"FETCH SOME SOUPMEAT"

*William N. Eskridge, Jr.**

Suppose a housekeeper says to a domestic: "fetch some soupmeat," accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be.[1]

Although first published over 150 years ago, Francis Lieber's *Legal and Political Hermeneutics* remains broadly influential, and the soupmeat hypothetical in particular has been reproduced in the most widely read twentieth-century legal texts for teaching statutory interpretation.[2] The directive, "fetch some soupmeat," seems straightforward in most situations, because the housekeeper and the servant are operating under the same assumptions, and because their shared assumptions are borne out as the servant goes about his task. Lieber's project—and the project of any sophisticated theoretical treatment of statutory interpretation—was to explore the many ways in which "fetch some soupmeat" proves susceptible to surprising interpretations. I should like to explore some variations of the hypothetical in order to demonstrate how Lieber's vividly written treatise both anticipated twentieth-century theories and suggested lines of deeper analyses than subsequent analysts have been able to do. On the one hand, Lieber appreciates the appeal of all the "foundational" theories of interpretation (one factor is the focus of the enterprise) and explicates these theories in strikingly familiar terms. On the other hand, *Hermeneutics* is eclectic and anti-foundational. Lieber's approach is on the whole

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1 FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS 18 (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), *republished in* 16 CARDOZO L. REV. 1883, 1904 (1995). [In subsequent citations, the page number as it appears in the republication will be given in brackets following the page citation to the third edition.]

2 WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 517-18 (2d. ed. 1995) (see pages 574-75 in the first edition published in 1988); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1114-15 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); HARRY W. JONES ET AL., LEGAL METHOD: CASES AND TEXT MATERIALS 355-57 (1980). The soupmeat hypothetical is a key expositional device in my book: WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

most similar to a "practical reasoning" approach.[3] I shall conclude, however, with a discussion of the ways in which current theorizing about statutory evolution has intellectually advanced beyond Lieber's approach.

I. TEXTUALISM (RULE OF LAW)

Lieber insists that "one of the main ingredients of civil liberty, and at the same time one of its greatest blessings, is the protection against individual passion, violence, views, opinions, caprice or well meant but disturbing interference—the supremacy of law."[4] *Hermeneutics* was written in order to facilitate this supremacy, or rule, of law, for the book sets forth a systematic array of rules and principles by which statutes can be interpreted in a determinate and predictable manner. Hence, Lieber's first rule of statutory interpretation is: "A sentence, or form of words, can have but one true meaning."[5] By that he meant that differently situated judges, lawyers, and indeed citizens ought to be able to derive roughly the same interpretation of a statutory text when applied to the same set of circumstances. Only under a predictable and objectively determinable rule of law can the citizenry be secure in its liberty. Lieber contrasted this happy state of affairs with its alternative, "subjective justice—an administration of justice according to the subjective view of the judge, the substitution of individual feelings and views for the general rule and equal law."[6] This was unacceptable to Lieber, who blamed judges and lawyers—"an almost invincible legion of harpies"[7]—for their historical roles in subverting the rule of law.

Invocation of the rule of law, and of the importance of an objectively determinable method for applying the text across different circumstances, is the key argument made by jurists and thinkers from Oliver Wendell Holmes to Antonin Scalia to justify textualism as the foundational method for interpreting statutes,[8] and no one has put the case for the "externality" (Holmes's term) of law

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3 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

4 LIEBER, *supra* note 1, at 40 [at 1919].

5 *Id.* at 108 [at 1966].

6 *Id.* at 39 [at 1919].

7 *Id.* at 38 [at 1918].

8 Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); *see also* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 632-33 (1949) (opinion of Keen, J.); Antonin Scalia, Speech on the Use of Legislative History (delivered between Fall 1985 and Spring 1986 at various law schools) (transcript on file with author).

better than Lieber. To say that the statutory interpreter should focus on the text tells us very little about how the interpreter should treat the text, however. Notwithstanding the renewed appeal of an objective textualist methodology, many twentieth-century thinkers beg the critical questions of determinability that are exposed by Lieber.

A. *A Textualist Should Avoid Literalism*

A literal-minded servant might return from the store empty-handed, because there was nothing in the store explicitly labeled "soupmeat." This is a boneheaded approach to interpretation:

> under the guise of strict adherence to the words, it wrenches them from their sense.
>
> . . . It is false, deceptive, or artful interpretation, if we do not give that sense to words which they ought to have, according to good faith, common sense, the use which the utterer made of them . . . .[9]

Even the most ardent textualist should not, and presumably does not, advocate boneheaded interpretation. Lieber's *Hermeneutics* persuasively distinguishes between a plain meaning and a literalist approach to statutory text. Still, the most sophisticated interpreters oftentimes fall into Lieber's literalist fallacy, and the Supreme Court has engaged in and encouraged an unhealthy literalism through the dictionary fetishism of its recent opinions.[10]

Significantly, Lieber does admit the desirability in some cases of what he calls "close" interpretation, in which the interpreter "take[s] the words in their narrowest meaning."[11] Close interpretation is most appropriate "[t]he more the text partakes of the character of a compact" between equal parties, for in such cases each word may be presumed to have been bargained over.[12] Modern textualists have echoed, and possibly distorted, this insight. Frank Easterbrook, for example, calls for a close ("stingy") approach to statutes that are essentially rent-seeking deals negotiated with leg-

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9 LIEBER, *supra* note 1, at 56 [at 1930] (footnote omitted).

10 Most recently, and amusingly, in MCI Telecommunications Corp. v. AT&T Co., 114 S. Ct. 2223 (1994). *See also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 355-58 (1994) (analyzing Court's increasing reliance on dictionaries); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) ("In recent years . . . the Court has come to rely on dictionaries to an unprecedented degree.").

11 LIEBER, *supra* note 1, at 54 [at 1928].

12 *Id.* at 121 [at 1977].

islators by powerful groups.[13] Lieber would be cautious in applying this principle, because he viewed statutes and constitutions as "contracts" having substantial third-party effects. Easterbrook might respond that rent-seeking statutes have malign effects, but his response is open to the caution that one person will see rent-seeking where the next will see the public interest (as in Title VII, for example).

B. *Textual Plain Meaning Depends upon and May Vary with Context*

Lieber emphasized many sources of textual ambiguity. Chief among them is the multiplicity of meanings a single word might have, and the way in which context determines the "one true meaning." Soupmeat, for example, is not a self-defining term, and its meaning cannot be plucked out of a dictionary; instead, its meaning will vary depending upon particular circumstances. Soupmeat may be a term of art in the region or the household. If the housekeeper has on previous occasions made it clear to the servant that soupmeat signifies a certain kind of beef, the servant would be a bad interpreter if he fetched chicken. Custom and prior usage are clearly relevant when figuring out a text's meaning[14]—a precept whose lesson has sometimes been lost on current interpreters.

The Supreme Court usually acts as though the same term has the same meaning whenever it is used in a statutory scheme.[15] If it is true that meaning depends on context, this assumption should not be pressed too strongly. The same word uttered by the same principal might have two different meanings if the contexts are materially different. Thus, if the servant fetching some soupmeat knows that the soupmeat will be used at a fancy dinner, he might also deduce that he should obtain a better cut of beef than he has done when the soupmeat was used for simple family luncheons. The same directive—"fetch some soupmeat"—might have subtly different meanings in the two contexts, and the sensible textualist will implement the same directive in different ways.[16]

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

14 LIEBER, *supra* note 1, at 25-26 [at 1909-10].

15 *See e.g.*, Ratzlaf v. United States, 114 S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears").

16 This point is demonstrated by Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). Michael Herz suggests that the point in text may undermine the idea of textualism as a foundational methodology.

C. *Statutory Texts Evolve as Social Context Changes*

Hermeneutics anticipates H.L.A. Hart's distinction between the "core" coverage of a statute, and the "penumbras" of ambiguity.[17] Lieber observed that "terms receive a meaning, distinct as to some points, but indistinct as to others, or . . . distinct as to the central point of the space they cover, but become less so the farther we remove from that centre, somewhat like certain territories of civilized people bordering on wild regions."[18] Thus, the servant knowing that soupmeat means some kind of beef, but not of the best quality, might be confronted with an array of different kinds of beef from which choice is not completely predetermined. Lieber's view is that there is still "one true meaning" of the directive, but the servant must figure out that meaning through the exercise of recalled experience and analogy. How have I (or another person whom I have observed) made this choice in the past? How have the past choices been received? Which cuts appear to be most appropriate for today's luncheon? Today's interpreters, especially those in the federal judiciary, are wont to mistake (or misstate) penumbral applications of statutes for core applications, and thereby to refuse to engage in this process of reasoning from experience and analogy.[19]

As time passes, a statute's central point (its core) grows smaller, and the unanticipated wild regions (its penumbras) expand. Judges today sometimes approach statutes as self-contained mechanisms whose meaning is set in stone for all time.[20] Lieber disagreed: "A code is not a herbarium, in which we deposit law like dried plants. Let a code be the fruit grown out of the civil life of a nation, and contain the seed for future growth."[21] Even the staunchest of the modern textualists agrees with this point, at least in principle.[22] *Hermeneutics* draws an analogy between evolving

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17 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. HART, THE CONCEPT OF LAW (1961).

18 LIEBER, *supra* note 1, at 14-15 [at 1902]. Note how both Lieber and Hart usefully deploy geographical metaphors to make their points.

19 Recent examples of hard-to-defend textual dogmatism include NLRB v. Health Care & Retirement Corp., 114 S. Ct. 1778 (1994) (compare the opinion for the Court with Justice Ginsburg's unanswerable dissenting arguments); Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994) (compare the opinion for the Court with Justice Stevens's excellent dissenting arguments).

20 *See Central Bank*, 114 S. Ct. at 1439.

21 LIEBER, *supra* note 1, at 33-34 [at 1915].

22 *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (Scalia, J., concurring in part and dissenting in part) (accepting the possibility that a text can evolve as circumstances change but expressing a very narrow view of that principle); Business Elecs. Corp. v. Sharp

statutory texts and the doctrine of *cy pres*, by which judges have reconfigured wills and testaments to adapt to changing circumstances over time.[23] Alex Johnson has recently retrieved this idea and developed its implications for statutory interpretation theory.[24]

II. INTENTIONALISM (REPRESENTATIVE DEMOCRACY)

Most twentieth-century theorists of statutory interpretation have emphasized legislative intent, often in conjunction with statutory text.[25] Lieber endorses as the "true sense of any form of words . . . the sense which their author intended to convey."[26] Like modern interpreters, Lieber would maintain that where the author had a specific expectation about how a directive is to be interpreted, she makes that intention clear in the text of her directive; he would also agree that it is undemocratic for unelected judges to ignore the textually supported intention of elected legislators. Hence, in matters of interpretation, there should rarely be a dissonance between text and specific intent. Yet Lieber admits the possibility of a dissonance between the letter of a statute and the best meaning—a dissonance that is dissolved through "construction."

"Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."[27] How can this be? How can the interpreter, or the constructer, be faithful to the text or the author's intentions if the constructer goes beyond the text and the expectations? These are questions judges are usually

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Elecs. Corp., 485 U.S. 717 (1988) (Scalia, J.) (broadly phrased statutes such as the Sherman Act are evolutive, changing in meaning as social understanding evolves).

23 LIEBER, *supra* note 1, at 43-44, 52 [at 1921, 1927].

24 Alex M. Johnson Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545 (1989); *see also* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989) (also reviving this idea).

25 *See, e.g.*, LEARNED HAND, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND (Hershel Shanks ed., 1968); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985); MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY (1991); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

26 LIEBER, *supra* note 1, at 11 [at 1900].

27 *Id.* at 44 [at 1921]; *see id.* at 45 [at 1922] ("[C]onstruction is the causing of the text to agree and harmonize with the demands or principles of superior authority, although they are not, according to the immediate and direct meaning of the words constituting the text contained in it.").

not willing to confront openly, and law professors have long avoided them as well. Lieber insists that these are unavoidable inquiries, "because times, relations, things change, and cannot be foreseen by human intellect . . . . Many things are dangerous, yet we cannot dispense with them nevertheless."[28] Lieber suggests or develops several different ways of reconciling the fidelity the interpreter owes to the author's expectations and the practical need to adapt a directive to changed circumstances.

A. *Construction "Beyond" Versus "Against" the Author's Expectations: The Requirement of Good Faith*

The housekeeper tells the servant to fetch some soupmeat, and the servant knows from prior dealings that the housekeeper intends that he fetch a certain grade of beef from a specific store. The servant arrives at the store and finds that the store has closed. Should the servant return home empty-handed? Such action would probably be obtuse. Instead, the servant should put himself into the place of the author (housekeeper) and, given the author's values and goals, should deal with the new circumstance in the way the author would were she there. In the foregoing variation of the soupmeat hypothetical, the housekeeper assumed that the store was open; finding the store closed, the servant should ask himself: What would the housekeeper have me do? In all probability, the housekeeper would want the servant to go to another store and purchase the soupmeat. But what if the servant goes to a nearby store and finds soupmeat at double the price the household is accustomed to paying? Whether the servant should proceed to fetch *that* (pricey) soupmeat is a harder question, and there is a good case to be made that the servant should then return empty-handed. (I am assuming that the housekeeper cannot be consulted by telephone, a convenience unknown to Lieber.)

When circumstances have changed in ways such as these, Lieber insists that the key obligation of the statutory interpreter (the servant) is one of good faith:

> Common sense and good faith are the leading stars of all genuine interpretation. Be it repeated, our object is not to bend, twist, or shape the text, until at last we may succeed in forcing it into the mould of preconceived ideas, to extend or cut short in

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[28] *Id.* at 53 [at 1928].

> the manner of a Procrustes, but simply and solely to fix upon the true sense, whatever that may be.[29]

This obligation of good faith is akin to more recent intentionalist formulations, that the interpreter engage in a process of "imaginative reconstruction" of what the author *would have desired* had she known about the new circumstances.[30] Another felicitous way of expressing this obligation is suggested by Lieber's careful formulation that "construction endeavors to arrive at conclusions *beyond* the absolute sense of the text," but still true to the spirit of the text, while avoiding "extravagant construction [which] *abandons*" that spirit.[31] This anticipates the useful distinction drawn by Daniel Farber, between an interpretation that goes "beyond" the author's intent and one that goes "against" that intent.[32] The servant who buys at another store when the directed store is closed has gone beyond the housekeeper's instruction but has engaged in responsible interpretation. But the servant who spends double the expected price for soupmeat might well pass the line suggested by Lieber and Farber, going not only beyond the author's expectations, but also against them.

A clearer case of extravagant interpretation is one in which the servant purchases an expensive, higher grade of beef than has been the household's practice. When questioned about this extravagance, the servant might say that this grade of beef is sometimes used for soupmeat, but Lieber would insist that the servant is not interpreting in good faith. He calls this "predestined" interpretation, where "the interpreter, either consciously or unknown to himself, yet laboring under a strong bias of mind, makes the text subservient to his preconceived views, or some object he desires to arrive at."[33] In this instance Lieber foresaw the legal realists' claim that judges tend to read their own values into texts they interpret,[34] but condemned the practice as one that good-faith interpreters, and especially public officials such as judges, must avoid as much as they can.

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29 *Id.* at 77 [at 1945]. Good faith "means that we conscientiously desire to arrive at truth" and "take the words fairly as they were meant." *Id.* at 80-81 [at 1947]. For similar statements of common sense and good faith, see *id.* at 88, 109 [at 1952, 1966].

30 Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907); *see also* POSNER, *supra* note 25; Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

31 LIEBER, *supra* note 1, at 53, 69 [at 1927, 1939] (emphases added).

32 *See* Farber, *supra* note 24.

33 LIEBER, *supra* note 1, at 60 [at 1933].

34 *E.g.*, K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 31-40 (1934).

B. *Apply Statutes to New Circumstances So As to Advance the Statutes' Overall Goals*

Peppered throughout *Hermeneutics* are admonitions to interpret statutes in light of their "aims" or "objects."[35] The servant told to fetch some soupmeat would interpret the directive very differently for different purposes. He would, for example, purchase a much higher grade of meat if the object of the directive were to prepare a fine soup for the commencement of a fancy dinner party, than if the purpose were to feed the children at lunch. If unforeseen circumstances thwart the housekeeper's original expectations, the servant's practical response might well consider the purpose of the directive in adapting it. If only day-old soupmeat is available at the store, the servant should probably go somewhere else when the goal of the fetching is to contribute to a fancy dinner party.

Henry Hart and Albert Sacks's materials on *The Legal Process* built a whole theory of statutory interpretation around the proposition that statutes rendered ambiguous by changed circumstances should be interpreted so as best to facilitate the statutes' purposes.[36] Their theory of statutory interpretation drew from the *Hermeneutics* generally and from the soupmeat hypothetical specifically, for the hypothetical is reproduced at the beginning of *The Legal Process*'s chapter on statutory interpretation, under the approving heading, a "Breath of Fresh Air."[37] The Supreme Court has long relied on the spirit or purpose of statutes as a primary tool in statutory interpretation (albeit less so in recent years).[38]

C. *Apply Statutes in Light of Fundamental Law*

The servant told to fetch soupmeat might be confronted with directives having greater authority than those issued by the housekeeper. The town, for example, may have imposed an ordinance

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35 *E.g.*, LIEBER, *supra* note 1, at 136 [at 1988].

36 HART & SACKS, *supra* note 2, ch. 7; *see also* LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940); Harry W. Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); Frederick J. de Sloovère, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527 (1940).

37 HART & SACKS, *supra* note 2, at 1114.

38 The leading opinion, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), distinctly echoes *Hermeneutics* by its invocation of the law's "spirit" to displace the apparent plain meaning of a statutory text. *Church of the Holy Trinity* has, in turn, been the focal point of the debate between the Supreme Court's "new textualists" and more purpose-based interpreters. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (majority opinion by Justice Brennan relying on *Church of the Holy Trinity*, disputed by a concurring opinion by Justice Kennedy questioning *Church of the Holy Trinity* and a spirit-based approach to statutes).

rationing the sale of meat, and the servant would not be able to fetch the amount or grade of soupmeat desired by the housekeeper. Or the servant might be well justified in returning empty-handed. Lieber would approve of this "[t]ranscendent construction . . . derived from, or founded upon, a principle superior to the text."[39] To develop this point, Lieber anticipates Richard Posner's analogy between the statutory interpreter and the platoon commander who might be required to interpret battlefield commands constructively or creatively.[40] Embracing the proposition that an "inferior officer has to obey the superior," Lieber sensibly admits the possibility of resistance "if the former is convinced that the latter is committing an act of treason . . . . Why? Because general safety is a law superior even to military or naval discipline."[41]

Both jurists and legal scholars have shown great enthusiasm for a corollary to Lieber's idea of "transcendent" interpretation. That is, interpreters should construe directives, if possible, to avoid conflicts with the superior or fundamental law in the Constitution. Consistent with Lieber's generally libertarian philosophy, courts will sometimes interpret statutes narrowly even when a broader interpretation would not be unconstitutional but would only raise constitutional "difficulties."[42] Thus, the servant ordered to fetch soupmeat would return empty-handed not only in the event that the state was rationing soupmeat, but also in the event the state restricted consumption of "luxury foodstuffs," it being unclear whether soupmeat fell into that category.

III. DYNAMICISM (EVOLUTIVE INTERPRETATION)

Long before twentieth-century theories of dynamic statutory interpretation became fashionable,[43] Lieber maintained that the statutory meaning found by a subsequent interpreter would often be different from the meaning a contemporary interpreter (or legis-

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39 LIEBER, *supra* note 1, at 65 [at 1936]; *see id.* at 67 [at 1938] (Lieber recognized that "dangerous" transcendent interpretation is "not always unavoidable").

40 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE ch. 7 (1990).

41 LIEBER, *supra* note 1, at 101 [at 1961].

42 *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

43 Most theorizing about statutory interpretation since 1982 has emphasized the ways in which statutes evolve. *E.g.*, FRANCIS BENNION, STATUTORY INTERPRETATION (1984); RONALD DWORKIN, LAW'S EMPIRE (1986); ESKRIDGE, *supra* note 2; DENNIS PATTERSON, LAW AND TRUTH (forthcoming 1995); POSNER, *supra* note 40, ch. 7; CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

lator) would have reached. Lieber posited that the primary reason for statutory evolution is changed circumstances, and *Hermeneutics* can also be read to suggest that changing values might also be the basis for statutory evolution. Both propositions find echoes in recent theories of statutory interpretation. The main way in which recent theories have departed from Lieber is their suggestion that the ideological and institutional context of the interpreter will often be decisive.

A. *Changed Circumstances and the Practical Adaptation of Statutes*

Hermeneutics provides a classic statement of the practical reasons for statutory evolution:

> The farther removed the time of the origin of any text may be from us, the more we are at times authorized or bound . . . to resort to extensive construction. For times and the relations of things change, and if the laws, &c., do not change accordingly, to effect which is rarely in the power of the construer, they must be applied according to the altered circumstances, if they shall continue to mean sense or to remain beneficial. . . . Whether we rejoice in it or not, the world moves on, and no man can run against the movement of his time. Laws must be understood to mean something for the advantage of society; and if obsolete laws are not abolished by the proper authority, practical life itself, that is, the people, will and must abolish them, or alter them in their application.[44]

As a statement of statutory evolution because of changed circumstances, this excerpt precisely anticipated the legal realists' theories of interpretation,[45] as well as more recent dynamic theories, and even Guido Calabresi's proposal that courts be able to overrule obsolescent laws.[46]

Before embarking on a lengthy trip, the housekeeper tells the servant to fetch two pounds of soupmeat every Monday. This directive will probably be clear for awhile, but changed circumstances may present new issues of interpretation (or, as Lieber calls this exercise, construction). The housekeeper might forgo the fetching if the price of soupmeat doubles, or the state reports that soupmeat might be infected, or the children in the household de-

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44 LIEBER, *supra* note 1, at 125-26 [at 1980-82] (footnote omitted).

45 *See* JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (1916); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950).

46 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

velop allergies to soupmeat, or a host of other unanticipated circumstances. These are all legitimate constructions. Like Richard Posner's platoon commander facing unanticipated battlefield conditions,[47] or Alex Johnson's *cy pres* judge applying a trust instrument to circumstances beyond the imagination of the author,[48] or my diplomat presented with a political surprise,[49] the interpreter applying statutes to unforeseen circumstances is performing badly if all she does is apply the law's plain or originally intended meaning. "Great evil has arisen at various epochs from insisting on established laws in times of great crisis," Lieber warned.[50]

On the other hand, Lieber hardly believed that the dynamic interpreter is an unfettered interpreter, and he maintained that the habit of liberty requires close interpretation in most cases:

> The result of our considerations then will be, that we ought to adhere to close construction, as long as we can; but we must not forget that the "letter killeth," and an enlarged construction becomes necessary when the relations of things enlarge or change. We ought to be careful, however, not to misjudge our own times; for every one who is desirous of justifying an extravagant construction does it on the ground, that the case is of a peculiar character and the present time a crisis.[51]

Just as the housekeeper should not be quick to abandon or alter her directive, so the statutory interpreter should ordinarily hew closely to the statutory text and should update statutes cautiously. Lieber's cautiously libertarian dynamicism approximately describes the Supreme Court's current approach to statutory interpretation.[52]

B. *Interpretation to Reflect Public Values*

At various points, *Hermeneutics* suggests the importance of "values" in statutory interpretation. Although modern norm-based theories of statutory interpretation are much more explicit and elaborate than Lieber's relatively undeveloped thinking, he

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47 POSNER, *supra* note 40, ch. 7.

48 *See* Johnson & Taylor, *supra* note 24.

49 *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

50 LIEBER, *supra* note 1, at 128 [at 1982].

51 *Id.* at 129 [at 1983].

52 The best examples from the 1993 Term are Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994); BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994); Staples v. United States, 114 S. Ct. 1793 (1994). These and other cases are situated in the Court's libertarian context by William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

does plant the seeds of such theories (see my discussion above) and, more interestingly, lays out some tentative precepts appropriate for a norm-based theory.

Lieber's faint anticipation of later theory is best perceived in two of his precepts: "Whenever a decision between the powerful and the weak depends upon our construction, the benefit of the doubt is given to the weak";[53] and "Let mercy prevail if there be a real doubt."[54] These precepts lend obvious support to the old (and now more important than ever before) rule of lenity, that penal statutes should be closely construed, so as to protect the liberty of those accused of violating vague criminal laws.[55] Somewhat more indirectly, these precepts suggest a "representation-reinforcing" approach to statutory interpretation: if there is ambiguity, interpret a statute against the interests of powerful groups, and in favor of groups underrepresented in the political process.[56] The housekeeper should be reluctant to punish a servant who dawdles in fetching soupmeat unless the housekeeper (or past practices) makes it clear that haste is required.

Lieber also states that, "in general, the higher prevails over the lower, the principle over a specific direction."[57] The ideas pregnant in such a formulation are quite undeveloped in the *Hermeneutics*, but passages such as this can be read as a general anticipation of the twentieth-century legal process idea that statutes should be read in light of background "principles" or "policies."[58] Hart and Sacks first articulated this interpretive approach, which has been the basis for more than a few Supreme Court decisions as well.[59] Drawing from Hart and Sacks (and perhaps indirectly therefore also from Lieber), Ronald Dworkin and Cass Sunstein

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53 LIEBER, *supra* note 1, at 134 [at 1986-87]; *see id.* at 137 [at 1988] ("Let the weak have the benefit of a doubt, without defeating the general object of the law.").

54 *Id.* at 137 [at 1988].

55 Lieber also sets out the rule of lenity as a separate precept: "If any doubt of the meaning exists in penal laws or rules, they ought to be construed in favor of the accused; of course, without injury to any one else." *Id.* at 165 [at 2007].

56 JOHN H. ELY, DEMOCRACY AND DISTRUST (1980), develops a representation-reinforcement theory of judicial review, and ESKRIDGE, *supra* note 2, ch. 5, extends this theory to statutory interpretation.

57 LIEBER, *supra* note 1, at 135 [at 1987]. The publication editor of the third edition distinguishes this precept from its opposite concerning laws where a specific law will govern over a more general one. *Id.* at 135 n.15 [at 1987 n.28].

58 This idea is developed in HART & SACKS, *supra* note 2, ch. 1; Fuller, *supra* note 8 (opinion of Foster, J.).

59 The most celebrated, and notorious, being Bob Jones Univ. v. United States, 461 U.S. 574 (1983). *See also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (surveying other cases).

have developed theories of interpretation where national "principles" (Dworkin) or "background norms" (Sunstein) exercise gravitational pull on interpretive outcomes.[60]

C. *Lieber's Inattention to the Ideological and Institutional Dimensions of Statutory Evolution*

Lieber's understanding of statutory evolution is as old as Athens, for it is based upon the practical reasoning in response to changed (societal, legal, and constitutional) circumstances that Aristotle first announced.[61] Modern theorizing about statutory interpretation has expanded upon this sort of changed circumstances reasoning to posit other, deeper, reasons why statutory interpretation will be dynamic. Notwithstanding my claim that Lieber's *Hermeneutics* was prescient, I now maintain that it was far from omniscient. The soupmeat hypothetical exemplifies Lieber's naivete about why statutes evolve. This sort of problem—like the platoon commander, *cy pres*, and diplomat analogies—misunderstands the interesting issues of statutory dynamicism, because it involves an institutionally and ideologically elementary situation. Where there is ideological distance between author and interpreter or where there is a richer institutional context for interpretation, hermeneutics works very differently from Lieber's assumed model.

Lieber believed that differently situated interpreters, acting in good faith, could reach similar interpretations, even in hard cases. This belief strikes many modern theorists as naive. Twentieth-century hermeneutical theories insist that interpretation depends critically upon the perspective of the interpreter; differently situated interpreters will render strikingly different readings of the same statute.[62] That is, two intelligent people considering the same text, legislative background, and precedents (and acting diligently and in good faith) can easily render diametrically opposed interpretations, because they filter that evidence through different understandings about the world. To take a specific example, one's willingness to

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60 *See* DWORKIN, *supra* note 43; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

61 *See* ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., 1985).

62 This point is developed in this Symposium by Georgia Warnke, *The One True Sense*, 16 CARDOZO L. REV. 2191 (1995). For explication in the legal literature, see LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523 (1988); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

interpret Title VII to permit voluntary affirmative action depends critically on one's situated understanding of racial justice in America.[63] The perspective of an African American who laid his life on the line for racial integration (such as Justice Marshall) will be different from that of an Italian American who has seen ethnic groups overcome prejudice without state help (such as Justice Scalia), and both perspectives will differ from the perspective of women who struggled against sexist barriers to their careers (such as Justices O'Connor and Ginsburg). Each of these individuals can—and do—construct different meanings out of the same raw materials, because their angles of vision differ. The soupmeat hypothetical, where the housekeeper and servant operate within similar intellectual frameworks, is therefore substantially irrelevant to the more exciting statutory interpretation cases today.

Even more limiting is the simple institutional framework suggested by the soupmeat hypothetical, namely, a principal (the housekeeper) and an agent (the servant). Statutory interpretation in the United States involves decisions made by coordinate branches of government—usually the executive and the judicial branches—in a context of institutional interdependence. The executive agency interpreting a statute is not necessarily interested in following Lieber's rules of good faith interpretation; instead, the agency is motivated to engage in what Lieber calls predestined interpretation (reading its own policy into the statute), limited only by whatever trumping mechanisms the American lawmaking process offers. One of the trumping institutions is the judiciary, of course, but modern political theory suggests that courts are not Lieber's faithful agents but are instead coordinate centers of lawmaking authority that engage in their own strategic version of predestined interpretation.[64] Thus, when the Supreme Court interpreted Title VII to allow voluntary affirmative action, it was not necessarily engaged in Lieber's exercise of faithfully reading the text, legislative history, statutory purpose, and relevant precedents. Instead, a strategic Court was bending the statute to reflect its own

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63 This is the argument of ESKRIDGE, *supra* note 2, analyzing United Steelworkers v. Weber, 443 U.S. 193 (1979), from many different angles.

64 The political science literature includes WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960 (1961); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). The legal literature includes ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986); Eskridge & Frickey, *supra* note 52; Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992).

policy preferences, carefully mindful of the political consequences of alternative readings.[65]

Notwithstanding my admiration for Lieber's *Hermeneutics*, which develops traditional theory about as far as it can be developed, I end this tribute with an insistence that a modern intellectual understanding of statutory interpretation must develop post-Lieber lines of inquiry.[66] The modern—even more the postmodern—student of statutory interpretation must seek insight from more recent perspectivist and institutionalist theories. The soupmeat hypothetical is only a starting point for understanding the next century's debates about statutory interpretation.

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65 This reading of the affirmative action cases is developed in ESKRIDGE & FRICKEY, *supra* note 2, ch. 1. *See also* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

66 Michael Herz observed to me that Lieber himself was a political scientist who understood the complexity of institutional relationships and that the soupmeat hypothetical is only one of several in *Hermeneutics*. As to the first part, Herz and I both think that *Hermeneutics* little reflects *institutional* complexity, and I insist that is a severe limitation. As to the second point, the soupmeat hypothetical is, I believe, representative of the hypotheticals in the book in its neglect of ideological or institutional considerations.