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1995

Book Review. Dynamic Statutory Interpretation by William N. Eskridge, Jr.

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Recommended Citation
Popkin, William D., "Book Review. Dynamic Statutory Interpretation by William N. Eskridge, Jr." (1995). *Articles by Maurer Faculty*. 559.
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William N. Eskridge, Jr., *Dynamic Statutory Interpretation.* Cambridge, Mass.: Harvard University Press, 1994. Pp. ix + 438.

Reviewed by William D. Popkin

"Dynamic" statutory interpretation means that "[t]he interpretation of a statutory provision by an interpreter is not necessarily the one which the original legislature would have endorsed" (page 5). Bill Eskridge's book sets out to prove that this is what judges do and should do when they interpret statutes. The book is a remarkable tour de force, taking us through every major strain of thought and doctrine that has worked its way into our thinking about statutory interpretation, without losing sight of broader themes.

Part I describes originalist theories of interpretation (intentionalism, purposivism, and textualism) and dynamic statutory interpretation. It argues that dynamic interpretation is inevitable because originalism is indeterminate. Part II takes a normative approach, explaining why the major jurisprudential theories (liberalism, legal process, and normativism) support dynamic interpretation. Normative issues are important because originalism, while indeterminate, is neither incoherent nor irrelevant, and judging will be different depending on whether it leans towards originalism or dynamism. Part III examines important interpretation doctrines (including those dealing with legislative history, postlegislative events such as reenactment, and interpretive canons) from the perspective of the theories developed previously in the book. It makes the important point that doctrine, like statutory meaning, also evolves dynamically.

Part I undermines the claim that originalism (either original intent or textualism) can lead to determinate results. The arguments are linked to the normative discussion in part II, which considers the implications of values associated with the rule of law (predictability and objectivity) and democratic responsibility (laws should be made by elected legislatures). If originalism is determinate, the normative claims for dynamic interpretation are much more difficult to sustain. Eskridge therefore sets out to show that originalists "lack a methodology for linking up their approaches with democratically legitimate expressions of preferences by the legislature" (14).

His arguments are completely persuasive. Most of them are familiar from the writers in the legal realist, public choice, and law-and-literature traditions, but they aggregate to make an ovewhelming case against determinate originalism. Oversimplified, these are the major points. As for intentionalism (specific intent): actual intent is unknowable; conventional intent relies on

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legislative history, which is often unreliable; and imaginative reconstruction has at least as much judicial imagination as reconstruction. As for purposivism (general intent): it rests on a simplistic view of the legislative process, is too general and malleable, and depends too much on both the statute's historical and the interpreter's contemporary context to provide clear answers. As for textualism: the text lacks a democratic foundation because of the problems of indeterminate cycling of positions within the legislature, as well as the hermeneutical problems raised by both historical and contemporary context.

The major thread running through part I is that change makes it impossible to fix original meaning. The key problem is that the interpreter must always ask a counterfactual question: "What would you—the original legislature—do if you knew the facts of the case?" The historical legislature can never be sure of its answer. No matter how hard it might try to understand change, it cannot be sure how it would react to a future it cannot fathom, or what it would want an interpreter, knowing the future, to do. Although Eskridge does not put it this way, the problem is a temporal multiculturalism which parallels the multiculturalism that plagues efforts to agree on a normative basis for dynamic statutory interpretation (with which Eskridge grapples later in the book).

Chapter 2 describes dynamic statutory interpretation and explains why it is inevitable, drawing on several strands from philosophy and political science. The first strand is pragmatism, which emphasizes the case-oriented problem-solving approach that an interpreter necessarily adopts when trying to apply a statute to facts. Eskridge introduces the example of a hypothetical legislative instruction—"Fetch me some soup meat from Store X"— (53) to show how someone interpreting instructions necessarily adjusts to evolving circumstances. The changes are not just what we might call factual, but include social, cultural, policy, and legal changes as well, all of which make facts meaningful.

Pragmatism emphasizes the pull of facts on the interpreter. The second strand—hermeneutics—emphasizes the pull of the interpreter's context, never free of engagement with the text, but inevitably drawn to contemporary "dynamic" context to influence meaning. The third and final strand stresses the impact of institutional dynamism on evolving interpretation, especially the interpreter's sensitivity to what other political players might do—such as the reaction of legislative and executive branches to interpretation decisions. (I am doubtful about this argument. If difficulty about knowing what legislatures would do undermines originalism, is it likely that judges will guess about legislative behavior when interpreting statutes? Interpreters undoubtedly respond to current political concerns dynamically, but I think judges are more likely to respond to their own sense of judicial role than to the prospect of a legislative override they cannot predict.)

At this point Eskridge's work has only just begun. Indeterminacy is not incoherence. An interpreter has choices, and they include giving the benefit of the doubt to the best guess about what the historical legislature wanted, steering clear of controversial dynamic political judgments. Moreover, dyna-

mism might not always be inevitable. Even though unanticipated events might require the interpreter to go beyond the legislature's expectations, dynamic interpretation is resistible if it goes *against* expectations on an issue that the legislature considered and resolved (107). Without the normative justification presented in part II, dynamic interpretation (which is no less indeterminate than originalism) is without a firm base.

Eskridge is reluctant to rely on rule-of-law and democracy values. It is not that they are irrelevant, but that we learn about the rule of law and democracy from working out interpretive theory rather than the other way around.

> Does democratic theory or the rule of law suggest guidelines for reading statutes dynamically? I have no answer, in part because there is no consensus in our polity as to the precise value and implications of democratic theory and the rule of law. The more modest aim of [part II] is to address these issues of legitimacy from the perspectives of different jurisprudential traditions, which help us evaluate how theories of dynamic interpretation may be carried out. In turn, dynamic statutory interpretation theory helps us evaluate theories of jurisprudence, for this discussion impels us to ask what the rule of law ought to mean, and how law ought to work in a democracy (108).

Eskridge argues that all the major jurisprudential theories (liberal, legal process, and normative) support dynamic statutory interpretation. The most surprising claim in the book may be that liberal theory (ch. 4) supports dynamic statutory interpretation. Eskridge discusses formal and functional liberal theories. Formal theories are based on Articles I–III (separation of powers, giving Congress legislative power; Article III restraints on judicial power; and bicameralism and the presentment clause of the Constitution, which appear to define the text passed by both houses of Congress and signed by the president as *the* source of law).

Functional theories, stressing the "policy-making supremacy of the legislature," require congressional consent to make policy (120). It is easiest to show that functional theories require dynamic interpretation for reasons related to those which made originalism indeterminate: it is hard to know what Congress would agree to regarding a future case. Eskridge makes this point by further elaborating on the instructions, issued by a hypothetical legislature to a "relational agent" (125), to buy soup meat for a child. There is no way to be faithful to the instructions (to which the legislature consented) without thinking about how to adapt to changes in the context—such as the child's developing allergies, the issuance of studies showing how bad cholesterol is, and family budgetary problems. Fidelity to whatever the original author adopted calls for dynamic updating, sometimes even against the author's specific wishes.

Formalist theories also turn out to support dynamic statutory interpretation, although that takes a bit more work (118–20). Separation of powers gives legislative power to Congress but does not deny law-making power to courts. In fact, the Article III judicial power was, from the beginning, understood to permit interpretive lawmaking (see Hamilton's reference in Federalist 78 to a court limiting unjust laws through statutory interpretation). As for bicameral-

ism and the presentment clause, the textualism it supports is (according to Scalia) a holistic textualism—interpretation of language compatible with the surrounding body of law. But that brand of textualism is too indeterminate to prevent judicial discretion from adapting texts to change, which was the whole point of the formalist case for textualism in the first place. Deference to the historical text is nothing but a "scholastic liberal belie[f] in a law of text tyranny" (120).

Legal process theories (ch. 5), which commit the judge to reasoned elaboration of legislative purpose, are obviously dynamic, because they require the court to adapt the statute to change. Less obvious is the dynamic potential of legal process's focus on "institutional competence," which is usually considered a reason for less rather than more judging, based on doubts about what courts can do. But "incompetence" is comparative, and rooting out legislative incompetence can justify a dynamic interpretive role. For example, the court might favor those interests least likely to overcome legislative inertia because of organizational difficulty or political marginalization.

Normativist theories (ch. 6) are also obviously dynamic. Natural law's concern with the right answer is not committed to originalist values. And feminist republicanism's concern with deliberative dialogue projects a procedural ideal onto the entire political process, which requires both legislatures and judges to participate in the dynamic evolution of statutory meaning.

The most trenchant parts of chapters 5 and 6 are not the demonstration that legal process and normativist theories are dynamic but the critique of these theories. To the legal process judge who uses reason to apply legislative purpose to facts, the question is "Whose reason?" To the natural law normativist, the question is whether there is enough consensus to legitimize natural law claims. And to advocates of a feminist-republican dialogue, the question is how we can be sure that the terms of the dialogue and the accommodations it reaches respond to the genuinely felt needs of the affected communities. The last point is the most wrenching. Eskridge is obviously most attracted to the dialogic approach, but the danger of jurispathic judging is hard to avoid, as the judge is unable to grasp how the litigants define themselves and to prevent accommodation from being an unprincipled compromise. In sum, Eskridge cannot accept "the 'modernist' assumption that an authoritative, legitimate answer to a statutory puzzle can be arrived at through a process of reasoning that itself legitimates the answer" (192).

Which brings Eskridge to postmodernism, which (he admits) can be both "depressing" and "descriptive" (199). Eskridge's own postmodern approach is "critical pragmatism"—the best we can do. His approach is pragmatic both in requiring the judge to learn from focusing on the specific case for its instruction about the meaning of intent, purpose, and text, and in forcing the interpreter to adopt multiple perspectives (liberal, legal process, and normativist), which hold together "like a cable, weav[ing] together several mutually supporting threads" (200). It is also critical, willing to "criticize existing conventions and traditions" (201).

And that is how Eskridge ends his discussion of normativist theories—not

exactly a robust theory of judging. For some, it will say too little, confirming the conservative nature of judging. For others, it will only rationalize renegade judging or explain opinions written to obtain the agreement of multi-judge benches or to avoid reversal on appeal. To me, it is an accurate reflection of postmodern political reality. When Eskridge tells us that he is middle-class, gay, and fascinated with scarcity (200), he mirrors the uncertainty we now experience about politics in general and judging in particular. Judges can no longer rely on the common law as a source of law-making power, and we have lost our optimism, which emerged in the middle decades of the twentieth century, that legislatures and judges can cooperate to implement law reform. All we have left is the judge's common law power of statutory interpretation without the positive image of the substantive common law or legislative purpose to sustain a vigorous judicial role. Eskridge has painted a picture of dynamic interpretation by a nondynamic judiciary.

There is much more that is commendable about this book than I have had time to review. The discussion has not done justice to the richness of the material Eskridge uses to make his case. There is a supporting cast of theoretical material drawn from public choice (to show the indeterminacy of "majority" decisions and the dysfunctions of the political process); positive political theory (viewing interpretation as a sequential political game between judges, legislature, agencies, and the president); and literary criticism (to explain the hermeneutical circle). And there is almost no current theory of statutory interpretation that is not mentioned and sympathetically critiqued, including a variety of republican theories (those of Michelman, Calabresi, Dworkin, and feminist scholars generally), and normative theories (both natural law and postmodern.)

There is also a lot of attention paid to specific cases to provide a testing ground for various theories and to show how theory can highlight aspects of an interpretation that might otherwise escape the lawyer. (Do not overlook how useful this book is to lawyers. Opinions may not write the way Eskridge would want them written, but judges will respond to the arguments he develops and figure out how to write a justifying opinion.) For example, chapter 3 is all about the evolving history of the labor injunction. Important cases (referenced in the index) include *Weber* (Title VII voluntary affirmative action); *Gay Rights Coalition* (gay rights); *Patterson* (coverage of civil rights law dealing with "making and enforcing" contracts); *Griffin* (liquidated damages "plain meaning" case); and *K Mart* (exceptions to trademark protection for imported goods).[1]

I have also slighted part III, about various statutory interpretation doctrines. Not everyone will agree with the way Eskridge integrates doctrines into underlying theories of interpretation. (1) His defense of legislative history is (I think) too conventional, focusing on its utility in proving historical and

1. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982); K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988).

linguistic context rather than as a source of legal authority that may be institutionally competent. (2) His justification of the reenactment and inaction doctrines is that they help judges make guesses about evolving legislative positions, which seems futile to me. These doctrines are, I think; best understood as judicial efforts to allocate law-making responsibility between courts and legislatures. His fundamental point, however, is sound—that interpretation doctrine itself evolves as theories of interpretation change. In fact, Eskridge could have made more of this point, which can be grounded in the fact that statutory interpretation is a common law power inherent in the judicial power vested in courts by Article III.

I cannot end this review without commenting on a statement with which Eskridge introduces the book: "Statutory interpretation is the Cinderella of legal scholarship" (1). A major purpose of the book is to move statutory interpretation to center stage—to prevent Cinderella from turning into a pumpkin. No one has come close to doing as much as Eskridge to assure this happy ending, but there is something more that needs to be done. Common law teachers live and breathe the methodology of the common law and convey it to their students in a reasonably sophisticated manner, without being very self-conscious about this process. If statutory interpretation is to take hold, teachers of statutory subjects must absorb a rich understanding of interpretive theories into their work. Whether the field is tax, environment, bankruptcy, civil rights, securities, labor, etc., something more than superficial comments about text, intent, purpose, and legislative history is required when law professors teach and write about their fields of expertise. Eskridge's book should be must reading for everyone who teaches specific substantive areas of statute law as well as any one interested in statutory interpretation more generally.