

STATUTORY INTERPRETATION AND THE IDEA OF PROGRESS

Daniel A. Farber*

DYNAMIC STATUTORY INTERPRETATION. By *William N. Eskridge, Jr.* Cambridge: Harvard University Press. 1994. Pp. vii, 438. \$49.95.

Statutory interpretation, Professor Eskridge¹ observes, has been a neglected intellectual stepchild, “the Cinderella of legal scholarship” (p. 1). If so, then Eskridge himself may qualify as the messenger with the glass slipper who has rescued the waif from obscurity. For over a decade, he has been in the forefront of research on the subject and has played a leading role in the scholarly renaissance now underway. *Dynamic Statutory Interpretation* synthesizes and extends his far-reaching contributions to the subject.

Even beyond its theoretical sophistication and extensive scholarship, perhaps the book’s most attractive feature is the internal tension between sometimes opposing viewpoints. Eskridge candidly admits that he admires conflicting normative visions, for his experiences have given him a prismatic rather than a unified vision:

My approach can be described as one of critical pragmatism. It reflects a balance among three facets of my life: my thoroughly middle-class background and exposure to legal work through the usual insider institutions (Ivy League law school, clerkship, tony law firm), versus my experience as a gay man (which makes me a pariah looking at legal practice from the outside), versus my fascination with the phenomenon of scarcity and its [economic] implications for public life. My experience sweeps widely if not comprehensively across the American political spectrum.²

Consequently, Eskridge’s discussion tends to be dialectical, embracing first one viewpoint and then another. His conclusions are more nuanced than some readers may expect from an outspokenly “progressive” legal scholar. The price of these internal intellectual tensions is a reduction in theoretical elegance and rhetorical sweep,

* Henry J. Fletcher Professor of Law, Associate Dean for Faculty, and Acting Associate Vice President for Academic Affairs, University of Minnesota. B.A. 1971, M.A. 1972, J.D. 1975, University of Illinois. — Ed. I would like to thank Jim Chen and Phil Frickey for comments on a previous draft.

1. Professor of Law, Georgetown University; Visiting Professor of Law, Yale University.

2. P. 200. Eskridge’s “critical pragmatism” involves a general presumption in favor of existing legal practices, except where those practices fail to respond adequately to excluded groups. See text accompanying notes 57-61.

but the result is a more fruitful and profound engagement with the issues. Throughout the book, although Eskridge's conclusions are often debatable, he never fails to engage opposing viewpoints honestly and to acknowledge their legitimacy.

This review begins by considering Eskridge's quarrel with his major opponents — textualists such as Judge Frank Easterbrook and Justice Antonin Scalia. It then probes Eskridge's understanding of "dynamic interpretation." Dynamic interpretation's distinctive feature is the view that statutory meaning changes over time, but this view need not be hostile to the need of the legal system for continuity and fidelity to the past. Eskridge's approach may have roots in the activism of the Warren Court, but it also turns out to have some intriguing affinities with the work of Alexander Bickel, a legal-process³ critic of judicial activism. Finally, the review revisits *United Steelworkers of America v. Weber*,⁴ the leading statutory-interpretation opinion involving affirmative action — an opinion that has fascinated Eskridge and other interpretation scholars.

I. DYNAMIC INTERPRETATION VERSUS NEW TEXTUALISM

In evaluating the argument for dynamic interpretation, we may begin profitably by considering its main current competitor, the recent revival of textualism. Eskridge argues that dynamic interpretation is inevitable.⁵ This is a difficult proposition to establish empirically. At least one might say, however, that textualists have failed to provide a counterexample in their own practice of statutory interpretation. This failure is all the more revealing because opposition to dynamic interpretation is so central to the textualist creed. We first consider the textualists' unsuccessful effort to eliminate dynamic interpretation, and then briefly consider the arguments in favor of a dynamic approach.

A. *The New Textualism*

When interpreting statutes, modern courts generally have felt free to rely on an eclectic mix of reliance on text, legislative history, statutory purpose, and public policy.⁶ This eclecticism allows room for dynamic interpretation for judges who are so inclined. Beginning in the 1980s, textualists challenged this eclectic approach in

3. For a comprehensive discussion of the legal process school, see the introduction by Eskridge and Philip P. Frickey to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

4. 443 U.S. 193 (1979).

5. To buttress this claim, Eskridge uses the history of federal labor injunctions as a case study. See pp. 81-106.

6. For a fuller discussion, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

favor of a much more structured method of statutory interpretation.⁷ Their favored approach claims to be rigorously nondynamic.⁸ Textualists, as Judge Easterbrook has explained, stress that the proper forum for policymaking is the legislature; the role of judges is to apply statutes as written, without attempting to adapt them to changing times: "Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new. . . . Law does not change in meaning as the political culture changes."⁹

There are several corollaries to this antidynamic thesis. Textualists maintain that the ideas of legislative purpose and legislative intent are incoherent: "Legislation is compromise. Compromises have no spirit; they just are."¹⁰ Hence, if the legislature has failed to speak clearly to an issue, the argument continues, a court should not try to fill the gap. When the court reaches the limits of a statute's clear instructions, the only thing to do is to put the statute aside and admit that it provides no basis for ruling.¹¹ As Judge Easterbrook puts it, "[w]hen the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy — or economics! Instead the interpreter should go to some other source of rules."¹² Refusing to stretch statutory language or fill gaps has another major advantage: Knowing that courts will follow only their plain language, legislators will have an incentive to draft carefully and precisely,¹³ so textualism helps foster the democratic process.¹⁴

What this adds up to, as Judge Easterbrook puts it, is a "relatively unimaginative, mechanical process of interpretation,"¹⁵ offered in the name of upholding the legislature's monopoly on policymaking.¹⁶ Only this mechanical approach "can be reconciled

7. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY. 61 (1994).

8. As Eskridge has observed, "[f]ormalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990).

9. Easterbrook, *supra* note 7, at 69 (footnote omitted).

10. *Id.* at 68.

11. See, e.g., Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533 (1983).

12. Easterbrook, *supra* note 7, at 68.

13. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1022 (1992).

14. See *United States v. Taylor*, 487 U.S. 326, 344-45 (1988) (Scalia, J., concurring in part).

15. Easterbrook, *supra* note 7, at 67.

16. This goal, however, is not consistent with textualists' use of substantive canons and strong "clear statement" rules. See pp. 280-83, 297.

with the premises of democratic governance.”¹⁷ According to textualists, this approach is also consistent with the essence of the judicial function, which is to submit to “the lines of the logical and analytical categories” and to operate under clear rules rather than fuzzy principles.¹⁸

The textualist vision of statutory interpretation is sharply at odds with Eskridge’s. Textualism aspires to be resolutely nondynamic and insulated from judicial value judgments. Its aspiration to formalist simplicity is equally distant from Eskridge’s vision. Rather than seeking a cut-and-dried method of interpretation, he criticizes courts for attempting to simplify their tasks instead of engaging the deep complexities of interpretation (p. 145). Thus, although he utilizes some of the same intellectual apparatus as the textualists,¹⁹ ultimately Eskridge’s theory is almost entirely opposed to theirs.

B. *The Failure of Textualism*

Not surprisingly, textualism has not gone unchallenged.²⁰ According to its critics, textualism fails on its own terms by leaving judges free to inject their values into statutory interpretation. Critics charge that courts have “begun to use textualist methods of construction that routinely allow them to attribute ‘plain meaning’ to statutory language that most observers would characterize as ambiguous or internally inconsistent,” and even to attribute plain meaning to language that “was nearly universally believed to have a contrary meaning” for many decades.²¹ Others describe textualism as increasing the tension between democracy and the rule of law and serving “as a cover for the injection of conservative values into statutes.”²² Room for doubt exists, then, about whether textualism is living up to the promises of its advocates.

17. Easterbrook, *supra* note 7, at 63.

18. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 593 (1989-90); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

19. Most notable is public-choice theory, which plays a prominent role in both Eskridge’s and Easterbrook’s scholarship.

20. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861-74 (1992); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response*, 93 MICH. L. REV. 1, 40-66 (1994); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 549-54 (1992); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 825-31 (1994).

21. Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

22. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

These concerns are illustrated by Justice Scalia's opinion in *BFP v. Resolution Trust Corp.*²³ *BFP* involved a Bankruptcy Code provision that invalidates certain prebankruptcy transfers unless the debtor received "a reasonably equivalent value."²⁴ The transfer in *BFP* was a foreclosure sale on the debtor's real estate for a fraction of its market value. Applying the bankruptcy provision to foreclosures had given the lower courts a great deal of difficulty because prices at forced sales are not infrequently depressed. Some courts had set aside such sales when the sale price was well below fair market value.²⁵ Others, such as the lower court in *BFP*, had found compelling policy reasons for ignoring the price disparity despite the statutory language.²⁶ Justice Scalia upheld the foreclosure, but without adopting the policy-oriented rationale of the lower court.

According to Justice Scalia, whatever amount is received in a lawful foreclosure, however minute, is simply *by definition* "a reasonably equivalent value."²⁷ Justice Scalia argued that the value of property inevitably is depressed if it is the subject of foreclosure proceedings.²⁸ "[I]t is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)."²⁹ Thus, under Justice Scalia's view, if a mortgagee buys the property at a small fraction of its market value, the price paid is simply its true value under the circumstances.

Whatever else may be said of Justice Scalia's argument, it hardly corresponds with the textualist call for a "relatively unimaginative, mechanical process of interpretation."³⁰ No ordinary speaker of English would use the phrase "reasonably equivalent value" to mean "fair market value except in the case of a foreclosure, when it

23. 114 S. Ct. 1757 (1994).

24. 11 U.S.C. § 548(a)(2) (1994).

25. The leading case is *Durrett v. Washington National Insurance Co.*, 621 F.2d 201, 203-04 (5th Cir. 1980) (setting aside sale when purchase price was less than 57.7% of fair market value and indicating in dicta that any sale for less than 70% should be set aside).

26. For a discussion of pre-*BFP* law, see Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 VA. L. REV. 933, 936-53 (1985).

27. See *BFP*, 114 S. Ct. at 1761-62.

28. See 114 S. Ct. at 1761-62.

29. 114 S. Ct. at 1762 (citation omitted). It is some indication of Justice Scalia's discomfort with his own interpretation of the statute that he explicitly "emphasize[d] that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." 114 S. Ct. at 1761 n.3. As a matter of logic, of course, these other situations are indistinguishable on the basis of Justice Scalia's rationale.

30. Easterbrook, *supra* note 7, at 67.

means *whatever* the debtor receives." At most, Scalia's argument would support only a definition of fair value as the expected price at a foreclosure sale, not the actual price in one particular sale. Moreover, as Justice Souter's dissent cogently demonstrates, Justice Scalia's interpretation of the statute simply makes a hash of Congress's deliberate decision to subject involuntary transfers to Bankruptcy Code section 548.³¹

As Eskridge and Frickey have observed, "*BFP* is an astonishing decision for a textualist."³² Their overall evaluation of the opinion is biting: "By giving its policy-driven result an unsupportable formalist gloss, Justice Scalia's opinion flunks any requirement of judicial candor."³³ Harsh, perhaps, but not entirely inaccurate. If this is what textualism can do in the hands of its foremost proponent, we may wonder how well it will function in other hands. *BFP* provides little reassurance about the ability of textualism to constrain result-oriented judges.

Textualism does, however, seem to have the ability to persuade those judges subscribing to it that their interpretations are coerced by the text, even when this claim objectively seems quite implausible. Consider Justice Scalia's striking dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.³⁴ *Sweet Home* involved the Endangered Species Act³⁵ ban on "taking" endangered species; "taking" was defined to encompass any effort to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."³⁶ The Secretary of the Interior had defined "harm" in turn to include a significant habitat modification, if the modification "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."³⁷ The question before the Court was whether this was a reasonable reading of the statute. In a careful opinion by Justice Stevens, the Court upheld the agency's interpretation of the statute.³⁸

Justice Scalia wrote a vitriolic dissent, which amply lives up to Eskridge's comment that he finds the "mists of the Middle Ages" more relevant than recent sources of law (p. 271). The centerpiece of Justice Scalia's dissent is his assertion that the word "take," as applied to wildlife, is "as old as the law itself" and means "to re-

31. See *BFP*, 114 S. Ct. at 1767-78 (Souter, J., dissenting).

32. Eskridge & Frickey, *supra* note 22, at 83.

33. *Id.* at 84.

34. 115 S. Ct. 2407, 2421-31 (1995) (Scalia, J., dissenting).

35. 16 U.S.C. §§ 1531-1544 (1994).

36. 16 U.S.C. § 1532 (1994).

37. *Sweet Home*, 115 S. Ct. at 2410.

38. See 115 S. Ct. at 2407.

duce those animals, by killing or capturing, to human control.”³⁹ “It should take the strongest evidence,” he said, “to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.”⁴⁰ This is an *ipse dixit* in the grand manner. Although a reasonable member of Congress conceivably might have had in mind the ancient meaning of the term “take” in game law, that legislative understanding was hardly inevitable. After all, the statute was not an amendment to other game or fishing laws but instead was an aggressive addition to federal environmental law, in the context of which the medieval meaning of the word “take” might not have immediately sprung to the legislators’ minds. Surely, a member of Congress who wanted to know what the word meant would have been more likely to look at the broad language of the bill’s definition than to consult a treatise on game law. Justice Scalia’s reading of the statute may not be impermissible, but under the *Chevron*⁴¹ doctrine, he had the burden of showing that the agency’s contrary interpretation was not merely wrong but unreasonable.⁴²

Justice Scalia’s dissent also falls far short of overcoming the strong textual argument in the other direction. The term “harm” naturally encompasses habitat modification.⁴³ It would be peculiar to say that Mrs. O’Leary’s cow did not harm the people of Chicago when she kicked over the lantern that started the Chicago fire. Similarly, as a matter of ordinary English usage, someone who destroys the breeding grounds used by an endangered species or eliminates its food supply surely “harms” them.

Justice Scalia’s view that the statute unambiguously precludes the agency’s interpretation is at best an example of self-deception. The reason for this self-deception is not hard to find. It leaps out of the opening paragraph of the dissent, when Justice Scalia says the agency interpretation “imposes unfairness to the point of financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”⁴⁴ Justice Scalia’s textualism seems to have blinded him to the extent to which he engaged in dynamic interpretation based on conservative public

39. 115 S. Ct. at 2422 (Scalia, J., dissenting).

40. 115 S. Ct. at 2423 (Scalia, J., dissenting).

41. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

42. See 467 U.S. at 843.

43. For instance, one dictionary contemporaneous with the statute defines harm as “physical or material injury; hurt; damage; detriment; misfortune.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 827 (2d ed. 1977).

44. *Sweet Home*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

values — values that also may command the support of the current, rather than the enacting, Congress.⁴⁵

At one point, Eskridge caustically remarks that textualism reduces statutory interpretation “to a linguistic shell game played by amateurs” (p. 134). Perhaps it is unfair to accuse Justice Scalia of deliberately hiding the statutory “pea” in *Sweet Home*, for he seems to have fooled even himself.⁴⁶ But Eskridge’s larger point remains valid. Like other reductionist approaches to statutory interpretation, textualism fails to provide sufficient determinacy in practice to squeeze value judgments out of the interpretative process (pp. 38-47). Like it or not, we seem to be stuck with some degree of dynamic interpretation, even from judges who vehemently proclaim their desire to avoid it.

C. *The Legitimacy of Dynamic Interpretation*

As Eskridge recognizes, assuming that some degree of dynamic interpretation is inevitable, this fact does not necessarily mean that it is desirable. We might instead, like textualists, want to reduce the amount of dynamic interpretation to the minimum (p. 6). The worry, of course, is that courts armed with dynamic interpretation will usurp the legislature’s superior position as lawmaker. Eskridge devotes Part II of the book to exploring various jurisprudential theories, ranging from classical liberalism to critical race theory, as they bear on this question. He concludes that under all of these theories some form of dynamic interpretation is legitimate.

Three of Eskridge’s arguments are quite simple but ultimately quite powerful. First, even in hierarchical institutions such as the military, lower-level agents are recognized as having necessary authority to improvise and adapt their orders to changing circumstances (p. 124). Modern organizational theory stresses the need for flexibility and innovation by subordinates rather than centralized, top-down decisionmaking.⁴⁷ From an organizational point of view, rule-bound decisionmaking is unlikely to succeed in a diverse or rapidly changing environment.

To show the need for improvisation in adapting orders to actual conditions, Eskridge refers to Judge Richard Posner’s analogy⁴⁸ to a platoon commander who has lost touch with headquarters in the

45. As Eskridge points out, Justice Scalia and other members of the Rehnquist Court often smuggle in their public values through references to canons of interpretation, sometimes freshly minted, that embody conservative political preferences. See pp. 280-83, 297.

46. Justice Scalia himself has observed that he usually sees no reason for agency deference because he finds most statutes clear. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

47. See Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278, 1279, 1286-87 (1993).

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

middle of a battle (p. 124). The severely disciplined German army provides a striking example — it not only tolerated but encouraged the exercise of discretion by subordinates during World War II.⁴⁹ The French army, in contrast, was run on formalist principles, with a highly centralized organization that could not adjust to the unexpected.⁵⁰ In a “system wholly at odds with the stereotypical view of the German army as composed of fanatical soldiers blindly obeying the dictates of a Prussian general staff,” the Germans had “remarkably little paperwork” compared with the Americans, left tactical decisions to the officers at the front, and gave medals largely for the exercise of initiative on the battlefield.⁵¹ This organizational system was “well adapted to the task of getting men to fight against heavy odds in a confused, fluid setting far from army headquarters and without precisely detailed instructions” and contributed to the ability of the Germans to outmaneuver larger but less flexible opponents.⁵² Surely, the degree to which federal courts are subservient to legislators cannot exceed the degree to which Teutonic lieutenants were subordinate to generals!

Second, some degree of dynamism seems inherent in the enterprise of interpretation itself. At the most abstract level, Eskridge argues that all interpretation necessarily involves an effort to align the world of the reader with that of the author, making static interpretation impossible (pp. 60-65). More specifically — and perhaps more persuasively for those unsympathetic with contemporary literary theory — he points out that legal interpretation generally involves some dynamic element in areas ranging from the law of contracts to the law of trusts (pp. 122-23). Furthermore, in other legal systems, some with highly textualist aspirations, dynamic interpretation of statutes is well-accepted.⁵³ Even textualists utilize canons of interpretation that in practice provide a dynamic element (pp. 118-19). Thus, dynamic interpretation is hardly a frightening novelty.

Third, it is difficult to see how the legal system can function effectively without some degree of dynamic interpretation. It is impractical to revise the entire United States Code every few years; inevitably, some provisions must be left in place for decades, if not longer. Intolerable anomalies would develop without some way to keep these provisions in tune with the changing legal framework

49. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 14-18 (1989).

50. See *id.* at 43.

51. See *id.* at 16-17.

52. See *id.* at 17.

53. See p. 345 n.2. For further discussion, see Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 *CORNELL L. REV.* (forthcoming 1996).

(pp. 48-49). Moreover, as the understandings of the law by those involved in its everyday administration evolve over time, abrupt efforts to restore the original understanding can undo justifiable patterns of reliance by the relevant actors. Thus, as Richard Pierce observes, for essentially conservative "rule of law" reasons, a completely nondynamic approach to interpretation would be a mistake.⁵⁴

Those who would dismiss dynamic interpretation as a form of judicial activism would do well to consider Peter Strauss's explanation of its traditional role in administrative law:

Administrative agencies are continuing bodies with proactive responsibilities, acting under the oversight of the political branches as well as the judiciary. We anticipate that they will change course; they are in effect the preferred managers of change. . . . Whatever else, the agency . . . will not have encountered issues of statutory meaning freed of consideration of purpose, politics, or contemporary understandings.⁵⁵

Similarly, Strauss is critical of Justice Scalia's *BFP* opinion for its reluctance to recognize the established role of federal judges as "officials with acknowledged law-generating authority" sufficient to put flesh on the reasonableness standard of the Bankruptcy Code.⁵⁶ On this score, Strauss and Eskridge are the conservatives, whose views reflect established legal practices and traditions, while Judge Easterbrook and Justice Scalia are the radicals.

II. THE DYNAMICS OF INTERPRETATION

The difficult question, then, is not whether to engage in dynamic interpretation, but how to do so, and in particular, how freely to do so. It is easy to interpret Eskridge — dynamically — as an enthusiastic advocate of judicial activism in statutory interpretation. Establishing the argument for dynamic interpretation is after all the main purpose of the book (p. 5), and the word "dynamic" seems to connote activism. This interpretation, however, misreads his views. As we will see, Eskridge is actually somewhat cautious in his view of the judicial role, and his work reflects some of the concerns raised by legal process theorists such as Alexander Bickel. While Eskridge wishes to leave room for legal evolution, he is also quite aware of the limits of the judicial role in legal change; like Bickel, he is not lacking in awareness of the "passive virtues."

54. See Pierce, *supra* note 21, at 765-66. Thus, one of Eskridge's most thoughtful critics agrees that dynamic interpretation is appropriate, but only under more limited circumstances than Eskridge would countenance. See John Nagel, *Review Essay: Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2236 (1995).

55. Peter Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 437.

56. *Id.* at 454.

A. *Critical Pragmatism and the Judicial Role*

Eskridge's views lay exposed to misinterpretation in part because he is attracted strongly to conflicting jurisprudential visions. He discusses three quite different jurisprudential theories: traditional liberal theory, legal-process theory, and normativism. Each has its appeal:

Most of us find something attractive in each one, and the three theories together more accurately capture our political society than any one separately. We value individual autonomy (liberalism), but we also understand our interdependence (legal process) and crave a society that stands for values we can be proud of (normativism). As a result, we usually favor limited government, but endorse state regulation to address social and economic problems and to foster national values. [p. 109]

Consequently, Eskridge calls for a "dialectic" among these theories (p. 109). His own preferred approach is a "critically pragmatic one in which the rule of law is grounded in and follows everyday practice, but which reevaluates practice in light of rank discriminations" (p. 109).

Eskridge's critical pragmatism recognizes the limits on judicial innovation.⁵⁷ As he puts it, courts are pressed from below and above in statutory cases (p. 49). From below, the Supreme Court often finds that agencies, private actors, and lower courts already have interpreted statutes in ways that have become deeply embedded in society (p. 66). From above, the Court's interpretation faces the threat of being overruled by Congress. Thus, the courts normally must respect the interpretative status quo rather than upset the balance in the name of either social progress or the original understanding. This principle is embedded in a number of well-established canons of interpretation such as the following:

- Reenactment rule: when Congress reenacts a statute, it incorporates settled interpretations of the reenacted statute.
- Super-strong presumption of correctness for statutory precedents.
- Acquiescence rule: follow unbroken line of lower court decisions interpreting statute.
- Rule of deference to agency interpretations unless contrary to plain meaning of statute or unreasonable. [pp. 324-25]

These rules reflect formal recognition of the broader principle that other legal actors hem in a judge's room for interpretation.

Thus, the Supreme Court never writes on a clean slate and never has the final word. For this reason, Eskridge endorses what he considers the most modest forms of dynamic interpretation using "pragmatic, situational metaphors," such as analogies to private law

57. As another reviewer trenchantly put it, "Eskridge has painted a picture of dynamic interpretation by a nondynamic judiciary." William D. Popkin, Book Review, 45 J. LEGAL EDUC. 297, 301 (1995) (reviewing *DYNAMIC STATUTORY INTERPRETATION*).

doctrines like *cy pres* (pp. 192-93). A pragmatic interpretation is one that “most intelligently and creatively ‘fits’ into the complex web of social and legal practices” (p. 201). In most cases, Eskridge believes, the courts should defer to settled practice, rather than seeking to anticipate future progress.⁵⁸ Quoting the Roman Emperor Hadrian, he reminds us that “[l]aws change more slowly than custom, and though dangerous when they fall behind the times are more dangerous still when they presume to anticipate customs” (p. 201). Only in the exceptional case should judges “break away” from current practice (p. 200).

Thus, when evaluating a possible interpretation of a statute, a court first should consider whether the interpretation comports with professional, social, and political practice. If the interpretation would disrupt current practice, the court then should consider whether such a disruption is normatively justified (p. 206). In the typical case, the court’s role is essentially conservative, not in terms of the political spectrum, but in terms of current social practices that the court attempts to preserve. Only in an extraordinary case does the court contemplate disruption through interpretations that “press beyond or criticize” existing conventions and traditions in order to re-ground the legitimacy of the legal system in its underlying norms (p. 201).

Notably, even when disrupting current practice, the ultimate goal is conservative rather than transformational — to preserve the social order rather than overturn it. Both at the beginning (p. 2) and end of the book (p. 306), Eskridge invokes Hadrian’s view about the need to attract the loyalty of downtrodden groups. Rather than applying the law rigidly, Hadrian believed that flexibility was necessary in order to preserve the legal system’s viability:

All nations who have perished up to this time have done so for lack of generosity: Sparta would have survived longer had she given her Helots some interest in that survival. . . . I wished to postpone as long as possible, and to avoid, if it can be done, the moment when the barbarians from without and the slaves within will fall upon a world which they have been forced to respect from afar, or to serve from below, but the profits of which are not for them. I was determined that even the most wretched, from the slaves who clean the city sewers to the famished barbarians who hover along the frontiers, should have an interest in seeing Rome endure. [p. 306]

Thus, even seemingly disruptive legal interpretations ultimately may serve the long-term maintenance of the legal order.

58. Typically, courts lag behind rather than lead changes in the political culture, making them unlikely candidates for a leadership role in social change. See James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555-56, 560 (1995) (arguing that the Supreme Court reflects public opinion less than other institutions and is driven by changes in its own composition plus rational perceptions of the anticipated effects of changing public opinions).

Disruptive interpretations, while unusual, are also critically important. Eskridge's views about disruption can be plumbed best by considering two cases that he discusses extensively. Both cases involve gay rights, a cause about which he cares passionately. In both cases, he favors an interpretation at odds with the legal status quo, but only with misgivings.

The first of these cases is *Boutilier v. INS*,⁵⁹ which involved the application of an immigration restriction to homosexuals. The statute required the Immigration and Naturalization Service to exclude individuals found by the Public Health Service to have "psychopathic personalities," a term that Congress apparently anticipated would include gays and lesbians. Although the Court interpreted the restriction to apply to gay men, Eskridge believes that a dissenting Court of Appeals judge had a better view. Judge Moore had dissented because he was reluctant to read the statute to apply to such figures as Leonardo da Vinci and Michelangelo.⁶⁰ Moore was a moderate Republican who found the exclusion policy "unnecessarily hurtful, and indeed wasteful and inefficient in light of the productive people it swept within its exclusionary net" (p. 202). It is only Moore's dissent, Eskridge remarks, "that inspires admiration today" (p. 202). In *Boutilier*, then, Eskridge would favor a rupture in prior social understandings in favor of an oppressed group.⁶¹

The second case is *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*,⁶² which was brought by a gay rights group seeking official recognition from a Catholic university. Eskridge considers this a very difficult case because it pitted two conflicting moral world views against each other (pp. 181, 185). Although he finds none of the opinions in the case fully satisfactory, he seems most drawn to the opinion of Judge Mack, who attempted to accommodate the conflicting interests in the case and open lines of communication between the college and the gay community.⁶³ By excusing the University from granting formal recognition to the gay group, she acknowledged the school's religious objections while requiring the University to provide equal access and benefits, thus meeting the group's practical needs (p. 178). The result of this decision was to foster a fruitful dialogue and the creation of a new consensus within the university (p. 182). Here, the best available

59. 387 U.S. 118 (1967).

60. *Boutilier v. INS*, 363 F.2d 488 (2d Cir. 1966) (Moore, J., dissenting), *aff'd.*, 387 U.S. 118 (1967).

61. Such a rupture ultimately took place when changed cultural and medical understandings made the Public Health Service unwilling to perform its role under the statute of certifying gays as psychologically unhealthy. See pp. 66-67.

62. 536 A.2d 1 (D.C. 1987) (en banc).

63. Pp. 188-89. Eskridge nevertheless has some reservations about Mack's opinion. See p. 192.

judicial action was not to rupture prior traditions but to mediate between conflicting norms.

B. *Statutory Interpretation and the Lincolnian Tension*

As we have seen, a central theme of *Dynamic Statutory Interpretation* concerns the tension between the usual role of courts as restrained agents of tradition and their occasional need to breach the status quo in light of fundamental moral imperatives. As Eskridge explains, this tension is also a critical feature of legal-process theory:

The genius of legal process theory is its ability to mediate substantive divisions through procedure and to press the polity toward new consensuses over time. Its danger is that procedural regularity may become a cover for the triumph of a partial substantive position and consensus a shield for an unjust or inefficient status quo. The challenge for a legal process theory of statutory interpretation is to find a balance — one that must be constantly recalibrated — between procedural mediation and substantive responsibility. [p. 143]

Within the legal-process movement, Alexander Bickel most deeply grappled with this tension.⁶⁴ Despite great differences in their philosophical and political outlooks, Bickel's work finds a resonant chord in Eskridge's jurisprudence.

Bickel believed that law must rest on fundamental principles, but also that it must duly consider practical realities. Analogizing a judge's position to Abraham Lincoln's on the issue of slavery, Bickel referred to the tension between principles and practical realities as the "Lincolnian tension," which he saw as pervasive in the Supreme Court's work.⁶⁵ It is the Court's task, Bickel argued, to resolve the "tension between principle and the hard — at any rate, often ominous — facts of the day's politics."⁶⁶ The judicial "art" is the creative extension of the law's moral tradition to new situations and problems, but with a prudent regard for the need to generate societal support.⁶⁷

Thus, like Eskridge, Bickel believed that the normal judicial role is to maintain continuity with current social norms. More than Eskridge, however, Bickel doubted that the Court effectively could force society into the future; he had little belief in "the intuitive judicial capacity to identify the course of progress."⁶⁸ Nor did he

64. For an illuminating discussion of Bickel's thought, see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985).

65. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 68 (1962).

66. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 98 (1970).

67. See BICKEL, *supra* note 65, at 66-69.

68. BICKEL, *supra* note 66, at 173-74.

believe that the Court had the power to compel social change.⁶⁹ Bickel, however, did not see the Court as merely a passive reflection of current practices. He thought it must aspire to the role of moral teacher,⁷⁰ for society also "values the capacity of the judges to draw its attention to issues of the largest principle that may have gone unheeded in the welter of its pragmatic doings."⁷¹

Bickel's model of law was "flexible, pragmatic, slow-moving, highly political"; without "pretense to intellectual valor," it rested on a "mature skepticism" about the validity of any catechism of moral values.⁷² Yet in Bickel's view, law cannot be unprincipled, for in order to maintain its stability and coherence, a civil society must rest on a moral foundation.⁷³ "A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life with and under them, insupportable."⁷⁴ That moral foundation is not, however, to be found in abstract philosophical theory, but in an evolving tradition: "We hold to the values of the past provisionally only, in the knowledge that they will change, but we hold to them as guides."⁷⁵

Bickel was deeply concerned with how law can generate the consent necessary to maintain the social order in a free society. Ultimately, he believed, law can operate only through consent, for a free government lacks the power to exact obedience from large numbers of people through direct coercion.⁷⁶ As a result, when the law sharply conflicts with the norms of a significant segment of society, a dialogue must take place between that group and the courts⁷⁷ a dialogue in which civil disobedience can, within limits, play an important part.⁷⁸ A minority with intense preferences cannot be coerced at an acceptable cost by the majority and therefore often must be accommodated.⁷⁹

As his closing quotation from Hadrian makes clear, Eskridge also is quite concerned about how the legal system can earn the consent of dissatisfied minority groups.⁸⁰ His account of the development of gay rights also has a distinctly Bickelian tone as he ex-

69. See *id.* at 91.

70. See Kronman, *supra* note 64, at 1583 & n.73.

71. BICKEL, *supra* note 66, at 177.

72. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 4 (1975).

73. See *id.* at 23.

74. *Id.* at 24.

75. *Id.*

76. See *id.* at 106.

77. See *id.* at 111.

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

79. See *id.* at 102.

80. See p. 306. See *supra* text accompanying notes 58-59.

plains how the legal system adapted to the demands of an alienated minority. According to Eskridge, the social consensus in favor of repressing homosexuality continued until the Stonewall Riot, which began a period of gay resistance and ultimately forced a change in social practices (pp. 53-55). In the end, rather than coming from "above" — the courts — legal change came from "below" — through Stonewall, the gay rights movement, and other acts of resistance (p. 72). The result was to override prior legal interpretations in *Boutilier* and force an accommodation to gay interests in *Gay Rights Coalition*. A successful disruption of prior legal practice was mandated by the effort to maintain allegiance from the gay community. Clearly, Eskridge's view is that it was also required by moral principle.⁸¹

Eskridge is surely not a reincarnation of Alexander Bickel, who was far more conservative both intellectually and politically. What they have in common is an abiding focus on the Lincolnian tension between high principle and "business as usual." It is this focus that saves Eskridge's work from becoming a banal celebration of judicial activism and provides much of the intellectual energy that pervades this book.

III. *WEBER*: THE PARADIGM CASE REVISITED

As Phil Frickey has pointed out,⁸² much of the contemporary debate about statutory interpretation has been sparked by the Supreme Court's decision in *United Steelworkers of America v. Weber*,⁸³ which upheld affirmative action under Title VII.⁸⁴ At least for liberals, nowhere is the pressure for a "disruptive" interpretation so great as it is in the context of affirmative action, for nowhere is the tension between legality in the form of text and legislative history, and perceived morality in the form of social equality, so severe. Understandably, *Weber* is a central focus of the Eskridge book (pp. 14-47, 80, 135, 173, 303-06). In his lengthy discussion of *Weber*, Eskridge seems to have two purposes. The first is to undermine Justice Rehnquist's dissent by demonstrating the existence of indeterminacy in the statute's text and legislative history. The second is to embed *Weber* in a larger story about the evolution of Title VII law. We will consider these two aspects of Eskridge's analysis in that order, ending with a reevaluation of *Weber*.

81. See *supra* note 61 and text accompanying notes 59-63.

82. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 245 (1992).

83. 443 U.S. 193 (1979). *Weber* was reaffirmed and expanded in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). All the current casebooks on Legislation use *Weber* as a principal case.

84. See *Weber*, 443 U.S. at 197.

A. Weber and Legislative Intent

To understand the problem posed by the *Weber* case, it is best to begin with Justice Rehnquist's dissent, which musters the conventional tools of statutory interpretation for a powerful attack on affirmative action.⁸⁵ Begin with the language of the statute. The most directly applicable provision of the statute, section 703(d), prohibits an employer from "discriminat[ing] against any individual because of his race"⁸⁶ in any apprenticeship or training program — the specific setting in *Weber*. In addition, section 703(a)(2) forbids employers from classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race."⁸⁷ As Justice Rehnquist pointed out, on its face this language seemed to address the situation of Brian Weber, who was unable to gain admission to a training program because he was white.⁸⁸ Moreover, the legislative history contained some powerful support for Justice Rehnquist's "color-blind" interpretation of the statute. Hubert Humphrey, "perhaps the primary moving force" behind the bill in the Senate, explained that "the meaning of racial or religious discrimination is perfectly clear. . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin."⁸⁹ The Senate "floor captains" explained its provisions as follows:

[I]f a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged — *or indeed permitted* — to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*⁹⁰

In terms of the conventional indicia of legislative intent, then, Justice Rehnquist had a powerful argument against affirmative action.

Justice Brennan's opinion for the Court admitted the force of this argument against the legality of affirmative action but emphasized that the affirmative action plan had been voluntarily adopted

85. For a similar analysis by a leading authority on labor law, see Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

86. 42 U.S.C. § 2000e-2(d) (1994).

87. 42 U.S.C. § 2000e-2(a)(2) (1994).

88. See *Weber*, 443 U.S. at 226-27 (Rehnquist, J., dissenting).

89. 443 U.S. at 236 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 5423 (1964)). Later, Humphrey added that quotas would not be established to maintain racial balance and that the bill "would prohibit preferential treatment for any particular group." *Weber*, 443 U.S. at 243 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 11,848 (1964)).

90. *Weber*, 443 U.S. at 240 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 7213 (1964)) (alteration in original).

by private parties to eliminate entrenched racial discrimination.⁹¹ Invoking the spirit of the law over its letter, Justice Brennan stressed that the supporters of the bill had strongly desired to remedy the inferior employment status thrust upon blacks by discrimination.⁹²

It would be ironic indeed, if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁹³

Justice Brennan bolstered this argument with a heavy reliance on section 703(j), which says that the statute should not be interpreted to require preferential treatment on the basis of race.⁹⁴ Notably, according to Justice Brennan, section 703 banned only mandatory affirmative action, thereby signaling its intention to leave voluntary affirmative action intact.⁹⁵

As Eskridge remarks, Brennan's opinion is somewhat cavalier in its treatment of the text and legislative history (p. 135). Justice Blackmun's concurrence is more candid in its discussion of the difficulties of the case. Justice Blackmun remarked that he shared some of the "misgivings" expressed by Justice Rehnquist about the original intentions of Congress. Nevertheless, he believed that practical considerations, "only partially perceived, if perceived at all" by Congress, supported the result in the case.⁹⁶ If read literally, Title VII would put employers in an untenable position, mandating either liability to blacks for past discrimination or liability to whites for attempting to remedy that discrimination. Thus, Justice Rehnquist's interpretation of the statute would make voluntary compliance — even in the form of a "whisper of emphasis on minority recruiting" — dubious.⁹⁷ Justice Blackmun's preference would have been to require an arguable past violation of Title VII as a justification for affirmative action.⁹⁸ Given Congress's initial orientation toward color blindness, he found the Court's more expansive approach to affirmative action somewhat disturbing. Yet, he was ultimately persuaded to join the Brennan opinion.⁹⁹

91. See *Weber*, 443 U.S. at 201.

92. See 443 U.S. at 201-04.

93. 443 U.S. at 204 (quoting 110 CONG. REC. 6552 (1964)) (citation omitted).

94. See *Weber*, 443 U.S. at 205-06.

95. See 443 U.S. at 205-07.

96. 443 U.S. at 209 (Blackmun, J., concurring).

97. 443 U.S. at 210-11 (Blackmun, J., concurring).

98. See 443 U.S. at 211 (Blackmun, J., concurring).

99. See 443 U.S. at 212-13 (Blackmun, J., concurring).

Eskridge makes a concerted effort to undermine the Rehnquist-Blackmun view of legislative intent. As to the statutory text, he argues that the term "discrimination" is ambiguous and might not include bona fide efforts to promote racial equality (p. 27). As to the legislative history, the endorsements of color blindness may have been nothing more than "cheap talk" that did not reflect the actual views of the majority or the leadership (p. 19). Also, pivotal voters such as Senator Dirksen might well have endorsed Justice Brennan's principle of managerial freedom, particularly if they had been aware of the pressures that the disparate-impact theory of liability would place on business (pp. 24, 37).

Despite Eskridge's ingenuity and extensive research, however, he fails to rebut Justice Rehnquist's analysis convincingly. Regarding the statutory text, as Eskridge acknowledges, a number of other provisions buttress the word "discrimination" and strongly suggest a colorblindness reading (pp. 42-43). The cheap-talk explanation of the legislative history is also implausible. First, it requires assuming that the leadership was willing to take the risk of blatantly misrepresenting the meaning of the statute. As Eskridge points out in another context, such misrepresentation is dangerous because of the likelihood that other legislators will correct the record (p. 405 n.127). Second, by the 1960s, Congress was well aware that courts might rely on legislative history (pp. 209, 213, 215-18, 234). Talk by the sponsors of the bill could not be regarded as "cheap" because it carried the known potential to modify the legal interpretation of the statute. Finally, although it is possible that Dirksen and his cohort would have taken the position posited by Eskridge, in the end this is a mere speculation, unsupported by any hard evidence.

To say that the evidence of legislative intent is strong is not to say that it is utterly unambiguous or conclusive. But by conventional standards of statutory interpretation, Justice Rehnquist clearly seems to have the better side of the argument. Thus, supporters of *Weber* need what Eskridge calls a "disruptive" interpretation, one that does more than implement the original expectations of the enacting legislators.

B. *Rupture or Reconciliation?*

Although he does make some effort to reconcile *Weber* with legislative intent, Eskridge's primary historical account portrays *Weber* as part of a rupture. His historical narrative begins after the passage of the Civil Rights Act.¹⁰⁰ As soon as the statute was passed, key players in the Equal Employment Opportunity Commission (EEOC) and in the civil rights movement were determined to pro-

100. 42 U.S.C. §§ 2000a to n-6 (1994).

mote what Eskridge calls a results-oriented approach to Title VII. Given experience under other labor laws, they were dubious that an intent-oriented definition of discrimination would be effective and instead focused on statistical measures of job equality. They were candid about the inconsistency of this approach with the legislative compromises embodied in Title VII (p. 73).

The first fruit of this new approach came in 1971 with *Griggs v. Duke Power Co.*,¹⁰¹ which adopted the theory of disparate impact originated by the NAACP Legal Education and Defense Fund, Inc. According to Eskridge, *Griggs* was at odds with the view of the enacting legislature and even with that of the legislature of 1971 (p. 77) — enough so that the legal community was stunned by the unanimous decision.¹⁰² Thus, *Griggs*, like the later decision in *Weber*, resulted from an ideological battle over the meaning of discrimination that had first been fought within the federal government and then in the private sector with less complete success.

This reworking of Title VII reached fruition, Eskridge says, in *Weber*. “The thrust of the Court’s opinion in *Weber*,” according to Eskridge, was our country’s commitment to results, based on the statute’s goal of obtaining compensatory justice for an oppressed minority (p. 40). Thus, “[d]uring the 1970s the EEOC, the Supreme Court, and Congress worked together toward a proportional representation ideology, encoded in Title VII through the *Griggs* and *Weber* decisions making disparate impact a form of discrimination and allowing voluntary affirmative action” (p. 304). In short, voluntary affirmative action was not considered a form of discrimination (pp. 40-41). On Eskridge’s interpretation, *Weber* was something like Judge Moore’s dissent in *Boutillier*:¹⁰³ a fundamental reworking of a statutory concept to correspond with more progressive social norms.

Eskridge’s interpretation seems plausible if we think only of Justice Brennan, the author of the opinion. Yet it fails when we consider some aspects of the opinion in historical context. Perhaps the most obvious difficulty is that Justice Brennan carefully refrains from attempting to reconcile the result with the statutory term “discrimination.” His majority opinion makes no effort to read the term “discrimination” as involving some evolving social norm of equality, and for good reason. He simply did not have solid majority support for an expansive redefinition of the concept of discrimi-

101. 401 U.S. 424 (1971).

102. P. 74; see also Earl Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1357 (“Commentators of all stripes have concluded that Congress did not consciously intend to adopt impact analysis in Title VII.”).

103. See *supra* text accompanying notes 59-61.

nation. In *Bakke*,¹⁰⁴ a majority of the Court had recently construed a companion provision to Title VII more narrowly, with four Justices allowing no affirmative action and a fifth Justice allowing only restricted use of affirmative action.¹⁰⁵ Moreover, in constitutional decisions expressing its own best understanding of racial equality, the Court had rebuffed efforts to define "disparate impact" as discrimination.¹⁰⁶ Thus, Brennan would not have been able to secure firm support for a "rupture" with color blindness in favor of a result orientation.

In order to distinguish *Weber* from *Bakke*, Brennan needed a different kind of argument. He had to accentuate the private nature of the affirmative action in *Weber*, as opposed to the federally subsidized state program in *Bakke*. His discussion of the overall goals of Title VII in promoting black interests arguably distinguished it from other portions of the 1964 Act with narrower goals,¹⁰⁷ but realistically, little justification existed for attributing fundamentally divergent purposes to various parts of the Act. For this reason, Brennan's second argument was particularly important because it rested on a statutory provision, section 703(j), that had no counterpart in *Bakke* and related to a well-established tradition of employer autonomy in labor law. In short, rather than announcing a brave new interpretation of the concept of discrimination, Brennan structured his opinion precisely to avoid the necessity of such a conceptual leap.

Perhaps Brennan could have carried the day in *Weber* with a broader, more conceptual opinion. Because two Justices — Stevens and Powell — had recused themselves, he needed only to hold his four-Justice block from *Bakke* to "win" the case. But this would have been a pyrrhic victory because of the likelihood that a 4-3 win would be overturned as soon as the full Court heard another affirmative action case. Hence, he needed to pick up Justice Stewart's vote and preferably to stake out a position that Justice Powell

104. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

105. In *Bakke*, four Justices held that Title VI of the 1964 Civil Rights Act, whose language is rather similar to that of Title VII, bans all affirmative action by recipients of federal funds. See 438 U.S. 265, 408-21 (opinion of Stevens, J., joined by Burger, C.J., Stewart & Rehnquist, JJ.). Justice Powell equated the statutory antidiscrimination standard with the concept of discrimination under the Equal Protection Clause and held that the latter allows affirmative action only in the presence of a compelling governmental interest such as remedying past illegal discrimination or attaining diversity in an educational institution. See 438 U.S. at 281-320. For a case from the *Johnson* era showing a similar lack of enthusiasm for affirmative action in a constitutional setting, see *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986) (invalidating layoff plan designed to prevent erosion of diversity).

106. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

107. Brennan relegated his effort to draw this distinction to a footnote and cited only two passing remarks in the *Congressional Record*. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979).

would also be willing to endorse in future cases. In addition, Justice Blackmun's concurrence makes it clear that he would have had great difficulty in joining a broader opinion. Justice Brennan's opinion in *Weber* was almost certainly the best outcome he could obtain. Despite its inadequacy under conventional legal criteria, Justice Brennan's opinion brilliantly succeeded in dealing with the situation he faced on the Court, confirming his reputation as an outstanding tactician.

In reality, rather than endorsing affirmative action, the thrust of *Weber* was to privatize it. Later cases highlight the Court's determination to allow voluntary affirmative action under Title VII while providing a much cooler reception to coercive affirmative action, even by a federal court.¹⁰⁸ Indeed, the Court went so far as to distinguish a program created by a consent decree, voluntary and therefore permissible, from one created by a judicial modification of a consent decree, coercive and therefore closely scrutinized.¹⁰⁹ Thus, despite its analytic difficulties, the line identified by *Weber* between voluntary and coerced programs stood the test of time.¹¹⁰

Rather than being a rupture, Justice Brennan's decision has more of the reconciliatory quality of Judge Mack in *Gay Rights*.¹¹¹ While leaving affirmative action in the public sector restricted under *Bakke* and its successor cases, the Court left more leeway in the less politicized private sphere. It thus attempted to reconcile the original expectations of the statute's framers with the perceived needs of the black community and the practical needs of the business community. Only one group was left out of this concord — white blue-collar workers, who were soon to manifest their political displeasure.¹¹² Although, as in the abortion area, the Court's prediction of the future may have failed to anticipate the backlash

108. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (upholding voluntary employer plan under lenient standard of review); *Local No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (upholding affirmative action consent decree regardless of whether court would have had power to enter same decree as remedy for proven violation).

109. In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court overturned a lower court order adjusting layoffs in order to preserve gains under an affirmative action plan. In *Local 28 v. EEOC*, 478 U.S. 421 (1986), the Court upheld a judicial affirmative action order only after careful scrutiny to determine its necessity. But in *Local 93*, the Court required such scrutiny only when an affirmative action plan lacked the consent of the employer, as when it was a judicial modification of a consent decree as opposed to being part of the decree itself. *Local 93*, 478 U.S. at 528.

110. Notably, recent opposition to affirmative action, such as the current California initiative proposal, is also focused on government-mandated programs. See Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2260 n.105 (1995) (quoting California initiative).

111. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987). See also *supra* text accompanying notes 62-63.

112. The rise of the conservative wing of the Republican party to national power under Ronald Reagan received a considerable boost from white opposition to affirmative action.

against what it considered progressive views, Justice Brennan's *Weber* approach has managed to survive for almost a generation. It remains to be seen whether, as Bickel asked about the Warren Court, the *Weber* Court's gamble on the future will pay off in the end.¹¹³

C. *Final Thoughts on Weber*

On conventional legal grounds, Justice Brennan's opinion is far less satisfactory than Justice Rehnquist's. Yet, it is difficult to endorse the Rehnquist opinion wholeheartedly, particularly its tone of self-righteousness. In his closing, Justice Rehnquist invokes the spirit of the Act, which rings out with "unmistakable clarity" — "[i]t is equality."¹¹⁴ He then quotes Senator Dirksen's statement that "[e]quality of opportunity . . . is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone."¹¹⁵ Nothing is more destructive to equality than the quota, which Justice Rehnquist calls "a creator of castes, a two-edged sword that must demean one in order to prefer another."¹¹⁶ In passing Title VII, Justice Rehnquist continues, Congress outlawed "all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative."¹¹⁷

Rousing language, but a little grating when we recall its authorship. Justice Rehnquist's stirring belief in racial equality was seemingly absent in 1954, when he was a law clerk during the *Brown* case, or during the civil rights movement, which he opposed.¹¹⁸ Indeed, even during his distinguished career on the Court, little sign can be seen of a desire to eradicate racial inequality. Justice Brennan says that it would be "ironic indeed" if the effect of the 1964

See Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 897-98 (1994).

113. BICKEL, *supra* note 66, at 173.

114. *United Steelworkers of America v. Weber*, 443 U.S. 193, 254 (Rehnquist, J., dissenting).

115. 443 U.S. at 254 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 14,510 (1964)).

116. *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

117. 443 U.S. at 254 (Rehnquist, J., dissenting).

118. At the time of the 1964 Act, Justice Rehnquist strongly opposed a similar public-accommodation law in Phoenix. See 8 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATION OF SUPREME COURT JUSTICES 357 (Roy Mersky & J. Myron Jacobstein eds., 1977) [hereinafter SUPREME COURT HEARINGS]. Ten years earlier, he drafted a memo for Justice Jackson defending the separate-but-equal rule. There is some debate about the surrounding circumstances, but certainly no evidence that he supported the result in *Brown* at the time. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 190 (1994). As late as 1974, Justice Rehnquist's sensitivity to racial issues was sufficiently low that he overlooked his lawyer's notice of a restrictive racial covenant on property he was purchasing. See 12A SUPREME COURT HEARINGS, *supra*, at 1510-11 (1989).

Civil Rights Act were to block voluntary efforts to diminish inequality.¹¹⁹ It is at least equally ironic that the spirit of the Act should be trumpeted so valiantly by those having least sympathy with its passage.¹²⁰

Yet Justice Brennan's opinion is also unsatisfactory. Although a tactical success in terms of coalition building, it gives little credence to the critical statutory text or the legislative history. It also ignores reality to the extent that much "voluntary" affirmative action was in fact a response to government pressure, whether in the form of threatened litigation or federal contracting rules.¹²¹ Finally, as later events have made clear, it was dangerously dismissive toward the interests and views of white workers, who responded by abandoning liberalism as an ideology.

Hard cases make bad law not because judges are weak or stupid, but because hard cases often have no really good solutions. In *Weber*, the Court faced a choice between more or less unsatisfactory solutions. Of the available options in *Weber*, the approach sketched in Justice Blackmun's concurrence, and later elaborated by Justice O'Connor,¹²² seems to do the least total damage to the legal fabric. It would allow affirmative action only to correct or avoid statistical disparities between the employer's hiring or promotion and the relevant qualified labor pool. This solution is not wholly satisfactory. It strains somewhat against the text of Title VII and its legislative history, but not to the breaking point. It would give blacks less than they might fairly claim as a matter of social justice because it ignores the lingering effects of pre-enactment discrimination. It would not be wholly satisfactory to white workers, but it does not treat them as harshly as Justice Brennan's solution. It is, in short, the least unsatisfactory among the flawed options available.

This interpretation rests on the theory that the statute should not be construed to be self-defeating. Consider, by analogy, a statute that forbids starting fires in a state park. It would be one thing to construe the statute to permit any fire that would advance the statute's general purpose of making the park enjoyable. That inter-

119. See *Weber*, 443 U.S. at 204.

120. Justice Scalia's dissent in *Johnson* presents a similar irony. In arguing for an interpretation of Title VII according to what he considers its clear language, he waxes indignantly on the injustice played by affirmative action on white workers. *Johnson v. Transportation Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting). Though his concerns in *Johnson* may well have some foundation, the irony remains: When has he ever shown similar anger at discrimination against blacks? See generally Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 *MERCER L. REV.* 1035, 1038, 1061, 1078, 1086 (1994).

121. Justice Blackmun's opinion is more candid in this respect. See *Weber*, 443 U.S. at 209 (Blackmun, J., concurring).

122. See *Johnson*, 480 U.S. at 649-53.

pretation is analogous to Justice Brennan's position in *Weber*. It is another matter, however, to allow a backfire to be set when the park is threatened by a forest fire. Like the "arguable violation" theory under Title VII, allowing backfires only seeks to save the statute from the irony of self-defeat.

The Blackmun-O'Connor interpretation of Title VII is, like most compromises, a bit unsatisfactory on general principle. Perhaps, however, Hadrian would approve of this effort to make the law worthy of the allegiance of all groups within our society.

As the example of *Weber* shows, Eskridge's analysis may not always win converts even from sympathetic audiences. In the end, he may not even have a coherent dogma that a convert might embrace, for his "critical pragmatism" seems as much a style of analysis as a coherent theory. But engaging Eskridge's ideas can force us to deepen our own thinking and come to a greater awareness of the profound issues posed by statutory interpretation. That is enough to make *Dynamic Statutory Interpretation* an important book.