universal accuracy and testability we require of propositions of the empirical sciences.[92] Law is a social phenomenon, subject to all the willful vagaries of human behavior. Even the laws generated by legal decisions, as compared with theories about how they are made (like theories of statutory interpretation), allow counter examples without being invalidated. One reason at least is that legal data, cases and judicial opinions are always contestable. If a particular decision is not congenial to one's theory, you can say it was wrongly decided.[93] Eskridge is clearly aware of this, as he freely contests judicial decisions.[94]

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90. Professor Farber calls *Weber* "the paradigm case." Farber, *supra* note 72 at 1561. *See* Philip P. Frickey, *The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 245 (1992) (*Weber* is the case that "triggered the revival of interest" in statutory interpretation.).

91. This has been proposed as the most useful criterion on which to demarcate the domains of the physical sciences on one hand from the domains of social and political sciences and other sources of knowledge (non-mathematical knowledge that is) on the other. *See* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 34-39, 86-92, 313-14 (Routledge 1992) (1959).

92. Curiously, however, a principle failing of the *dynamic* theory of statutory interpretation is that it accounts for all decisions. *See infra* notes 222-26 and accompanying text.

93. For further differentia, including, most importantly, the causal role played by legal theories in determining their data, see M.B.W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 384-86 (1985-1986).

94. Examples of Eskridge's rejection of decisions as wrongly or poorly decided include: *United States v. Albertini*, 472 U.S. 675 (1985); *United States v. Locke*, 471 U.S. 84 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *see* ESKRIDGE, *supra* note 1, at 154-59. In his analysis of *Boutelier v. INS*, 387 U.S. 118 (1967), Eskridge approves of only the dissenting opinion of Circuit Court Judge Moore.

As with all social phenomena, empirical evidence of interpretive theories needs to be based on relative frequencies, not particular cases.[95] To make an empirical (in Eskridge's terms "positive" or "descriptive") claim that originalism is not the basis of judicial decisions, one would have to show that it *never* is—an impossible task—or that it rarely is or that it is relatively *infrequent*. One case, even a landmark case such as *Weber*, does not do that. Eskridge frequently says that what he is doing is descriptive, but the claim is not supported by what he actually does in this Chapter.

Eskridge's argument is normative,[96] and we should not be misled by his protests to the contrary. What is at issue is the effectiveness, the workability, even the wisdom and desirability of originalist theories of interpretation. *Can*, or *should*, legislative intent or purpose guide and constrain judicial decisionmaking under statutes?

For a "Yes" answer to this question, Eskridge would require an originalist theory to give a determinate answer even in *hard* cases. "Like intentionalism, purposivism does not yield determinate answers in the hard cases."[97] In the jargon, introduced by Ronald Dworkin, a *hard* case is one

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See Boutelier v. INS, 363 F.2d 488 (2d Cir. 1966) (Moore, J., dissenting); ESKRIDGE, *supra* note 1, at 51-55.

95. *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

96. "Normative" is a wretched word. The problem is that, contrasting "positive" (which Eskridge at least acknowledges to be synonymous with "descriptive"), it includes both institutional facts and moral and exhortative claims. Institutional facts (contrast "brute facts") are those that depend for their existence on human institutions, like money, but also statistically convergent behavioral and judgmental patterns, i.e., *norms*. *See* G.E.M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69 (1957-1958). Our current use of "normative" confuses and/or conflates empirical institutional claims with moral ones. We could reduce confusion, and deceptive argument, by using "empirical/moral" instead of "positive/normative," and distinguishing between institutional and brute facts under "empirical." But rhetorical fashions are persistent in legal academic writing. Fortunately, the confusion and conflation is appropriate here: Eskridge's arguments are moral and exhortative and sometimes institutional.

97. ESKRIDGE, *supra* note 1, at 29. This is not isolated or an accidental misstatement. For example Eskridge states, "[l]ike intentionalism and purposivism, textualism cannot rigorously be tied to majority preferences, does not yield determinate answers or meaningfully constrain the interpreter in hard cases." *Id.* at 34. Later, he demands the same measure of success for textualist (plain meaning) statutory interpretation: "[a] simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation." *Id.* at 41. "Foundational" as a modifier of "theory" creeps into Eskridge's writing only late in the chapter and does not appear to serve any non-rhetorical function. For an argument that a foundational theory of law is appropriate, see Roy L. Stone-de Montpensier, *The Compleat Wrangler*, 50 MINN. L. REV. 1001, 1001-25 (1966)

the outcome of which is not determined by the set of antecedent legal resources; it thus requires judgment.[98] Taken literally, then, the standard of excellence Eskridge demands is a necessary impossibility. So, on the principle of charity, we should look for a somewhat reduced standard. He does suggest that by "hard cases" he means only those that "arise when the issue is either unanticipated or conflictual."[99] In such cases an originalist cannot prove that hers is the meaning actually intended by most legislators, either through rigorous vote counting, or conventional sources or even reconstruction of the enacting coalition. The *Weber* case demonstrates that the concept of legislative purpose (or intent) does not give a determinative result to the question. This is because "[a]n attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, for its application depends on context and the interpreter's perspective."[100]

The point Eskridge misses here is that the distinguishing characteristic of hard cases is that they are *hard*. Of course there is no archaeological method of resolving them in talismanic fashion. If there were they would not be hard. Even on this reduced criterion (not indeterminate on prior law, but unanticipated or conflictual), the standard he requires is impossible to meet. Were it satisfied by the words of the statute and all other archaeological resources, that is, were the problem *anticipated*, the parties would not be litigating. Were there no legitimate conflict, the parties would not be litigating, and especially not before the Supreme Court.

Eskridge ignores the empirical fact that most potential disputes in society are not litigated because the behavioral standards, including those established by statute, are quite clear to the governed, and just as the legislatures intended. His argument that in conflictual scenarios unanticipated by the enacting legislature the "application [of the statute] depends on context and the interpreter's perspective[,]"[101] adds nothing. Of course different judges can reach different conclusions in such cases. Otherwise we would have no conflicts for judicial resolution, and no dissents in such resolutions.

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and Roy L. Stone-de Montpensier, *Logic and Law: The Precedence of Precedents*, 51 MINN. L. REV. 655, 655-74 (1967). I have argued that this idea is logically incoherent. *See* M.B.W. Sinclair, *Notes Toward a Formal Model of Common Law*, 62 IND. L.J. 355, 363 (1987).

98. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978). *See also* ESKRIDGE, *supra* note 1, at 20 (acknowledging Dworkin).

99. ESKRIDGE, *supra* note 1, at 20.

100. *Id.* at 29.

101. *Id.*

Eskridge's criterion of adequacy, *viz.*, universal determinacy and mathematical certainty, cannot be met by foundationalist, originalist or any other theory of statutory interpretation of any content.[102] And he offers no other method or standard of evaluation. But that does not mean it can not be done or that we should be excused from the task. After all, when we discuss statutory interpretation decisions we do not do so *in vacuo*. And one limitation should be clear: the choice of method should *not* be simply outcome driven such that the method utilized achieves the result the judge or critic personally prefers.

At the very end of the chapter, Eskridge introduces a new criterion, *explaining or predicting statutory interpretations*. "The analysis also suggests that originalist theories are not capable of explaining or predicting statutory interpretations, even when interpreters are rhetorically invoking one or more originalist theories to justify their interpretations."[103] But explaining is exactly what originalist argument does in particular cases. Eskridge seems here to confuse the legal explanation or justification given in the opinion and the judge's personal motivation, a confusion characteristic of legal realism. Since law and legal decisions are intrinsically public communications, this conflation of motive and reason is illegitimate. Prediction is the laboratory science test. As pointed out above, if it were applied to law, disagreement could only be based on mistake and dissenting opinions would hardly be possible.

When it comes to judicial decisionmaking, at the forefront of constraints under our constitution is legislative supremacy.[104] If this is to mean anything, statutes, the product of the legislative process, must constrain judicial decisions so that "any conflict between the legislative will and the judicial will must be resolved in favor of the former."[105] No theory can provide universal determinacy no matter what the archaeological resources. But any reasonable theory should require deference to the legislature. And deference of the judiciary requires compliance with the intent, purpose, will or meaning of the legislature. As Judge Wald puts it, the judge must strive "*to advance rather than impede or frustrate the will of Congress.*"[106] No one should pretend that

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102. The *caveat* "of any content" is essential. It is simple to formulate a theory of decision-making that will answer all problems. For example, "justice is what is administered by our courts" means courts' conclusions are just, 100%, universally, but vacuously. As a theory it is content*less*, merely a redefinition of "just." This is a problem for Eskridge's *dynamic* statutory interpretation.

103. ESKRIDGE, *supra* note 1, at 47.

104. *See* Johnson v. Southern Pac. Co., 117 F. 462 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904).

105. DICKERSON, *supra* note 8, at 8.

106. Wald, *supra* note 10, at 301.

this is always easy. New York's chief judge, Judge Judith Kaye explained:

> [A]scertaining the legislative intent is often no less difficult than drawing common-law or constitutional distinctions, requiring "a choice between uncertainties," surely an "ungainly judicial function." . . . Indeed, "there is no sharp break of method in passing from 'common law,' old style, to the combinations of decisional and statutory law now familiar. Statutes, after all, need to be interpreted, filled in, related to the rest of the corpus."[107]

Such an attitude acknowledges our democratic structure, legislative supremacy, and the search for guidance by legislative intent in difficult cases.

2. What is "legislative intent?"

Attacks on the notion of the intention of the legislature presume that this intention is a perfect analogue of the intention of an individual human in giving a direction or command. Unless something can be found in the legislative process which is equal to the mental process or state of the individual, there will be no such thing as legislative intent. But why should we expect the intent of a legislature to be such a perfect analogue of an individual human's intent in the utterance of an order or direction? Perhaps the temptation comes from our belief that the paradigm of legislation is something like the ten commandments, or the commands of a sovereign.[108] Or, perhaps, it is a tendency to think of one's own intent as the paradigm and of anything ascribed on less perfect criteria as mythic. However, that is simply to put a high redefinition on "intent." Whatever the cause, insisting that legislative intent be the same as the intent of an individual, ensures that intent will not be found in the assembly or the assembly's behavior.

Eskridge's conception of intention is limited to the individual human's mental state and so his compendium of arguments is completely confined to the conception of legislative intent as "the actual intentions of the

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107. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 25 (1995) (footnotes omitted).

108. In the treatise commonly said to be the foundation of modern jurisprudence, John Austin argued that all law is the command of a sovereign. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 212 (Wilfrid E. Rumble ed., 1995). But the analogy is a limited one and we should not allow ourselves to be caught up in it beyond its useful limits.

legislative coalition that enacted the statute."[109] Legislative intent (and legislative purpose is exactly parallel in this respect) is seen only as an aggregate of individual intents; if meaning, intent or purpose is something in the mind of the speaker, then the meaning, intent, or purpose of the speech of an aggregation of speakers or a legislative body, can only be an aggregation of those individual meanings, intents or purposes. This identification of legislative intent with individual intent is a mistake. But it is a special kind of mistake, *viz*, a category mistake.[110]

The concept of "category mistake" was introduced by Oxford philosopher Gilbert Ryle with a famous set of examples.

> A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and administrative offices. He then asks 'But where is the University? I have seen where the members of the Colleges live, where the Registrar works, where the scientists experiment and the rest. But I have not yet seen the University in which reside and work the members of your University' . . . . His mistake lay in his innocent assumption that it was correct to speak of Christ Church, the Bodleian Library, the Ashmolean Museum *and* the University, to speak, that is, as if 'the University' stood for an extra member of the class of which these other units are members. He was mistakenly allocating the University to the same category as that to which the other institutions belong.[111]

After two further illustrations, Ryle continues:

> These illustrations of category-mistakes have a common feature which must be noticed. The mistakes were made by people who do not know how to wield the concepts *University, division* and *team-spirit*. Their puzzles arose from inability to use certain items in the English vocabulary.

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109. ESKRIDGE, *supra* note 1, at 16.

110. This point has already been made by Supreme Court Justice Breyer:

> To refuse to ascribe a "purpose" to Congress in enacting statutory language simply because one cannot find three or four hundred legislators who have claimed it as a personal purpose, is rather like (to use Professor Ryle's old example) refusing to believe in the existence of Oxford University because one can find only colleges.

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1992).

111. GILBERT RYLE, THE CONCEPT OF MIND 16 (1949).

> The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong.[112]

Ryle's purpose was to demonstrate how, in the philosophy of mind, Cartesian dualism was a category mistake and that recognizing this dissolved most of its problems. Once we recognize the categorical difference between legislative and individual intent, many of the problems associated with originalist theories of statutory interpretation will also dissolve.

Ryle suggests that one way to test for a category mistake is to examine incongruity in conjoined lists. For example, "She left in a flurry of tears and a taxi."[113] Similarly, it is easy to find anomalous parallels with 'intent' predicated of a person and of a legislature. "John said Φ, but intended the opposite." "Congress enacted Ψ, but intended the opposite." "Jane's words belie her intent." "The legislation belies congress' intent." It is grammatically anomalous to lump legislative intent together with acting, pretending, lying or dissembling. Doing so is to make a mistake.[114]

Individual humans can act, lie, defraud, dissemble and disguise their true intentions in any number of more or less venal ways. However, a legislature cannot—a legislature cannot even make a Freudian slip. When we ascribe an intent to another person, we can go wrong in a number of ways having to do with the imperfect correlation between public manifestations and interior states. Were this not so, play acting would be impossible: "An 'inner process' stands in need of outward criteria."[115] With humans we know from our own case, and allow for in others, the possibility of an intent different from that manifested. However, with legislatures we do not and cannot. Thus finding the intent of the legislature is rather *easier* and *more certain* than finding the intent of an individual. A legislature is an intrinsically public body and wears its inner thoughts on its sleeve, so to speak. To conflate "legislative intent" with "individual human intent" is to make a category mistake. Eskridge's

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112. *Id.* at 17.

113. *See id.* at 21 (Ryle uses a different wording of this old joke).

114. It is a mistake adopted enthusiastically in the oft-cited article, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. OF LAW & ECON. 239 (1992).

115. WITTGENSTEIN, *supra* note 67 at § 580.

arguments about legislators' having no intent,[116] or dissembling[117] lose credibility when this category mistake is uncovered.

It is one thing to show the error of identifying legislative intent with individual intent, or to think of legislative intent as an aggregate of the intents of the individual legislators. It is quite another thing to give an account of legislative intent itself. Many philosophers have addressed this, giving an account of the intention of a collective body as fundamental, at least as fundamental and perhaps more so than individual intent.[118] Renowned philosopher John Searle puts it thus:

> Many species of animals, our own especially, have a capacity for collective intentionality. By this I mean not only that they engage in cooperative behavior, but that they share intentional states such as beliefs, desires, and intentions . . . . Obvious examples are where *I* am doing something only as part of *our* doing something. So if I am an offensive lineman playing in a football game, I might be blocking the defensive end, but I am blocking only as part of *our* executing a pass play.[119]

Searle argues against the view that singular intentionality is fundamental and collective intentionality must therefore be derived.

> In my view . . . these efforts to reduce collective intentionality to individual intentionality fail. Collective intentionality is a biologically primitive phenomenon that cannot be reduced to or eliminated in favor of something else . . . . The crucial element in collective intentionality is a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that

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116. *See, e.g.*, ESKRIDGE, *supra* note 1, at 16 ("[L]egislators usually do not have a specific intention on more than a few issues (if that) in any bill for which they vote."); *see also* WITTGENSTEIN, *supra* note 67, at § 580.

117. *See* ESKRIDGE, *supra* note 1, at 16 ("Even when legislators state for the record what they think a bill means for a specific issue, their statements may not be reliable because of strategic behavior."); *see also* WITTGENSTEIN, *supra* note 67, at § 580.

118. *See, e.g.*, MARGARET GILBERT, ON SOCIAL FACTS 435-36 (1989) (discussing the notion of a plural subject of intentions that is not reducible); *see also* John R. Searle, *Collective Intentions and Actions*, *in* INTENTIONS IN COMMUNICATION 400, 401 (Philip R. Cohen et al. eds., 1990) ("[c]ollective intentional behavior is a primitive phenomenon"); Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327 (1992) (analyzing the content of collective intent).

119. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 23 (1995); *see also* Breyer, *supra* note 110, at 865 (similarly using a sports team—basketball—illustration).

> each person has is derived *from* the collective intentionality that they share.[120]

Why do so many think collective intentional acts must be built of individual intentionality? Because we think of intentionality as a kind of mental state, something strictly within an individual mind:

> I want to claim, on the contrary, that the argument contains a fallacy and that the dilemma is a false one. It is indeed the case that all my mental life is inside my brain, and all your mental life is inside your brain, and so on for everybody else. But it does not follow from that that all my mental life must be expressed in the form of a singular noun phrase referring to me. The form that my collective intentionality can take is simply "we intend," "we are doing so-and-so," and the like. In such cases, I intend only as part of our intending. The intentionality that exists in each individual head has the form "we intend."[121]

Accordingly, the concept of legislative intent, ascribed to a legislature of many members, does not have to be parasitic on individual intent. It is independent, at least as fundamental as individual intent, and perhaps more so. One could think of it as an emergent property. Hydrogen and oxygen are both colorless gasses, and perfectly dry. But put them together in the right combination and they become water, the paradigm of wet things. Wetness then is an emergent property of the combination. Intent, likewise, is an emergent property of a legislature.[122]

If we look at how we use the words "legislative intent," or their close relatives "legislative purpose," "legislative will" and the like, we find nothing magical or mysterious. When a judge faces a problem the solution to which is not immediately apparent under the governing statute, what should she do? The doctrine of legislative supremacy suggests that the choice should not be entirely free, that if she can she should follow the will of the legislature rather than her own. She should seek to find and then defer to legislative intent. That's fairly ordinary, isn't it? We are entitled to assume that the legislature was not enacting sentences at random, so finding its intent or purpose in selecting the particular words and sentences in question is a matter of finding what was meant in a case

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120. *See* SEARLE, *supra* note 119, at 24-25.

121. *Id.* at 25-26.

122. *See* J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 875-80 (1996) (discussing the concept of an emergent property and its application to law).

like this. Even Judge Easterbrook, himself once a skeptic about legislative intent,[123] acknowledges as much.

> We must separate two questions: (1) What did Congress think the words of § 92 meant? (Assume for the moment that a collective body can "think" or "intend" anything at all.) (2) How did Congress expect things to turn out in a world governed by the new statute? The former question concerns the interpretation of the law; legislative "intent" is relevant in the sense that it shows how the legal community understood these words at the time. The latter question rarely assists the interpretive enterprise, because "intent" is useful only to the extent it helps illuminate the meaning of the enacted statute. It does not matter what Congress intended in the abstract; the question is what it meant by what it enacted.[124]

This does not mean that legislative intent will always be easily or unequivocally determinable. It is no more easily or unequivocally determinable than the intent of an individual person. But the legislature presents *in public* all relevant information on which to base arguments and judgments of intent. Individuals don't.

Of course, legislation is often the end result of compromises, negotiations and even under-the-table bargains.[125] But that does not alter the fact that the legislative intent is discoverable, if at all, entirely from a public record. The private deal struck in the men's room has no place in the public record and no place in the determination of legislative intent.[126]

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123. *See generally* Easterbrook, *supra* note 15.

124. NBD Bank, N.A. v. Bennett, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.).

125. *See* Posner, *supra* note 61, at 275 ("Log rolling implies that legislators often vote without regard to their personal convictions.").

126. Public choice theorists might disagree. For example, Judge Frank Easterbrook, wrote:

> [A judge] first identifies the contracting parties and then seeks to discover what they resolved and what they left unresolved . . . . A judge then implements the bargain as a faithful agent but without enthusiasm; asked to extend the scope of a back-room deal, he refuses unless the proof of the deal's scope is compelling. Omissions are evidence that no bargain was struck: some issues were left for the future, or perhaps one party was unwilling to pay the price of a resolution in its favor.

Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). Easterbrook further states:

> If the statute gave Group *X* twenty-five percent of what it wanted, it probably meant contending groups to keep the rest . . . . The compromise was that

Justice O'Connor probably means something similar in drawing a distinction between a legislator's motive and the purpose of the legislation:

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.[127]

Legislative intent is derived from sources beyond the words of the statute but the sources are confined to publicly available materials. We may debate their meaning but only based on publicly accessible sources.[128] A legislature can have a variety of intents, purposes, motives and wills, or none at all,[129] but all those of permissible relevance are to be discovered in the public record. Thus, the legislature as such cannot act, pretend, lie, or disguise its "true feelings." Legislative intent is more objectively determinable than individual human intent.

Those who would seek something different, something more like the intention of an individual, are indeed seeking a phantom. The legislative intent that is to be implemented in statutory interpretation is not

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> Group *X* would get some benefits but not more. When a court observes that Congress propelled Group *X* part [of the] way to its desired end, it cannot assist Group *X* farther along the journey without undoing the structure of the deal.

Id. at 46. *See also* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

127. Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990).

128. Contrast our debates about the true intent of an individual: what lies behind his action? . . . what did the author really mean here? . . . is this an act or what?

129. In first enacting the Uniform Commercial Code, most state legislatures simply enacted the whole package. Thus for any particular section it would be inaccurate to attribute to them any intent, purpose, motive, or will whatsoever. Similarly, where the United States Congress enacted a filing deadline as "by December 31st," the Supreme Court was no doubt correct in denying any intent at all, other than that on the face of the words.

> To attempt to decide whether some date other than the one set out in the statute is the date actually "intended" by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. "Actual purpose is sometimes unknown," *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring), and such is the case with filing deadlines; as might be expected, nothing in the legislative history suggests why Congress chose December 30 over December 31.

United States v. Locke, 471 U.S. 84, 93 (1984).

phantasmic, it is not even something that can be disguised, hidden or misrepresented. Quite the contrary. Legislative intent is something to be sought in printed records and justified by public argument. It is also apparent, as a matter of empirical observation, that this is the belief of practicing judges.

3. The Nature of Statutory Meaning

When we look for the legislative intent, we look for the role the legislature intended the statute to play in society. Primarily, as Chief Justice Marshall said: "The intention of the legislature is to be collected from the words they employ."[130] But if the words are not clear, if the words are ambiguous, if the words seem inconsistent with other enactments or if the words of the statute lead to absurdity or manifest injustice, what then? In a passage quoted above, Warren Lehman identified as problematic "the case in which the subject matter to which the law is to be applied could not have been known to its draftsmen: *e.g.*, the application of a nineteenth-century statute to the airplane."[131] The problem is useful for identifying two different senses of meaning of the words the legislature employs, the intension and the extension.[132] These provide a distinction that can help us dissolve some of the conceptual difficulties that have been built up around interpreting statutes, including "[t]he unreality of [legislative] intention . . . ."[133]

Consider, for example, the word "green." If an English speaker goes into a factual environment (a room, for instance) in which he has never been before, he will be able to pick out all of the green things there. This is simply what it is to be a speaker of English and to know the meaning of "green." Included in this ability is being able to distinguish the things that are obviously and indisputably green from those that are borderline; the class of green things in a factual environment has fuzzy edges.

One could say that the meaning of "green" is the class of green things. But this would not do because then one would not know the meaning of "green" unless one had surveyed all green things. Nobody has done or could do this although many people know the meaning of "green."

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130. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

131. Lehman, *supra* note 53, at 500.

132. The words "intension" and "extension" are probably the words most commonly used to draw this distinction in semantics; they correspond to Frege's *sinn* and *bedeutung* (respectively) and mean the same as the translations "sense" and "reference." *See* Gottlob Frege, *On Sense and Reference*, *in* TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56-78 (Peter Geach & Max Black eds., 1970). Their meanings are roughly the same as the popular "connotation" and "denotation."

133. Lehman, *supra* note 53, at 500.

Nor is the meaning merely all the green things one is presently observing, for there are many other things that can properly be said to be green.

On the other hand, it would not do to say that the meaning is the criterion in the mind of an English speaker to which she personally ascribes the predicate. The language is more public and more objectively testable than that. One can, and must be able to be right or mistaken in what one says. The meaning of predicates relates to and their correct ascription depends upon facts in the extra-linguistic world. A general theory of meaning has to accommodate both of these facets: the empirical world and the speaker's linguistic knowledge.

The intension of the word is what one knows. It is the criterion according to which the speaker confidently can ascribe "green" to objects in an hitherto unobserved factual set-up.[134] Note the spelling: "intension" with an "*s*". The class of green things (at a particular scene) is the *extension* of the word "green" (at that scene). These are two aspects (or modes of meaning[135]) of predicate expressions.[136] Intensions are the determiners of extensions, but we demonstrate our knowledge of intensions by correct application to extensions. Of course some people are better at picking out green things than others, and some disputes about borderline cases can be irresoluble. But this does not alter the fact of a linguistic community's shared knowledge of intensions of words. To the contrary: If speakers of the language did not have this shared knowledge in common, not only would communication be impossible but so would these

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134. Intensions of common nouns, intransitive verbs, and adjectives are functions from possible worlds into sets; extensions are the values of those functions for given possible worlds as arguments. *See generally* M.J. CRESSWELL, LOGICS AND LANGUAGES (1973); Richard Montague, *English as a Formal Language, in* FORMAL PHILOSOPHY 188-221 (Richmond H. Thomason ed., 1974).

135. A much larger variety of modes of meaning can be distinguished. *See, e.g.*, C.I. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION 35-70 (1946).

136. Complexes of words, such as sentences, also have meanings. The meaning of a sentence is what tells us whether it is true or false of a given scene, or sequence of scenes. Thus, "the book Dickerson, '*The Interpretation and Application of Statutes*' is green" is true or false according to the color of that book. It is because I know the intension of that sentence that I can make the necessary determination of truth or falsity. The extension of a sentence at a particular place-time is usually said to be one or other of the values true and false (in the jargon of set-theoretic semantics, the intension of a proposition is a function from possible worlds into the pair $< T, F >$; the extension is the set of possible worlds at which it is T). When we talk of the semantic content, or the descriptive content, or the phrastic of a statute, we mean that part of it that could be true or false.

very indeterminacies and disputes about words. When we talk of meanings, then, we usually mean intensions.[137]

When legislatures speak, when they enact statutes, what mode of meaning do they intend? Intensions or extensions? Clearly intensions. Legislators may use descriptions of particular fact patterns, historical or hypothetical, as diagnostics, as motivations, as sales pitches or as *reductio* conclusions. But the strings of words they enact convey meanings by way of commonly shared intensions and apply to indefinitely many fact patterns not specifically contemplated in the legislative process.[138] This must be the case. Were statutes confined only to those fact patterns explicitly contemplated by the enacting legislature, they would have no application to any other fact patterns, including those occurring at different or future times.

Eskridge, in his arguments against the existence of legislative intent, fails to recognize the distinction between intension and extension as modes of meaning. Many of his and others' arguments depend exactly on confusing the two. For example, Eskridge writes:

> The "original intent" and "plain meaning" rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment . . . .
>
> . . . Other industrialized countries conceive of statutory interpretation as dynamic: the meaning of a statute is not fixed until it is applied to concrete circumstances, and it is neither uncommon nor illegitimate for the meaning of a provision to change over time. . . .
>
> . . . Over time, the gaps and ambiguities proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute. The original meaning of the statute or the original intent of the legislature has less

137. This has to be: extensions are things in the (extra-linguistic) world; intensions, like meanings, are in our heads.

138. *See* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). Fuller thought a mistake of legal realists was to presume that meanings had to be extensions only. Fuller states: "[t]he fallacy underlying Llewellyn's whole discussion is the assumption that thinking must be directed toward particular 'things,' when, as a matter of fact, it may be, and generally is, directed toward classes and universals . . . ."). *See also* Hon. Lord Wright, *Precedents*, 8 CAMBRIDGE L.J. 118, 118 (1943) (It is commonly said that to be good law a statute must be *general*, ie, not govern a specific situation—a specific extension—only. "The word 'law,' however, necessarily implies generality and uniformity, which can operate only in practice by some method and mechanism.").

> relevance for figuring out how the statute should apply to unforseen circumstances.[139]

Presumably he does not mean that the sequence of words, the "collocation of ink spots" that comprise the statute is not static until amended. So he must mean that the statute's meaning can develop. If he means extensional meaning, then "the meaning of a statute is not fixed until it is applied to concrete circumstances" is trivially true. But in terms of intensions, it is simply false. Intensional meaning might change over time,[140] but when it does, the meaning as and when enacted is usually discoverable.[141] Judge Easterbrook makes and relies on this point:

> Unanticipated developments frustrate many a drafter. So it was with § 85; in 1864 Congress could not have anticipated credit cards and the computers that make them possible, but the Court did not suggest that this lack of precognition limited the scope of the law. Economic changes (the transistor, high speed interstate communications networks, and so on) greatly altered the *effect* of § 85 without altering its meaning.[142]

It does not follow that the application of the statute to unforeseen circumstances is necessarily clear or determinate. It does mean that the judge is constrained by the statute, by its *meaning* and is not completely free to decide as she might choose. Judge Learned Hand wrote: "[B]ut we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast."[143] The principle of legislative supremacy requires that intensional meaning, "the original meaning of the

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139. ESKRIDGE, *supra* note 1, at 9-10.

140. For example, when the poet T. S. Eliot writes: "Words move, . . . slip, slide, perish, Decay with imprecision, will not stay in place, Will not stay still," he is clearly writing about intensions. T. S. Eliot, *Burnt Norton*, *in* THE COMPLETE POEMS AND PLAYS: 1909-1950, 117, 121 (1980).

141. Take, for example, the word "science" in Article 1, Section 8, Clause 8, of the Constitution, the intellectual property clause: "To promote the progress of science and useful arts . . . ." U.S. CONST. art I., § 8, cl. 8. In the eighteenth century it was used in the sense of the Latin "*scire*" meaning "knowledge." It was not until the mid-nineteenth century that it was first used in its present sense. All this is quite easily discoverable.

142. NBD Bank, N.A. v. Bennett, 67 F.3d 629, 633 (7th Cir. 1995).

143. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 789 (2d Cir. 1946), *aff'd* 328 U.S. 275 (1946).

statute or the original intent of the legislature," provide the relevant constraint on judicial decisions under it.

None of this, of course, means that decision-making in hard cases is easy or certain. It means only that it is constrained and that a judge must look to that constraint. As New York's chief judge, Judge Judith Kaye has recently written: "I do not think one has to be a 'metademocrat,' a 'public law theorist,' or even (heaven forfend) a 'dynamic statutory interpreter' to acknowledge that the 'will of the legislature' is not always easy (or even possible) to discern when it comes to specific facts before a court."[144]

And as Justice Brennan said:

> The struggle for certainty, for confidence in one's interpretive efforts, is real and persistent. Although we may never achieve certainty, we must continue in the struggle, for it is only as each generation brings to bear its experience and understanding, its passion and reason, that there is hope for progress in the law.[145]

F. *Summary*

Thus we see that Eskridge's case against archaeological theories, theories of the existence and priority of legislative intent, purpose or meaning, rests on three fallacies. First, he sets the criterion of success for such theories at a level inappropriate to the subject matter, legal decision making. "[N]one of the methodologies yields determinate results. Consequently, none fully constrains statutory interpreters or limits them to the preferences of the enacting coalition."[146] Of course no originalist theory will "*fully* constrain" a judge or *determine* her decision in any but the most trivial of cases.

The second fallacy confuses the intent, purpose or meaning of an institutional body like a legislature with that of an individual human. If "intent" is only understood as the inner psychological state of an individual person, then legislative intent is seen as some sort of aggregate

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144. Kaye, *supra* note 107, at 28 (citations omitted).

145. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 42 RECORD 948, 962 (1987) (Forty-Second Benjamin N. Cardozo Lecture).

146. ESKRIDGE, *supra* note 1, at 14. "But in the hard cases an intentionalist cannot prove that her is the one actually intended by most legislators . . . ." *Id.* at 23. "Like intentionalism, purposivism does not yield determinate answers in the hard cases." *Id.* at 29. "A simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation." *Id.* at 41. "This methodology ['holistic textualism'], too, fails because it does no better than plain meaning to yield determinate interpretations . . . ." *Id.* at 42.

of the personal intents of individual legislators. This is a category mistake. Legislative intent is a demonstrably different phenomenon which, although not always ascertainable with scientific precision, is still more objectively determinable than individual intent.

Third, Eskridge confuses the application of a string of words to a particular situation with the meaning of those words, *i.e.*, he fails to distinguish extensions from intensions.[147] Meanings, in the sense of *intensions*, are public and relatively stable. Were they not, language would be impossible. Determination of whether particular complicated factual situations are within the *extension* at a given time and place of a particular, complicated set of words is not always clear, easy or determinate. That is why courts are needed, and, in a society built on the democratic principle of legislative supremacy, why courts in difficult cases resort to extrinsic aids to determine the will, intent, purpose or meaning of the legislature.

Much of Eskridge's argument is taken up with examples, usually of Supreme Court cases.[148] But law is not a laboratory science. Examples, or *counter* examples, carefully chosen for their indeterminate quality, cannot prove originalist theories of statutory interpretation inviable. At most they show that in hard cases what counts as legislative intent can be as underdetermined and contentious as the statute itself.

In deference to Eskridge's illustrative method, let us look at a simple hypothetical finely adapted to his purpose by Lon Fuller. "Suppose a legislator enacts that it shall be a crime for anyone 'to carry concealed on his person any dangerous weapon.' After the statute is passed someone invents a machine, no larger than a fountain pen, capable of throwing a 'death ray.' Is such a machine included? Obviously, yes."[149] The key issue here will be the meaning of the noun phrase 'dangerous weapon.' Assume that a death ray machine will not be found among the scenarios expressly contemplated by the enacting legislature. Nor do we have any information about the individual intents of the members of the enacting coalition or of the log-rolling that went into creating that coalition's dominance. But that legislature enacted a string of meaningful words, not a set of particular descriptions of real or hypothetical states of affairs. As Fuller says, *"obviously"* this death ray machine is among the items picked

147. *See id.* at 50 ("Every time a statute is applied to a problem, statutory meaning is created.").

148. In Chapter 1 his prime example is *United Steelworkers v. Weber*, 443 U.S. 193 (1979), a hard case that divided the Court.

149. Fuller, *supra* note 138, at 445-46. Fuller says the new example is within the *latent content* of the statute, an inherent capacity for expansion of coverage. The argument in the text is that the coverage of the death ray machine is *not* an expansion, simply part of the meaning of the original.

out by 'dangerous weapon' in any plausible factual scenario.[150] This is obvious to any speaker who knows the meaning—the intension—of the words.[151] Legislative intent, the intent behind the enactment of words with meanings in the sense of intensions is neither phantom nor metaphor: it too is obvious. Legislatures do not enact prohibitions spuriously, for no purpose. To doubt the existence or determinability of the legislature's intent or purpose in this case would be strange indeed, despite our lack of access to the inner attitudes of the legislators.

Remember "[t]he primary rule for the interpretation of a statute" derived from the democratic principle of legislative supremacy is, "to ascertain, if possible, and enforce, the intention [of] the legislative body that enacted the law . . . ."[152] Has the intention of the legislature that enacted the prohibition on carrying dangerous weapons changed because of the invention of the death ray? Surely not. The intension of the words 'dangerous weapon' has not changed either. It is simply being applied to a different factual set-up than was possible at the time of enactment.[153]

Looking to intensions as the meaning of the statute and to the intent of the legislature as publicly manifested is hardly novel, even if the jargon

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150. This is an easy example. However, argument along these lines can also cope with indefinitely complicated and under-determined examples. *See, e.g.*, DAVID LEWIS, COUNTERFACTUALS (1973). For the seminal article introducing the notion of plausibility (accessibility conditions between possible worlds) see Saul A. Kripke, *Semantical Considerations on Modal Logic*, 16 ACTA PHILOSOPHICA FENNICA 83 (1963). For a historian's use of this kind of argument, limiting hypotheticals to plausible only see GEOFFREY HAWTHORN, PLAUSIBLE WORLDS (1991) (following David Lewis, *Counterpart Theory and Quantified Modal Logic*, 65 J. OF PHILOSOPHY 113 (1968)).

151. An example of courts' use of extensional meaning to limit a later application to what might be within the contemplation of a mid-nineteenth century legislature is *Commonwealth v. Welosky*, 276 Mass. 398 (1931) (it makes a fascinating pair with *Commonwealth v. Maxwell*, 271 Pa. 378 (1921), made famous by Professors Hart and Sacks, *supra* note 17, at 1172-87.). Massachusetts, like many other states, has a statute requiring that jury panels be drawn from those entitled to vote. *See* MASS. GEN. LAWS ANN. ch. 234, § 1 (West 1985). The Nineteenth Amendment required review of such statutes to ensure the right of women to serve as jurors. The Massachusetts Supreme Judicial Court found women were not within the intended meaning of 'person' in "A person . . . qualified to vote . . . ." *Id.* "Manifestly . . . the intent of the Legislature must have been, in using the word 'person' in statutes concerning jurors and jury lists, to confine its meaning to men. That was the only intent constitutionally permissible." *Welosky*, 276 Mass. at 406. The Pennsylvania Supreme Court held the opposite in *Maxwell*.

152. Johnson v. Southern Pac. Co., 117 F. 462, 465 (8th Cir. 1902), *rev'd on other grounds*, 196 U.S. 1 (1904); *see supra* notes 8-11 and accompanying text.

153. Of course it is not always so easy. For example, in 1931 the Supreme Court held that an airplane was not a "motor vehicle" under the National Motor Vehicle Theft Act. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931).

is. It is merely a way of articulating widely held intuitions, the same intuitions that underlie Plowden's method and the rules of Heydon's Case. Those who, like Eskridge, argue that a statute *means* only the extensions recognized by the individual members of the enacting coalition (*plus* those later added by courts) fly in the face of everyday interpretive realities.

III. THE DYNAMICS OF STATUTORY INTERPRETATION[154]

Chapter 1 of Eskridge's book is negative: it seeks to destroy a key underpinning of rival theories. Chapter 2, by contrast, is positive: it lays out the basic arguments for his idea. It is certainly an idea with legs, an idea as dynamic as its name. "Here I argue that statutory interpretation is multifaceted and evolutive rather than single faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historical political culture."[155]

One gets the feeling that this is a theory that is to be all things to all persons. Whatever in society can change over time or place or can have more than one "facet," can be dynamically influential. The clearest summary comes at the beginning of Chapter 3:

> Statutory interpretation is a cultural as well as a legal process. Cultural shifts generate movement of statutory meaning. Changes in society, its values, and its competing ideologies shape and reshape statutory meaning as they reveal new practical problems unresolved by the statute, interpretive horizons distant from those of the drafters, and novel political environments attentive to interpretive developments.[156]

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154. ESKRIDGE, *supra* note 1, at 48-80.

155. *Id.* at 48. The word "evolutive" is usually associated with evolution, but Eskridge does not use it in that way. Evolution contrasts with design, or revolution: evolution is distinguished by the retention of prior characteristics limiting adaptive changes; design, like revolution, is not so limited. Pure adaptationist theories, like Eskridge's, are thus akin to theories of designed or revolutionary change rather than evolution. *See* M.B.W. Sinclair, *The Use of Evolution Theory in Law*, 64 U. DET. L. REV. 451 (1987) (arguing that change in law is evolutive, retention being the most significant and interesting part of the model); *see also*, Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996) (using "path dependence," the economists' synonym for "retention").

156. ESKRIDGE, *supra* note 1, at 81.

So, "the meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes . . . ."[157]

Eskridge categorizes influential variables into three groups: those arising out of factual developments, those dependent on the interpreter, and those that result from the work of legal institutions, like courts. These he terms "Pragmatic Dynamism," "Hermeneutic Dynamism" and "Institutional Dynamism." Their exposition comprises the affirmative case for *dynamic* statutory interpretation.

A. *Pragmatic Dynamism: Applying Statutes Under Changed Circumstances*[158]

Pragmatism comes in many shapes and sizes, almost as many, one might say, as there are pragmatists.[159] What is Eskridge's pragmatism?

> Pragmatism argues that there is no "foundationalist" (single overriding) approach to legal issues. Instead, the [ ] problem should [be] consider[ed] from different angles, applying practical experience and factual context before arriving at a solution . . .
>
> . . . .
>
> . . . Pragmatism emphasizes the concrete over the abstract and is problem-solving in its orientation . . . . Pragmatic thought understands application as a process of practical reasoning.[160]

On this account, I must say I join the club, don't you?

How does pragmatism create or require dynamism in statutory interpretation? The enactment of a statute, its purpose and the meanings of its terms, are embedded in and presuppose the cultural understandings of the time. It is fashionable to point out how even the "hard sciences" are infected with social relativity.[161] But the point has long been stock in

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157. *Id.* at 199.

158. *Id.* at 50-57.

159. In the United States we trace the venerable tradition of pragmatism as a philosophy to William James. *See* WILLIAM JAMES, PRAGMATISM (1991); *see also* Summers, *supra* note 40, at 863-66. Its proponents include law and economics guru, Chief Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. *See generally* RICHARD A. POSNER, OVERCOMING LAW (1995).

160. ESKRIDGE, *supra* note 1, at 50 (citing ARISTOTLE, NICHOMACHEAN ETHICS, bk.6, chaps. 5-11 (discussing 'practical wisdom')).

161. *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

trade in social philosophy. The economist Joseph Schumpeter pointed out that our social presuppositions are ideologically driven.

> Analytic work begins with material provided by our vision of things, and this vision is ideological almost by definition. It embodies the [definition] of things as we see them, and wherever there is any possible motive for wishing to see them in a given rather than another light, the way in which we see things can hardly be distinguished from the way in which we wish to see them.[162]

Our social understandings and conceptions of justice, like our wishes, ideologies and technology, vary with time and place. The point was made some four hundred years ago by that foundational legal genius, Francis Bacon.

> And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the site of territories, the disposition of peoples, and the nature of commonwealths.[163]

How a statute will apply to a given set of facts in a changed social, political, economic, technological and moral environment will not be determined at its enactment, but will depend on judicial adaptation. An adaptive decision under an old statute in new circumstances may appear to give new meanings to the old words. Thus it will appear *dynamic*. Bacon biographer Daniel Coquillette summarizes Bacon's method of statutory interpretation thus: "its essence was to determine and articulate the rationale of the statute's enactment, and then to apply the statute, not according to its strict terms, but as appropriate to achieve the statute's goals given the changes in time and circumstance since its enactment."[164]

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162. JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 42 (1954).

163. Quoted in DANIEL R. COQUILLETTE, FRANCIS BACON 288 (1992).

164. *Id.* at 278. Coquillette continues: "Typical of Bacon, he perceived the inherent subjectivity of even this theory. He urged that it be used in conjunction with regular culling and amendment of statutes by legislative commissions, so that terminology would never be too out-dated." *Id.* (citation omitted). For this reason, the great economist John Maynard Keynes wrote that in modern times we could not expect a statute to remain relevant for more than "five or ten years."

> We cannot expect to legislate for a generation or more. The secular change in man's economic condition and the liability of human forecast to error are as

This is pragmatic dynamism. In Eskridge's account, since the "rationale of the statute's enactment," the legislative intent, is either non-existent or indeterminable, it too becomes contextually variable — *dynamic.*

From a problem solving position then, a statute may present itself as uncertain in meaning, indeterminate of the legal status of the facts at hand. Eskridge explains with an example. Section 212(a)(4) of the Immigration and Nationality Act of 1952, provided that "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect shall be excluded from the United States."[165] Legislative history shows that this was so drafted as to be, in the Public Health Service's (PHS's) understanding, "sufficiently broad to provide for the exclusion of homosexuals and sex perverts."[166] In the early 1950s, homosexuality was thought "in the medical and psychiatric profession . . . [to be] a mental 'disease,' a type of 'psychopathic personality.'"[167] "[B]y the 1960s, as empirical studies found no correlation between pathology and homosexuality, [ ] the Ninth Circuit in *Fleuti* [*v. Rosenberg*[168]] explicitly relied on newer medical studies in its effort to curtail application of the psychopathic personality exclusion."[169] The Supreme Court however, in 1965, sided with the PHS and original intent, upholding the exclusion of a homosexual under the statute.[170] At the same time, Congress sought to override *Fleuti* by amending § 212(a)(4) "to exclude aliens 'afflicted with psychopathic personality, *or sexual deviation*, or mental defect.'"[171] But medical enlightenment could not be forestalled; Eskridge attributes the change to the 1969 Stonewall riots:

> likely to lead to mistake in one direction as in another. We cannot, as reasonable men, do better than base our policy on the evidence we have and adapt it to the five or ten years over which we may suppose ourselves to have some measure of prevision; and we are not at fault if we leave on one side the extreme chances of revolutionary change in the order of Nature or of man's relation to her.

JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE 204 (1920).

165. ESKRIDGE, *supra* note 1, at 51.

166. *Id.* (citation omitted) (quoting legislative history).

167. *Id.*

168. 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

169. ESKRIDGE, *supra* note 1, at 53 (citation omitted). The court "held that the term 'psychopathic personality' was too vague to be constitutionally applied to 'homosexuals' generally." *Id.* at 52.

170. *See* Boutilier v. INS, 387 U.S. 118 (1967).

171. ESKRIDGE, *supra* note 1, at 52 (citation omitted).

> Within four years of Stonewall the American Psychiatric Association removed "homosexuality" from its list of mental disorders, after intense debate over the evidence. Other medical associations followed suit immediately, and the prior medical consensus collapsed. Responding to the new views within the medical establishment, the PHS announced in 1979 that it would no longer carry out examinations or issue certificates to exclude gay men, bisexuals, and lesbians pursuant to section 212(a)(4) because there was no reliable basis for considering homosexual orientation a medical disorder.[172]

The story continues to date and is very well told.

What is the point of this story? It is, says Eskridge, exemplary of dynamic statutory interpretation. "The PHS's about-face represented a dynamic interpretation of section 212(a)(4) based on changed societal and cultural circumstances."[173] Of course "dynamic statutory interpretation" is Eskridge's expression and he has control over its meaning. But if this is all he means, it doesn't amount to very much, and certainly is not much different from the views of a "static originalist." He explains that "assumptions" made at the enactment of the statute in 1952 had proven invalid, and "when those assumptions become obsolescent, the statute's application changes."[174] The general original purpose of the section was "to prevent entry into the United States of people with severe medical problems."[175] The relevant assumption, then, was that homosexuality was such a severe medical problem.[176] Ultimately, "[w]hat drove the statute's evolution (and ultimately drove the statute into an early retirement) was a sea change in American attitudes about sexual orientation, from hysterical intolerance to partial toleration."[177] Nicely expressed, perceptive, and accurate, but it doesn't support his thesis.

The meaning of the original statute was clear. In this case original intent, purpose and all that are acknowledged and useful. In 1952 the meaning of "psychopathic personality" and "severe medical problems" included "homosexuality" as a sub-part. Thus, the extension of the statute's terms at any given scenario would, according to the understanding

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172. *Id.* at 53-54 (citation omitted).

173. *Id.* at 54.

174. *Id.*

175. *Id.* at 53.

176. However, this was not an assumption. In 1952 homosexuality was considered a quasi scientific classification by the experts. Such science is fallible, especially as applied to socially constructed categories.

177. ESKRIDGE, *supra* note 1, at 55.

of homosexuality prevalent at the time, include all present homosexuals. The meaning of "psychopathic personality" and "severe medical problems" did not change and the criteria of "psychopathic personality" might be exactly the same now as they were then. But our official understanding of homosexuality has changed dramatically, and now those criteria would not fit it as such. The original intensions, like the original intent and the original purpose, of the key expressions in § 212(a)(4) have not changed, but their application today does not require the exclusion of homosexuals. However, had the section included homosexuals expressly,[178] no matter how enlightened and accepting society became, until repeal of that language, the Immigration and Naturalization Service and the PHS would be stuck, wouldn't they? That meaning and original intent would be too plain to escape.

What Eskridge has failed to recognize is the difference in modes of meaning, and what it is, perforce, that a legislature enacts and intends. A legislature cannot normally enact extensions; they would be simply too particular. This he acknowledges: "[b]ecause they are aimed at big problems and must last a long time, statutory enactments are often general, abstract, and theoretical."[179] But it is a distinction he constantly ignores. For example: "statutory meaning is not fixed until it is applied to concrete problems. . . . Every time a statute is applied to a problem, statutory meaning is created."[180] This is not trivial. A large measure of stability of meanings, intensions, is essential if language is to function. Every argument that Eskridge makes about meanings of statutory expressions can be made about common language expressions, equally fallaciously.

B. *Hermeneutic Dynamism: The Critical Role of the Interpreter's Perspective*[181]

This sub-section is easily the weakest in the first chapters, and there is ample indication that the author is aware of it. In some ways this doesn't matter: it's weakness is only in it's failure to substantiate a position nobody would seriously contest. But in some ways it does matter.

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178. For example, if § 212(a)(4) had provided that "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect, or who are homosexual shall be excluded from the United States." *Id.* at 51.

179. *Id.* at 48.

180. *Id.* at 50. A similar argument about common law predicates can be found in Sinclair, *supra* note 93, and Heidi L. Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994). Unlike statutory predicates, common law predicates do not come to us in precisely specified and authoritative sentences. Common law predicates need not communicate; statutes must.

181. ESKRIDGE, *supra* note 1, at 58-68.

The role of the sub-section's thesis as support for the general theory of dynamic statutory interpretation is exemplary of a form of fallacious but dangerously seductive argument.

"Hermeneutical dynamism" and its role are defined by the following: "the independent and changing identity of the interpreter ensures dynamic interpretation for reasons best explained by philosophical hermeneutics. The interpreter's role involves selection and creativity, which is influenced, often unconsciously, by the interpreter's own frame of reference—assumptions and beliefs about society, values, and the statute itself."[182] The citations, here omitted, are to postmoderns, especially to the work of Hans-Georg Gadamer and his epigones.[183] In effect the section elaborates on the stunningly original insight of postmodernism that things look different from different points of view. It's true and it's inescapable. Even the judge who strives mightily to follow the express will of the legislature "is influenced, often unconsciously" by his socialization, point of view, "field of vision,"[184] pre-understandings, in short by his "horizon."[185] One may look on all this with understandable skepticism, but it cannot be ignored. Eskridge makes the arguments as clearly and honestly as anyone.[186]

Eskridge introduces the argument with a list of various interpretations of *Jane Eyre* over the last hundred and fifty years[187] and his own interpretations when young and at present, thus showing that "[t]he meaning of *Jane Eyre* will not only change from generation to generation and from interpreter to interpreter but will change for the same reader over

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182. *Id.* at 58 (citation omitted). Eskridge, in a self-referential explanatory gesture, attributes his adoption and advocacy of *dynamic* statutory interpretation to (a) his middle-class upbringing and privileged legal education, (b) his "experience as a gay man" and (c) his "fascination with the phenomenon of scarcity and its implications for public life." *Id.* at 200 (the first two factors pervade the book, but in style and choice of examples, respectively, not determinatively. However, there is no sign of the third, even in the analysis of *Weber.*). But what's the point? Would I be justified in rejecting Eskridge's theory solely because my background is so different from his? Can I validate any position I might adopt merely by pointing out that I am just a country boy from the antipodes? Unless Eskridge can put a principled constraint on this hermeneutic pragmatism, he is in a free fall into solipsism.

183. *See* HANS-GEORG GADAMER, TRUTH AND METHOD (Garrett Barden & John Cumming eds., The Crossroad Publ'g Co. 1985) (1975).

184. ESKRIDGE, *supra* note 1, at 58.

185. *Id.*

186. *See, e.g., id.* at 192-204.

187. Curiously Eskridge omits the modern feminist classic, Sandra M. Gilbert & Susan Gubar, *A Dialogue of Self and Soul: Plain Jane's Progress, in* THE MADWOMAN IN THE ATTIC 336-71 (1984). Their analysis would have been useful to Eskridge in later parts of his argument.

time."[188] But in what sense of "meaning?" Surely Eskridge doesn't mean that "There was no possibility of taking a walk that day[,]"[189] says different things to different readers. Of course what determines the possibilities of walking has varied over time with the development of thermal underwear and the like and the mere likelihood of contemplating a walk varies with social class. But does it follow that the meaning of the sentence varies accordingly? Were it a legal problem, interpretation would more likely fall on a sentence such as this than on set of words as long and rambling as a this novel. And very often, as Eskridge's own examples show, the crux is the meaning of just a few words. He tells the story well, but it doesn't do much for his argument.

Eskridge is aware of the difficulty, but works on it from a different angle:

> Literary interpretation is not legal interpretation, and so it is not immediately clear that hermeneutics generally, and specifically my use of *Jane Eyre*, provides any insight into statutory interpretation. The traditionally emphasized difference between the two derives from the normative force of statutory interpretation: what we learn from interpreting statutes has a coercive effect on us that is not the same as what we learn from interpreting novels.[190]

His first response is to minimize this difference: "[s]urely there is some truth in this traditional distinction between legal and literary interpretation, but it is usually expressed too strongly."[191] Novels too can "have a substantial normative force . . . ."[192] "I do insist that there is not necessarily less at stake in the interpretation of literary or religious texts than there is in the interpretation of legal texts."[193] No doubt, and no doubt relevant, if only all things that have "normative force" had it in the same or at least in a commensurable manner. They don't. In the extreme, the life or death of a particular person could hinge on a judge's interpretation of a statute and at the least some person's wealth or welfare will be at stake. That's not the sort of normative force *Jane Eyre* has.

Eskridge does not rest his case for hermeneutic dynamism (meaning's dependence on the interpreter) on literary criticism alone. He returns to

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188. ESKRIDGE, *supra* note 1, at 59.

189. *See* CHARLOTTE BRONTË, JANE EYRE 1 (Bantam Books 1981) (1848).

190. ESKRIDGE, *supra* note 1, at 61 (citation omitted).

191. *Id.*

192. *Id.*

193. *Id.* at 62.

the example of § 212(a)(4) of the Immigration and Nationality Act and its interpretation. Just as the development of public attitudes and medical and psychological wisdom changed the factual application of "psychopathic personality," so too, aided by the replacement of old judges by new, they changed the horizons of the judiciary. The change in judicial attitudes affected judicial opinions. Who could doubt it? So long as there are reasonable dissents to decisions under statutes, how can there be any doubt that different judges with different judicial horizons, produce different results? Eskridge makes portentous and elegantly expressed claims for hermeneutic dynamism. For example: "[it] recasts the traditional textual, historical, and evolutive inquiries as more explicitly interconnected and mutually influencing."[194] "By representing the interpreter's horizon of thought as the field on which this back-and-forth process proceeds, the hermeneutical model recognizes the critical role played by the interpreter's framework."[195] Yet all the bells and whistles in the world can't rescue it from the obvious: different judges can have different views.

Were that all there is to it, it would be harmless enough. But it isn't really. It is clear that no general description will completely capture the empirical reality of judicial interpretation. All theories of and arguments about statutory interpretation are thus to a great extent about the justifiability, the propriety or the validity (under some higher predicate), of a particular approach. What Eskridge does in this sub-section is move the question from normative justification to the acceptance of empirical descriptions. It is hardly to be denied, empirically, that a judge's horizons influence her decisions. But it does not follow that a judge should acquiesce to her own subjective preferences, in disregard of legislative intent, precedent or discordant societal norms. Quite the contrary. This is one of the reasons that we have judicial opinions, and require judges to strive for objectivity in them.[196] 'I decide thus-and-so because this is how I was brought up/my education, religion and socialization so dictate' are not acceptable in the judicial system. All lawyers know that and right from the start, law school socialization prevents it.[197] Eskridge's argument lacks a normative qualification and limitation on the hermeneutical

194. *Id.* at 63.

195. *Id.* at 64.

196. *See* Feldman, *supra* note 180 (discussing objectivity in legal judgment).

197. *See* ESKRIDGE, *supra* note 1, at 65 (Eskridge acknowledges this, but does not explain how or why it fits into hermeneutical dynamism except to say that it does).

dynamism thesis. But just such a limitation is necessary if we are not to accept judicial whim as a normatively neutral justification.[198]

To be fair I should acknowledge that there are indications that Eskridge sees this point. He writes that "hermeneutics rejects the idea that individual beliefs necessarily dominate interpretation[,]"[199] yet only as a bald statement, inconsistently backing off from the rest of the sub-section. Even this he sees as a problem for the predictability essential to legal planning. It is overcome by the fact that, despite what he has written immediately before, the role of the interpreter is quite insignificant because judges are similar in attitude and horizons. This because the interpreter is constrained by her institutional tradition: "[t]he statutory interpreter is constrained—often unconsciously—by the traditions of the surrounding culture and of her professional culture, just as all interpreters are."[200] Is this just a re-taking of the entire preceding argument of the sub-section?

C. *Institutional Dynamism: Statutory Interpretation as a Sequential Process*[201]

The third leg of the triad underpinning the theory of dynamic statutory interpretation has a name only slightly more commonplace: "*Institutional* dynamics." It results from the structure of the social institutions involved with statutes namely: the legislature, the Supreme Court, other courts, lawyers, police officers, administrative agencies in both front-office and back-office functions and the citizenry. All interpret statutes and their interpretations have an effect on the interpretations of others. So far Eskridge has concentrated on the Supreme Court and the federal legislature. Here he wants to focus on the others, all of which are even more subject to changing social mores and pressures.

Here, at last, Eskridge recognizes that he and others interested in statutory interpretation concentrate too much on the Supreme Court:

> we should stop looking at statutory interpretation just from the perspective of the Supreme Court and instead consider statutes from . . . the perspective of private parties, agencies, and lower courts, whose work most shapes and influences what the Court

198. For example, Eskridge writes that a judge may have "a better understanding of what is good or useful about the statutory text and what is not[,]" than the enacting legislature. *Id.* (citation omitted). May a judge exercise such a distinction? We academics may talk about it theoretically, however, judges cannot constitutionally impose their better views.

199. *Id.*

200. *Id.*

201. *Id.* at 69-80.

> hears and how it will resolve cases . . . . This claim suggests how statutory interpretation is dynamic, but in a more complex way than has been suggested thus far.[202]

Looking at interpretation at levels other than the Supreme Court is a plan worth hearty endorsement. Indeed, the authoritative force of Supreme Court interpretive practice, how it goes about statutory interpretation rather than the interpretations it puts on statutes, is a subject worthy of more exploration. At the very least it is of less than precedential power. Much could also be gained from focusing more on everyday state statutes, such as the Uniform Commercial Code or Uniform Probate Code, than on contentious high-level federal statutes. It is, after all, where most professional interpretation takes place.

There are distinctions among all these less than supreme institutions, distinctions implicit in Eskridge's explication of institutional dynamics. Administrative agencies in their back-office roles provide interpretive elaborations of statutes or make rules when delegated the authority to do so. Their's are statute-like products, in generality and power. The front-office agency employee deciding whether one of society's victims should continue to receive governmental largesse, the police officer deciding whether to arrest and charge a disruptive teenager, a lawyer deciding how to advise his client on a point of estate planning, just like trial courts, all deal with particular factual scenarios.[203] The former group expand on intensions and the latter decide whether particular facts are in extensions.

The former group, those with the power to make public verbal elaborations of legislative enactments, influence the public and the Supreme Court. So much is transparent.[204] Lawyer's read books of regulations and the Court, *ceteris paribus*, defers to agency interpretations.[205] Eskridge provides clear and dramatic historical examples.[206] The impact of the latter group (lower level institutions

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202. *Id.* at 69. Statutory interpretation is a significant function of all the institutions mentioned for reasons other than how their work can ultimately shape the Supreme Court.

203. *See id.* at 71-72 ("Most interpretation is done in the lawyer's office, on the police officer's beat, and at the bureaucrat's desk.").

204. *See id.* at 74-80 (Eskridge relates such a detailed game playing story that one might wonder at the universality of its transparency).

205. The Court has deferred to regulations since *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

206. *See* ESKRIDGE, *supra* note 1, at 69. For example, Eskridge explains that looking at statutory interpretation from the 'bottom up' includes the perspective of "private parties, agencies, and lower courts." *Id.* Eskridge states that "to the extent we view statutory interpretation from the 'top down,' we need to remember that the top is not the Supreme Court but the current Congress and president . . . ." *Id.*

applying statutes) is not so obvious. Persons in these kinds of role select which cases proceed through the judicial system and how far. They determine what examples the Supreme Court will come to consider. These people work day to day in the trenches with the public who enjoy or suffer the effects of legislation. Such front-line institutional operatives are subject to present day social, political and moral values and pressures, not "the historical preferences of the original enacting coalition."[207] The filter they provide on the case load of higher level courts is thus dynamic, not static and historic. Surely this is correct. But what is really needed here is an examination of what persons in these roles typically look to in interpreting statutes. Does the lawyer examine present socio-political mores or the legislative history of the section? When one, when the other, and why?

How does Congress figure in institutional dynamism? It always has the power to overrule a Supreme Court interpretation of one of its statutes. Whether it does so or not is governed entirely by its "current preferences . . . [not by] the historical preferences of the original enacting coalition."[208] The Supreme Court will always be aware of this and may modify its interpretive decisions accordingly. Thus, the institutional relationship between Congress and the Court enhances the dynamism of Supreme Court interpretation.[209]

These three sub-theories, *pragmatic*, *hermeneutic* and *institutional* dynamism, comprise Eskridge's affirmative support for *Dynamic* Statutory Interpretation. As he writes: "[d]ifferent intellectual traditions—pragmatism, hermeneutics, and positive political theory—interact to explain the dynamics of statutory interpretation."[210] In other words, they tell us what is meant by the word "dynamic" and make a convincing case that in this sense statutory interpretation is indeed dynamic. Thus the question is whether this means anything more than has long been understood as statutory interpretation *sans* modifier. Insofar as that question is answered affirmatively, the interesting theoretical question is whether, as presented, the theory of *dynamic* statutory interpretation can be justified. Eskridge himself asks the right questions at the end of

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207. *Id.*

208. *Id.*

209. Despite firm Congressional response, the actions of an ideologically driven majority in *United Airlines Inc. v. McMann*, 434 U.S. 192 (1977) and *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), suggest the Court is not always especially attentive.

210. ESKRIDGE, *supra* note 1, at 80.

Chapter 3: "Is dynamic [statutory] interpretation consistent with the rule of law? With democratic theory? With justice?"[211]

The *Weber*[212] case, its statutory basis and its subsequent judicial progeny, illustrates all three kinds of dynamism. The statute in question, § 703(a)(1) of the Civil Rights Act of 1964,[213] was fifteen years-old by the time the case reached the Supreme Court in 1979. Much had changed in industry and society, including changes brought about by the statute itself and the actions of administrative agencies. The facts could not have arisen in 1964. The nine justices had varied backgrounds, varied horizons, and varied socio-political outlooks. *Weber* was a hard case: the outcome was not determined by the aggregate legal resources available, different outcomes were possible, thus genuine judgment was necessary. Another eight years passed before *Johnson v. Transportation Agency*[214] expanded on *Weber* reasoning, removing it even further from what was envisioned by the enacting coalition in 1964. The *Weber* decision could not have taken place in 1964 and *Johnson* could not have taken place in 1979, let alone in 1964. Statutory interpretation is thus dynamic.

But that means little more than that 1979 was different from 1964 and 1987 was different from both, and in ways that had an impact on the type of behavior coming within the scope of the statute. The expression "dynamic statutory interpretation" is, in this sense, a pleonasm. To find statutory interpretation that was not dynamic in this sense, one would have to go back more than five hundred years to the days of England when change, like travel and communication, was slow, where the legislators were the judges and when Judge Hengham is reported to have said "Do not gloss the statute for we know it better than you; we made it."[215] In England through the Fourteenth Century at least, both the enactment and application of statutes fell to the same persons. The late Professor Thorne wrote:

> The interpretation of statutes in its modern sense is a late-comer to English law: it must be obvious that so long as the law maker is his own interpreter the problem of a technique of interpretation does not arise. Only when he is forced to delegate

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211. *Id.* at 105.

212. United Steelworkers v. Weber, 443 U.S. 193 (1979).

213. 42 U.S.C. § 2000e (1994).

214. 480 U.S. 616 (1987).

215. THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 50 (1980) (quoting Aumeye v. Anon, Y.B. 33 & 35 Edw. I, 79, 82 (1305)).

> the function of interpretation to a different person does the matter become urgent.[216]

If this is all Eskridge means to distinguish by the word "dynamic," then his theory really is pleonastic: *dynamic* statutory interpretation is merely statutory interpretation.

Dynamic statutory interpretation must be more than that, and it is. The basic argument form takes a true, but particular premise, and deduces not only the inevitability and generality of that phenomenon, but also its virtue. If variation in meaning with time, interpreter, and institutional setting is inevitable, it must be normatively proper. Well dressed up, it can look very good. This is a standard ploy of post-modern argumentation.[217] But nevertheless it is invalid.

Archaeological data is sometimes insufficient to determine with certainty the legislative intent relevant to a question,[218] but that does not justify rejection of that data in its entirety. Even where the archaeological data tends toward a uniform conclusion, different conclusions will always be possible.[219] However, that does not justify inferring that the obvious conclusion is not warranted, or that the indefinitely many alternate possibilities are equally plausible. The meaning (in some sense) of a statutory text may depend *in some way* upon the reader; but that does not warrant a judge's abandoning deference to legislative intent or taking her own preferences as a justified interpretation. The reader's institutional context may have some effect on the reader's interpretation of some statute; but it does not follow that all statutory interpretation is institutionally variable and legislative intent irrelevant. The mere

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216. S. E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 203 (1937).

217. For example, about science:

> [S]ome may have been led to the conclusion that scientific knowledge is nothing but a social construction by a faulty inference from the true premise that the scientific knowledge we now possess has been the work of whole, intergenerational, community of inquirers. Some, again, may have been led to the conclusion that reality is socially constructed by a faulty inference from the true premise that (because of the ever-increasing interpenetration of theory and instrumentation), the objects of scientists' observations are often what one might call "laboratory phenomena"; or by the same faulty inference from the true premise that social institutions and categories (the objects of sociological theories) would not exist were it not for human activities.

Susan Haack, *Puzzling Out Science*, 8 ACADEMIC QUESTIONS 20, 22 (1995)

218. Where the question is both important and difficult, the archaeological data will often be underdeterminate. If not, the question would not be hard and would probably not be either litigated or appealed.

219. *See supra* text accompanying note 65-68.

possibility of alternative interpretations of a statute does not warrant the inference that no *particular* interpretation is the most justifiable. Possible fallibility suggests only that the interpreter should be alert to alternatives and justify the determination made.

What about the criterion of adequacy that Eskridge set for the "rival" originalist theories? As previously described, he set the impossibly high test of determinately resolving all problems, a standard I argued they never claimed or aspired to and which guaranteed their failure. Does *dynamic* statutory interpretation meet its author's own standard?

Later in the book, when he espouses postmodernism, Eskridge says that it does not! "The postmodern skepticism about an objective rule of law and majority-based statutory applications finds support in the analysis in Part I of this book."[220] "In short, dynamic theories may not meet the modernist assumptions any better than the originalist theories questioned in Part I. The methods introduced in this book for criticizing modernist-based originalist reasoning can be extended to criticize modernist-based dynamic reasoning."[221] Does this make a mockery of the arguments of Chapters 1 and 2? Not necessarily. It depends on these "modernist assumptions." Eskridge says they are

> an authoritative, legitimate answer to a statutory puzzle can be arrived at through a process of reasoning that itself legitimates the answer. Because the answer is arrived at through a method independent of the specific interpreter, a good interpretation can be replicated by other interpreters and is a legitimate application of the rule of law.[222]

If being replicable by others is a modernist criterion of goodness in statutory interpretation, it seems pretty good to me.[223] But does it rest on the use of 'a method independent of the specific interpreter'? Not necessarily. That's a set up *ignoratio elenchi*.

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220. ESKRIDGE, *supra* note 1, at 175.

221. *Id.* at 192. Not everyone counts Eskridge's inconsistency and lack of overall coherence as a fault. For example Professor Farber extols it as a primary virtue: "perhaps the book's most attractive feature is the internal tension between sometimes opposing viewpoints." Farber, *supra* note 72, at 1546.

222. ESKRIDGE, *supra* note 1, at 192. That's a bit excessively *a priorist* for most moderns, isn't it? After all, modernism, unlike postmodernism, does recognize an external, non-subjective reality.

223. The fallacy that leads one to reject replicability as a criterion of goodness—a fallacy into which, I suspect, Eskridge falls—is to interpret "replicate" to mean "agree with."

Eskridge says modernists require "that reason can yield determinate answers, tied to legislative expectations and capable of replication by differently situated interpreters[.]"[224] Note that "replication" doesn't necessarily mean "adoption" nor does it require the replicator to agree. If it's a hard question, the old-fashioned commonplaces—postmodern insights—that things look different from different points of view and that people can in good faith hold different values, suggest that different interpreters can reach different solutions to hard questions. However, it does not follow that one cannot understand, and in that sense *replicate*, the reasoning of another, even of that ubiquitous character of postmodern rhetoric, The Other.

Despite Eskrige's protestations to the contrary, I believe Eskridge's *dynamic* statutory interpretation *does* meet the elevated standard of adequacy that archaeological theories failed. Oddly enough, that is the theory's most serious problem. By claiming all interpretive resources as its own and by claiming indiscriminate legitimacy for them all, the theory can provide answers to all questions of statutory interpretation.

The key to the universal power of *dynamic* statutory interpretation is its acceptance of the three kinds of dynamism as normatively justified: each can provide a justified resource on which to base a decision and each can properly be outcome determinative. For example, hermeneutic dynamism recognizes the interpreter's subjective horizons as a legitimate resource and thus guarantees a justified answer to any interpretive question, *viz*, whatever the judge wishes. But one never needs to state it so bluntly. The judge is inevitably situated in a factual world, normatively constituted and unavoidably ideological—pragmatic dynamism.[225] And, of course, the judge—or other interpreter—is an element of an institutional setting that creates and controls his or her perception and evaluation of fact and reasoning—institutional dynamism. In such a dynamic world, the judge's own personal predilections may not present themselves as very dominant. "One lesson of hermeneutics is 'how little interpreters and their points of view matter . . . .'"[226]

Yet, however disguised, if hermeneutic dynamism has any role in the theory, one has to ask: how can any interpretation be wrong? If I disagree, or argue against it, isn't that just because of a different viewpoint due to social and cultural makeup?[227]

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224. ESKRIDGE, *supra* note 1, at 193.

225. *See supra* note 163 and accompanying text.

226. ESKRIDGE, *supra* note 1, at 65.

227. Eskridge makes just such a case in his postmodern section. He explains the seven opinions in *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (en banc) thus:

Dynamic statutory interpretation can satisfy any criterion of adequacy because, in the end analysis, it uses no more than *whatever is necessary to reach a decision*. To that extent dynamic statutory interpretation could be said to be no theory at all, merely an elaborate description of the fact that courts must decide cases brought to them and of all the causal factors that *could* bring about such decisions. Later, Eskridge renames the theory "critical pragmatism" and returns to the limitations of social and institutional context. But it doesn't help.

> If the rule of law is situated in practice, there is no foundational theory that can capture that protean complexity, but our situation within practice . . . may help us figure out which applications work best within the conventions of society and law. And these are themselves plural: no single legal convention governs statutory interpretation, but all are relevant—statutory text, legislative intent or purpose, the best answer. . . . It takes into account a number of different factors in evaluating interpretations—conventions of language and expression, the statute's background history, its subsequent interpretation, its relationship to other legal norms, and its consequences.[228]

The trouble is: can you think of anything that has been suggested as an aid to or factor in statutory interpretation that is not here? Within this comprehensive grab-bag, Eskridge offers no ordering of priorities. So, this is not a theory in any of the usual senses of "theory". It has no explanatory power.[229]

To some extent this makes Eskridge's theory an elaborate version of legal realism: One cannot avoid the power of the final decision-maker. In this context, the problem is the theory's disregard of the constitutional

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> The act meant something different to each of the different judges not because the statutory text was different for each judge, but because each read the text in the light of his or her own understandings about the free exercise clause, evidence in the trial record relating to Georgetown's objections to the student groups, and the legal [norms] and moral status of lesbians and gay men. Because the statute's meaning varied among the different interpreters, we can see how the dominant term (authoritative text) depended on the subordinate term (the interpreter).

ESKRIDGE, *supra* note 1, at 194 (citations omitted).

228. ESKRIDGE, *supra* note 1, at 200.

229. Later Eskridge offers a coherence theory: "A pragmatic interpretation is one that most intelligently and creatively 'fits' into the complex web of social and legal practices." *Id.* at 201. Of course we hope all interpreters do it intelligently. However, apart from the sophistic hooks, there is nothing much to link this with *dynamic* statutory interpretation or critical pragmatism.

principle of legislative supremacy and our social ideal of a government of laws, not of men.

We should, therefore, examine Eskridge's treatment of legislative supremacy as a principle hostile to dynamism.[230] In Chapter 4, Eskridge addresses liberalism as the progeny of social contract theory:

> Liberalism views government as a social contract among autonomous individuals who in the distant hypothetical past gave up some of their freedom to escape the difficulties inherent in the state of nature. For liberals the baseline is private activity (property, contract, the market), and government regulation is the exception requiring justification. The justification for government regulation is consent.[231]

In the United States this consent "is embodied in the Constitution"[232] which expressly incorporates the concept of legislative supremacy.[233] As to this liberalism's position on statutory interpretation: "[b]ecause the Constitution does give Congress the authority to adopt statutes entitled to supremacy unless unconstitutional, liberalism requires a connection between the text and/or the legislative history of the statute and the interpretation reached in a particular case."[234] *Prima facie* this would seem to present a problem to dynamic statutory interpretation, at least as elaborated in Chapter 2. How can the judge's horizon's be hermeneutically determinate? How can present social concerns be pragmatically determinate? How can the accident of choice of lawyers in bringing a case be determinate of a statute's meaning? Surely that determination is constitutionally delegated to Congress? These questions do not present a problem to dynamic statutory interpretation if "one thinks about legislative intent in a complex way."[235]

This is not merely a verbal *ad hominem*.[236] Eskridge explains what he means by "complex." "The legislature typically does not have a 'specific intent' as to most issues of statutory application, or at least no specific intent beyond delegation of statutory detail and gap filling to other decision makers. . . . The legislature may also have a 'general intent'

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230. *See id.* at 120-23.

231. ESKRIDGE, *supra* note 1, at 111.

232. *Id.*

233. *See id.* at 112-14.

234. *Id.* at 134.

235. *Id.* at 121 (citation omitted).

236. That is, if you do not agree it is because your thought is insufficiently complex.

about the goals the statute subserves."[237] Consider a set of facts brought before a court under a statute some time after its passage. It is hardly likely that the particular fact set was expressly contemplated by the enacting legislature, but even if it was, argues Eskridge, the change in the general factual environment may require a different decision from one just after the statute's enactment. "Even when one can figure out the legislature's specific intent as to an issue when it enacted the statute, there may be considerable doubt that the legislature 'would have' specifically intended that the issue be resolved in that way if it could have predicted future circumstances."[238]

Thus, the argument goes, there is a change in general intent when the generally relevant factual environment changes. "To implement the legislature's general intent requires dynamic interpretation as circumstances change, because the statute has to adapt to the changed circumstances if it is to achieve its goal, even if that means bending the literal terms or original meaning of the directive."[239] Not necessarily.

I may never have had a clear grasp of the meaning of "psychopathic personality," but I never understood it to include homosexuality. When (in response to the medical profession's revised view) Congress and the courts and the Public Health Service changed their understanding, the meaning—the intension—of the operative predicate "psychopathic personality" did not change. It was clarified that a person was not within its extension merely by virtue of being homosexual. Chief Judge Judith Kaye of the New York Court of Appeals offers a good example.

> Only recently . . . my court construed the words "currently dangerous" in a criminal statute governing whether a paranoid schizophrenic, found not responsible for attempted murder by reason of mental disease or defect, should remain confined in a secure mental hospital. Surely the word "currently" is clear enough: it means right now, at this moment. But, as the court wrote, to apply those words strictly "would lead to the absurd conclusion that a defendant in a straightjacket, surrounded by armed guards, is not currently dangerous under the statute." Instead, we applied concepts of "common-sense and substantial justice" to give the term "currently" what must have been its intended meaning: dangerous not at the moment of confinement and treatment, but foreseeably dangerous if confinement and

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237. ESKRIDGE, *supra* note 1 at 121. These new concepts of *specific* and *general* intent, the constituents of complexity in legislative intent, seem like extensions and intensions as modes of meaning, but in Eskridge's use play out only partially the same.

238. *Id.*

239. *Id.*

> treatment were not continued into the future. Indeed, had our courts interpreted the word "currently" in its most literal sense, we would have been less than faithful to the underlying legislative purpose—to protect society from potentially dangerous insanity acquitees.[240]

Of course intensions may change over time. The meaning of 'science' between 1790 and the present is a clear example. But typically intensions remain fairly constant even though the factual environment, state of knowledge, and cultural, social, political, economic, and technological backgrounds change so much that there is a clear change in extensions. That is why Jane Austen, Charles Dickens, Francis Bacon and Lord Coke remain quite intelligible to this day.

Thus in this instance, Eskridge does not make his case. But suppose he had. Suppose, like the meaning of 'science,' words changed in meaning with changes in factual background. Would that save dynamic statutory interpretation from the charge of ignoring legislative supremacy? Well for one thing it would show that present *meanings* are linked to the present general factual environment,[241] and sometimes that can matter. Surely a court would have a choice between the original meaning and the present one. We use the 1790 meaning of 'science' in the Constitution, but not the 1790 understanding of 'cruel and unusual.' But even if this is an answer, what about the other aspects of *dynamic* statutory interpretation? This is only pragmatic dynamism but not hermeneutic dynamism and institutional dynamism. For example the judge cannot avoid and thus (in *dynamic* statutory interpretation) is permitted to exercise her horizons (subject only to some tradition, itself a component of the horizons) in reaching her decision. This is hardly deferential to legislative supremacy.

What we see here occurs too frequently in these chapters. I find my margins replete with the comment: "If that's all you mean by 'dynamic', I agree." But of course this is not all that is meant by *dynamic* statutory interpretation. This is an example of the pervasive problem that the theory simply claims too much. In examples it is elided by ignoring problematic aspects. But is it legitimate to take one component of the theory alone to

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240. Kaye, *supra* note 107, at 26-27 (citations omitted).

241. Eskridge cites examples of statutes expressly requiring resort to temporally and geographically local social conditions—those with key predicates like "usage of trade" and "commercially reasonable"—in Article II of the Uniform Commercial Code. But they are surely too special to save his case. *See* M.B.W. Sinclair, *Plugs, Holes, Filters, and Goals: An Analysis of Legislative Attitudes*, 41 N.Y.L. SCH. L. REV. 237, 249-52 (1996).

satisfy an objection without considering the impact of all the other components?

For example, in the same subsection,[242] Eskridge retells Judge Posner's version[243] of Plowden's story.[244] Courts are the interpretive servants of the legislatures. By analogy, suppose that after the captain gave explicit orders, the platoon commander took her troops off on patrol and runs into a situation not contemplated by the captain. What does the platoon commander do? One means is to determine what the captain would have wanted in such circumstances and implement it. Eskridge comments, "[n]either the formal nor the functional supremacy of the high command is sacrificed by such a dynamic reading of one's orders."[245] Indeed not. If that is all that's meant by "dynamic" who could quibble about statutory interpretation's being dynamic. No one in the last two or three hundred years would have doubted it. Yet this ignores hermeneutical and institutional dynamism.

The argument in this chapter does not adequately deal with the principle of legislative supremacy even on its own terms. Only if *dynamic* statutory interpretation *qua* dynamic is reduced to triviality does it even approach the question. The richness of the theory advanced by Eskridge in the first chapters suggests that this is not what he intends.

If anything is absolutely clear, it is that no one source of understanding is adequate for interpretation of all statutes. In a sense, what Eskridge claims for *dynamic* statutory interpretation is free use of all resources, theoretical power to all judges to use what they will at their own discretion. That seems a fine idea in the abstract and arguably inevitable given that any accessible resource will be determinative in at least some case. But it is a position that, if adopted, would be a danger to our legal order. If *any* interpretive resource is freely and equally available, *any* chosen outcome will be justifiable. By giving the judiciary such freedom, Eskridge's theory would significantly shift legal power from the legislature to the judiciary. It would take us back four hundred years to the era of judicial supremacy, epitomized by Lord Coke's renowned statement in Dr. Bonham's Case:

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242. ESKRIDGE, *supra* note 1, at 124.

243. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 269-73 (1990).

244. Plowden's key method is:

> [I]n order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present.

Eyston v. Studd, 2 Plow. 459, 467, 75 Eng. Rep. 688, 699 (1574).

245. ESKRIDGE, *supra* note 1, at 124.

> [I]t appears in our books, that in many cases, the common law . . . will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void . . . .[246]

This would greatly exacerbate the problem of the legitimacy of such power in the hands of non-elected officials, often with life tenure.

What is essential—but Eskridge does not provide—is an ordering among sources of statutory interpretation. As I have noted throughout the above, legislative supremacy is a principle constitutionally enshrined and essential to the realization of democracy. Any theory of statutory interpretation must recognize this principle. Accordingly, a theory of statutory interpretation must be little more than a hierarchy of sources, constrained by legislative supremacy, with an account of the appropriate conditions for access to different levels. In one of his postmodern moments, Eskridge writes that a principled ordering of interpretive resources is impossible: "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."[247] Elusive or not, such an ordering, a principled ordering, is exactly what is required of a normative theory of statutory interpretation.

But a theory of statutory interpretation doesn't have to be so elusive. For example, democracy and legislative supremacy suggest that one cannot fail to start with the language of the statute: that is all that the legislature actually said. Then it must answer certain questions: under what circumstances is resort to extrinsic sources justified? what is the priority among different extrinsic sources? and under what circumstances might that ordering be changed?

Eskridge's predominant argument form is inevitability. There are cases in which each resource will be dominant. No doubt true, but it doesn't signal equal normative justifiability. Occasional inevitability does not mean equal priority. Not all cases are hard cases. Some are not even difficult, some are merely difficult or very difficult, but very few are intractable.

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246. Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610). *See generally* S. E. Thorne, *Dr. Bonham's Case*, 54 LAW QUARTERLY REV. 543 (1938); Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV L. REV. 30 (1927).

247. ESKRIDGE, *supra* note 1, at 175.

IV. CONCLUSION

Professor Eskridge's arguments against originalist statutory interpretation and those in favor of the multi-dimensional variability of *dynamic* statutory interpretation are not convincing. The arguments in both Chapters 1 and 2 of Eskridge's book and the problems inherent in them are all arguments that can be made about ordinary, non-statutory linguistic (or, more generally, *symbolic*) communication. In this light, Eskridge curiously missed a standard and quite powerful argument in support of his theory.

Linguistic behavior normally relates to communication. With statutes the communicative function is critical because statutes give notice to the governed of behavioral control data. This is critical to statutes because, as long held fundamental, absent notice of it a person cannot be bound by a law.[248] But our legislatures speak only through their statutes; statutes are the only authoritative legislative voice.[249] Surely, then, the governed should be able to rely on the authoritative legislative voice and resolve ambiguities and indeterminacies as seems proper in their community without having to resort to further, less accessible and non-authoritative resources. Linguists distinguish speaker's meaning from hearer's meaning. Surely, with legislative speech, the hearer's meaning should prevail. It is an argument that until recently, prevailed in the courts of England.[250]

However, this argument has not prevailed in the United States. One reason flows from our faith in democracy, the principle of legislative

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248. *See* Saint Thomas Aquinas, Question 90: De Essentia Legis, Concerning The Essence of Law, *in* THE TREATISE ON LAW, Art. 1 and 3 (R. J. Henle ed., 1993); *see also* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT §§ 56, 136 (1986); LON L. FULLER, THE MORALITY OF LAW 34-35, 39 (1964); 1 Jeremy Bentham, *Essay on the Promulgation of the Laws, and the Reasons Thereof; with Specimen of a Penal Code, in* 1 THE WORKS OF JEREMY BENTHAM 155 (John Bowring ed., 1962); Lambert v. California, 355 U.S. 225 (1957).

249. *See* Dickerson, *supra* note 8, at 9 (quoting Max Radin in a footnote: "the constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes."); Max Radin, *A Case Study in Statutory Interpretation: Western Union Co. vs. Lenroot*, 33 CAL. L. REV. 218, 223 (1945). The point is that the exclusivity of statutes as the vehicle for expressing congressional will is based on the procedural requirements the constitution places on legislative action. This is true of the Federal Constitution. Some state constitutions say it directly, i.e., "no law shall be enacted except by bill." N.Y. CONST. art. III, § 13.

250. *See* Pepper v. Hart, [1993] App. Cas. 593, 630-40 (appeal taken from C.A.) (in the opinion of Lord Browne-Wilkinson the House of Lords decided that after many years of exclusion from judicial (and hence lawyers') reasoning, legislative history should again be admitted).

supremacy and the ideal of a governance of laws. Legislators are elected; the legislature's view, the speaker's meaning, thus has a certain democratic legitimacy. To allow that "hearer's" meaning to triumph over a different meaning founded in the legislative intent would be anti-democratic and would allow the triumph of non-elective law making over the normal, elective law-making.

The extent to which I resort to the principle of legislative supremacy in opposition to *dynamic* statutory interpretation must by now be crashingly obvious. Its recurrence, however, has much to do with the pervasive shape of Eskridge's arguments, and in particular their applicability to all linguistic communication. Arguments from linguistics may help us to understand the sentences comprising statutes, but not *qua* statutes. The importance of legislative speech, and the difficulties peculiar to its application arise out of its special governmental role. "The question of how judges should decide cases cannot be conclusively resolved . . . by a (new and better) theory about meaning or understanding. All the important questions can be answered—and *should* be answered—by a political theory about the appropriate relationships among rulemakers, rule-interpreters, and the general public."[251] Legislative supremacy is so fundamental because it underlies the critical relationship in statutory interpretation—the hierarchical ordering of authoritative sources. Eskridge's linguistic arguments fail because they ignore exactly this.

Our fascination with difficult and contentious cases, especially those that reach that pinnacle of judicial decision-making, the United States Supreme Court, unduly undermines our confidence in statutes as sources of law. For *most* situations, *most* statutes work just fine. This is one reason why the overwhelming majority of interpersonal transactions work without conflict, why so few of those that do not are litigated, why so few of those that are litigated go to trial, and of those that do, why the remainder that warrant appeal on statutory interpretation grounds is an exceedingly minuscule percentage of all transactions. But that minuscule percentage remainder is not in danger of extinction. There are simply too many possibilities for interpretation to go awry. Especially if the stakes are high, the incentive for advocates to find problems is too often productive. The point was made more than a hundred years ago by Sir James Fitzjames Stephen: "Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are

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251. Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1314-15 (1992). The material omitted in the ellipsis states, "it probably cannot be more than slightly furthered . . . ." I have omitted it in the text because I believe this point to be incorrect.

determined to do so . . . ."[252] Of the Indian Criminal Code (for the drafting of which Stephen was partially responsible) he wrote: "The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every-one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions . . . ."[253] Today there surely exist ample resources and motivation for determined attacks on legislative good sense. But even with the best cooperative spirit, problems are unavoidable.

The language of the statute itself is not always clear and unambiguous, and even when it is, its application to the particular facts at issue may not be. Looking to extrinsic archaeological resources will not always provide the guiding legislative intent or will or purpose to resolve the difficulty. Nor will the common law methodology of drawing on prevailing, contemporary societal values. Hard cases can be very *hard*. But that fact alone does not justify a general abandonment of the principles and procedures of democratic statutory interpretation.

Professor Eskridge may not have made the case for his central theory of *dynamic* statutory interpretation, but in attempting to do so he does collect and present very clearly the sort of arguments which are characteristic of legal academics of our time. In this respect his *Dynamic* Statutory Interpretation is a landmark work.

252. 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 306 (1883).

253. *Id.* at 305.