Spinning Legislative Supremacy

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Legislative supremacy has long been a shibboleth in discourse about statutory interpretation. So much so that it has almost become trite. Although we invoke legislative supremacy with the routineness of intellectual boilerplate—indeed, perhaps because of this routineness—we have come to treat the precept uncritically. Characteristic of the traditional neglect of this precept is its treatment in the classic legal process materials compiled by Professors Henry Hart and Albert Sacks in the 1950s. Although Hart and Sacks broadly recognized the lawmaking supremacy of the legislature, they marginalized that concession by presuming that legislators act as reasonable persons (i.e., like judges), and by emphasizing that the nature of lawmaking is a cooperative process of “reasoned elaboration” by judges, administrators, and other reasonable people who carry out the statute’s purpose over time.

Fundamental to Hart and Sacks, and to a whole generation of legal process scholars, was the evolution of policy through the interaction of legislators, courts, agencies, the executive, and private parties. A critical corollary to the legal process consensus was that judges interpreting statutes have significant policymaking discretion, and that this is good. Even as constitutional scholars in the 1960s and 1970s focused on the “countermajoritarian difficulty” with the discretion implicated in judicial review, statutory inter-

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2. See H. HART & A. SACKS, supra note 1, at 1414-15 (the judicial interpreter, in determining the statute’s purpose, “should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”).

3. Id. at 160-79, 1148-79; see also Eskridge & Frickey, supra note 1, at 694-98.

4. This corollary was implicit in the position taken by Lon Fuller in his celebrated debate with H.L.A. Hart. Fuller argued that legal interpretation depends on context, especially the context provided by the overall purposes of legal texts. Recognition that statutory terms are not absolutes, but hinge on the context from which they arise and to which they are applied, necessarily embraces a more dynamic role for the interpreter. Fuller, Positivism & Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661-69 (1958).

5. See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) (judiciary's power to invalidate acts of the legislative or executive branches is in tension with the majoritarian assumptions of a democracy).
pretation remained an area in which such discretion seemed unproblematic. This consensus has now been shattered.

In the 1980s, legislative supremacy has become a shibboleth with bite. One of the reasons statutory interpretation has become such an active area for legal scholarship is that it is now a conceptual battleground for determining what this important precept means and how much, if any, policymaking discretion it leaves for those interpreting and implementing the legislature's statutes. Many of the most prominent scholars writing on statutory interpretation in the early 1980s, especially those influenced by the law and economics movement, have argued that legislative supremacy requires judges interpreting statutes to "be honest agents of the political branches. They carry out decisions they do not make." As "honest agents" carrying out the commands of the legislature, judges must adhere closely to the directives provided to them by the statute's text, legislative history, or both. A central tenet of these theorists is that judicial discretion to make law is suspect in statutory interpretation, just as it is in constitutional interpretation.

A fresh generation of "new legal process" scholars has vigorously contested the honest agent theory. From within the legal process tradition, we

6. For the seminal works on statutory interpretation in which little or no "countermajoritarian difficulty" seemed to be recognized, see R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); J. Hurst, DEALING WITH STATUTES (1982); S. Mermin, LAW AND THE LEGAL SYSTEM—AN INTRODUCTION ch. 3, pt. B (2d ed. 1982); see also J. Ely, DEMOCRACY AND DISTRUST 4 (1980) (judicial lawmaking in statutory interpretation is less problematic than in constitutional interpretation, because Congress can correct statutory interpretations).


8. For works that expressly or implicitly criticize the honest agent theory, see generally R. Dworkin, LAW'S EMPIRE (1986); W. Eskridge & P. Frickey, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY ch. 7, § 1 (1988); Aleinikoff, UPDATING STATUTORY INTERPRETATION, 87 Mich. L. Rev. 20 (1988); Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987) [hereinafter Eskridge, Dynamic Statutory Interpreta-
have argued that the honest agent theory slights the cooperative nature of lawmaking and the importance of context. Somewhat beyond the legal process tradition, we have argued that the honest agent theory does not sufficiently take account of the need for statutes to evolve over time. Substantially beyond the legal process tradition, some critics have argued that the honest agent theory undercuts the critical role of statutory interpretation in developing our nation's public values.9

Although new legal process theorists contest the honest agent approach, the academic dialogue that has ensued has persuaded most critics that we must give more systematic consideration to the implications of legislative supremacy for statutory interpretation and for judicial discretion in statutory interpretation. Professor Daniel Farber's article, published in this issue,10 is the leading attempt thus far to consider what tangible limits legislative supremacy may place on judicial discretion without relinquishing our commitment to dynamic statutory interpretation. In this commentary, I want to “spin”11 the precept of legislative supremacy by suggesting three theories relating it to a judge's role in interpreting statutes. My positive theory accepts the political assumptions of honest agent theory and argues that the metaphor that best captures the judicial role is that of a relational agent. My negative theory follows new legal process doctrine by disputing some of the political assumptions of the honest agent theory, principally its assumption that the legislature makes all law. This theory argues that legislative supremacy only precludes dynamic statutory interpretation when the apparent meaning of the text, legislative history, 


10. See Farber, supra note 8.

11. To “spin” a precept, as I am using the term, means to interpret it from a different angle. I do not use the term in a neutral sense, but rather in the colloquial sense that it has acquired in political jargon. Different political camps will put completely different “spins” on the same event (such as presidential debates). Sometimes one can understand the event better after listening to the different spins.
or both has not been overtaken by materially changed circumstances, more recent statutes, or new meta-policies, or when the legislature has relied on an established interpretation in its ongoing creation of public policy. Finally, my anti-theory relies on legal hermeneutics to question the traditional assumptions under which writers about legislative supremacy have labored. This theory suggests that the legislative supremacy precept is not quite as important as has been assumed.

By spinning the legislative supremacy precept, I develop three overall themes. First, and most important, under any rigorous theory of statutory interpretation, legislative supremacy not only tolerates, but requires judges to interpret statutes dynamically—that is, in ways not contemplated by the original drafters. Even under a more thoroughly developed honest agent theory, for example, dynamic statutory interpretation is natural and proper. Dynamic interpretation is most often appropriate in three situations: when there has been a material change in circumstances between the date of enactment and the date of application, when the legislature has compromised its original policy in subsequent statutes, or when new meta-policies have overtaken original legislative expectations.

Second, virtually all the scholarship emphasizing the countermajoritarian difficulty with statutory interpretation rests upon controversial assumptions. These assumptions include a belief in the command theory of government in which the legislature originates all the commands, a static original legislative intent that can be neutrally discovered in most cases, and the proposition that rules constrain and limit the interpreter. These are by no means baseless assumptions—indeed, they are traditional ones. But neither are they beyond question. Relaxing these assumptions not only confirms that dynamic statutory interpretation is inevitable, but teaches us that the soundest normative objection to dynamic interpretation is not the objection of process ("dynamic interpretation violates legislative supremacy"), but instead the objection of substance ("this application of dynamic interpretation is counterproductive, incoherent, or unjust").

Third, what is important in statutory interpretation is not legislative supremacy, but the nature of interpretation itself. The most fruitful theories of interpretation, derived from hermeneutics, are a powerful instrument in deconstructing the oversimplified assumptions underlying countermajoritarian fears and in comprehending what interpretation is. They are a bridge between the past and the present, a dialogue in which neither the past text nor the present interpreter is supreme.

I. A POSITIVE THEORY OF LEGISLATIVE SUPREMACY: JUDGES AS RELATIONAL AGENTS

The honest agent theory of statutory interpretation posits that judges who
interpret and apply statutes to new problems should do no more than carry out the original directives of the enacting legislature. This approach assumes a command theory of government, in which the sovereign power to issue commands resides solely in the legislature and leaves subordinate officials such as courts, agencies, and executive departments to carry out the commands. This "legislative sovereignty assumption" is the main characteristic of all the recent theorists' work embracing something akin to the honest agent theory. Two further, interrelated assumptions also seem to be characteristic of the honest agent literature: the "limited judiciary assumption" and the "determinate meaning assumption." Under the former, courts in our polity must have narrowly limited policymaking discretion, if any discretion at all. Under the latter, the statutory text, the legislative history, or both can provide effective limits on that discretion.

Because a static view of interpretation does not rigorously follow from their premises, it is not completely clear why virtually all of the honest agent theorists resist the concept of dynamic statutory interpretation. Insofar as honest agent theory rejects dynamic statutory interpretation, it apparently does so on the basis of the limited judiciary assumption. Such a conclusion, however, could only establish that the limited judiciary assumption is incoherent with the more important legislative sovereignty assumption. That is, if it were true that the legislature speaks with the sole sovereign voice in our polity, it would by no means follow that courts have little or no policymaking role. This is evident for three reasons. First is the "specific intent" problem: when the text and legislative history suggest no specific answer to

12. See, e.g., R. Posner, supra note 7, at 286-93 ("imaginative reconstruction" is premised on preeminent role of enacting legislature); Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533, 544-52 (1983) (absent a clear legislative statement in statute, either expressly resolving issue at hand or providing for creation of a common law, court must dismiss statute as inapplicable); Merrill, supra note 7, at 32-46 (underlying premise "that federal common law is legitimate only if it rests on a search for the specific intentions of the draftsmen of authoritative texts").

13. The articles that are most explicitly concerned with judicial policymaking are Easterbrook, Original Intent, supra note 7; Maltz, supra note 7; Marshall, supra note 7; and Merrill, supra note 7.

14. Judge Easterbrook is critical of any effort to go beyond statutory text. See Easterbrook, Original Intent, supra note 7, at 60 ("The words of the statute, and not the intent of the drafters, are the 'law.'"). Justice Scalia shares these concerns. See INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); Eskridge, The New Textualism, 37 UCLA L. REV. — (forthcoming 1990), manuscript at 33-38 (manuscript on file at The Georgetown Law Journal) (analyzing Justice Scalia's textualist approach to statutory interpretation). The other sources in note 7, supra, focus more on the importance of original legislative intent, for which statutory text is, of course, the best evidence.

15. Even if the limited judiciary assumption were coherent with the legislative sovereignty assumption, there is no rigorous way to implement the limited judiciary assumption, unless the determinate meaning assumption were also true. As I show in Part III, infra, the determinate meaning assumption is probably wrong.

16. This assumption is questioned in Parts II and III, infra.
an interpretive issue, courts have no option but to make policy choices in resolving the issue. Many statutes are "open-textured"\(^{17}\) to some extent, either by design or because of gaps revealed by the passage of time. When a statute is open-textured, judicial interpreters exercise discretion whenever they construe the statute. For instance, as time passes, problems arise about which the legislature gave little or no thought. Statutory interpreters must decide how the statute deals with these problems. Even a refusal to apply the statute is a policy decision by the interpreter.

Second is the "general intent" problem. Even when a statute appears not to be open-textured, applying it to changed circumstances may involve judicial discretion because of conflict between the statute's literal application and its overall goals.\(^{18}\) That is, interpreters often have to choose between applying a statute strictly as written or specifically as intended, or applying it with an eye to its overall goals. This choice is a lawmaking choice. Who is to say that the honest agent is not violating the legislative supremacy precept by choosing specific meaning over general meaning?

Third is the "meta-intent" problem. The legislature itself might have a meta-intent that judicial interpreters exercise policymaking discretion. Much political theory suggests, and legislative experience confirms, that legislators have strong incentives to pass hard policy questions on to unelected bureaucrats and judges rather than to resolve them. This is in large part because taking a position on the hard issues can harm their reelection chances.\(^{19}\) Hence, if the legislature—the body considered supreme—has a meta-intent to delegate the resolution of policy issues to agencies and/or courts, then dynamic statutory interpretation subserves legislative supremacy.

These and other problems with the honest agent theory have impelled Judge Posner, the theory's leading early exponent, to suggest a more sophisticated variation that explicitly endorses a degree of dynamic statutory interpretation: a judge interpreting a statute is like a platoon commander following orders in battle.\(^{20}\) Not infrequently, the platoon commander finds his forces in an unexpected situation not quite contemplated by existing orders. Given battlefield conditions, he is unable to communicate with the high

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\(^{17}\) Professor Hart, in H.L.A. Hart, The Concept of Law (1961), uses the term "open-textured" to describe ambiguity in a legal directive, which calls for interpretive discretion. Id. at 121-32.

\(^{18}\) See generally H. Hart & A. Sacks, supra note 1, at 1148-79, 1416-17.


\(^{20}\) This metaphor was first proposed in Posner, Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution, 37 Case W. Res. 179, 189-90 (1986), and is being developed at greater length in R. Posner, The Problems of Jurisprudence ch. 9 (Apr. 24, 1989) (unpublished manuscript) (copy on file at The Georgetown Law Journal).
command, but it is reasonable to expect that he must do something. In this situation, he will have to go beyond the four corners, and perhaps even the original intent, of existing orders to ensure the success of the overall battle plan. According to Judge Posner: "The responsible platoon commander will ask himself what his captain would have wanted him to do if communications should fail, and similarly judges should ask themselves, when the message imparted by a statute is unclear, what the legislature would have wanted them to do in such a case of failed communication."21

The platoon commander metaphor is a marvelous analogy, because it shows that even in an archetypically hierarchical system that possesses a clear chain of authority, subordinate officers must sometimes expand upon their orders, through interpretation, to deal with current problems. The supremacy of the high command is not sacrificed by such an act of dynamic interpretation. The platoon leader’s creativity is borne of necessity and his decision is constrained by efforts to figure out what his superiors would have him do, based upon their past orders and their overall plan. Indeed, the platoon commander’s refusal to interpret his orders dynamically might violate the supremacy of his superiors, who very probably would not want outdated orders implemented in a wooden and counterproductive way that could result in heavy casualties or even defeat.

The platoon commander metaphor, which is consistent with the assumptions of the honest agent theory (especially the legislative sovereignty assumption), demonstrates how readily one must admit the possibility of dynamic interpretation. Yet the metaphor itself understates the dynamic nature of statutory interpretation. On a theoretical level, Judge Posner’s metaphor focuses on the specific intent problem and does not fully appreciate the general and meta-intent problems. On a practical level, the main difficulty with the metaphor is that it assumes a temporal situation atypical of that facing a judge interpreting a statute: the platoon commander has been in recent, perhaps continuous, contact with the high command, and the breakdown in communication is probably brief. Hence, the commander has many clues as to what his superiors would want him to do in the new situation. In contrast, the judge interpreting a statute is not only unable to talk directly with the enacting legislators, but often deals with orders issued long ago. She may never receive feedback from the legislature about her interpretation of the statute.

Time is the essence of my quarrel with Judge Posner’s analogy. If a judge is a subordinate officer, an agent, how should she deal with directives issued by her superior over time? The passage of time and the changing of circumstances make the general intent and meta-intent problems critically impor-

21. R. Posner, supra note 20, at 303; see Posner, supra note 20, at 190 (developing platoon commander metaphor).
tant. The Supreme Court's practice in such instances has been very dynamic, going well beyond Judge Posner's analogy.\textsuperscript{22} If one is really committed to a hierarchical metaphor for statutory interpretation, and I am not, the metaphor that better deals with the problem of time is that of a "relational agent." A relational contract is one that establishes an ongoing relationship between the parties over time; it is characterized by open-ended clauses requiring all parties to use their "best efforts" to accomplish common objectives.\textsuperscript{23} In a principal-agent contract of this type, the agent is assigned a duty: she is supposed to follow the general directives embodied in the contract and the specific orders given her by the principal, but her primary obligation is to use her best efforts to carry out the general and specific orders over time. I call the agent in such a contract a "relational agent," but note that most agents are relational agents.

Like the relational agent, the judge is the subordinate in an ongoing enterprise who follows directives issued by the legislature, the principal. Like the relational contract, statutes are often phrased in very general terms, written long before an interpretive issue arises; yet they are the most authoritative documents to which the judge (agent) may refer when answering an interpretive question. Like the relational principal, the legislature will often speak on a specific question just once, leaving it to the judge (agent) to fill in details and implement the statute in unforeseen situations over what is often a long period of time. Hence, like the relational agent, the judge will often exercise great creativity in applying prior legislative directives to specific situations.

The virtue of my relational agent analogy is its sensitivity to the temporal dimension of the hierarchical relationship.\textsuperscript{24} Although the principal is in a formal sense "superior" to the agent, it is the agent who makes most of the

\begin{itemize}
\item \textsuperscript{22} See Eskridge, \textit{Dynamic Statutory Interpretation}, supra note 8, at 1538-49 (using Supreme Court cases to demonstrate validity of dynamic statutory interpretation as a descriptive model); Eskridge & Frickey, \textit{Statutory Interpretation as Practical Reasoning}, 42 STAN. L. REV. -- (forthcoming 1990), manuscript at 33-56 (manuscript on file at The Georgetown Law Journal) (same). As one of my Legislation students wrote in response to an examination question about the platoon commander theory: "If the Supreme Court were a platoon commander, as under Judge Posner's theory, it would long ago have been court-martialed."


\item \textsuperscript{24} Of course, because relational contracts, unlike most statutes, expire after a period of years, even the relational agent analogy understates the importance of time. To capture the temporal element more completely, one might compare a judge to a trustee of assets left by a deceased principal for the benefit of her heirs. Although the trustee is bound by the terms of the trust's text and original intent, most of the trustee's actions are also heavily influenced by the current situation and her own judgment about what is best in light of the current situation. I still prefer the relational agent analogy, in part because such a minor twist on the honest agent analogy makes such a major doctrinal difference, but a trustee metaphor would work perfectly well in all of the examples that follow in this Part.
\end{itemize}
situation-specific decisions, subject to possible overrule by the principal (a possibility not often invoked). The effect of time on the agent’s role is to require a great deal of decisionmaking discretion—discretion to go beyond, and perhaps even against, orders made by the principal. Time has this effect for at least three reasons: (1) changed circumstances will often undermine assumptions underlying the principal’s order and impel the agent to bend the order when responding to these new circumstances; (2) the principal will often give orders that become inconsistent over time, thereby impelling the agent to alter one or more of the orders; and (3) new meta-policies over time may supersede one or more of the principal’s orders.

Consider the following variation of the familiar “soupmeat hypothetical.” Williams, the head of the household, retains Diamond as a relational agent to run the household. This is necessary because Williams is a busy and important person and is often absent from the household on business. The contract is very detailed, setting forth Diamond’s duties to care for Williams’ two children, maintain the house, prepare the meals, and do the shopping on a weekly basis. The contract also obligates Diamond to follow Williams’ specific household directives. Williams prepares to embark on a long trip abroad and writes out a list of directives for Diamond. One of the directives is that Diamond fetch five pounds of “soupmeat” every Monday (the regular shopping day), so that he can prepare soup for the children to eat at several meals during the week. Diamond knows from earlier directives that “soupmeat” means a certain type of nutritious beef that is sold at several stores in town. The order seems simple enough. But time can turn even the simplest order into a law professor’s hypothetical.

A. CHANGED CIRCUMSTANCES

As with the platoon commander metaphor, one can easily imagine changed circumstances that would justify Diamond’s deviation from the directive that he fetch five pounds of soupmeat each Monday. For example, suppose Diamond goes to town one Monday and discovers that none of the stores has the precise soupmeat he knows Williams had in mind when she gave the order. Should he drive miles to other towns in search of the proper soupmeat? Probably not. It is probably reasonable for him to purchase a suitable alternative in town, especially if it appears in his judgment to be just as good for the children. One can imagine many reasons why, in a given week, Diamond should not follow the apparent command of his superior to fetch five pounds of soupmeat; most of the reasons would arise out of the impracticability of fetching soupmeat under specific circumstances not pre-

25. The soupmeat hypothetical was originally developed in F. Lieber, Legal and Political Hermeneutics 17-20 (2d ed. 1880), and is reproduced in H. Hart & A. Sacks, supra note 1, at 1146-47, and in W. Eskridge & P. Frickey, supra note 8, at 574-75.
cisely contemplated by Williams when she issued her directive. The reasons for deviating are akin to the judicial creation of "exceptions" to a statute's broad mandate, based upon the general intent of the statute.

The reasons multiply over time, and one can imagine changed circumstances that effectively nullify Williams' directive altogether. This scenario is distinct from the situation of the platoon commander, which probably would not involve changed circumstances over a long period of time without new orders. Suppose that one of the children develops an allergy to soupmeat. That child can continue to eat soup, but not with meat in it. Because Diamond realizes that one of the reasons Williams directed him to fetch soupmeat every Monday was the good health and nourishment of the children, and because he further thinks that Williams would not want him to waste money on uneaten soupmeat, he henceforth only purchases three pounds of soupmeat per week. If both children become allergic to the soupmeat, and Diamond does not care for the soupmeat himself, he might be justified in entirely foregoing his directive to fetch it. Although he would be violating the original specific intent of Williams' orders, Diamond could argue that his actions are consistent with her general intent that he act to protect the children's health, and with her meta-intent that Diamond adapt specific directives to that end.

B. INCONSISTENT DIRECTIVES

Unlike the platoon commander, the relational agent might very well receive inconsistent directives over time. Suppose that two months after Williams embarked on her trip, she reads in a "Wellness Letter" that if children do not eat healthy foods they will have cholesterol problems later in life. She immediately sends Diamond a letter instructing him to place the children on a low-cholesterol diet, which should include Wendy's Bran Muffins and fresh apples. Ever the faithful relational agent, Diamond does this. He also reads up on the cholesterol literature, including the Wellness Letter, and discovers that soupmeat is fairly high in cholesterol. He discontinues the weekly fetching of soupmeat and fetches chicken instead, because it is lower in cholesterol. Diamond's action is akin to a court's reconciliation of conflicting statutory mandates, in which one of the statutes often is given a narrowing interpretation.

Changed circumstances might further alter Diamond's interpretation of
Williams' inconsistent directives. Weeks after he has decided to forego soupmeat and instead fetch chicken, Wendy's Bran Muffins, and fresh apples, Diamond learns from the Wellness Letter that Wendy's Bran Muffins actually do not help lower cholesterol, and that they have been found to cause cancer in rats. Furthermore, Diamond discovers that fifty percent of the apples sold in his region have a dangerous chemical on them. Diamond thereupon switches from Wendy's Bran Muffins to Richard's Bran Muffins, recommended by the Wellness Letter, and from fresh apples to fresh oranges. Thus, Diamond has not only overthrown Williams' earlier directive on soupmeat because of the new policy in her latter directive, but he has also altered her specific choice of low-cholesterol foods in the latter directive! If Diamond ends up being wrong about which are the good bran muffins, his decisions could be criticized as erroneous on their merits. They are otherwise unimpeachable, however, because he has been faithful to Williams' general and meta-intents.

C. NEW META-POLICIES

Again unlike the platoon commander, the relational agent's interpretation of his orders may well be influenced over time by changing meta-policies. The new meta-policies may be endogenous or exogenous. Endogenous meta-policies are those generated from the principal herself (and are just a more dramatic form of inconsistent directives). For instance, suppose that after several months, Williams writes to Diamond that due to financial reverses, she must cut back on household expenses. Food costs must thereafter be limited to $200 per week. Although he has long been directed to fetch soupmeat every Monday, and there are other ways to economize, Diamond cuts back on soupmeat, in part because it is the most expensive item on the shopping list. This is akin to a court's modifying an original statutory policy to take account of supervening statutory policies.

Exogenous meta-policies are those generated from an authority greater than the principal. Suppose that Diamond has an unlimited food budget and no health concerns about soupmeat, yet he stops fetching it on a weekly basis. He stops because the town is in a crisis period and meat of all sorts is being rationed; hence, Diamond could not lawfully fetch five pounds of soupmeat per week. This is akin to a court's construing a statute narrowly to avoid constitutional problems, based upon the legislature's meta-intent not to pass statutes of questionable constitutionality.

In all of these hypotheticals, Diamond, our relational agent, has interpreted Williams' soupmeat directive dynamically. Quite dynamically, in

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28. Again, because any breakdown in the platoon commander's communications with the high command is usually both temporary and brief, meta-policies are not likely to have changed between communications.
fact, because in most of the variations Diamond creates substantial exceptions to, or even negates, the original specific meaning of the directive. Notwithstanding his dynamic interpretation of the directive, I believe that Diamond has been nothing but an honest agent. His interpretations, in the foregoing circumstances, are at least arguably correct and are not inconsistent with the supremacy of the principal.

If we accept the legislative sovereignty assumption and want a positive, hierarchical model for legislative supremacy in statutory interpretation, judicial policymaking is both desirable and inevitable. The honest agent theorists’ early efforts to develop narrow limitations on judicial policymaking, in purported furtherance of the legislative supremacy precept, have only created a deep incoherence between their two premises (legislative sovereignty and no judicial policymaking). If one really wants a positive theory of the judicial role consistent with the legislative supremacy precept,\(^29\) one should adopt my relational agent theory, not the mechanical and incoherent honest agent theory. Under my relational agent theory, it is not inconsistent with legislative supremacy for a judge to interpret a statute dynamically when (1) circumstances have changed so substantially that they undermine critical assumptions of the statute, or (2) other statutory directives derogate from the instant statute, or (3) statutory or constitutional meta-policies suggest a narrowing interpretation.\(^30\)

II. A NEGATIVE THEORY OF LEGISLATIVE SUPREMACY: AVOIDING UNJUSTIFIED VIOLATION OF LEGISLATIVE EXPECTATIONS

The honest agent theory of limited judicial policymaking in statutory interpretation is, as I have just argued, incoherent because of the inconsistency between two of its assumptions. The honest agent theory is also vulnerable because its assumptions are themselves questionable.\(^31\) This has been critics’ main reason for rejecting the theory’s narrow view of statutory interpretation. Critics have been the most vocal in their questioning of the legislative sovereignty assumption, which seems inconsistent with the Constitution’s precept of popular sovereignty vested in three coequal branches of government.\(^32\) Rather than viewing statutory interpretation as the honest agent’s

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29. This assumes that we accept the legislative sovereignty assumption, which is questioned in Parts II and III, infra.

30. Of course, mere recognition that dynamic statutory interpretation is consistent with legislative supremacy in theory does not guarantee that it will always be consistent in practice. A court may, for example, err in its evaluation of prior legislative assumptions or present policies, rendering its “dynamic” interpretation a poor interpretation.

31. See supra text accompanying notes 12-14.

32. See, e.g., Aleinikoff, supra note 8, at 56-61 (judicial interpreters, through “present-mindedness,” are necessarily “creators of meaning”); Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1498-1503 (refuting formalistic separation of powers objection to judicial lawmaking);
implementation of policy choices made long ago by the principal, critics view statutory interpretation as a partnership, in which the present court and the departed legislature are collaborator-partners in creating statutory meaning.\textsuperscript{33}

On the one hand, the critics relax the assumptions made by the honest agent theory. Thus, the sovereign commands often represent the interaction among the legislative, judicial, and/or executive branches of government. Hence, a "shared sovereignty" assumption replaces the legislative sovereignty assumption. Following from this very different vision of sovereignty, the critics simply do not accept the determinate meaning assumption and do not consider the limited judiciary assumption to be a bar to at least some degree of judicial policymaking in statutory interpretation.\textsuperscript{34} Under these revised assumptions, the critics explicitly contemplate dynamic statutory interpretation. On the other hand, some critics of the honest agent theory remain concerned about establishing "limits" on dynamic statutory interpretation by judges.\textsuperscript{35} These critics also seem to think that rules of interpretation can be used to enforce such limits.

In seeking limiting principles, perhaps it is natural for scholars to turn to the legislative supremacy precept. Professor Farber has been the most thoughtful proponent of a limiting principle drawn from legislative supremacy. He argues that "[w]hen statutory language and legislative intent are unambiguous, courts may not take action to the contrary."\textsuperscript{36} This seems like a pretty safe statement, but is it a cogent one? If Professor Farber's statement is the limiting principle, it may be even more conservative than the relational agent theory about the dynamic nature of statutory interpretation. This would be anomalous.

This Part explores three problems with Professor Farber's approach. To begin with, the approach is incoherent absent an accompanying theory of interpretation that can provide closure in a significant range of cases. If the limiting rule is that courts cannot deny the meaning of an unambiguous statutory text and legislative intent, the limiting rule hinges on what one consid-

\textsuperscript{33} For some of the partnership metaphors developed in the critical literature, see R. DWORKIN, supra note 8, at 228-75 (comparing statutory interpretation to a judge writing the next chapter in a "chain novel"); Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1553-54 (judge interpreting statute is like a "diplomat" interpreting orders, with the necessary creative freedom to meet the needs of unforeseen situations); Popkin, supra note 8, at 590-626 (describing and justifying "collaborative model" of statutory interpretation).

\textsuperscript{34} See Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1506-11, 1513-23.

\textsuperscript{35} See R. DWORKIN, supra note 8, at 337-54 (respect for textual integrity and political fairness limits the judicial interpreter); Farber, supra note 8, at 292 (court is limited by text and legislative history).

\textsuperscript{36} Farber, supra note 8, at 292.
ers "unambiguous." Because Professor Farber, like other process theorists, seems to believe that meaning depends on context,\textsuperscript{37} it is difficult for him to demonstrate a meaning completely lacking ambiguity for the same reasons that cause the honest agent theory to founder: context can be muddy and multilayered. Often it will be impossible to figure out what the specific intent of the legislature was, and even if one can do so, a focus on specific intent will be met with counterarguments drawn from general intent. If Professor Farber seeks closure by appealing to the general intent of the legislature, he will be met with arguments that he has focused on the wrong general intent (statutes typically have several, sometimes inconsistent, general purposes) or that he has neglected a legislative meta-intent. Given the elasticity of context, it will be difficult, if not impossible, to accomplish the kind of closure one needs to support the statement that "this text and legislative history are unambiguous!" For example, several of Professor Farber's paradigmatic cases are ones in which I consider the text and legislative history to be quite ambiguous.\textsuperscript{38}

Second, an approach focusing solely on text and original legislative intent is overinclusive: it may preclude dynamic statutory interpretation in some cases without truly serving the values of legislative supremacy. This is particularly so in those cases in which changed circumstances have undermined original legislative assumptions, or in which there have been inconsistent legislative signals over time, or in which new meta-policies supersede outdated policies.\textsuperscript{39} In each of these instances, the assertion that a certain result is compelled by legislative supremacy rests upon unproven assumptions that (1) specific legislative intent governs over general or meta-intent, (2) legislative expectations over time do not matter, and (3) legislative supremacy trumps all other values, such as protecting constitutional rights, reaching just results in individual cases, and providing policy coherence across apparently conflicting statutes. Legal process theory has traditionally rejected such assumptions, and Professor Farber suggests no reason to depart from that tradition.

Finally, Professor Farber's approach gives us no reason to limit judicial discretion in statutory interpretation. The primary meaning of legislative supremacy for statutory interpretation is that the legislature can amend a statute to overrule or modify judicial interpretations—in-deed, Congress in the 1980s has vigorously and frequently exercised that prerogative.\textsuperscript{40} Why, then, should legislative supremacy arguments clutter statutory interpretation

\textsuperscript{37} See id. at 311.
\textsuperscript{38} See infra Part II.A-B.
\textsuperscript{39} See supra Part I.
\textsuperscript{40} I am undertaking a study of Congress' overruling of federal court (not agency) interpretations of federal statutes. I have found that from 1976 to 1987 Congress enacted, on average, over two dozen different statutory provisions per year, with the apparent intent to overrule judicial interpretations of federal statutes. I am also discovering that there is much more legislative monitoring of judicial decisions than scholars have previously assumed.
opinions at all? Legal process theory has never really grappled with this issue, beyond the bland assertion that judicial policymaking can only be “interstitial.” The only limitations readily apparent from legal process theory are functional ones, such as reliance interests built around particular legislative understandings. Because of this, Professor Farber’s theory may also be underinclusive: its textual and historical focus may invite dynamic statutory interpretation in cases in which there has been legislative reliance on an apparent statutory meaning.

These analytical difficulties probably apply to most negative legal process theories that seek to limit judicial creativity through the legislative supremacy precept; thus, it is important to develop these objections more concretely. The remainder of this Part uses several of Professor Farber’s case examples and the three categories developed in Part I to illustrate the difficulties with his particular negative theory. The upshot of my analysis is that I do not consider the legislative supremacy precept a very tangible limit on dynamic statutory interpretation. If one wants a negative theory, I would propose the following: A court should not interpret a statute against its apparent textual or legislative history meaning unless circumstances have changed to undermine original legislative assumptions, the legislature has sent inconsistent statutory directives, or new meta-policies justify a different interpretation. These three exceptions, however, do not apply when there has been significant legislative reliance on the apparent meaning. This is an elaborate negative theory.

A. CHANGED CIRCUMSTANCES

Every statute is enacted against a congeries of background assumptions about law, society, and the operation of the statute itself. These assumptions often turn out to be wrong, or insufficiently sophisticated, as circumstances change over time, sometimes in response to the statute itself. When circumstances change in a material way, interpreters may take such changes into consideration without violating the principle of legislative supremacy. As illustrated by the child-with-the-allergy and no-soupmeat-in-town variations of the soupmeat hypothetical, legislatures can be presumed to have a meta-intent that their statutory schemes be efficacious over time and that judges and others charged with implementing the statutory schemes adapt them to new circumstances and problems. Professor Farber agrees with this in principle. Nevertheless, he declines to apply the exception for changed circum-

41. See supra Part I.
42. See Farber, supra note 8, at 313-14 (accepting a “statutory cy pres doctrine” as a way to update statutes when changed circumstances clearly undermine original legislative assumptions); see also K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1835 (1988) (Scalia, J., concurring in part and dissenting in part) (disregarding the application of statute’s plain meaning is permissible only
stances to United Steelworkers of America v. Weber, because he finds the text and legislative intent of the statute at issue in that case to be relatively unambiguous. His use of Weber illustrates my first two problems with his negative theory of legislative supremacy.

Section 703(d) of title VII of the Civil Rights Act of 1964 makes it unlawful for an employer or labor organization "to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." In Weber, several whites holding senior positions at a Kaiser Aluminum and Chemical Corporation plant were passed over for a craft training program for which seven blacks holding junior positions were selected. The Court held that section 703(d) permits an employer and union to create a training program for craft positions with an admissions preference for blacks when a "manifest racial imbalance" exists in the employer's craft work force. Professor Farber, like the Weber dissenters, believes that the holding contradicts the "plain language" of title VII, as well as the legislative history, which evidences congressional hostility to preferential treatment of minorities. Because he believes the statute is unambiguous, Professor Farber argues that the Weber holding violates the legislative supremacy precept.

I find the evidence underwhelming. Looking first at the text, the crucial statutory term, "discriminate," is not defined in title VII. Although "discriminate" denotes "differentiating" in any way, it also has strong connotations of "invidious" differentiation. For example, it would be correct denotative usage of the term "discriminate" to say that one "discriminates" against pears because one prefers apples to pears; however, under the term's connotative meaning, use of the term would be inappropriate because the preference for apples probably is not borne out of an "invidious" prejudice against pears. Similarly, under the connotative meaning of the statutory term, passing over Brian Weber and other white workers because of an affirmative desire to redress past injustices to black workers is not the same as...
passing over him because the company or union is prejudiced against whites. Section 703(d) is hardly an unambiguous statutory text.49

Although section 703(d) is the provision applicable to training programs, and is the provision on which Weber relied in his complaint and in his appeal,50 Professor Farber believes that any textual ambiguity within it can be dispelled by reference to section 703(a)(2).51 That section provides that an employer cannot “limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s race.”52 It is not entirely clear to me that section 703(a)(2) targets the situation in Weber, because the training program did not represent a company policy to “limit, segregate, or classify” employees according to race. Indeed, without the training program, there was arguably de facto “segregation” of black employees in Weber’s plant because they were effectively precluded from becoming craft workers. In an opinion that has become the leading interpretation of section 703(a)(2), the Supreme Court, in Griggs v. Duke Power Co.,53 held that this subsection precludes “employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”54 When Weber was decided, eight years after Griggs, section 703(a)(2) as interpreted provided as much, if not more, support for the company’s position as it did for Weber’s.55

Although there are other textual arguments, which cut both ways, on the whole I consider the text of title VII to be ambiguous on the issue of voluntary affirmative action in training programs.56 A better case can be made that the legislative history is unambiguous, because the leading congressional supporters of the statute repeatedly reassured their colleagues that title VII

49. See Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1489-90.
51. See Farber, supra note 8, at 305 (citing § 703(a)(2) as illustrative of clear policy within title VII against considering race in employment decisions).
54. Id. at 432.
55. Perhaps it is for this reason that Weber himself never relied on § 703(a)(2). See Brief for Respondent, supra note 50 (90-page Supreme Court brief never citing § 703(a)(2)). Although one can argue that the company was in violation of § 703(a)(2) by preferring black employees for the craft apprenticeship program, it is also arguable that the company violated § 703(a)(2) when it had no program but required prior experience, effectively granting preference to whites because past discrimination had kept blacks from acquiring experience.
56. See Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1489-90 (comparing § 703(h)'s bona fide seniority system defense, which is superfluous if § 703(d) only prohibits invidious discrimination, with § 703(j), which provides that the Act does not “require” preferential treatment, leaving open (or implicitly supporting) legality of voluntary preferential treatment).
would not impose quotas upon employers. For example, Senator Humphrey, the statute's most loquacious supporter, denied that the bill would require employers to satisfy racial quotas. Senator Humphrey instead argued: "In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing." Is his statement not unambiguous on the question of legislative intent?

Given the context of the legislative consideration, I am reluctant to draw dogmatic conclusions about Congress' "intent" concerning voluntary affirmative action. To begin with, almost all of the relevant legislative discussion comes from the tendentious debate between southern opponents, who claimed that title VII would empower the Equal Employment Opportunity Commission to tell employers whom they could hire, and liberal supporters, who denied that the bill would "require" hiring based on race. Hence, the supporters made some sweeping claims about the color-blindness of title VII, but even the most sweeping claims failed to target the Weber situation, in which an entrenched work force imbalance was voluntarily redressed by the union and employer.

One wonders why there is no "smoking gun" in the legislative history—why there is no senator who said: "We don't care if racial disparities persist over time—there can be no preferences for minorities, ever." The most relevant lesson to be gleaned from the legislative history is that the prevailing assumption was that once jobs were opened to blacks on an equal basis, blacks would enter the work force and assume their rightful place in the American economy. As the facts of Weber illustrate, this was wishful thinking. A decade after title VII became law, less than two percent of the craft positions in Weber's plant were filled by blacks, although blacks made up thirty-nine percent of the region's work force. As far as I can determine, an important reason for these disappointing results was that craft unions had historically discriminated by race, leaving blacks unable to satisfy the employer's hiring requirement of prior craft experience. The possibility that past discrimination would have continuing effects was not considered in the 1964 legislative debates. For this reason alone, the precise issue in Weber is not "unambiguously" resolved by the legislative history.

Indeed, even if there were smoking guns galore in the debates, backed by a

58. 42 U.S.C. § 2000e-2(j) (1982) provides that the statute does not "require" an employer to adopt affirmative preferences, but says nothing about "prohibiting" voluntary preferences.
59. Weber, 443 U.S. at 198-99 (majority op.).
60. See Brief for Petitioner at 6-12, Weber, 443 U.S. 193 (No. 78-432) (quoting from trial court testimony and findings regarding the reasons for numerical disparity and employer's motivation in establishing affirmative action program).
clearer statutory text, the changed circumstances—the unbundling of two originally consistent statutory purposes—would lend some support to Weber’s dynamic reading of the statute. Even if it were clear that the enacting Congress believed affirmative action would not be permitted under the statute, it is not clear that the Court should apply that understanding when the underlying assumptions (here, that color-blind hiring would expeditiously yield more jobs for minorities) have been undermined over time. When an assumption behind legislative passage is revealed as flawed, blind adherence to the textual language and legislative history premised on that assumption does not serve the values of legislative supremacy. Rather, when there have been changed circumstances, those values are best served by a dynamic interpretation of the statute based on the purposes behind the assumption.

Changed legal circumstances, including the Court’s prior interpretations of the statute, also pushed the Weber Court toward interpreting title VII to permit some affirmative action.61 In Griggs, the Court interpreted title VII to impose liability on companies following facially neutral employment practices that had the effect of excluding blacks.62 This decision shifted the focus of title VII away from pure color blindness toward a somewhat greater emphasis on positive results. It also presented companies like the employer in Weber with a dilemma: they were vulnerable to Griggs-type lawsuits by blacks because of their unsatisfactory statistics, but they were vulnerable to lawsuits by whites if they improved their statistics through affirmative action. Weber could have resolved that dilemma by cutting back on Griggs, but the Griggs decision had been endorsed by committees in both houses of Congress when it amended title VII in 1972.63 The other alternative was to permit some affirmative action, which is what the Court did in Weber. In my view, this interpretation was perfectly consistent with legislative supremacy and was, indeed, the correct interpretation of a statute that had changed in unpredictable ways since its enactment.

B. INCONSISTENT DIRECTIVES

Statutes are usually enacted against a backdrop of other statutes, and even more statutes follow upon their heels. Only the most omniscient legislature

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61. See Weber, 443 U.S. at 209-16 (Blackmun, J., concurring) (literal reading of title VII barring affirmative action would place employer on “high tightrope without a net” as Court’s prior interpretations threaten employer with liability for present disparity caused by past discrimination); Eskridge, Dynamic Statutory Interpretation, supra note 8, at 1492-94 (Court’s prior interpretations of title VII are factors in, and reflective of, evolutive concerns surrounding title VII that demanded dynamic interpretation in Weber).
could prevent statutory policies from colliding with one another. Thus, one of the most challenging tasks of any court is to unpack interacting statutory policies. When a court derogates from one statutory policy to serve another, it is rarely violating legislative supremacy principles, as my Wellness Letter variation on the soupmeat hypothetical suggests.\textsuperscript{64} I do not think Professor Farber would disagree with this. Nevertheless, \textit{Tennessee Valley Authority v. Hill},\textsuperscript{65} a classic case in which the Supreme Court arguably slighted the interaction of statutory policies, is one that he considers "a judicial performance exemplifying obedience to the legislature's commands at the expense of the Justices' own political preferences."\textsuperscript{66}

In \textit{Hill}, the Court held that section 7 of the Endangered Species Act of 1973\textsuperscript{67} precluded the completion of a $107 million dam because the completion would have violated the statute's mandate to the Tennessee Valley Authority (TVA) and other federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species" (in this case, the snail darter) or "result in the destruction or modification of habitat of such species."\textsuperscript{68} The statutory language is certainly broad enough to give firm support to the Court's result, but the language hardly targets the unusual situation in \textit{Hill}. In that case, the dam was already well under way when the Act was passed; killing the dam project would have been an extraordinarily costly move; and Congress continued to appropriate money for the dam even after the snail darter issue had been flagged for it by the relevant committees. Precedent existed in which courts had interpreted equally clear language of another environmental statute not to apply to projects substantially completed when the statute became effective.\textsuperscript{69} Moreover, the Court had long been willing to massage broad statutory texts to prevent "absurd results."\textsuperscript{70}

As in \textit{Weber}, the textually based arguments in support of the Court's decision are complicated and cut in different directions (although I consider the text in \textit{Hill} less ambiguous than the text in \textit{Weber}). There is a fair amount of legislative history in \textit{Hill}, however, suggesting that Congress was concerned about protecting endangered species but little concerned over how much this

\begin{itemize}
\item \textsuperscript{64} See supra Part I.B..
\item \textsuperscript{65} 437 U.S. 153 (1978).
\item \textsuperscript{66} Farber, supra note 8, at 297 (footnote omitted).
\item \textsuperscript{69} \textit{Compare Hill}, 437 U.S. at 206 (Powell, J., dissenting) (urging the Court to apply a line of cases holding that environmental impact statements required by the National Environmental Policy Act (NEPA) were not required for projects substantially completed when Act was passed) \textit{with id.} at 188 n.34 (majority distinguishes NEPA cases).
\item \textsuperscript{70} Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (establishing principle); see \textit{Hill}, 437 U.S. at 204-05 n.14 (Powell, J., dissenting) (collecting cases that follow this principle).
\end{itemize}
would cost society. Unfortunately, that history is as woefully broad as the statute's text. The most specific evidence the Court could find within the legislative history was the following: The conference committee took the sweeping language of section 7 from the House bill without probative comment. Representative Dingell, the House manager, asserted on the floor that once the conference bill was enacted, the Secretary of Defense would be required to stop Air Force bombing activities in Texas if they threatened endangered whooping cranes, and that the Secretaries of Agriculture and the Interior would have to take action to preserve endangered grizzly bears in national forests and parks. This is all well and good, but hardly conclusive evidence that the result in *Hill* is required by an unambiguous legislative history.

Representative Dingell's comments nowhere reveal an understanding that section 7 would not only require immediate policy modifications, but would also necessitate flushing away a $107 million dam project. To require the Air Force to stop bombing whooping cranes and the Departments of Agriculture and the Interior to help the grizzlies is a far cry from telling the TVA that it must shut down a nearly finished dam to protect the snail darter. Moreover, Representative Dingell's statement was not supported by language in the conference report, which makes it seem a bit fishy. Even if the text and legislative history made it crystal clear that Congress in 1973 intended to protect endangered species at any cost, considering the post-enactment congressional treatment of the snail darter issue leaves me uncertain that legislative supremacy requires the *Hill* result.

After passage of the Endangered Species Act, the snail darter issue was repeatedly brought to the attention of the House and Senate Appropriations Committees. These committees continued to recommend funding for the dam, explicitly stating in their reports that they considered the Endangered Species Act to be no obstacle. Congress continued to appropriate money to

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71. See *Hill*, 437 U.S. at 182-83 (majority op.).
73. In 1975, 1976, and 1977, the House and Senate Appropriations Committees questioned TVA officials about the snail darter problem, and on each occasion the committees endorsed TVA's proposition that the Endangered Species Act was inapplicable to a dam in such an advanced state of completion. E.g., S. REP. No. 960, 94th Cong., 2d Sess. 96 (1976). Congress, with full notice of the problem, continued to fund the dam. See *Hill*, 437 U.S. at 197-202 (Powell, J., dissenting); Brief for the Petitioner at 7-18, *Hill*, 437 U.S. 153 (No. 76-1701).

The 1977 committee reports specifically disapproved of the Sixth Circuit's decision to enjoin completion of the dam, reported in 549 F.2d 1064 (6th Cir. 1977). See S. REP. No. 301, 95th Cong., 1st Sess. 98-99 (1977) ("This [Senate] Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well underway at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the
complete the dam and in 1977 appropriated $2 million for TVA to relocate endangered species threatened by the dam and other projects.\textsuperscript{74} Although it is true that appropriations measures are not supposed to "amend" substantive legislation and that the understandings of specific committees are not necessarily the understandings of Congress,\textsuperscript{75} it is blinking reality to ignore the only evidence of legislative expectations that precisely and explicitly addressed the snail darter issue. Indeed, the Court's treatment of legislative intent was incoherent—it treated as dispositive the general language used by the House sponsor in a floor statement, not supported by the conference report, while refusing to give any weight to several years of explicit Appropriations Committee language that brought the snail darter issue to the attention of both Houses.

Given all this evidence, unusually well-rehearsed in the Court's majority opinion and in the primary dissenting opinion, neither result in \textit{Hill} is compelled, and either is permitted, by the assumptions of the legislative supremacy precept as understood by legal process theory. Virtually alone among legal scholars, I have no view as to which is the better result.\textsuperscript{76}

\section*{C. NEW META-POLICIES}

In addition to being enacted against a backdrop of assumptions and interacting policies, statutes are enacted against a backdrop of meta-policies (including statutory policies and constitutional policies) that may change over time. The change in meta-policies wrought by the passage of time may influence the way we view original legislative expectations and the way we interpret statutes. For example, the Supreme Court's qualified approval of voluntary affirmative action in \textit{Weber} reflects the change in policy marked by the Court's qualified approval of affirmative action in \textit{Regents of the University of California v. Bakke}.\textsuperscript{77} Another example of this phenomenon is \textit{Jones

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\textsuperscript{75} See \textit{Hill}, 437 U.S. at 190-92.

\textsuperscript{76} The appeal of the \textit{Hill} dissenters is that closing down the dam is unreasonable. As the dissenters conceded, however, \textit{id.} at 210, it was all but certain that Congress would quickly overrule \textit{Hill}, as it indeed did in a very sensible way. \textit{See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (implementing a balancing test when an "irresolvable conflict" exists). Whether the Court's decision imposed unnecessary burdens on the congressional agenda (which is very limited) is hard for me to tell.

v. Alfred H. Mayer Co.,\textsuperscript{78} a case in which I believe the result may be contrary to the legislative supremacy precept, but not for the reasons normally advanced.

In Alfred H. Mayer, the Court held that the Civil Rights Act of 1866\textsuperscript{79} established a federal cause of action for those persons discriminated against because of race by private individuals engaged in the sale or rental of property. The statute provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”\textsuperscript{80} This text is not unambiguous. On the one hand, if one interprets “the same right” to mean a legal right enforceable by the federal statute, one may read the statute to outlaw all forms of private as well as public discrimination.\textsuperscript{81} On the other hand, if one interprets “the same right” to mean a legal right enforceable under state property law, then the statute only applies to state action.\textsuperscript{82} Without more information it is difficult to determine what Congress meant by the term “right.”

As evidenced by the legislative history, the 1866 Act, like the Civil Rights Act of 1964, generated considerable acrimonious floor discussion. But, unlike the legislative histories at issue in Weber\textsuperscript{83} and Hill,\textsuperscript{84} the legislative history of the 1866 Act contains “smoking guns”—statements on point for the precise issue in the case. The bill’s sponsors repeatedly represented it as inapplicable in states that did not have “Black Codes” limiting the ability of freed slaves to engage in property and commercial transactions.\textsuperscript{85} That is, they designed the statute to eliminate state law barriers to property transactions, rather than to create a new federal law prohibiting private discrimina-

\textsuperscript{78} 392 U.S. 409 (1968). The Court’s interpretation of the 1866 Civil Rights Act in Alfred H. Mayer was the focus of recent sustained debate when Runyon v. McCrary, 427 U.S. 160 (1976), which followed Alfred H. Mayer’s interpretation, was unanimously reaffirmed in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). The Court’s opinion in Patterson reflects a division between the Justices on whether Runyon was a correct interpretation, but all nine Justices felt compelled by stare decisis to reaffirm the decision.


\textsuperscript{82} See Alfred H. Mayer, 392 U.S. at 420-22.

\textsuperscript{83} See id. at 452-54 (Harlan, J., dissenting).

\textsuperscript{84} See supra text accompanying notes 56-60.

\textsuperscript{85} See supra text accompanying notes 72-75.

The Senate sponsor said: “[T]he bill will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.” Cong. Globe, 39th Cong., 1st Sess. 476 (1866) (remarks of Sen. Trumbull). The House sponsor said: “It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on ‘account of race, color, or previous condition of slavery.’” Id. at 1118 (remarks of Rep. Wilson).
tion in property transactions. However, there is other legislative history reflecting Congress' concern that freed slaves were being victimized by private discrimination, with or without the Black Codes. This supports a broader interpretation of the statute. On the whole, given the historiography available to the Court in 1968, the smoking guns shooting down actions against private defendants were more pervasive and are more persuasive.

Based on the text and legislative history, in 1968 one might have viewed Alfred H. Mayer as inconsistent with the legislative supremacy principle, were it not for societal, legal, and constitutional developments since 1866—primarily the emergence of our Nation's strong meta-policy against private racial discrimination. As a concurring opinion eloquently argued, many "badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men." To the extent there was any "play" at all in the text and legislative history of the 1866 Act, the Court was determined to interpret the statute to further the meta-policy against racial discrimination. Considering the 1866 Congress' apparent concern for the plight of victims of private discrimination and the breadth of the statute's text, Alfred H. Mayer seems to be a defensible example of dynamic statutory interpretation that is not inconsistent with the legislative supremacy precept.

Given the functional limitations that legal process assumptions impose on dynamic statutory interpretation, however, I believe Alfred H. Mayer is inconsistent with a negative, legal-process based theory of legislative supremacy. The reason has nothing to do with Congress' original expectations, which I am satisfied were either sufficiently ambiguous and/or sufficiently overtaken by changed circumstances and new meta-policies to justify dynamic interpretation. Instead, I am troubled by the Court's willingness to shift directions after Congress had relied on the apparent meaning of the 1866 Act. In a line of prior cases, the Supreme Court had interpreted the 1866 Act to apply only to state action, and in 1968 Congress acted on this

86. The historiography of the Reconstruction era has developed most of this evidence since Alfred H. Mayer was decided in 1968, and the contemporary "conventional wisdom" among historians is that the 1866 statute targeted private action as well as the Black Codes. See generally E. Foner, Reconstruction (1988); R. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876 (1985). This conventional wisdom is not without its critics. See Sullivan, Historical Reconstruction, Reconstruction History and the Proper Scope of Section 1981, 98 Yale L.J. 541, 546 n.36 (1989) (reviewing division among historians on this issue).

87. The evidence available to the Court in 1968 is thoroughly captured in the debate between Justice Harlan's dissenting opinion, see Alfred H. Mayer, 392 U.S. at 454-76 (Harlan, J., dissenting), and the Court's response, see id. at 427-36 (majority op.).

88. Id. at 445 (Douglas; J., concurring).

89. See supra Part II.

90. See Hurd v. Hodge, 334 U.S. 24, 31 (1948) (dictum); Corrigan v. Buckley, 271 U.S. 323, 331 (1926); see also Civil Rights Cases, 109 U.S. 3, 16-17 (1883) (dictum) (distinguishing 1866 Act from
understanding of the law by creating a complex legislative system for prohibiting private discrimination in property transactions. The Fair Housing title of the Civil Rights Act of 1968 provides a remedy similar to that created by the Court in *Alfred H. Mayer*, but with procedural burdens and exemptions not found in the more expansive *Alfred H. Mayer* remedy. Operating under the traditional legal process assumptions, I should have been inclined to agree with Justice Harlan's dissent that Congress' action in the wake of the Court's prior interpretations, namely, its reliance on the settled view of the 1866 statute when it adopted the 1968 statute, rendered the interpretation in *Alfred H. Mayer* inappropriate.

III. ANTI-THEORY OF LEGISLATIVE SUPREMACY: THE PRIMACY OF INTERPRETATION

The more deeply one considers legislative supremacy, the more complex and ambiguous it becomes, and the less it appears to preclude dynamic statutory interpretation. If scholars of statutory interpretation want to make legislative supremacy a central concern of dynamic statutory interpretation, I urge that they think about legislative supremacy in a complex way. First, it is a dynamic precept. Although there may be reasons for giving primacy to the intent of the enacting legislature, the precept of legislative supremacy ought not be limited to the supremacy of the original legislature alone. To say that the legislature is the supreme lawmaking body means that the courts should be attuned to the legislature's current policies, its reliance on prior statutes and judicial interpretation of those statutes, and its shifts in policy direction.

Second, legislative intent cannot be evaluated without considering the legislature's underlying assumptions. On their face, many statements made in Congress in 1964 were unsympathetic to affirmative action for minority em-

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92. Examples of these exemptions include the sale or rental by the owner of a single-family house, 42 U.S.C. § 3603(b)(1), and of dwellings of not more than four units if the owner also resides in one of the units, id. § 3603(b)(2). Examples of the procedural burdens include that a civil action must be commenced within 180 days after the discriminatory practice occurred, id. § 3612(a), and punitive damages are limited to $1000, id. § 3612(c).
93. *See Alfred H. Mayer*, 392 U.S. at 477-79 (Harlan, J., dissenting). Although Justice Harlan's legal position is that the writ of certiorari should have been dismissed as improvidently granted because title VIII had diminished the public importance of the case, *see id.* at 477-78, it is apparent that his opinion was driven by the conflict between the judicial and congressional solutions, *see id.* at 478.
ployees. But the lack of sympathy was based in part upon the assumption
that once a color-blind hiring and promotion policy had been implemented,
affirmative results would follow. If that assumption proves to be wrong in
a specific context, such as in the Weber case, is it still clear that Congress
"intended" to prohibit voluntary affirmative action in that context? More
generally, Congress' deliberation in 1964 took place in the context of a very
unsophisticated understanding of "discrimination" itself. Did Congress in-
tend that its understanding of discrimination—an important statutory term
that Congress chose not to define—be frozen forever? I think not.

Third, there are certain meta-principles that underlie legislative activity.
True deference to legislative supremacy will strive to effectuate these under-
lying principles. One such principle is that statutes are part of a coherent
body of public law that should be implemented in a reasonable manner. Our
nation's public laws are an ongoing enterprise, and courts applying those laws
should try to assist in making that enterprise work.

These three observations about the dynamic nature of statutory interpret-
ation lead me to conclusions that are even more iconoclastic. The current
debate between honest agent theorists and legal process theorists highlights
the difficulty both theories have in articulating determinative limitations on
judicial discretion based solely on the legislative supremacy precept. This dif-
ficulty is similar to the inability of constitutional scholars to devise coherent
theories of judicial review that limit judicial discretion to some "objective"
criterion. Both phenomena are related to the inability of philosophical "lib-
eralism" to provide a satisfactory theory of judging.

Liberalism posits a society of autonomous individuals whose interests are
incommensurable. These autonomous individuals form a social contract to
achieve collective goals unattainable through private action. They do not
readily surrender their autonomy, however, preferring to protect the private
sphere from the public sphere. The mechanism agreed upon in a liberal
democracy to make the collective decisions necessary to achieve collective
goals is the legislature, which remains accountable to the individuals com-

95. See supra text accompanying notes 58-60.
96. I am using the terms "liberalism" and "liberal" in their nineteenth century philosophical
sense, e.g., J.S. Mill, On Liberty (E. Rappaport ed. 1978) (1859), and not in their current "lib-
eral-versus-conservative" politics sense.
97. For elaboration of this point in the context of constitutional theory, see generally M.
Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988);
R. Unger, Knowledge & Politics 88-100 (1975); Brest, The Fundamental Rights Controversy:
The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981);
Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the
98. Cf. Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Mainte-
nance Theory of Constitutional Law, 96 Yale L.J. 1006, 1016-18 (1987) (recognizing tension be-
tween public and private values in libertarian constitutional theory).
prising society because its members want to be reelected. In a liberal democracy, legislative policymaking is arguably legitimate because its abridgement of private interests is accomplished by representatives chosen by the people and accountable to some democratic process of retaliation and correction. Because federal judges are not elected and have lifetime tenure, judicial policymaking lacks this degree of accountability. This makes liberals nervous about how to defend judicial discretion in a democracy. The liberal response is to "limit" judicial discretion by requiring judges to justify their decisions through a rigorous deductive process ultimately based upon policies adopted by democratically accountable bodies.

The revival of honest agent theories in the 1980s reflects the academic awareness that legal process theory accepted a great deal of judicial discretion, and it reflects the liberal desire to limit this discretion. Yet honest agent theories cannot rigorously cabin judicial discretion, either. Nor can new formulations of legal process theory. Indeed, it is doubtful that any theory will successfully allay liberalism's anxiety about permitting unelected judges to make policy choices that invade private interests.

There are several possible responses to this theoretical impasse. One, of course, is to abandon liberalism and embrace some form of republicanism, which has its own shortcomings.99 Another response is to think about statutory interpretation from a different angle. Rather than focusing on the precept of legislative supremacy, we need to consider the nature of "interpretation" itself.100 My anti-theory of legislative supremacy posits that we need a theory of interpretation before we can understand and evaluate legislative supremacy and its role in statutory interpretation.

I believe that the most fruitful theories of interpretation are those drawn

99. Compare M. Tushnet, supra note 97, at 313-18 (liberalism is incoherent, republicanism is not practically possible in our alienated society, and "[c]ritique is all there is") with Sherry, Outlaw Blues (Book Review), 87 Mich. L. Rev. 1418, 1428-37 (1989) (reviewing M. Tushnet, supra note 97) (arguing that republican notions of community can act as a workable principle for interpretation).

100. Indeed, much of the talk about legislative supremacy in statutory interpretation may be more closely linked to the nature of interpretation than to the legislative supremacy precept. A simple illustration suggests the cogency of this observation. When a judge interprets a statute, she usually considers the statutory text and legislative intent as most authoritative, with evolutive concerns (precedents, changed circumstances, other statutes, and so on) as dispositive evidence in some cases. The critical importance of following the directives of the text and legislative history is usually explained by reference to the legislative supremacy precept. Yet, when a judge interprets a contract (such as the relational contract between Williams and Diamond in Part I, supra), she also usually considers the text of the contract and the intent of the parties as most authoritative, with evolutive concerns (course of dealing over time, commercial custom, public policy) as dispositive evidence in some cases. Why does the judge treat the text and intent as dispositive? It is not because the contracting parties are "supreme" in the sphere of private contracting. Far from it, because private parties must adhere to all sorts of judicial as well as legislative limits on their freedom to enter into contracts. The answer lies within the nature of interpretation itself.
from hermeneutics,\textsuperscript{101} and that thinking about statutory interpretation through the lens of hermeneutics is more useful than thinking about it through the lens of the legislative supremacy precept. The hermeneutical theory I consider most useful is that of Hans-Georg Gadamer\textsuperscript{102} and all references to hermeneutics will be to my interpretation of Gadamer.\textsuperscript{103} Hermeneutics addresses the alienation and distance that a present interpreter must overcome when confronted with a historical text. Hence, it addresses precisely those cases that tend to be the "hard" ones—like Weber and Alfred H. Mayer, in which the passage of time has generated changed circumstances, inconsistent legislative directives, and new meta-policies that separate the world of the present interpreter from that of the enacting legislature.

Hermeneutics considers interpretation to be a dialogue or conversation between the present interpreter and the historic text. Gadamer calls this a "fusion of horizons."\textsuperscript{104} Every text has a context (horizon) of assumptions the author makes about the world around her. The interpreter also has a context (horizon), but one that is different from the text's, because the world has changed and the interpreter is a different person from the author. When applying text to a specific situation, hermeneutical principles suggest that the interpreter will find a common ground between the two contexts, a fusion of the two horizons.

As the starting point for the dialogue, the interpreter considers the most plausible meaning of the words used in the text, with due consideration for the whole text. The interpreter may have questions about the apparent meaning of the text—it seems strange, even absurd; it is inconsistent with current context or policy—and she will scrutinize this apparent meaning. Is such an absurd, unjust, or counterintuitive interpretation necessary? Is it possible to reconcile the interpreter's vision with that of the text? Sometimes, it will be possible to reconcile the two, because the horizon of the text can be expanded by including the original legislative discussions, the purpose(s) embodied in the text, and the interpretation and application of the

\footnote{101. For an excellent collection, see \textit{INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER} (S. Levinson & S. Mailloux eds. 1988), which is reviewed by Barbiero, \textit{Agreeing to Disagree: Interpretation After the End of Consensus} (Book Review), 78 GEO. L.J. 447 (1989).


104. H.-G. GADAMER, \textit{supra} note 102, at 216-18, 273-74. This central feature of Gadamerian hermeneutics is discussed more extensively in G. WARNKE, \textit{supra} note 102, at 68-69, 103-04, and J. WEINSHEIMER, \textit{supra} note 102, at 156-57, 183-84, 210-12.}
text prior to the instant case. Other times, it will not be possible to reconcile
the interpreter's vision with that of the text, and in such instances the inter-
preter should reconsider her own view.

This "to-and-fro" process between the text and the interpreter suggests
both positive and negative theories of statutory interpretation. As a positive
theory, hermeneutics posits that statutory interpretation is a dialogue be-
tween the statutory text and the judge. The role of the statute is to remain
open to change as the context into which it is thrown changes. The duty of
the judge is to remain open to what the statute has to say about the right
answer in the case. This openness requires the judge to study not just the
statute's text, but also its legislative history, its purpose(s), the evolution of
its purpose(s) over time, and precedents concerning the statute's application
in other circumstances. As a negative theory, hermeneutics requires the
judge to respect the statute's integrity and not ignore the truths that come
from its history.

To illustrate the application of hermeneutics to statutory interpretation,
consider again Alfred H. Mayer.¹⁰⁵ Different interpreters would probably
understand the apparent meaning of the statutory language guaranteeing
"the same right, in every State and Territory, as is enjoyed by white citizens
thereof to inherit, purchase, lease, sell, hold, and convey real and personal
property" in different ways.¹⁰⁶ My initial reading of the statute suggested to
me that it applied to private conduct, but that may have been because I have
matured in a period when Congress has frequently legislated antidiscrimina-
tion laws that apply to private actors. Also, given my admiration for the
principles embodied in the Civil Rights Act of 1964,¹⁰⁷ which did not cover
private discrimination in property transactions, I am open to a broad inter-
pretation of the 1866 statute. But I should want to know more about the
statute before I come to a conclusion about its meaning.¹⁰⁸

As I read the legislative background of the statute, I come to question my
initial impression, for there is great reason to believe that the statute was only
intended to prohibit state action. The law was enacted at a time in our his-
tory when several states had adopted Black Codes forbidding property and
contractual transactions by blacks; notwithstanding the recent adoption of
the thirteenth amendment, there was some doubt about the extent of Con-
gress' power to regulate private discriminatory conduct; and the Senate spon-
isor of the bill repeatedly portrayed it as inapplicable to those states that had

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¹⁰⁶ 42 U.S.C. § 1982 (1982); see supra text accompanying notes 81-82.
¹⁰⁸ The desire to know more, beyond being an ingrained tendency of a cautious lawyer or aca-
demician, stems from recognizing that a statute's text is only a single part of the horizon it
represents.
not adopted the Black Codes.\textsuperscript{109} On the other hand, the legislative history is also replete with evidence of private injustices to blacks and with the disgust the legislators felt about such injustices.\textsuperscript{110}

The former evidence strikes me as more pervasive and on point, but I wonder if the two types of evidence might be reconciled. In 1866, Congress may have been most uncertain about its ability to regulate private conduct under then-prevailing constitutional assumptions.\textsuperscript{111} In 1968, such caution was no longer warranted, if for no other reason than the wildly flexible reading the Supreme Court had given the commerce clause. This strikes me as the basis for a plausible hypothesis: the overall problem felt by the 1866 drafters—the persistence of “badges of slavery” in the oppressive racist attitudes regarding property transactions at any level, state or private—is still with us. Whatever doubts that might have existed in 1866 about the reach of the statute might be resolved today in favor of a broad interpretation, one that reaches acts of private discrimination. This reconciliation seems just to me, without ignoring the complexity of the text’s horizon.

Yet, in good faith, I must subject my reconciliation to further scrutiny. It does go against much of the 1866 Act’s specific legislative history. More importantly, it also goes against the statute’s development after 1866. In 1926, the Supreme Court held that the 1866 statute was inapplicable to private racially restrictive covenants, because the statute, “like the Constitutional Amendment under whose sanction [it was] enacted, [does] not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.”\textsuperscript{112} This holding was explicitly reiterated by the Court at least once.\textsuperscript{113} Most importantly, these prior interpretations formed the backdrop for Congress’ decision in 1968 to enact a comprehensive antidiscrimination statute covering property transactions.\textsuperscript{114} Although some members of Congress were apparently aware

\textsuperscript{109} See Alfred H. Mayer, 392 U.S. at 455-77 (Harlan, J., dissenting) (detailing these currents of the legislative history).

\textsuperscript{110} See id. at 427-29 (majority op.) (detailing this current of legislative history); see also supra note 86 and accompanying text (discussing historiography of Reconstruction era).


\textsuperscript{112} Corrigan v. Buckley, 271 U.S. 323, 331 (1926).

\textsuperscript{113} Hurd v. Hodge, 334 U.S. 24, 31 (1948). In the Hurd opinion, the Court stated:

We may start with the proposition that [the 1866 Act] does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of Corrigan v. Buckley . . . .

of the possibility of a new interpretation of the 1866 statute, the comprehensive statute was enacted before the Supreme Court decided *Alfred H. Mayer.*

Under traditional legal process assumptions, I should have stopped with this observation, concluding that legislative reliance interests necessitated perpetuating the narrow interpretation. But hermeneutics opens further doors. In response to criticism that his hermeneutics is too conservative in its uncritical deference to traditions founded in suppression, Gadamer emphasizes that the hermeneutic interpreter might reevaluate historical consensus that is ideologically constrained, as is the case when social or racial groups are marginalized. Perhaps this is what the Supreme Court in *Alfred H. Mayer* was really doing—engaging in a historical critique of a prior Court tradition that had denuded the 1866 statute of much of its force and meaning. This is a legitimate enterprise, even under the relatively conservative hermeneutics of Gadamer. For me, the final inquiry would be the practical one of whether the new legislative act itself adequately corrected the Court's historical mistakes. I would have been willing to interpret the 1866 Act to apply to some private property transactions if I were persuaded that this move were permitted by the 1968 statute.

This truncated dialectic is what statutory interpretation is all about. I would have been wrong to have stopped with my initial understanding of the statute's apparent meaning. And equally wrong to have stopped with my impression of the original legislative expectations. And just as wrong to have stopped with my reconciliation. Interpretation of any kind demands an openness to what the text has to teach, and a willingness to follow a reasoned approach to the bridge between the past and the present.

Hermeneutics represents not only a fresh way of looking at statutory interpretation, but also a fresh way of looking at assumptions traditionally made about legislative supremacy. Both the defenders and the critics of the honest agent theory view the legislature as the primary source of law. They therefore desire to place limitations on judicial lawmaker, and believe that rules of interpretation can enforce those limitations. Hermeneutics casts doubt on these assumptions.

115. See *Alfred H. Mayer,* 392 U.S. at 415-16.
116. *Id.* The comprehensive statute was passed by Congress on April 10, 1968, see 114 CONG. REC. D158 (daily ed. 1968), and signed into law by the President the next day. 82 Stat. 73, 73 (1968). *Alfred H. Mayer* was handed down on June 17, 1968. 392 U.S. at 409.
117. See supra text accompanying notes 89-93.
119. See Ingram, *Hermeneutics and Truth,* in HERMENEUTICS AND PRAXIS, supra note 102, at 32, 46-49 (history is subject to revision by the interpreter).
Over the life of a statute, the legislature loses its primacy, and it is that very loss of primacy that demands interpretation of the statute. When a statute is enacted, it speaks directly to specific problems and situations, and because there is no temporal gulf between the legislature’s understanding and that of the audience, the application of the statute is usually clear. But as time passes, the problem originally targeted by the legislature disappears or changes—often through strategic behavior in response to the statute. This presents a choice for those interpreters implementing the statute. They can go beyond the original legislative expectations to meet new and unanticipated versions of the original problem, or they can stick to those expectations and let the statute wither away into irrelevance. It is a choice between Proteus and Tithonus,\textsuperscript{120} between a statute that changes over time through interpretation or one that shrivels without dying. In either case, the passage of time strips the legislature of its lawmaking primacy. Dynamic interpretation is the way by which current interpreters can retrieve that part of the legislature’s past effort that is still relevant, true, and useful. Ironically, even while changing the statute, the interpreter who breathes new life into it may be doing a greater service to the long-departed legislature than the interpreter who lets the statute wither. This is the first lesson of hermeneutics for legislative supremacy.

The second lesson, related to the first, is that some of the concern about unrestrained judicial lawmaking is misplaced. Once the statutory scheme has passed its infancy, and the legislature has failed to revisit it, the statute’s evolution over time is not necessarily the result of judicial fiat and willfulness. Gadamer’s fusion of horizons illustrates this evolution well: when the statute is fresh and new, the horizon of the text and of the interpreter will usually be about the same, and the judicial interpretation will probably be the very one the legislature would have reached if it had thought about the issue. But as time passes, the interpreter’s horizon diverges from that of the text—not just because the judge has policy preferences of her own, but because society’s policy preferences have changed, the assumptions underlying the statute have changed, and/or the factual context of society and the targeted problem have changed.

Although the inevitable evolution of the statute is not driven solely by the interpreter’s preferences, these preferences are not irrelevant. Many of the “prejudgments” with which an interpreter approaches a text will be influenced by class biases, ideological beliefs, and political assumptions of the in-

\textsuperscript{120} Tithonus was the human husband of the goddess Aurora. At her request, Zeus made Tithonus immortal, but Aurora had neglected to ask that he remain eternally young as well. “So it came to pass that he grew old, but could not die. Helpless at last, unable to move hand or foot, he prayed for death, but there was no release for him. He must live on forever, with old age forever pressing upon him more and more.” E. HAMILTON, MYTHOLOGY 428 (1942). Pitying him, Aurora turned Tithonus into a chirping grasshopper.
Because it makes a difference who interprets the text, our concern with lawmaking by unelected judges is not entirely abated. Yet, precisely because this difference stems from personal prejudgments, it is clear that the remedy does not lie, as some assume, in limiting rules of interpretation. Thus, a third lesson of hermeneutics is that rules of statutory interpretation, such as, "you must follow unambiguous legislative intent," do not necessarily constrain interpreters. The conflicting opinions in *Weber, Hill,* and *Alfred H. Mayer* demonstrate that Justices following the very same methodology can reach very different results. I do not think the differences arise because they are behaving in bad faith or are result-oriented, as critics typically charge, but rather because they bring different prejudgments to the cases.

For any area of policy, the role of the legislature is determined not by how courts pursue statutory interpretation, but instead by how active the legislature chooses to be. If the legislature creates a detailed statutory scheme and then revisits that scheme with updating amendments, it retains its effective primacy; regardless of the theory of interpretation used by the courts, the result is faithful implementation of the legislature's directives. But if the legislature enacts a broadly worded statute and then leaves it alone, the legislature rapidly loses its policymaking primacy, again regardless of the theory of interpretation courts adopt. Consequently, if we are truly concerned that unelected judges are making policy—a concern that hermeneutics questions—the remedy is not to advocate a particular method (such as the honest agent theory) for constraining judges, because the method will not adequately constrain them. The remedy is *either* greater activity on the part of the legislature to reassert its primacy through amending the statute, *or* delegation of interpretive policymaking to agencies over which there are greater political controls.122

**CONCLUSION**

The debate in the 1980s between the honest agent and legal process theories of legislative supremacy is, in my view, an intellectual dead end. The debate has proceeded without a careful consideration of its premises. Why are we concerned with limiting judicial discretion? If that is a serious con-

121. "Prejudgment" or "pre-understanding" is a translation of Gadamer's *Vorurteil,* which can also be translated as "prejudice." Prejudgments are the unconscious structures of thought, belief, and attitude that we bring to a text. Our prejudgments are conditioned by the historical culture into which we have been thrown.

cern, can a particular methodology or rule actually constrain judicial discretion? If judicial discretion can be effectively limited by methodology and rules, are the disadvantages of such limits acceptable?

The debate over legislative supremacy in statutory interpretation has also proceeded without an accompanying theory of interpretation by either camp. Hermeneutics, a robust theory of interpretation, suggests that the premises of the debate are at least questionable. Discretion informed by current values is inherent in the fusion of horizons that characterizes interpretation. Even if discretion were undesirable, the artifice of method could not effectively constrain it. And even if method could constrain an undesirable judicial discretion, it would straitjacket statutory interpretation in ways that violate legislative meta-assumptions, and hence would be inconsistent with the legislative supremacy whose banner it carries. The hermeneutical circle tightens like a noose, slowly strangling theories of legislative supremacy.

If we take interpretation seriously, our agenda should not be churning the tired legislative supremacy debate one more time. Instead, our agenda should be a more practical one of carefully evaluating the procedure and the substance of statutory opinions. At a process level, the inquiry should not be to define the ambit of judicial discretion, but rather to ensure greater congressional awareness of the Court’s actual (rather than romanticized) practice in statutory interpretation. This would make the interpretive process more openly dialectical and candid, and would encourage a more balanced flow of information to and from the Court and the Congress (so that the effects upon “have-not” groups would be ventilated as they already are for “have” groups). At the level of substance, the inquiry should not be just whether the interpretation is the one put in the statute by the enacting legislature, but also whether the interpretation is just, workable, and sensitive to the ongoing statutory scheme.

Legislative supremacy is a shibboleth. But it is time to talk about more practical concerns.