Statutory Interpretation and Legislative Supremacy

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"The general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention."[1]

In the six years since that statement was written, there has been something of a renaissance of scholarship about statutory interpretation.[2] Nevertheless, our understanding of statutory interpretation remains quite limited. The tremendous variety of statutes, as well as the broad range of contexts in which they must be interpreted, suggests that a unified theory of statutory interpretation may be unattainable. Still, theory can at least illuminate some of the recurring problems of statutory interpretation.

This article is an attempt to clarify one particular interpretation question: to what extent are judges constrained by statutory language and legislative intent? It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy.[3] If this

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1. Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process,* 35 STAN. L. REV. 213, 213 (1983); *see also* Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process* (Book Review), 66 TEX. L. REV. 1071, 1071 (1988) (reviewing W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) ("Legislatures, and the statutes they produce, are the poor cousins of legal education.").

2. Much of the "new learning" is collected in W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY ch. 7 (1988). For a thoughtful survey of the scholarly literature, see Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era,* 48 U. PITT. L. REV. 691 (1987).

3. *See, e.g.,* California v. Sierra Club, 451 U.S. 287, 297-98 (1981) (refusing to imply a private cause of action in the face of contrary statutory language and legislative history); S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 41-42 (1985) (judiciary subordinate to legislature in statutory application because judges are less accountable to the electorate); R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 240, 252-53 (1988) (subordinate judiciary must ferret out the intent of the legislature in statutory interpretation); Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20, 22 (1988) (describing as "archaeological" statutory interpretation seeks to fulfill the intent of the drafting legislature); Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Banking Regulation,* 85 MICH. L. REV. 672, 672 n.1 (1987) (citing both Easterbrook and Posner as proponents of the dominant jurisprudential tradition that statutory obsolescence is a matter of concern for the legislature only, not their faithful servants, the courts); Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach,* 63 TUL. L. REV. 1, 9 (1988) (doctrine of legislative supremacy rests on

subordinate role means anything at all, it must somehow constrain judges who interpret statutes from implementing their own notions of public policy. Although this much is clear, the extent of the constraint is far from obvious. At the one extreme, judges may be free to implement virtually any policies they want; at the other, they may be forbidden even to consider their own views of public policy in deciding statutory issues.

Part I of this article attempts to pinpoint this constraint on judicial policymaking. It argues that subordinating courts to the legislature in all nonconstitutional areas of public policymaking (the legislative supremacy principle) precludes judicial policymaking only when a statutory directive[4] is clear.[5] Even then, this "weak conception" of the supremacy principle may allow courts to go beyond (but not against) clear legislative intent. Thus, the supremacy principle leaves courts considerable, although subordinate, policymaking authority.[6]

Part II demonstrates that the supremacy principle, although limited in scope, nevertheless significantly constrains judicial decisions. On occasion, the legislative supremacy principle has led judges to embrace results obviously contrary to their own views of public policy. On other, less creditable occasions, courts have failed to live up to the demands of the supremacy principle.

Part III considers some possible qualifications to the principle of legislative supremacy. Under some circumstances, rational legislators would not want judges to adhere strictly to their statutory mandates. For example, blind adherence to a statute may be contrary to the drafters' intent because of an unforeseeable development or because a mistaken judicial interpretation has developed independent significance as precedent. These types of post-enact-

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deeply embedded premise of the American political system that legislature may prescribe rules of law that bind all other governmental actors within constitutional limits); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function,* 94 YALE L.J. 71, 76 (1984) (judiciary may openly ignore a legislative judgment only on the grounds of unconstitutionality).

As Professor Aleinikoff points out, most legislative interpretation is actually done by administrative agencies rather than courts. Aleinikoff, *supra,* at 42-43. Chevron, Inc. v. NRDC, 467 U.S. 837, 842-43 (1984), suggests a view of statutory interpretation by agencies that is strikingly similar to that espoused in this article regarding judges.

4. A statute may be purely descriptive or declaratory of the common law, rather than being a command. For example, Congress has enacted recommendations about the proper ceremonial treatment of the American flag. *See* Texas v. Johnson, 109 S. Ct. 2533, 2547 (1989); *see also* MINN. STAT. § 1.135 subdiv. 5 (Supp. 1989) (explaining the symbolism of the state seal). Such a statute, which does not purport to implement a legislative mandate, is outside the scope of the supremacy principle. Also, this article is only concerned with cases in which a statute is considered to be directly applicable, rather than with the use of statutes by analogy in common law cases.

5. The idea of statutory clarity is itself somewhat unclear, in part because it could refer to either the text or legislative history of the statute. One of the tasks in Part I will be to clarify this concept. *See infra* text accompanying notes 35-53.

6. There may well exist other constraints on judicial policymaking, but these do not derive from the court's subordination to the legislature.

ment events may justify the court in disobeying a clear statutory directive, because such disobedience is actually consistent with the legislature's presumed "meta-intent." In contrast, I argue that legislators generally do not want to condition the continued effectiveness of a statute on the state of public opinion. Consequently, even radical changes in public opinion do not, in themselves, justify deviations from statutory directives.[7]

The institutional structures and normative commitments needed to sustain democratic government must include judicial respect for legislative decisions. It should come as no shock, however, that the proper judicial role in a democracy is not readily reducible to a formula. The supremacy principle defines only part of the judicial role in statutory cases. Other norms, such as legal stability and fairness to individual litigants, also play legitimate roles in judicial decisions. Although the principle of legislative supremacy is but one piece of the interpretation puzzle, finding that principle can provide a point of reference as we struggle with the rest of the puzzle.

I. THE SCOPE OF THE SUPREMACY PRINCIPLE

Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.[8] This is a fairly commonplace notion, but it turns out to be surprisingly difficult to pin down the precise nature of that subordinate relationship. What exactly do we mean when we say that courts are subordinate to legislatures in making public policy?

In analyzing this issue, we must be careful to distinguish between legislative supremacy and legislative exclusivity in the making of public policy. In general, supremacy and exclusivity are quite separate concepts.[9] Legislatures are typically the supreme, but not exclusive, lawmakers.[10] State courts have the authority to create common law doctrines embodying their own views of public policy, subject to legislative modification. Although the federal courts have narrower common law powers, they also have this power in areas of particular federal concern.[11] Given the existence of a legitimate judicial role

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7. The supremacy principle does not, however, prohibit courts from giving effect to the current state of public opinion when construing ambiguous statutes. *See infra* notes 19-21 and accompanying text.

8. *See supra* note 3.

9. *See* Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?,* 78 MICH. L. REV. 322, 326, 331 (1980) (distinguishing between areas in which Congress' power is exclusive and areas in which other branches have concurrent legislative power but Congress' authority is final). For example, Congress has supreme lawmaking power over interstate commerce, but its authority is not exclusive. States are free to implement their own policies, as long as they do not thwart congressional goals. *Id.* at 322-24.

10. *See id.* at 325-26 (the Constitution gives Congress final authority, but not exclusive power, to establish the majority of legal norms).

11. *See* Eskridge, *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479, 1499-1501 (1987).

in policymaking, the question becomes whether, and to what extent, that role extends to statutory cases.

A. THE STRONG CONCEPTION OF SUPREMACY

Perhaps the most obvious understanding of legislative supremacy is that courts must follow legislative directives: "Judges must be honest agents of the political branches. They carry out decisions they do not make."[12] Hence, the "judges' role is to decipher and enforce" the statute.[13] This is a "strong," or "formalist," conception of legislative supremacy. The strong conception views the supremacy principle as an all-encompassing prescription of the judicial role in statutory cases rather than as a mere constraint on judicial behavior. This conception does not merely rule out judicial views on controversial matters of public policy. It also precludes judges from considering relatively noncontroversial policies like stare decisis, judicial administration, or other "legal process" values, unless the enacting legislature has endorsed those values.[14]

The fundamental flaw in the strong conception is that it oversimplifies the agency model. The judicial role in statutory cases is indeed something like that of an agent of the legislature, and this analogy can be quite illuminating. But the analogy must be understood in its full complexity. First, agents do not simply execute orders that their principals give. Rather, agents act on their principals' behalf, carrying out orders that may be subject to multiple interpretations in light of their understanding of the principals' overarching goals. Second, even in statutory cases, federal judges are not the agents of Congress. Their employer is not the Congress but the United States, and their ultimate allegiance is to the Constitution rather than to the House and Senate. Hence, it is the courts' role to carry out congressional directives in light of their understanding of the Constitution.

In determining the appropriate methods of statutory interpretation, then, it is not enough to consider only how best to implement the purposes of Congress. We must also determine what approach is most consistent with our scheme of constitutional government.[15] Many presumptions and clear

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A notable example is the Court's recent creation of a federal common law rule limiting the liability of government suppliers for defective products. *See* Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988).

12. Easterbrook, *Foreword, The Court and the Economic System,* 98 HARV. L. REV. 4, 60 (1984).

13. United States v. 9/1 KG. Containers, 854 F.2d 173, 179 (7th Cir. 1988) (Easterbrook, J.), *cert. denied,* 109 S. Ct. 118 (1989).

14. Some objections to this view of the judicial role are sketched in Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights,* 87 MICH. L. REV. 2, 6-7, 14-19 (1988) (reviewing arguments against originalism but in favor of judges' reliance both on personal values in "hard cases" and on consideration of public interest in stare decisis analysis).

15. *See, e.g.,* Eskridge, *supra* note 11, at 1523-38 (cautious dynamic statutory interpretation is

statement rules are designed to promote constitutionally rooted goals like fair notice to criminal defendants, federalism, and fairness to "discrete and insular minorities."[16] These rules are faithful to the constitutional scheme, and their use in statutory interpretation serves to advance by means of interstitial policymaking the constitutional goal of democratic, just, and effective government.

Judges have been compared to military officers attempting to obey unclear orders from headquarters.[17] This military analogy suggests some of the difficulties with the strong conception of supremacy. Within the confines of his orders, even a subordinate officer is expected to exercise his discretion in accordance with sound military judgment. In the absence of orders, the officer is not expected to sit on his hands regardless of circumstances.[18] Again, the agency model can be misleading if oversimplified. The captain must follow the general's orders, but to do so the captain may have to interpret an occasionally unclear order in light of his primary allegiance to the United States Army. Similarly, legislative supremacy does not proscribe statutory interpretation that may result in the elimination of judicial policymaking. This is not to say, of course, that statutory interpretation is an exercise in raw policymaking, but only that on occasion, the judiciary may properly consider nonlegislative sources of public policy.

A number of well-accepted judicial practices, such as the use of "clear statement" rules and other canons of construction, allow judges to include policy considerations in their statutory decisions.[19] For example, statutory

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not significantly countermajoritarian and is therefore consistent with the constitutional scheme of government).

16. *See* W. ESKRIDGE & P. FRICKEY, *supra* note 2, at 655-59 (discussing the application of substantive policy presumptions in statutory interpretation). McNally v. United States, 483 U.S. 350 (1987), is a recent notable example. In *McNally,* the Court read the mail fraud statute narrowly because of concerns about federalism and fair notice. *Id.* at 359-60. Both of these concerns have obvious constitutional roots. Courts may also find sources of policy in statutes that do not directly apply to the case at hand. *See* Gellhorn, *Contracts and Public Policy,* 35 COLUM. L. REV. 679, 690-93 (1935) (advocating the application of statutes by analogy in complex cases that, although they do not fall squarely within the statute, are related to the subject matter of the statute). By seeking guidance in statutory and constitutional provisions, courts can blunt the charge that they have assumed unbridled legislative authority.

17. Judge Posner, who originated the military analogy, explains that "[i]n our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts. . . . If the orders are clear, the judges must obey them." Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution,* 37 CASE W. RES. 179, 189 (1986-87).

18. *See id.* at 189-90 (military officers who receive orders by radio that begin "go—," but the rest of the message is unclear, should use their own judgment in going forward rather than remaining stationary until complete orders arrive, because it is clear that the commanding officer intended some action).

19. For an extensive discussion of these judicial practices, see W. ESKRIDGE & P. FRICKEY, *supra* note 2, at 655-95.

directives are often extremely unclear, and one does not have to be a legal realist to know that the resulting judicial interpretation often arises out of the court's view of public policy as much as any attempt to fathom the statutory text.[20] Not surprisingly, judicial opinions that "apply" open-ended or vague statutes often read like common law decisions.[21]

This judicial policymaking is not inherently objectionable. After all, if a state court can legitimately make public policy when the legislature has said nothing at all about a subject,[22] the same court should also be able to make policy when the legislature has spoken, but spoken so unclearly that the court cannot confidently decipher its directions. In such a case, the fact that the legislature has spoken makes it clear that the legislature intends for *something* to be done about the particular issue. Filling such gaps, "even if this calls for creation as well as re-creation, is an essential part of government, lest statutes become brittle and fail of their essential purposes."[23] Both descriptively and normatively, then, the line between common law policymaking and statutory construction is not so sharp as it might seem.[24]

Despite well-accepted justifications for judges to engage in interstitial policymaking, a supporter of the strong conception might question its legitimacy.[25] If the court is not simply implementing a policy judgment by the legislature, where does it derive its authority to act? This question may seem particularly pressing with respect to the federal courts, which have only limited common law powers.[26] Once a court is given jurisdiction to decide cases arising under a statute, however, by implication the court is empowered to use normal methods of judicial decision.[27] The nature of these judicial meth-

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20. *See* Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions,* 41 VAND. L. REV. 301, 305 (1988) (statutory ambiguity results when the legislature declines to make certain policy decisions; hence, the courts' "interpretation" of an ambiguous statute necessitates judicial policymaking). In the context of statutory interpretation by agencies rather than courts, an argument that policymaking is illegitimate would be even more tenuous. *See Chevron,* 467 U.S. at 843-44 (Congress intends for administrative agencies to fill explicit statutory gaps).

21. *See, e.g.*, Patrick v. Buhget, 486 U.S. 94 (1988) (construing Sherman Antitrust Act); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (same); United States v. Basye, 410 U.S. 441 (1973) (discussing "assignment of income" doctrine in income tax cases); Helvering v. Horst, 311 U.S. 112 (1940) (same).

22. *See supra* text accompanying notes 9-11.

23. Easterbrook, *Statutes' Domain,* 50 U. CHI. L. REV. 533, 551 (1983).

24. *See* Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1, 3-7 (1985); Westen & Lehman, *supra* note 9, at 331.

25. The strong conception seems to rest largely on concerns about legitimacy. *See* Merrill, *supra* note 24, at 3, 7-12 (analyzing the legitimacy of federal common law in light of concerns for federalism, separation of powers, and political accountability); *see also* Froomkin, *supra* note 1, at 1091-94 (allowing courts to become involved in policymaking raises grave separation of powers issues).

26. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) (federal courts do not have general power to develop their own rules of decision, except when Congress has not spoken on a particular issue).

27. For this reason, it does not seem necessary to search within a particular statute for specific

ods is partly a matter of convention and history and partly a matter of the judiciary's current sense of its role in the overall scheme of government. Our legal traditions do not countenance freewheeling judicial activism in statutory cases. They do, however, contemplate the use of a variety of interpretative techniques that allow interstitial policymaking.[28]

The essence of the strong conception is that judges are "just following orders" without regard to their own views of public policy. When directives are clear, this is a sound justification. But when the directives are reasonably open to conflicting interpretations (as is often the case), we should be reluctant to excuse judges from responsibility for their own actions on the ground that they were just implementing directives from above. Judges should not be encouraged to duck the responsibility for their choices. Since Holmes, it has been a commonplace that judges engage in interstitial policymaking;[29] the rhetoric of legislative supremacy should not be abused as a means of concealing the true judicial role.[30]

B. THE WEAK CONCEPTION OF SUPREMACY

Under the weak conception of legislative supremacy, a judge may not contravene statutory directives.[31] Thus, unlike the strong conception, the weak conception views supremacy as a constraint on judicial action, rather than as a complete specification of the judicial role in statutory cases.

The military analogy is helpful in clarifying the nature of this constraint. We cannot readily specify just what it means to tell an officer to follow orders, because to do so would require a complete philosophical account of interpretation. Inverting the prescription may be more useful: whatever else an officer may do, he cannot *disobey* lawful orders.

One advantage of the weak conception is that it demands relatively little consensus about what sources of public policy, if any, a judge may bring to

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evidence of a congressional delegation of authority to the courts, as some writers have suggested. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d Ed. 1988) (congressional delegation of lawmaking power to the federal courts must be either express or implied within a statute); Merrill, *supra* note 24, at 41-44 (same).

28. *See* Blatt, *The History of Statutory Interpretation: A Study in Form and Substance,* 6 CARDOZO L. REV. 799, 800-05, 813-15, 833-34 (1985) (discussing the role of equity in statutory analysis throughout history); Eskridge, *supra* note 11, at 1502-03 (discussing Blackstone's theory that "judges should enforce the textual commands of statutes, though not to the detriment of the statute's overall purposes and the current demands of equity").

29. *See, e.g.,* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (recognizing that judges must legislate, but that they can only do so interstitially).

30. *See* Posner, *Statutory Interpretation—In the Classroom and in the Courtroom,* 50 U. CHI. L. REV. 800, 816-17 (1983) (courts' pretense that statutory interpretation merely involves application of canons of construction conceals extent to which courts create new law).

31. This article presumes that all statutes are constitutional.

bear in interpreting statutes. It does not assume that statutes are determinate in the sense of having a single correct interpretation. It assumes only that methods of interpretation are not completely "up for grabs," and that a statute's language and legislative history together preclude at least some interpretations. Although the requirement that the President be at least thirty-five years old[32] seems perfectly clear to most people,[33] there are some who argue that it is potentially indeterminate.[34] Even they do not argue, however, that courts could interpret the provision to allow a toddler to become President. The weak supremacy principle requires only this low degree of determinacy.

Because the weak conception analyzes supremacy by analogy to the concept of disobedience, it remains only to define what it means to disobey an order.[35] Again, what seems initially obvious turns out to be unexpectedly elusive. If obedience may be construed as complying with the intent of a superior, then disobedience may be defined as a failure to comply with the intent of a superior. An officer, however, is not obliged to carry out the unexpressed wishes of superiors, even if he can somehow divine them. Nor can the intentions of legislators have any binding effect unless they are expressed in a law.[36] The Constitution contains procedural barriers intended to hinder the transformation of legislators' preferences into law.[37] Hence, to give legal effect to legislative intentions in the absence of any relevant statutory text would undermine the constitutional scheme.[38]

Disobedience, therefore, must relate to a text rather than merely to an

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32. U.S. CONST. art. II, § 1.

33. *See* Schauer, *Easy Cases,* 58 S. CAL. L. REV. 399, 414 (1985) (noting obvious legal result of 29-year-old presidential candidate).

34. *See* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory,* 58 S. CAL. L. REV. 683, 686-88 (1985) (interpreting age requirement as "shorthand" expression of Framers' policies, and arguing that the requirement could be changed without impairing the Framers' scheme of constitutional government). *But see* R. POSNER, *supra* note 3, at 219 (criticizing Tushnet's argument).

35. This analogy, it must be realized, is only that. Statutes do not, in general, take the form of orders to judges. *See generally* H.L.A. HART, THE CONCEPT OF LAW 18-26 (1961) (discussing general forms that law may take to communicate orders from government to society).

36. Thus, it is a mistake to see the statutory text as "a kind of second-best," as if "we would prefer to take the top off the heads of authors and framers—like soft-boiled eggs—to look inside for the truest account of their brain states at the moment that the texts were created." Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention,* 100 HARV. L. REV. 751, 758-59 (1987); *see also* Tribe, *Judicial Interpretations of Statutes: Three Axioms,* 11 HARV. J.L. & PUB. POL'Y 51, 51 (1988) ("our search in statutory interpretation . . . must be not for a subjective, unenacted intent but for an objective, enacted meaning of a legal text").

37. *See* U.S. CONST. art. I, §§ 1 (bicameralism requirement), 7 (presentment requirement); *see generally* INS v. Chadha, 462 U.S. 919 (1983) (bicameralism and presentment "serve essential constitutional functions").

38. *See* Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 HARV. J.L. & PUB. POL'Y 59, 64-65 (1988).

unexpressed intention. The requisite relationship with the text is less clear. Perhaps one naive view would be that disobeying an order means violating its literal terms.[39] After all, it is said, "[t]he words of the statute, and not the intent of the drafters, are the 'law.' "[40] This sanctification of the statutory text, however, goes too far. If the directive contains a typographical error, correcting the error can hardly be considered disobedience.[41] Moreover, literal application of a directive might be senseless or contrary to its obvious purpose. For example, virtually no one doubts the correctness of the ancient decision that a statute prohibiting "letting blood in the streets" did not ban emergency surgery.[42] In these examples, extrinsic evidence about the speaker's intentions is not needed to tell the ordinary legal reader that some literal applications of a statute are unintended. Rejecting the literal application in these situations can hardly be considered disobedience.[43] Today, some courts go even farther and refuse to follow the "plain meaning" of a statute not because its literal meaning is untenable on its face, but because its

39. Recently, literalism has been revived as an approach to statutory interpretation, with Justice Scalia as one of its leading advocates. For recent statements of Scalia's view, see Blanchard v. Bergeron, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring in part); Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1994-95 (1989) (Scalia, J., concurring in the judgment); *see also* Breger, *Introductory Remarks,* 1987 DUKE L.J. 362, 367-69 (citing additional Scalia opinions). At least one commentator discerned a trend toward literalism even before Justice Scalia's appointment. *See* Comment, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892, 894-98 (1982).

40. Easterbrook, *supra* note 38, at 60.

41. For statements of this principle, see Shine v. Shine, 802 F.2d 583, 588 (1st Cir. 1986); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1412 (tent. ed. 1958).

42. *See* K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1834 n.2 (1988) (Scalia, J., concurring in part). The most commonly cited authority for rejecting literal meaning when applying it would lead to an "absurd" result is Rector of Holy Trinity Church v. United States, 143 U.S. 457 (1892). For a recent application of this principle, see Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2565-67 (1989).

43. Judge Easterbrook suggests that the proper approach to interpretation is to ask how the "objectively reasonable person" would understand the statute. Easterbrook, *supra* note 38, at 65. But this begs the question. Does the objectively reasonable person know about the political context of the statute, or the historical period in which it was passed, or the practical problems in implementing it? If so, this method of interpretation differs little from that currently used. But, if the "objectively reasonable person" is intended to be the "Person from Pluto" (the gender-neutral successor to the famous Man from Mars), who knows nothing about American society and history, we must ask why judges should adopt such a peculiar persona. The vantage point more properly should be that of the statute's actual audience—typically, lawyers applying the conventional approach to statutory interpretation, which currently includes considering legislative history. A more fundamental flaw in Easterbrook's literalist approach, however, is its assumption that statutes have meaning *before* they are interpreted. Given such an assumption, literalism appears to be the only possible legitimate form of statutory interpretation, rather than one among several. For analysis of a similar problem with the method of interpretation proposed by Professors Hart and Sacks, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630, 661-69 (1958).

legislative history shows that the legislature had contrary intentions.[44]

This may or may not be a wise method for interpreting statutes, but it does not violate the supremacy principle. The concept of following instructions does not necessarily entail literalism. Indeed, wooden literalism, at the expense of the speaker's known purposes, is often used as a subtle form of disobedience, whether by obstructive bureaucrats or rebellious workers. A faithful agent will not give an order an entirely context-free or literal interpretation.[45] Similarly, the legislature could hardly complain that the courts have been insubordinate when judges have stretched the literal meaning of a statute to implement the legislative intent.[46]

The idea of legislative intent, however, is notoriously slippery.[47] If it is taken to require that a majority of the legislators share the same subjective view of the statute, the condition will rarely be met. Most legislators do not have time actually to read and come to an independent understanding of the statutes on which they vote. Rather, legislators depend on institutional actors (sponsors, committees, floor leaders, and staffers), who are charged with drafting statutes and moving them to enactment, to explain the meaning and import of the statutes under consideration.[48] Legislators normally—quite legitimately—accept the statements of these actors as commitments about the meaning of the enactments.[49]

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44. For judicial statements rejecting the plain meaning approach, see INS v. Cardoza Fonseca, 480 U.S. 421, 432 n.12 (1987); United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940); Escobar Ruiz v. INS, 838 F.2d 1020, 1023 (9th Cir. 1988); *see also* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 197-99 (1982); *see generally* Aleinikoff, *supra* note 3, at 31-32 (literalism is "no favor to the legislature" when it exalts plain meaning over legislative intent); Langevoort, *supra* note 3, at 729-30 (developing similar arguments against literalism).

45. For a general critique of strict literalism, see Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204, 205-09 (1980).

46. As Professor Merrill has stated: "If the legislative power belongs primarily to Congress, then it should not be regarded as a usurpation of that power for courts to interpret legislation to reach results that were specifically intended by Congress." Merrill, *supra* note 24, at 23. This statement is especially noteworthy because Merrill takes a very narrow view of the permissible scope of policymaking by the federal courts.

47. For a summary of the recent debate about the existence and significance of legislative intent, see Farber & Frickey, *Legislative Intent and Public Choice,* 74 VA. L. REV. 423, 425-37, 453-61 (1988).

48. *See* W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 94-95 (2d ed. 1984) (legislators generally defer to committee decisions); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 269-70 (1985) (arguing that committee reports and statements of sponsors are valid indicia of legislative intent, but statements of witnesses at hearings and of nonsponsoring members are not); Maltz, *supra* note 3, at 26-27 (legislators rely on committee reports and statements of floor managers to form their positions on bills).

49. Thus, these actors have an incentive to make their statements accurate. If the meaning of a statute is not consistent with the committee report or the sponsor's statement on which legislators have relied, the legislators will not likely cooperate in future endeavors with the committee or the sponsors. *See* R. POSNER, *supra* note 48, at 269.

Even assuming that the legislature possesses an ascertainable institutional understanding of a statute, one could ask why judges should be barred from adopting a contrary interpretation if the statutory language allows it. This question can be answered at two levels.

First, ignoring the legislature's understanding of statutes burdens the process of enactment with additional uncertainties. This, in turn, makes the process even more cumbersome and difficult.[50] A recent example can be found in the Senate debates over an arms control treaty. Approval of the treaty was delayed because the Reagan Administration refused to abide by a prior administration's commitments to the Senate regarding the meaning of a previous treaty, on the basis of which the Senate had approved that previous treaty.[51] If the legislature cannot trust the implementing authorities to respect its collective understanding, it may be reluctant to legislate at all; and if it does legislate, it will be forced to make substantial efforts to ensure that its intended meaning cannot be willfully ignored. An interpretative rule that ignores legislative intent will impose undue burdens on the legislative process, hindering the ability of the democratic branches to function effectively.

The second reason for respecting the legislature's collective understanding is more fundamental. The legislature's directives are entitled to the force of law because of their origins: "Statutory authority derives from its political source . . . ."[52] Once a statute is enacted, its meaning may not be limited to the intentions of its authors because the text has acquired a legal status of its own. But to construe the text squarely contrary to the collective understanding of the legislature weakens its claim to legitimacy.[53]

Thus, both the text and other evidence of the legislative intent seem relevant to determining judicial disobedience. Neither clear evidence of intent nor clear language, however, is alone sufficient to render contrary actions disobedient. There sometimes may be doubts about whether the intent was ever enacted or about whether the clear language should be taken literally. Thus, it is hard to state a mechanical rule to determine disobedience. The ultimate question is whether genuine doubt exists about the meaning of the legislative command. If a judge does have genuine doubts about the legisla-

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50. For a discussion of some of these increased transaction costs, see Farber & Frickey, *supra* note 47, at 458-59.

51. *See* Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper,* 99 HARV. L. REV. 1956, 1963-68 (1986); Gordon, *Within the Arms Debate, a 2d Debate,* N.Y. Times, Feb. 9, 1988, at A3, col. 1.

52. Weisberg, *supra* note 1, at 226. A literary work derives its authority from its own text. The identity of the author is of interest only because the text itself is significant. We care about Shakespeare because he wrote Hamlet, rather than vice versa. Commands are different. A general's orders are entitled to obedience because their source is the general, not because of their merits as texts. In this respect, statutes are more like orders than they are like literature.

53. *See* R. POSNER, *supra* note 3, at 229, 242-44, 256.

tion's meaning, there can be no question of obedience or disobedience.[54]

C. DEMOCRACY AND DISOBEDIENCE

The foregoing analysis suggests this formulation of the supremacy principle: When statutory language and legislative intent are unambiguous, courts may not take action to the contrary. In other words, when legislation clearly embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different.

This is not to suggest that the court should ignore statutory language or evidence of legislative intent in other situations. The same considerations that make language and intent binding when they are clear entitle them to judicial attention when they are unclear. When military orders are unclear, the officer must exercise his own judgment, but this should not mean that he ignores whatever guidance can be gleaned from the orders themselves. He simply may consider other factors as well.

Using this modest interpretation, the supremacy principle may seem obvious and noncontroversial. It is, nevertheless, worth pausing to inquire about its foundation. There are two reasons why courts should follow the supremacy principle.

The first is that the principle is a basic part of the traditional judicial methodology in our legal culture. We could conceive of a society in which courts were paramount, and legislatures merely proposed possible changes in the common law for judicial consideration. But that is not the world in which we live. Because the supremacy principle is fundamental to our institutional framework, violations of the principle defeat justified expectations and impair legal stability.

Second, in breaching the supremacy principle, a court is declining to implement clear decisions by the democratic branches of government. In our legal system, unlike some others, this is permissible if the court is willing to declare the statute unconstitutional. If the court actually believes the statute is unconstitutional, adopting a completely implausible "interpretation" to

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54. This assumes, of course, that it is possible for a text to communicate a clear meaning. In the context of legislative supremacy analysis, this assumption does not seem to be especially problematic, particularly because the contrary "indeterminacy" thesis is vulnerable to attack on several grounds. *See generally* Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 54 U. CHI. L. REV. 462 (1987). As often stated, the indeterminacy thesis contends that "a text lacks a single, objectively determinable meaning. A text's only meaning is the one given by an interpreter, who in turn always reads the text against a particular social and political backdrop." Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle,* 94 YALE L.J. 821, 823 (1985). Congress can reasonably anticipate that the judges and officials applying statutes will be somewhere within the political mainstream. If the meaning of a text is clear to mainstream judges, then that must be the meaning Congress desired. After all, Congress is also (perhaps by definition) rather firmly within the political mainstream.

reach the same result is intellectually dishonest and a breach of the duty of judicial candor.[55] On the other hand, if the court does not think the statute is unconstitutional, this necessarily means that under the court's own view of the Constitution, the legislature is entitled to have its way. In that event, refusing to implement the statutory command is simply lawless.

Violations of the supremacy principle are particularly serious because they impair the basic social norm of democratic self-government. When a court refuses to follow an admittedly constitutional statute, it arrogates the ultimate power to make public policy.[56] When the court concedes that a statute is within the legislature's prerogatives under the existing scheme of constitutional government, refusal to implement that statute is in a sense a minor assault on the constitutional structure itself.[57]

Although the imperative of the supremacy principle is quite strong, its scope is limited. It has a decisive impact only when the text and statutory history preclude genuine doubt about the statute's meaning. Moreover, although courts may not violate clearly enacted legislative intent, the supremacy principle does not prevent them from going beyond such intent in implementing statutory language when there are gaps in the legislative scheme. The language of a statute may also plausibly extend to situations beyond the legislators' specific intentions. Congress may have failed to consider broader applications of the statutory language, or may have failed to agree on the matter, leaving it to the courts to resolve. In deciding whether to adopt a broader reading, the court must look beyond the supremacy principle for guidance.

The supremacy principle is an incomplete guide to judicial decisionmaking, leaving much to be settled by recourse to other principles.[58] Its limited scope does not mean, of course, that beyond its mandate "anything

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55. On the importance of judicial candor, see Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731 (1987); *see also* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1, 10-22 (1964) (appellate judges must give candid reasons for accepting or dismissing an appeal). *But see* Greenawalt, *The Enduring Significance of Neutral Principles,* 78 COLUM. L. REV. 982, 1006-13 (1978) (candid statement of all reasons for decision may be inappropriate if the court needs to hand down a single majority opinion or if the actual grounds for decision would be legally suspect); Zeppos, *Judicial Candor and Statutory Interpretation,* 78 GEO. L.J. 353, 411 (1989) (complexity of judicial decisionmaking process makes it impossible for judges to articulate their reasoning).

56. *See* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 532, 545-46 (1947) (legislation should come from legislators, who are chosen to legislate, and not from the courts).

57. *See* Radin, *A Short Way With Statutes,* 56 HARV. L. REV. 388, 395-96 (1942). At the federal level, the supremacy principle gains added authority from the supremacy clause, which makes valid statutes "the supreme law of the land." U.S. CONST. art. VI, § 2. The clause appears to assume that courts lack any power to disregard federal statutes on nonconstitutional grounds.

58. The scope of the supremacy principle should not be exaggerated, because to do so would only hamper the search for other principled constraints on statutory interpretation.

goes." On the contrary, judicial decisionmaking may be tightly constrained in other ways, even when the principle of legislative supremacy is not involved.

Given its limited scope and relatively noncontroversial status, the supremacy principle may seem inconsequential. Nevertheless, as Part II will demonstrate, the principle is far from toothless.

II. JUDICIAL IMPLEMENTATION OF THE SUPREMACY PRINCIPLE

A. THE PARADIGM CASE

Chief Justice Burger's opinion for the Court in *Tennessee Valley Authority v. Hill*[59] is perhaps the most notable modern example of conscious judicial adherence to the supremacy principle. The facts of the case are familiar: the Court blocked completion of the Tellico Dam to protect an unremarkable but endangered species of fish known as the snail darter. Although the Court seemed somewhat uncomfortable with this result, it was compelled to reach its decision by the statute.[60]

The relevant provision, section 7 of the Endangered Species Act (ESA),[61] commanded all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species, or "result in the destruction or modification of habitat of such species . . . ."[62] As Chief Justice Burger's opinion made clear, Congress had repeatedly rejected efforts to qualify this language with references to the impairment of an agency's primary mission or to practicability.[63] Moreover, the legislative history contains repeated references to the mandatory nature and critical importance of an agency's duty to protect endangered species.[64] The statute and legislative history did not limit the agencies' duty to situations in which protection of endangered species is "reasonable." Justice

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59. 437 U.S. 153 (1978).

60. The Court's discussion of the legal issues opens with the following observation:

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

437 U.S. at 172-73.

61. Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (codified as amended at 16 U.S.C. § 1536(a)(2) (1982)).

62. 16 U.S.C. § 1536 (1976) (amended 1979).

63. 437 U.S. at 181-83.

64. *Id.* at 177-78, 182-84.

Powell, in dissent, suggested that Congress really only "intended to require governmental agencies to take endangered species into account in the planning and execution of their programs."[65] This was simply wishful thinking, in support of which Justice Powell was able to marshall no convincing arguments.[66]

In criticizing the majority opinion, both Justice Powell and, later, Professor Dworkin relied heavily on the fact that Congress continued to appropriate money to build the Tellico Dam even after it knew of the threat to the snail darter.[67] The Court carefully considered and rejected this argument.[68] The legislators who voted on the appropriations measures that included funds for the dam[69] were never put on notice that they were being asked to modify the Endangered Species Act.[70] Not only did the appropriations bills

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65. *Id.* at 207-08 (Powell, J., dissenting).

66. The only legislative history Justice Powell offered in support of his view that a reasonableness test should be imputed to § 7 is a statement by Senator Tunney that § 7 would not prohibit the Army Corps of Engineers from building a particular road if they deemed it necessary to do so. *Id.* at 208 n.17 (Powell, J., dissenting). As Chief Justice Burger noted, this statement was made during debate on an early version of § 7 that contained a practicability limitation later dropped by Congress. *Id.* at 186 n.31 (Burger, C.J., majority op.).

Justice Powell also argued that Congress intended that the statute apply only to future projects rather than to those in which large commitments of resources had already been made. *Id.* at 202-06 (Powell, J., dissenting). This argument is only plausible if we ignore the high priority that Congress placed on saving endangered species. If Congress was willing to forego unlimited future benefits to preserve endangered species, there is no reason to assume that it was any less willing to forego receiving a return from past expenditures. Whether Congress intends for a statute to be applied to existing projects may depend in part upon the legislative priority attached to that issue. For example, if Congress passed a statute absolutely forbidding the federal government from endangering the lives of children, it would be perverse to imply a grandfather clause allowing the government to complete any homicidal projects it already had underway.

In response to *Hill,* Congress amended the Endangered Species Act, creating a special Endangered Species Committee empowered to grant exemptions from the Act. Such exemptions may be granted if no reasonable alternatives are available, the costs of compliance outweigh the benefits of allowing the action, and the action is in the public interest and of at least regional significance. *See* Endangered Species Amendment of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752 (codified as amended at 16 U.S.C. § 1636(e)-(h) (1982)). The Committee denied an exception to the Tellico Dam, *see* 9 ENVTL. L. REP. 10,033 (1979), but Congress authorized its completion nonetheless. *See id.* at 10,183 (citing Pub. L. No. 96-69, tit. IV, 93 Stat. 437, 449 (1979)).

That Congress amended the ESA to allow exemptions on reasonableness grounds, and ultimately authorized the Tellico Dam, did not immunize other projects; nor did it authorize *courts* to make reasonableness judgments. Congress' action merely reaffirmed its institutional prerogative to make law that the courts are obligated to enforce. *See infra* notes 78 & 81. Indeed, very few projects have ever been exempted from the statute, *see* Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences,* 19 U. MICH. J.L. REF. 805, 829 (1986), and Congress has been content to allow the Act to have an extremely broad sweep. *See infra* note 81.

67. *See* Tennessee Valley Authority v. Hill, 437 U.S. at 209-10 (Powell, J., dissenting); R. DWORKIN, LAW'S EMPIRE 348-49 (1986).

68. 437 U.S. at 189-93.

69. *See* Pub. L. No. 94-355, 90 Stat. 889 (1976); Pub. L. No. 95-96, 91 Stat. 797 (1977).

70. *See* 437 U.S. at 192. Congress customarily continues to appropriate funds while litigation is pending, without prejudice to the results of the litigation. For examples of judicial discussion of this

fail to refer to the earlier statute, they also failed to refer specifically to the dam itself.[71] A legislator would have had to consult the Appropriations Committee report to have known that passage of the appropriations bill might affect the ESA.[72] As the Court pointed out, to expect members to scrutinize appropriations committee reports would have undesirable effects on the congressional process:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.[73]

Thus, passage of the appropriations bills did not itself carry any weight. The views of the Appropriations Committee, considered apart from any possible ratification of Congress as a whole, were also entitled to little weight. The Appropriations Committee apparently believed that the Tellico Dam could be lawfully completed,[74] but it conducted no hearings on the subject and lacked any particular expertise on the ESA.[75] Giving weight to such action on appropriations bills would merely invite special interests to abuse the appropriations process as a means of undercutting substantive legislation.[76]

For these reasons, the Court was correct to conclude that the statutory mandate was clear. The Court was also correct in its closing statement of the

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practice prior to *Hill*, see Environmental Defense Fund v. Froelke, 473 F.2d 346, 352-55 (8th Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 785-86 (D.C. Cir. 1971); Environmental Defense Fund v. TVA, 468 F.2d 1164, 1182 (6th Cir. 1972); *see also* Plater, *supra* note 66, at 842-44 (appropriations committees often continue funding despite contrary statutes or policies).

71. *See* 437 U.S. at 189 n.14; 90 Stat. at 899 (TVA appropriations); 91 Stat. at 808 (same).

72. *See* 437 U.S. at 189.

73. *Id.* at 190-91.

74. *Id.* at 189.

75. As the Court observed:

> We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple — and brief — insertion of some inconsistent language in Appropriations Committees' Reports.

Id. Moreover, the committee reports may have been based on a factual judgment about the possibility of transplanting the snail darter rather than on any specific interpretation of the statute. *See id.* at 192-93.

76. *See* Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1582 (1988) (appropriations process lacks visibility and is "comparatively likely to be dominated by well-organized private groups").

supremacy principle: "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."[77]

In short, *Hill* is a judicial performance exemplifying obedience to the legislature's commands at the expense of the Justices' own political preferences.[78] Ironically, it is just this aspect of the opinion that has been most harshly criticized as formalistic. For example, Professor Dworkin faults the Justices for failing to implement their own policy views. Hercules, his mythical ideal judge, has no difficulty in reaching a contrary result because Hercules thinks that "reading the statute to save the dam would make it better from the point of view of sound policy."[79] According to Dworkin, Hercules has "no reason of textual integrity arguing against that reading." Hercules' notion of textual integrity, one gathers, has an extraordinary degree of elasticity.

Professor Dworkin is not wrong to stress the creative aspects of the judge's role in statutory cases, nor is he wrong to suggest that the judge's own views of public policy can properly enter into the process. Where he goes wrong, at least if his discussion of *Hill* is to be taken seriously,[80] is in his apparent inability to perceive the difference between creatively interpreting a statute and rewriting the statute to suit one's desires. This is the distinction that the supremacy principle respects.

What may make *Hill* seem formalistic is that the Court takes Congress at its word, even though it is plausible to assume that many legislators really would have preferred that the Tellico Dam be built. Many of those who voted for the measure probably did not have strong feelings about endangered species. But the question is not what they privately felt, but rather what they voted on and what they understood it to mean. It seems clear that they did not understand the statute to embody a reasonableness test.

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77. 437 U.S. at 194. The opinion then ends with a quotation ascribed to Sir Thomas More in a play about the crucial importance of the rule of law. *Id.* at 195 (citing R. BOLT, *A Man for All Seasons,* in THREE PLAYS 147 (Heinemann ed. 1967)).

78. The Court was correct to refuse an invitation to "balance the equities" before issuing an injunction. 437 U.S. at 193-95. In essence, balancing the equities in this context would simply have meant displacing Congress' decision about the importance of protecting endangered species. *See* Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions,* 45 U. PITT. L. REV. 513, 518-19 (1984) (arguing that "a court cannot use equitable discretion as a pretext for reordering priorities that Congress already has set"); Plater, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV. 524, 591 (1982) ("When a court is asked to exempt a defendant from a legislative enactment, it is being invited to take over a core function of the legislature.").

79. R. DWORKIN, *supra* note 67, at 347.

80. Professor Dworkin has previously been faulted for his lapses in analyzing particular cases. *See* Christie, *Dworkin's "Empire"* (Book Review), 1987 DUKE L.J. 157, 182 n.186 (reviewing R. DWORKIN, LAW'S EMPIRE (1986)). Although Professor Dworkin cites actual cases, perhaps he only means that they should be taken as the basis for his own hypotheticals.

Dworkin's argument is plausible because of suspicions that the legislators were insincere in voting for the Endangered Species Act and even less honest in their posturing while the bill was being considered. To give effect to this suspicion would legitimate such legislative hypocrisy. If judges want the legislature to act with integrity, they must hold legislators to their public positions. Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later. Not only does the supremacy principle act as a constraint on courts, it also, indirectly, disciplines the legislature.[81]

B. VIOLATIONS OF THE SUPREMACY PRINCIPLE

Tennessee Valley Authority v. Hill is the paradigm of judicial adherence to the supremacy principle. Unfortunately, it is not hard to find cases in which the courts have been less obedient toward legislative mandates.[82] The cases in this section are not instances of simple judicial mistakes.[83] Rather, they resemble "jury nullification" because the judges were motivated by their disagreement with the legislature's view of public policy.

The first case, *International Harvester Co. v. Ruckelshaus,*[84] is a leading

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81. Congress responded to *Hill* by amending the Endangered Species Act to create a cabinet-level committee to review agency requests for exemptions from the Act. *See supra* note 66. The review committee rejected TVA's request for an exemption because it found that the benefits of completing the Tellico Dam did not clearly outweigh the benefits of other available alternatives. *Summary and Comments: The 1978 Amendments to the Endangered Species Act: Evaluating the New Exemption Process Under § 7,* 9 Envtl. L. Rep. (Envtl. L. Inst.) 10,031, 10,033 (1979). In response, Congress inserted a provision into the Fiscal Year 1980 energy and water development appropriations bill, authorizing completion of the Tellico Dam "notwithstanding the provisions of 16 U.S.C., chapter 35 or any other law." Pub. L. No. 96-69, tit. IV, 93 Stat. 437, 449 (1979). This provision, a prime example of a pork-barrel measure, had been strongly supported by the Tennessee congressional delegation. *See* Plater, *supra* note 66, at 857 ("linkage of Tennessee politicians to the TVA" was a critical factor in passage of legislation). President Carter signed the provision into law as part of a political deal to obtain a three-year authorization of the Endangered Species Act. *See 96th Congress, 1st Session: Environmental Issues in Limbo,* 10 Envtl. L. Rep. (Envtl. L. Inst.) 10,009, 10,013 n.54 (1980). Thus, the Supreme Court's decision forced Congress directly to confront the problem posed by *Hill.* Given the inherently political nature of the problem—a trade-off between protecting endangered species and promoting energy generation and economic growth, the cabinet review committee was probably a better solution than judicial exercise of equitable discretion. It would have been quite difficult for a court candidly to weigh the value of the dam against the value of saving the snail darter. To do so accurately, it would have had to announce the economic worthlessness of the congressionally authorized dam. For a detailed discussion of the litigation and its aftermath, see Plater, *supra* note 66. The amendment adding the cabinet-level committee may actually have strengthened the statute because exemptions became so difficult to obtain. *Id.* at 828.

82. This is not to say that such violations are common. The point is merely that the supremacy principle has more "bite" than might first appear.

83. These cases are drawn from the author's teaching in areas of environmental law and civil rights. Presumably, cases in these areas are not unique.

84. 478 F.2d 615 (D.C. Cir. 1973).

case in environmental law. Under the Clean Air Act,[85] car manufacturers were required to meet stringent air pollution standards by 1975. The Environmental Protection Agency (EPA) was authorized to grant a one-year suspension from the standards imposed by the Act if, among other things, "the applicant has established that effective control technology . . . [is] not available or [has] not been available for a sufficient period of time to achieve compliance prior to the effective date . . . ."[86] In 1972, the EPA denied applications for a one-year suspension filed by several car manufacturers.[87] In tests the manufacturers had performed on catalytic converters, none of the test cars had met the EPA's standards. After the EPA had made various adjustments to the test results, the agency concluded that the applicants had failed to demonstrate that the technology would be unavailable in time to meet the statute's mandate.[88]

In an opinion by Judge Levanthal, the D.C. Circuit reversed. As a matter of policy, Judge Levanthal concluded, the agency should not take a "hard-nosed" approach to the suspension issue.[89] After all, he observed, the environmental harm caused by a suspension would be relatively minor and the economic consequences of denying the suspension would be grave.[90] Based on this risk balancing, Judge Levanthal determined that once the companies reported their test results, the burden of proof shifted to the EPA to support the reliability of its methodology for adjusting these results.[91] After conducting a detailed examination of the technical issues, Judge Levanthal concluded that the EPA had failed to carry its burden:

> The number of unexplained assumptions used by [the EPA], the variance in the [EPA's] methodology from that of the Report of the National Acad-

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85. Pub. L. No. 89-272, 79 Stat. 992 (1955) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

86. 42 U.S.C. § 1857f-1(b)(5)(D)(iii) (1970) (current version at 42 U.S.C. § 7521(b)(5)(C)(iii) (1982)). Under this provision, the EPA also must determine that the suspension is essential to the public interest, that all good faith efforts have been made to meet the standards, and that the National Academy of Sciences agrees that the technology is unavailable. *Id.* at § 7521(b)(5)(C).

87. 478 F.2d at 624.

88. *Id.* at 626.

89. *Id.* at 649.

90. Judge Levanthal reasoned thus:

> This case inevitably presents, to the court as to the Administrator, the need for a perspective on the suspension [issue] that is informed by an analysis which balances the costs of a "wrong decision" on feasibility against the gains of a correct one. These costs include the risks of grave maladjustments for the technological leader from the eleventh-hour grant of a suspension, and the impact on jobs and the economy from a decision which is only partially accurate, allowing companies to produce cars but at a significantly reduced level of output. Against this must be weighed the environmental savings from denial of suspension. The record indicates that these will be relatively modest.

478 F.2d at 641.

91. *Id.* at 641, 643.

> emy of Sciences, and the absence of an indication of the statistical reliability of the [EPA's] prediction, combine to generate grave doubts as to whether technology is available to meet the 1975 statutory standards.[92]

Judge Levanthal's reasoning, boiled down, was that it was better policy to err in the direction of granting the suspension, so doubtful cases should be decided in favor of the industry. This meant, of course, that the burden was effectively on the EPA to establish technological feasibility. There is only one problem with this result: the statute required precisely the opposite.[93] Thus, if the availability of technology was in doubt, as the court apparently believed it was in *International Harvester,* the statute required a decision in favor of the EPA. Obviously, Judge Levanthal believed—perhaps correctly—that such a decision would be poor public policy.[94] But equally obvious is that Congress had taken (to use Judge Levanthal's expression) more of a "hardnosed" approach to achieving air pollution standards. The principle of legislative supremacy required Judge Levanthal to defer to Congress' expressed views.[95]

Another environmental law decision that violates the supremacy principle is *Ruckelshaus v. Sierra Club.*[96] At issue in *Ruckelshaus* was whether the Sierra Club was entitled to attorneys' fees for its participation in an important air pollution case. The underlying litigation was an extremely complex, multi-party challenge to the EPA regulation governing sulfur dioxide emissions by coal-burning power plants. None of the Sierra Club's attacks on the regulation were successful, but the D.C. Circuit found the Sierra Club's briefs helpful in understanding the complicated issues in the case. Additionally, the Sierra Club's arguments may have redounded to the benefit of the EPA as the agency defended the regulations from industry challenges. Under the circumstances, the court concluded that a fee award was

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92. *Id.* at 648.

93. 42 U.S.C. § 7521(b)(5)(C)(iii) (1982). The statute explicitly required the waiver applicant to establish that the necessary technology was not available. *See supra* note 86 and accompanying text. The disparity between the statute and the court's decision is noted in Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework,* 69 CALIF. L. REV. 1256, 1304-05 (1981).

94. Judge Levanthal's opinion gains plausibility from the suspicion that Congress did not really mean what it said. *See* Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law,* 1 J.L. ECON. & ORG. 313, 336 (1985) (arguing that Congress knew pollution standards were unrealistic). As in *Hill,* this suspicion, although perhaps well-founded, should not carry much weight in statutory interpretation. *See supra* text accompanying note 78.

95. Had Judge Levanthal deferred to Congress' expressed views, Congress would have been forced to intervene, which in the long run seems institutionally healthier than a judicial "bail-out." Congress might well have been able to devise a more creative remedy, such as a differential emissions tax that would have prevented an industry shut-down while rewarding Ford, the most diligent of the car companies.

96. 463 U.S. 680 (1983).

appropriate.[97]

In an opinion by Justice Rehnquist, the Supreme Court reversed. If its liberal use of italics is any guide, the Court found the idea of awarding fees to a nonprevailing party to be almost scandalous:

> Our basic point of reference is the "American Rule" . . . under which even "the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the *loser*." It is clear that generations of American judges, lawyers, and legislators, with this rule as the point of departure, would regard it as quite "inappropriate" to award the "loser" an attorney's fee from the "prevailing litigant." Similarly, when Congress has chosen to depart from the American Rule by statute, virtually every one of the more than 150 federal fee-shifting provisions predicates fee awards on *some* success by the claimant . . . .[98]

This consistent rule, the Court continued, reflects ordinary notions of justice that "reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it."[99]

Congress, however, is apparently less absolutely attached to the American Rule, as illustrated by the routine provision for attorneys' fees in modern statutes.[100] Unlike the statutes cited by the Court,[101] the fee-shifting statute applied in *Ruckelshaus* quite pointedly avoided the usual reference to prevailing parties. Instead, it provided for a fee award whenever the court determines "such award is appropriate."[102]

This phrasing was not inadvertent. The House Report on the provision explains that the purpose of fee awards is "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest."[103] Consequently, the report continues, "[t]he committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the

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97. Sierra Club v. Gorsuch, 672 F.2d 33, 41 (D.C. Cir. 1982) (per curiam), *rev'd sub nom.* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

98. 463 U.S. at 683-84 (citation omitted) (emphasis in original).

99. *Id.* at 685.

100. *See, e.g.*, 42 U.S.C. § 1988 (1982) (court granted discretion to award prevailing party reasonable attorneys' fees).

101. 463 U.S. at 684 nn.3-5 (citing the Voting Rights Act of 1965, the Freedom of Information Act, and the Real Estate Settlement Procedure Act, among others).

102. 42 U.S.C. § 7607(f) (1982). Such reference to granting an award when "appropriate" normally would be quite open-ended, but is less so in this context. Given the fact that fee-shifting provisions in other statutes routinely refer to prevailing parties, the use of different language here suggests strongly that Congress meant something other than a prevailing party standard. Whatever "appropriate" means here, it seems least likely to mean "prevailing party." Yet the Court adopted precisely the latter reading. *See Ruckelshaus,* 463 U.S. at 686.

103. 463 U.S. at 687 (citing H.R. REP. No. 294, 95th Cong., 1st Sess. 337, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1077, 1416 [hereinafter H.R. REP. No. 294]).

'prevailing party.' "[104] The committee then cited a court of appeals opinion rejecting the prevailing party standard because of the important role of private watchdogs in implementing "novel and complex" legislation.[105]

Despite the Court's half-hearted effort to explain away the language and legislative history of the statute,[106] the meaning of the statute seems unmistakable. The Supreme Court approached the case with a deep suspicion of fee-shifting. As a result, the Court apparently was either unwilling or unable to comply with the clear statutory directive. Justice Stevens was quite right to argue in dissent that the crux of the case was the Court's duty to defer to Congress' policy decision.[107]

These cases are not subject to criticism because they violate some supposed rule against judges consulting their own views of public policy when interpreting statutes. Rather, they should be criticized for crossing the line between creative interpretation made necessary by statutory ambiguity and creative rewriting made possible by the judges' "sly refusal" to follow a reasonably clear statutory command.[108]

A similar problem is found in a more dramatic setting in *United Steelworkers of America v. Weber,*[109] which involved one of the most "starkly divisive"[110] issues in American politics. The *Weber* Court held that title VII[111] allows employers to engage voluntarily in affirmative action favoring minor-

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104. H.R. REP. No. 294, *supra* note 103, at 337.

105. *Id.* (citing NRDC v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973)).

106. The Court argued that Congress understood the "prevailing party" standard to be quite narrow, excluding parties that had succeeded only on some issues. Hence, the Court reasoned, Congress intended by rejecting the prevailing party standard to "expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties." 463 U.S. at 687-88 (emphasis in original). As Justice Stevens explained in dissent, this was historically inaccurate. *Id.* at 708-11 (Stevens, J., dissenting).

107. Justice Stevens said:

> Regardless of our views about the wisdom of the choice Congress made, we have a plain duty to accept it. Congress consciously selected a particular course: that a party who seeks judicial review of an EPA regulation may be entitled to compensation from the Government, when the court deems it "appropriate," even if the reviewing court determines that there is no ground for disturbing the agency's conclusions. I would construe this category of "appropriate" cases to be narrow; it is wrong, however, to read it out of the statute altogether. It is not the function of the courts to "sit as a committee of review, nor are we vested with the power of veto."

Id. at 711-12 (footnote and citations omitted).

108. Dean Calabresi used the term "sly refusal" to characterize willful judicial ignorance of discernible statutory meaning. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 38 (1982).

109. 443 U.S. 193 (1979).

110. *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases,* 100 HARV. L. REV. 78, 78 (1986).

111. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. § 2000e-e17 (1982)).

ity groups, when a "manifest racial imbalance" is present, provided that the affirmative action plan meets certain standards of reasonableness.[112] Notably, *Weber* does not require that the threshold racial imbalance be the result of even arguably illegal conduct by the employer, or of illegal discrimination by third parties.[113] In *Weber,* because blacks were a large percentage of the local work force, but only a tiny percentage of the employer's skilled craftworkers, the Court upheld a crafts skills training program that reserved for blacks half of all openings in the program.[114]

In discussing *Weber,* it is helpful to distinguish between two conceptually distinct types of affirmative action. Remedial affirmative action is aimed at correcting possible illegal discrimination by an employer.[115] It need not rest on actual proof of a violation, but it does require at least some evidence of unlawful discrimination, such as a "conspicuous . . . imbalance in traditionally segregated job categories."[116] The Court has recently made clear that *only* remedial affirmative action is permissible in situations involving state governments.[117] Nonremedial programs are aimed at correcting racial imbalances regardless of their cause, even when the employer has a spotless record. For example, even though an employer has actually hired a greater percentage of minority applicants than white applicants, if a shortage of minority applicants has caused a racially imbalanced workforce the employer might institute a nonremedial program. In *Weber,* at least as construed in later opinions, the Court upheld nonremedial affirmative action.[118]

The problem with the *Weber* holding, as Justice Rehnquist pointed out in dissent, is that it contradicts both the plain language and the legislative history of title VII.[119] The statute itself clearly establishes a general policy

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112. *See* Johnson v. Transportation Agency, 480 U.S. 616, 625-26, 630 (1987) (explaining *Weber*).

113. *Id.* at 624-25.

114. *Weber,* 443 U.S. at 197-200.

115. For particularly clear examples of the use of affirmative action as a remedial tool, see United States v. Paradise, 480 U.S. 149 (1987), and Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

116. *Johnson,* 480 U.S. at 630 (quoting *Weber,* 443 U.S. at 209 (Blackmun, J., concurring)).

117. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 727 (1989) (under fourteenth amendment, classifications based on race are valid as remedial measures).

118. *E.g.,* Wygant v. Jackson Board of Education, 476 U.S. 267, 280-82 (1987) (plurality op.); *Johnson,* 480 U.S. at 630.

119. *Weber,* 443 U.S. at 252-53 (Rehnquist, J., dissenting). Arguments that the statute is ambiguous focus on the use of the word "discriminate" in some provisions, claiming that this term might not apply to affirmative action because any discrimination resulting from affirmative action would not be invidious. *See* R. DWORKIN, A MATTER OF PRINCIPLE 318 (1985) ("discriminate" may be used in a neutral way or in an evaluative way); Eskridge, *supra* note 11, at 1489-90 ("discriminate" has at least two plausible interpretations). This indeterminacy is the basis for Dworkin's argument that because Congress had "no pertinent collective understanding" about affirmative action, judges must use their own political judgment about its merits. *See* Dworkin, *supra,* at 329. In context, however, there seems to be no reason to read "discriminate" as meaning anything more subtle than "disadvantage."

against considering race in employment decisions. Section 703(a)(2), for example, prohibits employers from classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."[120] Furthermore, the statute's legislative history demonstrates that Congress was uneasy about preferential treatment, even as a remedy for past violations. The Senate floor captain in charge of the bill said that even if an employer had discriminated in the past, his only "obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged — *or indeed permitted* . . . to prefer Negroes for future vacancies."[121] In sum, allowing employers to use racial preferences to remedy "imbalance" cannot be reconciled with the statutory language or legislative history.[122]

In response to these criticisms, Justice Brennan, writing for the Court, made two arguments. First, he pointed out that the supporters of the Civil Rights Act intended to improve the economic lot of minority groups.[123] Congress chose to pursue this goal, however, through an antidiscrimination policy. The Court was not free to displace that congressional choice merely because the Justices thought Congress had picked the wrong strategy. To return to the military analogy, Justice Brennan was in somewhat the same position as a captain who has violated a general's order. The captain argues that he did not really disobey, because his action was a better way of attaining the general's ultimate purpose of winning the war. If such a defense were recognized, a military order would become little more than a recommendation. Similarly, Justice Brennan's argument would reduce statutory mandates to the status of policy proposals.

Justice Brennan's fallback argument was that section 703(j) of the statute introduces some ambiguity about congressional intent regarding remedial programs that employers enter into voluntarily. Section 703(j) states that nothing in the statute shall be construed to "require" any employer to give preferential treatment to remedy a racial imbalance.[124] Justice Brennan argued that this provision authorizes voluntary preferential treatment. Otherwise, he suggested, Congress would have disclaimed any intent to "require *or*

120. 42 U.S.C. § 2000e-2(a)(2) (1982). Similar language is found in subsection (a)(1) and in section (d).

121. 110 CONG. REC. 7213 (1964) (emphasis added). As Justice Rehnquist demonstrates in his dissent, the record is replete with similar statements in favor of "color-blindness." 443 U.S. at 235-51.

122. For an extensive discussion of this point, see Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment,* 47 U. CHI. L. REV. 423 (1980).

123. *Weber,* 443 U.S. at 202-04. For a general discussion regarding the risks of allowing such appeals to statutory purpose to undermine statutory rules, see Schauer, *Formalism,* 97 YALE L.J. 509, 532-35 (1988).

124. 42 U.S.C. § 2000e-2(j) (1982).

permit" preferential treatment.[125] As even those who support *Weber* concede, this is less than a compelling argument.[126] If Congress meant to authorize preferential hiring, it almost certainly would have used less subtle means.

Against Justice Brennan's arguments must be weighed the relatively clear statutory language and legislative history stressing the inappropriateness of racial considerations in employment decisions. It is difficult to escape the conclusion that the Court went "not merely *beyond*, but directly *against* title VII's language and legislative history."[127]

In displacing congressional policy to allow preferential hiring, the Court appears to have violated the supremacy principle. It is not certain, however, that all types of affirmative action invariably violate this principle with respect to title VII, because some form of affirmative action may be necessary to remedy violations of the statute. Vigorously pursuing an antidiscrimination policy may require employers, the Equal Employment Opportunity Commission (EEOC), or courts to use hiring targets as the only effective way of ensuring compliance with title VII's mandate.[128] For example, it would be enormously inefficient for General Motors to monitor company-wide compliance with an antidiscrimination directive by reviewing every minority job application submitted to each of the company's regional offices and plants. Instead, GM could ensure compliance with the directive by instituting minority hiring targets at each office and plant. Only if a plant failed to meet its target would headquarters actually need to audit applications. Similarly, it might not be efficient or even possible for the EEOC to monitor discrimina-

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125. 443 U.S. at 205-06.

126. *See* Edwards, *Affirmative Action or Reverse Discrimination: The Head or Tail of* Weber, 13 CREIGHTON L. REV. 713, 744-45 (1980) (stating that any voluntary preferential treatment potentially allowed by § 703(j) is still subject to §§ 703(a) and (d), which clearly "control the validity" of such treatment); Eskridge, *supra* note 11, at 1490 n.41 (suggesting that this argument is not wholly invalid, but rests upon a "highly unreliable" canon of construction and provides an "implausible view" of the purpose of § 703(j)). By analogy to Brennan's argument in *Weber,* one could read the eleventh amendment as an affirmative grant of federal jurisdiction over states in federal question cases.

127. 443 U.S. at 255 (Rehnquist, J., dissenting) (emphasis in original).

128. The need for hiring targets has probably become more acute since the statute has been construed to prohibit not only intentional discrimination but also facially neutral employment practices that have an unintended disparate impact on minorities. *See* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2785 (1988) (O'Connor, J., plurality op.). Several Justices have commented on the pressure such a construction of title VII creates toward affirmative action, *id.* at 2787-88, including Justice Blackmun in his *Weber* concurrence. 443 U.S. at 209-11 (Blackmun, J., concurring). However, this pressure alone is not a sufficient basis for allowing affirmative action. Since *Weber,* the Court has retreated from the disparate impact doctrine. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989) (cutting back on "disparate impact" claims under title VII). If the Court were to rely solely on the pressure for affirmative action created by disparate impact analysis, it appears that the legality of affirmative action under title VII could change every decade.

tion on a case-by-case basis, whereas using minority hiring targets as a trigger for case-by-case investigation would be both affordable and effective.

An analogy to *Hill* may be illuminating. Congress' high priority on saving endangered species prohibits a court from weighing other social policies against that congressional goal. On the other hand, if endangering one species was the only way to save another, either choice would be arguably consistent with the congressional mandate. Allowing employers to use affirmative action to remedy unlawful discrimination,[129] like threatening one endangered species to save another, does not violate the supremacy principle. The congressional mandate is perhaps bent, but not flouted by remedial affirmative action. In contrast, nonremedial affirmative action cannot be squared with the statute.[130]

Title VII can, and perhaps should, be read to allow affirmative action to correct unlawful discrimination. The *Weber* Court violated the congressional mandate, however, by allowing broad nonremedial use of affirmative action. The most interesting arguments in favor of upholding *Weber* concede this point, but argue that events since 1964 justify the result.[131] Before considering those arguments, we first must consider the broader question of how the passage of time affects the obligation to obey legislative mandates.

III. THE TEMPORAL ELEMENT IN LEGISLATIVE SUPREMACY

Several writers have suggested that because a statute's legal meaning is not entirely fixed when enacted, post-enactment events can be relevant to interpreting that statute.[132] A corollary of this theory is that courts should have more flexibility in interpreting old statutes than they have with respect to recent enactments.[133] The supremacy principle might suggest a contrary conclusion. If the text and original legislative understanding are clear, a

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129. In Justice O'Connor's view, title VII permits this use of affirmative action. *See* Johnson v. Transportation Agency, 480 U.S. 616, 650 (1987) (O'Connor, J., concurring).

130. *See Watson,* 108 S. Ct. at 2788 (congressional intent is "clear and emphatic" that title VII not lead to nonremedial affirmative action).

131. *See infra* text accompanying notes 175-80.

132. *See, e.g.*, R. DWORKIN, LAW'S EMPIRE 347-48 (1986) (suggesting that political decisions subsequent to enactment may be relevant to statutory interpretation); Farber, *supra* note 14, at 6-7 (arguing that alternative interpretive approaches are justified when originalist analysis becomes untenable); Popkin, *The Collaborative Model of Statutory Interpretation,* 61 S. CAL. L. REV. 541, 620-26 (1987) (providing examples of statutes interpreted in light of later developments).

133. *See* R. DWORKIN, *supra* note 132, at 350 (as statute ages, court may pay less attention to formal statements made at time of enactment); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1537 (1985) (arguing that the Court has more flexibility when interpreting older constitutional amendments than when interpreting more recently enacted amendments). Legislators may be indifferent to the long-term effects of statutes because these effects are minimal after being discounted to present value. This observation may sometimes be correct, but the argument is slippery because legislators may expect fairly significant long-term benefits that, even when discounted to present value, would be far from mini-

court would appear to have an obligation to apply the statute regardless of later developments. In fact, the supremacy principle may allow courts to disobey clear statutory language when, because of post-enactment events, the legislature's intent would be undermined by strict adherence to the statutory formula.

A. CHANGING VIEWS OF PUBLIC POLICY

Statutes are difficult to pass, but they are also hard to repeal. Consequently, a statute may remain on the books indefinitely, even though it no longer represents the dominant societal view of public policy. If a court believes that a statute is no longer consistent with contemporary mores, enforcing the legislative command may be a rather distasteful exercise.

Under certain limited circumstances, accepted methods are available to deal with this problem.[134] For example, if later legislation reflects a more palatable view of public policy, the court can declare that the earlier statute has suffered repeal by implication, or, less drastically, can reinterpret the old statute in light of later enactments.[135] Alternatively, if the statute touches upon a constitutionally sensitive area like gender-based classification, the vintage of the statute may be relevant to its constitutionality.[136] But often neither of these approaches is applicable, leaving the court with no apparent way to deal with the problem of the outmoded statute.

A somewhat radical solution is to declare the outmoded statute defunct. In support of this solution, Dean Guido Calabresi argues that the legitimacy of an old statute rests only on the facts that "it has gone unrepealed; and it once commanded a majoritarian bias."[137] The first fact, he observes, is

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mal. Moreover, even if legislators themselves have short time perspectives, the interest groups involved in the legislative process may take a longer view.

134. These conventional approaches are discussed in W. ESKRIDGE & P. FRICKEY, *supra* note 2, at 869-71, 879-82; *see also* Bonfield, *The Abrogation of Penal Statutes By Nonenforcement,* 49 IOWA L. REV. 389, 392-95 (1964) (outlining judicial approaches and arguing for civil doctrine of desuetude in which prolonged failure to enforce results in abrogation or repeal).

135. *See* United States v. Fausto, 108 S. Ct. 668, 676-77 (1988) (Civil Service Reform Act required repeal of judicial interpretation provision of the Back Pay Act, but not of Back Pay Act itself).

136. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 717, 725, 730 n.16 (1982) (statute's gender-based classification constitutes "archaic" characterizations of women and denies equal protection); Califano v. Goldfarb, 430 U.S. 199, 211 (1977) (plurality op.) (gender-based classification deriving from "archaic and overbroad" generalizations deny equal protection); *id.* at 223-24 (Stevens, J., concurring) (arguing that discrimination at issue is accidental byproduct of traditional way of thinking about women, and hence is not a substantial basis, under fifth amendment analysis, for disparate treatment).

137. G. CALABRESI, *supra* note 108, at 101-02. Calabresi's view of legislative legitimacy is critiqued in Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade* (Book Review), 82 COLUM. L. REV. 1752, 1762-66 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)).

equally true of old common law decisions that the legislature has left standing, and the second fact lacks significance if majority support for the statute has evaporated.[138] Hence, an old statute is no more (although, perhaps, no less) entitled to the court's respect than an old judicial precedent.

The major flaw in this argument is that it treats inertia as simply an unfortunate side effect of the political system—as if an ideal democratic system would instantly reflect changes of majority sentiment. On the contrary, the agenda rules and institutional structures that create legislative inertia are themselves fundamental to the workings of legislatures.[139] Without these constraints and constructs, legislatures would be plagued by instability and would be unable to function as deliberative bodies.[140]

Our legislative process is designed so that laws will outlive the political coalitions that enact them.[141] It is not at all clear that a democratic system could function otherwise. What is clear is that pure majoritarianism has

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138. G. CALABRESI, *supra* note 108, at 102-03. Calabresi's thesis is presaged in G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 447-48 (2d ed. 1975).

139. *See generally* Farber & Frickey, *The Jurisprudence of Public Choice,* 65 TEX. L. REV. 873, 903-06 (1987) (discussing how structural and rule-based constraints on legislative process promote legislative stability).

140. This is one of the fundamental insights of modern public choice theory. *See* W. RIKER, LIBERALISM AGAINST POPULISM 169-95 (1982) (arguing that the outcome of a legislative vote is the product of manipulation of legislative choices by a means of agenda control); Shepsle & Weingast, *Structure-Induced Equilibrium and Legislative Choice,* 37 PUB. CHOICE 503, 507-11 (1981) (institutional arrangements that restrict excessive legislative exchange enhance stability in pure majoritarian rule legislatures). For a detailed summary of the literature, see Farber & Frickey, *supra* note 47, at 425-35.

141. The Framers were keenly aware of the inherent instability of majority rule. In support of his argument for an extended republic, Madison criticized pure democracies as "spectacles of turbulence and contention." THE FEDERALIST NO. 10, at 81 (J. Madison) (C. Rossiter ed. 1961). One of Madison's major arguments for bicameralism (and in particular, for the Senate) was "the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions . . . ." THE FEDERALIST NO. 62, at 379 (J. Madison) (C. Rossiter ed. 1961). Federalist No. 62 also speaks at length about the costs of instability:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?
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> . . . .
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> In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. . . . In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.
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> But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No govern-

never been our system of government. It is a basic institutional requirement of our system of government that the legitimacy of a statute be independent of the current state of public opinion. Thus, it would be a mistake to add a proviso to the supremacy principle that "courts must enforce statutes, unless the latest Gallup poll shows that a statute has clearly lost majority support."

A less radical way to deal with outmoded statutes is for courts to interpret them consistent with current public mores.[142] When the statutory command is unclear, the supremacy principle does not preclude courts from bringing contemporary values to bear. But when the statutory language and legislative history make the statute's meaning unmistakable, such "interpretation" is more in the nature of a partial repeal. Under such circumstances, dynamic interpretation collapses into the Calabresian argument,[143] and it should be rejected for the same reason.

B. LEGISLATIVE META-INTENT AND DYNAMIC INTERPRETATION

The previous section considered Dean Calabresi's proposal that courts should have the power to nullify statutory directives that have lost majority support. This proposal would not be favored by enacting legislators, because it would substantially decrease the value of legislation to its supporters. Knowing that majority coalitions are unstable, the members of a coalition have good reason to want their legislation to survive it.[144] Consequently, Calabresi's proposal would bring courts into conflict not only with the statutory directives, but also with the legislature's own "meta-intent" concerning how courts should apply statutes.

A rational legislator might, however, favor a rule that would allow courts to disregard statutory directives under other circumstances.[145] Our hypothetical military officer, for example, might not want his order carried out if unforeseen circumstances make the order obviously futile or counterproduc-

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> ment, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.

Id. at 381-82; *see also* THE FEDERALIST No. 71, at 431 (A. Hamilton) (C. Rossiter ed. 1961) (strong executive adds to stability and reduces government's vulnerability to capricious shifts in public opinion).

142. This is the tack Professor Dworkin takes. *See* R. DWORKIN, *supra* note 132, at 340-41, 348-49 (arguing that political fairness requires that statutory interpretation be based on current public opinion, not public opinion at the time of enactment). Related arguments for dynamic interpretation can be found in Aleinikoff, *supra* note 3, at 46-66; Eskridge, *supra* note 11, *passim*; and, in a more limited form, in Farber & Frickey, *supra* note 47, at 461-68 (proposing model in which subsequent legislative events are relevant factors in interpreting statutes).

143. Calabresi himself suggests that this form of interpretation is undesirable. *See* G. CALABRESI, *supra* note 108, at 32-39; *supra* notes 137-38 and accompanying text.

144. *See* McCubbins, Noll & Weingast, *Administrative Procedures as Instruments of Political Control,* 3 J.L. ECON. & ORG. 243, 255 (1987).

145. *See generally* Aleinikoff, *supra* note 3, at 56-57.

tive. For instance, it would hardly be an act of insubordination to disregard an order to shell a hill, if in the meantime the hill had been taken by friendly forces. Similarly, the legislature might not appreciate having its intended beneficiaries wiped out by the courts' "friendly fire."

Several private law analogies exist. In contract law, for example, it is well established that performance of a contract may be excused if performance becomes impractical, or if changed circumstances frustrate the basic purpose of the contract.[146] Similarly, under the *cy pres* doctrine, provisions of a trust may be nullified or even rewritten by a court when changed circumstances prevent the original provisions from attaining the donor's goals.[147] To a literalist, these doctrines might seem to involve judicial disobedience to the directions of the contracting parties or the donor. But this criticism misfires because these rules are, in fact, those that rational parties would have chosen to incorporate in their directives if they had considered them.[148]

For this reason, a statutory *cy pres* doctrine would only superficially conflict with the supremacy principle.[149] Because the doctrine is one that ra-

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146. *See* U.C.C. § 2-615 (1988) (excuse by failure of presupposed conditions); E. FARNSWORTH, CONTRACTS § 9.1, at 647, § 9.6, at 677, § 9.7, at 689 (1982) (discussing mistake, impracticability, and frustration doctrines). Also, there are growing arguments in favor of allowing judicial modification of long-term contracts because of changed circumstances. *See generally* Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law,* 1987 DUKE L.J. 1.

147. According to the Second Restatement of Trusts:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). For an interesting discussion of this doctrine, see Comment, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine,* 40 STAN. L. REV. 973 (1988) (by V. Laird).

148. This is the standard "law and economics" view of state supplied contract terms. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 82 (3d ed. 1986); Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms,* 73 CALIF. L. REV. 261, 262, 266-67 (1985) [hereinafter Goetz & Scott, *Limits of Expanded Choice*]; Goetz & Scott, *Principles of Relational Contracts,* 67 VA. L. REV. 1089, 1089-90 (1981).

149. Although the concept of statutory *cy pres* has not found explicit recognition in American law, there are cases that seem to reach similar results. For example, in Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983), the court declined to enforce a clear congressional mandate that homosexuals be excluded from entry into the country because Congress had acted on the outmoded understanding that homosexuality was a psychiatric disorder. *Id.* at 584-85. In Li v. Yellow Cab, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the California Supreme Court abrogated a long-codified doctrine of contributory negligence, replacing it with comparative negligence. The court justified this apparent step into the legislative sphere by demonstrating that the California statute embodying contributory negligence was not intended to freeze the development of the negligence doctrine in the courts, but merely to clarify the extent of that development at the time the statute was enacted. *Id.* at 1232-39. *Id.* at 812-23, 532 P.2d at 1232-39, 119 Cal. Rptr. at 864-71. *Li* is not a typical statutory *cy pres* case, because the disputed statute was intended from its inception to be amendable

tional legislators themselves would favor, courts that engage in this type of dynamic interpretation can properly claim to be implementing rather than frustrating the legislators' design. For example, technological change might turn a statute passed for safety reasons into an actual source of increased danger. Under such circumstances, serious doubt will arise whether the enacting legislators intended the statute to apply; thus, disregarding the statute would not be considered an act of insubordination.

A recent case prompted an intriguing debate among the Justices about the effect of changed circumstances on statutory directives. *K Mart Corp. v. Cartier, Inc.*[150] involved an obscure customs regulation governing the importation of foreign-manufactured, trademarked goods. Section 526 of the Tariff Act of 1930[151] prohibits importing such goods if the trademark is owned by a United States citizen or corporation.[152] *K Mart* involved "gray-market" goods—that is, goods bearing United States trademarks, but imported without the consent of the trademark holder. The Customs regulation challenged in *K Mart* allowed gray-market goods to be imported under certain circumstances,[153] such as when the United States owner had authorized the use but not the importation of the trademark.[154] Justice Kennedy, in his opinion for the Court, rather brusquely held this exception to be inconsistent with the plain statutory language.[155]

For present purposes, the more interesting discussion is contained in the separate opinions of Justices Brennan and Scalia, each of whom represented a faction of four Justices. Justice Brennan, in the dissenting portion of his opinion, essentially conceded that the plain language of the statute was inconsistent with an exception for imported goods bearing a trademark that was authorized by the trademark's United States owner,[156] but argued that Congress never intended section 526's protections to cover such goods.[157] Justice Brennan reasoned that trademark law had changed radically in the fifty years since the statute was passed. When Congress imposed the import restriction, he suggested, trademarks served only to identify the source of

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to future jurisprudential developments. The *Li* approach is, however, essentially similar to *cy pres* in that it involves updating legislative pronouncements in light of developments unforeseen by the enacting legislators, while still abiding by the legislators' original purpose in enacting the statute. *Cf.* Langevoort, *supra* note 3, at 732-33 (courts have engaged in covert statutory updating in bank regulation cases).

150. 108 S. Ct. 1811 (1988).

151. Tariff Act of 1930, ch. 497, tit. IV, § 526, 46 Stat. 590, 741 (1930) (codified as amended at 19 U.S.C. § 1526 (1982)).

152. 19 U.S.C. § 1526(a).

153. 19 C.F.R. § 133.21(c) (1987).

154. *Id.* § 133.21(c)(3).

155. 108 S. Ct. at 1817-18.

156. *Id.* at 1828 (Brennan, J., concurring in part).

157. *Id.* at 1830.

goods.[158] Under this regime, Manufacturer *Y* could not legally license another manufacturer to use the "X" trademark; to do so would be "philosophically impossible since licensing meant that the mark was being used by persons not associated with the real manufacturing 'source' in a strict, physical sense of the word."[159] Hence, the Congress that enacted section 526 could not have imagined a foreign manufacturer's goods bearing United States trademarks under license, and could not have intended section 526 to reach such goods.[160] Justice Brennan drew an analogy to a nineteenth-century statute requiring ovens to be inspected for their propensity to spew flames; such a statute, he maintained, was never intended to apply to, and need not be applied to, microwave or electric ovens.[161]

Justice Scalia vigorously attacked Brennan's analysis. He argued that section 526 applied unambiguously to the case at bar,[162] and that courts should not "rewrite the United States Code to accord with the unenacted purposes of Congresses long since called home."[163] Rather, he argued, it is "the prerogative of each currently elected Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile; and to allow those laws whose effects have been expanded by change to remain alive if it favors the new effects."[164]

Justice Scalia's argument has several weaknesses. First, Congress does not have the luxury of "allowing statutes to die an unobserved death." Rather, Congress must engage in active euthanasia by repealing them. As Justice Scalia himself has argued elsewhere, the fact that a statute has not been repealed often reflects nothing more than inertia.[165] In *K Mart,* Scalia's argument is particularly weak, because Congress might well have assumed that the agency's regulations were valid, making legislative action to update the statute unnecessary.

Secondly, Justice Scalia's reference to rewriting statutes to accord with the "unenacted purposes" of past Congresses is puzzling, because it is precisely the enacted purpose of the statute that concerned Justice Brennan. Here, it is important to distinguish Justice Brennan's argument in *K Mart* from his argument in *Weber.* In *Weber,* Justice Brennan argued that the statute passed by Congress was a poor way to achieve its antidiscrimination goals.

158. *Id.* at 1828.

159. *Id.* (quoting 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION 826 (2d ed. 1984)).

160. *Id.* at 1830.

161. *Id.*

162. *Id.* at 1834 (Scalia, J., concurring in part).

163. *Id.*

164. *Id.*

165. *See, e.g.,* Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("vindication by congressional inaction is a canard").

Justice Scalia's criticism strikes home in this case. But in *K Mart,* Justice Brennan argued that Congress had never made any decision about how to apply the statute to imported goods bearing a United States trademark under authorization of the United States owner, because such licensing arrangements did not exist at the time of enactment. This argument, based on changed circumstances, respects rather than flouts the legislature's prerogatives.

Thirdly, Justice Scalia asserts that section 526's command is unambiguous. But the very fact that there was doubt whether the legislature intended the statute to apply in the particular circumstances suggests that the statute is not entirely unambiguous. Of course, the legislature could have included an express provision about unforeseen circumstances. In the absence of such an express provision, however, it seems reasonable for Justice Brennan to have implied one. It is a commonplace that in private law, courts serve a useful, legitimate function by implying contractual terms that rational parties themselves would agree to if they had unlimited time and resources to draft and negotiate contract terms. By implying these contractual terms, courts reduce the transaction costs of contract formation.[166] The courts' provision of such "off-the-rack" terms is equally appropriate in the statutory setting, in which Congress, like contracting parties, lacks the time to consider all fact permutations when memorializing its policy decisions.

Justice Scalia is on stronger ground when he suggests that what I have called the *cy pres* approach should be implemented only in "clear cases."[167] Between the time a statute is passed and the time it is construed by the Supreme Court, some, perhaps unforeseen, societal changes will almost always have occurred. If applied too broadly, statutory *cy pres* would give judges carte blanche to rewrite statutes, a result that enacting legislators would reject. As Justice Scalia suggests, statutory *cy pres* must be limited to cases in which "(1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that [the changed circumstances] cause the challenged application of the statute to exceed its original purpose."[168] A similar analysis should apply, of course, when changed circumstances cause the statute to fall short of, rather than exceed, its purpose.

Even when *cy pres* is permissible, it sometimes may be preferable for a

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166. *See* Goetz & Scott, *Limits of Expanded Choice, supra* note 148, at 266; D. Baird, Mitigation Rules and the Limits of Contract (1988) (unpublished manuscript) (copy on file at *The Georgetown Law Journal*). Some of the so-called "canons of construction" may, in fact, be such "off-the-rack" rules.

167. 108 S. Ct. at 1835 (Scalia, J., concurring in part).

168. *Id.* Sometimes, as may have been true in *Weber,* legislators may foresee, but prefer not to think about, later developments. Such legislative avoidance should neither prevent judicial updating when the statute is unclear nor justify the court's ignoring a statutory directive.

court to decline to update the statute. For example, if the value judgment involved is particularly controversial, or when the court lacks remedial power to implement an adequate substitute for the old statute, legislative updating would be preferable to judicial updating.[169] Against this preference must be considered the likelihood that legislative inertia will prevent any response, thereby resulting in clear harm to the public interest or injustice to a particular litigant. Given the threshold requirements for *cy pres* and these prudential concerns, statutory *cy pres* should not be invoked lightly. Nevertheless, on occasion, it could be a valuable doctrine.

C. META-INTENT AND STARE DECISIS

Sometimes the changed circumstances relevant to statutory interpretation are not extrinsic to the legal process, but rather consist of actions taken by judges themselves. As demonstrated in Part II, sometimes courts have been less than perfect in their fidelity to legislative supremacy. Once the infidelity has been committed, however, considerations of stare decisis may make the court reluctant to reverse itself. The result may be that the court in later cases will continue to interpret a statute in violation of the legislature's clearly enacted collective understanding. At first blush, this seems to be a violation of the supremacy principle. If the court is not authorized to amend the statute, how can a previous erroneous decision suspend the court's obligation to obey the legislature's command?

Recently, several writers have argued against adherence to stare decisis under these circumstances.[170] One has written: "If courts become instruments by which packages are undone, laws will be harder to pass. Bargains must be kept to be believed . . . ."[171] As a general matter, this observation is

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169. The possibility of administrative updating also weighs against judicial use of statutory *cy pres*, because agencies have several advantages over courts in bringing policy considerations to bear on statutory issues. *See* Chevron, Inc. v. NRDC, 467 U.S. 837, 865-66 (1984) (court deferred to agency expertise to define "stationary source" when Congress failed to provide definition); Pierce, *supra* note 20, at 307 (agency preferred over courts to make policy because of greater accountability to electorate).

170. *See* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404-05 (1988) (criticizing the Court in Johnson v. Transportation Agency, 480 U.S. 616 (1980), for effectively repealing title VII under cover of deference to *Weber*); Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 388-92 (1988) (criticizing stare decisis in statutory context; arguing that courts erroneously rely on legislature to correct courts' mistaken interpretations); Rees, *Cathedrals Without Walls: A View from the Outside* (Book Review), 61 TEX. L. REV. 347, 374 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)) (arguing that stare decisis is less appropriate in statutory than common law decisions, because people rely on what statutes say, not on courts' interpretations of what statutes say).

171. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429 (1988). The idea of viewing statutes as legislative deals originated in Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 877-85 (1976); *see also* Morrison-Knudsen Constr. Co. v. Director of Workers' Compensation Programs, 461 U.S. 624,

quite correct. It may not have as much force, however, when the issue is framed as whether courts should enforce the statutory "bargain" even at the cost of overruling precedent.

The crucial question with respect to the supremacy principle is the enacting legislators' meta-intent regarding the priority of stare decisis. If a rational enacting legislator would favor stare decisis even when an initial decision violates the supremacy principle, then a rule of stare decisis is consistent with the supremacy principle. The court cannot be accused of insubordination if stare decisis is an appropriate "implied term" in statutes.[172]

In analyzing this problem, it is important to recall that we are considering what rule legislators would approve at the time of enactment. At that time, legislators know that judges may make serious mistakes, but they do not know the direction of the mistakes. Supporters of the legislation have no way of knowing whether judicial mistakes will favor them (by giving them more than their original "bargain"), or injure them (by giving them less than they bargained for). This is not to say that legislators would be indifferent to the possibility of serious judicial errors. It does mean, however, that their interest in having these errors corrected by subsequent decisions is somewhat reduced by the possibility that honest judicial mistakes might redound to their benefit.

Against this interest, legislators also must balance the potentially serious social costs of legal instability, including the potential damage to reliance interests.[173] Sometimes, the balance will weigh in favor of stare decisis. In other cases, the legislators' interest in legal stability may be outweighed by the importance of fidelity to their original intentions. Thus, as a matter of meta-intent, legislators presumably would approve of a rule giving some weight to stare decisis, even when the result might be to entrench a case that violates the supremacy principle.[174]

635-36 (1983) (updating statute in accordance with "current trends" would upset original statutory deal).

172. Legislatures may sometimes wish to opt out of this implied term. One way of doing so would be to vest interpretive authority in an administrative agency, because agencies are typically not bound by stare decisis and may change their positions in light of new developments or even political shifts. *See* Garland, *Deregulation and Judicial Review,* 98 HARV. L. REV. 507, 584-85 & nn. 456-57 (1985) (change of administrations may justify change in agency's emphasis).

173. Legislators have several reasons to be concerned regarding the prospect of public uncertainty about judicial interpretations. If enacting legislators are risk-averse, they may be reluctant to gamble on the direction of judicial error. Social costs, such as increased litigation and difficulty in planning transactions, may be associated with uncertainty about how statutes will be construed. Jettisoning stare decisis, however, would do relatively little to reduce these various uncertainty costs. Moreover, a rule allowing ready judicial correction of prior mistaken opinions would create a variety of deadweight social costs. In general, then, rational enacting legislators would probably prefer that courts give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal.

174. This argument is developed at greater length in Farber, *supra* note 14, at 11-14. An alterna-

D. LEGISLATIVE META-INTENT AND *WEBER*

As discussed earlier, the most interesting arguments in favor of *Weber* rely on post-enactment events. The first such argument is that informed opinion on affirmative action has shifted to the extent that title VII requires updating. However, enacting legislators have little reason to want statutory directives to be made contingent on the state of public opinion. Such changes might well be relevant if the meaning of the statute were subject to genuine doubt, but they cannot release the court from compliance with a clear statutory command.[175]

The second argument is that events after 1964 demonstrated that the clear congressional mandate to eradicate racial discrimination could not be executed without permitting remedial affirmative action.[176] This argument, however, does not justify the kind of radical surgery performed by the *Weber* Court to legitimize nonremedial affirmative action under title VII. In *Weber,* Justice Brennan replaced Congress' solution to the problem of racial inequality (eliminating discrimination) with his own solution (preferential hiring even in the absence of any evidence whatsoever of prior illegal discrimination). Justice Brennan's approach to title VII cannot be justified even under the statutory *cy pres* doctrine, because events after 1964 were not such as to cause enforcement of title VII to work against the purposes of its drafters, nor did these events result in extending title VII's prohibitions to an area that Congress had never contemplated. In fact, post-1964 events merely revealed that perhaps Congress did not, by enacting title VII, choose the best stratagem to achieve its goals. But, as argued throughout this article, the supremacy principle does not allow courts to rechoose strategies for Congress.

The third argument is based on stare decisis and is actually an argument in favor of *Weber's* progeny rather than of the original decision in *Weber.*[177]

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tive formulation of the argument would classify stare decisis as one of several "background understandings" that Congress takes for granted when it legislates. *See* Stewart & Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1195, 1200 (1982) (discussing various understandings among government entities that promote effective governance). For another perspective on stare decisis in statutory cases, see Eskridge, *Overruling Statutory Precedents,* 76 GEO. L.J. 1361, 1385 (1988) (arguing that statutory precedents not be given stronger presumption against overruling than other precedents).

175. *See supra* notes 133-42.

176. *See supra* notes 128-31 and accompanying text; *see also* Eskridge, *supra* note 11, at 1492 (noting that current equal opportunities for minorities do not remedy previous effects of discrimination). Additionally, it is unclear whether affirmative action is an *effective* way of raising the economic status of blacks. For a survey of the relevant literature, see Smith & Welch, *Black Economic Progress after Myrdal,* 27 J. ECON. LIT. 519, 552-55 (1989) (affirmative action reallocated blacks between firms and caused a short-term rise in wages but no long-term wage increase).

177. *See* Johnson v. Transportation Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) (agreeing with *Weber*'s interpretation of title VII on grounds of stare decisis).

Following *Weber,* not a single bill was introduced in Congress to overturn the decision, and it has now been the law for over ten years.[178] In addition, *Weber* has been the subject of substantial reliance by employers and unions. Even if the Court were to immunize those who have relied on *Weber* from damage suits based on past affirmative action plans, abolishing the plans would upset many careers, and granting remedies to white male "victims" would disrupt seniority rights and pension plans.[179] Moreover, judicial waffling on such a crucial issue could undermine public confidence in the stability of the legal system. Under the circumstances, then, although the broad holding of *Weber* violated the supremacy principle, that principle does not require that the decision be overruled.[180]

IV. CONCLUSION

Judges must, except when exercising the power of judicial review, defer to the decisions of legislatures. This principle of legislative supremacy seems obvious on its face, but its meaning is surprisingly elusive.

The supremacy principle is actually quite narrow. Under the principle, courts engaged in statutory interpretation must consider both the language and legislative history of a statute. If, when taken together, they leave no room for doubt about the statute's meaning, courts may not interpret the statute contrary to that meaning. This principle does not prevent courts from going beyond (as opposed to "against") even clear statutory language and legislative intent. Nor does it seriously constrain methods of statutory interpretation when a statute's language and legislative intent are unclear. In such cases, the supremacy principle allows a court to consider any additional factors it deems appropriate, including its own view of public policy.[181]

The supremacy principle is further qualified by considerations of legisla-

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178. *Id.* at 629 n.7. On the subject of legislative silence, see Eskridge, *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67 *passim* (1988); Farber, *supra* note 14, at 8-14. Although these two articles advocate different theories, their practical implications appear quite similar: congressional silence can be a factor in favor of retaining a Supreme Court ruling.

179. More limited, remedial forms of affirmative action might be permissible under the statute. *See supra* text accompanying notes 128-30. Hence, if *Weber* were reversed, the result would not be simply to invalidate all affirmative action programs; rather it would be necessary to invest substantial legal resources into investigating each individual program that passed the *Weber* test to see if it conformed with the new requirements for permissible remedial affirmative action under title VII.

180. Even some strong opponents of affirmative action are now convinced that *Weber* is too well-entrenched to uproot. *See* Glazer, *The Affirmative Action Stalemate,* 90 PUB. INT. 99, 105-11 (1988). For a more complete discussion of why it would be undesirable to overrule *Weber,* see Eskridge, *supra* note 174, at 1409-14. On the other hand, although the stare decisis argument for allowing nonremedial affirmative action is fairly strong, it may be weaker than the argument for remedial affirmative action. Thus, stare decisis might allow but not require adherence to *Weber*'s endorsement of nonremedial plans.

181. *See supra* text accompanying notes 9-30. This conception of the judicial role need not entail judicial activism. *See* Posner, *The Jurisprudence of Skepticism,* 86 MICH. L. REV. 827, 862-64

tive meta-intent. Courts can read "off-the-rack" rules of interpretation into congressional enactments, provided those rules would be favored by rational enacting legislators. These rules can operate to allow courts to violate what otherwise appear to be clear statutory directives. For example, the occurrence of significant events unforeseen at the time of a statute's enactment may make enforcement of that statute counterproductive or pointless. If so, the court can apply a statutory version of the *cy pres* doctrine without violating the supremacy principle.[182] In another situation, a court may refuse to overrule an earlier precedent that violates the supremacy principle because rational legislators would favor stare decisis in statutory cases, even though it may entail some sacrifice of their original goals in passing the statute.[183]

This article has focused on how statutory interpretation is constrained by the subordinate position of courts with respect to legislatures. The argument has been that the constraint is limited, but, within its bounds, very powerful. Once outside those bounds, we must look elsewhere to understand judicial deference to legislatures. Deference is not, after all, necessarily a matter of subordination.[184] Indeed, preferences about the locus of decision can run counter to supremacy relationships, as when the Supreme Court defers to the discretion of a trial judge who is in every sense subordinate to the Justices. Similarly, quite apart from the supremacy principle, on occasion courts may have good reasons to defer to legislatures.

Like all metaphors, that of the court as the legislature's agent has both its uses and its limitations. The agent metaphor is useful to illuminate the ways in which statutes constrain courts. It does little, however, to illuminate other aspects of the relationship between courts and legislatures, such as the extent to which courts should leave to the legislature the initiative in creating public policy.[185] The metaphor of supremacy can only take us so far. But within its limits, it can shed light on some crucial aspects of the judicial role.

(1988) (framers of statutory and constitutional provisions know and expect that judges will bring personal policy preferences to bear on interpretation of open-ended language).

182. The fact that statutory *cy pres* is consistent with the supremacy principle does not necessarily establish that it is a desirable policy. The benefits of a statutory *cy pres* doctrine may be outweighed by its costs as an additional source of legal unpredictability, or by the fact that the doctrine may be too susceptible to abuse. If the doctrine is limited in the ways suggested earlier, however, *see supra* text accompanying notes 167-68, these drawbacks do not seem substantial.

183. *See supra* text accompanying notes 172-74.

184. When the Supreme Court says a problem should be resolved by state or local governments rather than the federal courts, it does not necessarily mean that it considers itself subordinate to the state legislatures or city councils.

185. For purposes other than supremacy principle analysis, it may be better to think of the court as the legislature's partner, each having its own area of primary responsibility. The partnership metaphor suggests, for example, that courts should feel free to make public policy in traditionally common law areas. For an insightful attempt to explore the complex judicial role in statutory interpretation, see Eskridge & Frickey, *Practical Reason in Statutory Interpretation*, 42 STAN. L. REV. — (forthcoming 1990).