

Book Reviews

Civil Rights Lawyers on the Bench

Unlikely Heroes. By Jack Bass. New York: Simon and Schuster, 1981. Pp. 352. \$14.95.

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“Nobody can free us but ourselves” is the wise but unsettling advice that New York black activist Preston Wilcox used to chalk on Harlem’s walls and sidewalks. In June 1981, the admonishment made motto was printed in black letters on a bright, yellow tee shirt that the lawyers and judges who had participated in my month-long civil rights seminar presented to me as a parting gift. Evidently, I had cited the Preston Wilcox slogan more than I realized during that first summer of President Reagan’s revealed determination to reverse a quarter of a century’s civil rights gains made through court orders and legislative programs.

After all, the commitment, courage, and sacrifice of black people spurred governmental entities to verify in law what blacks had long known: that the many dimensions of segregation and discrimination were uniform in their denial of black rights. Would those tardily recognized rights have been made more real, or have set more permanently, had blacks relied more on their ability to organize protests and boycotts rather than on simply petitioning for desegregation decrees and legislative mandates?

Survivors of the 1960’s civil rights movement will find little insight on this issue in Jack Bass’ *Unlikely Heroes*. The book is described on its dust cover as: “The dramatic story of the Southern judges of the Fifth Circuit who translated the Supreme Court’s *Brown* decision into a revolution for equality.” But for me, the Wilcox self-help exhortation, “Nobody can free us but ourselves,” provided a much-needed contemporary theme for a book that otherwise is little more than a testimonial to the judicial careers of a half-dozen district and appeals court judges. Despite its praiseworthy

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subjects and the author's honorable intentions, *Unlikely Heroes* seldom rises above the respectfully anecdotal. Published more than a decade after most of the events it describes took place, I expected more than a homily on a period rich in racial drama and in fertile expectations so prematurely turned barren.

At the least, I hoped that Bass would recognize that, given the systematic dismantling of their decisions, the unlikely heroes portrayed in his book may be destined to become tragic figures, victims along with racial minorities of powerful and pervasive majoritarian racial preferences. Unwritten, but no less controlling, these permanently vested preferences for whites over blacks slowly but surely will overturn all civil rights laws not eventually brought into conformity with the society's racial norm.

I

Given the out-of-fashion state of civil rights concerns, one wonders what motivations prompted a major publishing house to publish a book about racial issues. In recent years, even the awesome legitimating force of a white author has not succeeded in getting more than a token number of civil rights books through the publishing process.¹ Whatever the trade's reasons for issuing this book, and however transient the judicial deeds it hails, the annals of American law contain few counterparts to this handful of federal judges actually willing to do what they were being paid to do in cases involving black rights. Their activities deserve recording even if *Unlikely Heroes* perpetuates the country's tendency to embrace as miraculous the treatment of blacks by whites that the law requires.

Of course, as the author reports, *Unlikely Heroes* is not the premiere, book-length presentation of the Fifth Circuit during the era when that court was dominated by Judges Richard Rives, Elbert P. Tuttle, John Minor Wisdom, and John R. Brown.² Nor is it the first book to focus on the exploits in civil rights enforcement of District Court Judges Skelly Wright of Louisiana and Frank Johnson of Alabama.³

Nevertheless, to the extent there is interest in or curiosity about Southern federal judges who accepted opprobrium from their communities and

1. To the extent that *Unlikely Heroes* can be deemed history, it falls within the exception to contemporary publisher disinterest in nonfiction books on racial subjects. See, e.g., G. FREDRICKSON, *WHITE SUPREMACY* (1981) (Oxford University Press); V. HARDING, *THERE IS A RIVER* (1981) (Harcourt Brace Jovanovitch) (history of the black freedom struggle from slavery through 1965); J. RAWLEY, *THE TRANSATLANTIC SLAVE TRADE: A HISTORY* (1981) (W.W. Norton); W. ROSE, *SLAVERY AND FREEDOM* (1982) (Oxford University Press).

2. See J. POLTASON, *58 LONELY MEN* (1961); F. READ & L. MCGOUGH, *LET THEM BE JUDGED* (1978).

3. See R. KENNEDY, *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* (1978); T. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* (1981).

ostracism from their peers, and endured a constant stream of abusive phone calls interspersed with threats of violence and sickening acts of vandalism by the public, *Unlikely Heroes* meets the need. Bass writes well, a talent much needed in a discussion of legal proceedings and judicial opinions that unavoidably will seem too technical for the lay reader and overly simplistic to the legally trained.

The work of federal judges and their private lives are not usually the base ingredients for high adventure. Each of those honored in the book were hard-working and successful lawyers who became judges in recognition of their professional success and by virtue of their political connections. They certainly did not foresee controversy and public censure as part of the judicial challenge they faced. Judge Tuttle, having accepted a judicial appointment shortly after the Supreme Court's school desegregation decision in May of 1954, told a friend: "I'm going home to retire on the Fifth Circuit Court of Appeals."⁴ Both Judges Tuttle and Wisdom predicted the South would comply with the *Brown* decision. They proved far better judges than prognosticators of the region's rebellious response to the Supreme Court's long-delayed acknowledgement that "separate but equal" was no longer an acceptable interpretation of the Fourteenth Amendment's equal protection of the laws guarantee.

To dramatize the pre-*Brown* climate in the deep South, Bass provides as prelude to *Unlikely Heroes* an interview with Constance Baker Motley, now a federal district judge in New York. Judge Motley recalls her first trip to Mississippi in 1948 as an NAACP lawyer, and her initial confrontation with the now famous 40 feet long and 20 feet high plantation mural that stretched across the front of the federal courtroom in Jackson. The antebellum painting portrayed that mythical period of Southern history when imperfect memory and unabashed longing combined to create a continuing vision of what many Southerners consider to be the only real period of racial harmony in American history. The mural depicts blacks working in the cotton fields and others loading the products of those fields aboard a paddle-wheeled riverboat while the stereotypical "happy ducky" serenades them on a banjo, and the white overseer, whip in hand, surveys the whole reassuring scene.

The federal courthouse mural disturbed and embarrassed white liberals far more than it did blacks for whom it represented one of the more benign manifestations of the South's racial ethos. Too many other encounters with whites in Mississippi posed a far more immediate threat for blacks. For example, Judge Motley recalls how she and fellow NAACP attorney Robert C. Carter, now also a Federal district judge in New

4. J. BASS, UNLIKELY HEROES 15 (1981) [hereinafter cited by page number only].

York, were insulted by a grocery clerk in Mississippi. Instinctively, these highly educated black lawyers from the North knew as firmly as the poorest Southern black sharecropper that they could not protest even this casual slight to their dignity without endangering their lives.

Bass then suggests that, in the 1980's, a different and far more civilized South has emerged. He states without equivocation that the "heroic bank" of Fifth Circuit judges were primary movers in that change. To support this claim, Bass begins Chapter 1 with a quotation from reporter Claude Sitton who in the early 1960's served as the New York Times southern correspondent. "Those who think Martin Luther King desegregated the South," proclaims Sitton, "don't know Elbert Tuttle and the record of the Fifth Circuit Court of Appeals."⁵ Similar comments are sprinkled liberally throughout the text.

It is certainly permissible in a book intended to confer hero status on its subjects for the author to quote Yale Law Professor Burke Marshall, who served as Assistant Attorney General in charge of the Civil Rights Division during the Kennedy Administration, as stating that Tuttle, Rives, Wisdom, and Brown made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done on any court.⁶ But does either Professor Marshall or the author actually believe that, as Marshall contends further, "If it hadn't been for judges like that on the Fifth Circuit, I think *Brown* would have failed in the end"?⁷

Approbation of this character strikes an unharmonious chord for me. In 1960, I became an assistant to both Mrs. Motley and Mr. Carter, and worked for lengthy periods in Mississippi from 1961 to 1966. No one was more pleased than I to take an appeal to the Fifth Circuit and find one or more of the Court's liberal judges on the panel. But for all their worthwhile effort, favorable decisions in key cases were no more important than the leadership of Martin Luther King and dozens of lesser known Southern black leaders, particularly the handful of local lawyers who became identified with the civil rights cause at the expense of their practices and at the risk of their own and their families' lives.⁸

Perhaps it was unintentional, but it is unnecessary for Bass to subordinate the contributions of blacks in order to gain adequate appreciation for these courageous federal judges. Their decisions were welcome and valuable. But they were not determinative in the progress made by

5. P. 15.

6. P. 17.

7. *Id.*

8. See Amaker, *De Facto Leadership and the Civil Rights Movement: Perspective on the Problems and Role of Activists and Lawyers in Legal and Social Change*, 6 S.U.L. REV. 225 (1980).

blacks during the 1960's and 1970's, and their efforts to keep faith with the original understanding of the *Brown* decision may prove in the light of still unfolding events to have effected change that was both less substantive and less permanent than any of us believed during the exciting era this book records.

The author's decision not to come to grips with this unhappy epilogue of the *Unlikely Heroes*' work may also explain the nagging dissatisfaction with the book that I share with the New York Sunday Times reviewer, who faulted it because "it lacks a clear vision of how to reconstruct this history and relate the experience of regional strife to the shaping of federal law."⁹ It is one thing to review the tremendous developments in civil rights law that happened ten to twenty years ago. It is another to tell that story as though the hopes and expectations of that legal struggle have been realized.

The Fifth Circuit did give blacks and their lawyers hope—as Carsie Hall, one of Mississippi's first black attorneys, said¹⁰—but it was the hope that the courts would both grant and protect rights for blacks based on the latter's entitlement to them. Those hopes have fallen far short of expectations, and even rights that were judicially recognized in the past are now under concerted and continuing attack on all fronts, from the White House to the smallest Southern precinct.

To be sure, a great and courageous effort to bring justice to those from whom it has been withheld too long is not diminished because in the end it failed to attain all of its goals. Nor is the contribution of these judges less worthy because the black beneficiaries of their efforts contributed to the crusade. Bass seems to recognize this fact toward the end of *Unlikely Heroes*. He acknowledges that skilled and committed lawyers were necessary to bring to the Fifth Circuit the issues that the Court used to expand and reshape legal and constitutional principles,¹¹ and he quotes Judge Tuttle who had told him, "We became what I consider a great constitutional court, . . . and I think we largely have to thank the black plaintiffs for that."¹²

It did become a great constitutional court, but as the current declining status of civil rights precedent reflects, not great enough to deliver a mortal blow to the region's commitment to keep black people down. The Justice Department's John Doar, who traveled the South extensively in the 1960's, reports that he soon "began to appreciate the relentless determina-

9. N.Y. Times, Aug. 30, 1981, § 7 (Book Review), at 8.

10. P. 18.

11. P. 296.

12. *Id.*

tion of white people to maintain the caste system.”¹³ But, two decades after Doar’s discovery of what blacks had known and labored under for a century, it is clear that the pro-civil rights decisions handed down by the Supreme Court, the Fifth Circuit, and other federal courts have deflected rather than defeated the racist motives that underlay both slavery and the separate but equal doctrine of *Plessy v. Ferguson*.¹⁴ If there is a more optimistic explanation for why civil rights precedents established through the expenditure of so much sacrifice have proven incapable of effecting more than a temporary relaxation in the society’s traditional racial ordering, *Unlikely Heroes* does not provide it.

II

Criticism of what might have been done with *Unlikely Heroes* should not diminish its accomplishment as a worthwhile record of an historic period. Although it lacks an analysis of why so committed a judicial effort failed to bring us closer to the ultimate resolution of America’s racial dilemma, the book does offer insights at a less ambitious level that can enlighten contemporary race relations workers.

Of special interest is the interesting similarity in backgrounds of the judges whose work this book hails. Prior to their appointments, each of the four Fifth Circuit judges had been involved in pre-judicial “liberal” activities, or had undergone consciousness-raising racial experiences.

Judge Richard Rives, a deeply religious Alabamian, is a graduate of Exeter and Harvard. The book depicts several consciousness-raising racial experiences during his youth. As a young lawyer, he recalled his shock when a jury awarded him only \$1,000 for the estate of a pregnant black woman killed and almost decapitated in a fall down an elevator shaft that lacked a guard rail. During World War II, Judge Rives served as a lieutenant in the Pacific. Forced to spend several weeks in a hospital recovering from a serious illness with black servicemen on either side of him, he developed strong feelings about racial injustice and determined to work for change. At his son’s suggestion, Rives read *An American Dilemma*, Gunnar Myrdal’s major study on race relations published in 1944.

Judge Elbert Tuttle was born and grew up in Hawaii, attended a multi-racial school, and moved to Atlanta after graduating from Cornell Law School. He built a successful practice and became active in civic activities, including service as a member of the Board of Trustees at Morehouse College, a private black college in Atlanta. In the 1930’s, Tuttle, a

13. P. 268.

14. 163 U.S. 537 (1896).

National Guard major, commanded a unit that prevented a mob from lynching John Downer, a black accused of raping a white woman. After Downer's conviction, Tuttle was asked by Austin T. Walden, one of the few black attorneys in the South at that time, to help with an appeal. Tuttle agreed, and they obtained a reversal of the conviction and a new trial. Downer was again convicted and eventually executed despite Tuttle's effort to gain a stay to investigate new evidence that the black man may have been a scapegoat the complainant used to explain to her parents indications on her clothing of sexual intercourse that may have occurred when she surrendered her virginity to her boyfriend.

Later, Tuttle represented a black Communist, possibly the only defendant in the South less likely to receive a fair trial than a black charged with the rape of a white woman. Angelo Herndon had been convicted of attempting to incite insurrection for passing out literature on the Atlanta Post Office steps that urged Southern blacks to join the American Communist Party. The conviction was upheld on appeal and the defendant, who could have been sentenced to death under the statute, was given twenty years at hard labor. Tuttle and his law partner attacked the statute as unconstitutional under the First and Fourteenth Amendments. They finally prevailed at the Supreme Court by a five to four decision.¹⁵ Tuttle also served as counsel in *Johnson v. Zerbst*,¹⁶ the landmark case that established the right to counsel for every defendant charged with a federal crime. He had taken this case at the request of the ACLU, and when that organization ran out of funds, Tuttle personally paid the expenses of an appeal to the Supreme Court.

Tuttle and John Minor Wisdom, a successful corporate lawyer in New Orleans, had long been close friends and allies in the effort to reform the South's reactionary, one-party system. Both worked to elect Dwight Eisenhower in 1952, and Wisdom, declining nomination to the Fifth Circuit himself in 1954, recommended Tuttle for the post. Three years later, when a Louisiana vacancy occurred on the Fifth Circuit, Eisenhower personally selected Wisdom.

Judge Wisdom is a member of an exclusive segment of New Orleans' genteel aristocracy. He attended Washington and Lee College, spent a year as a graduate student in English at Harvard, and then returned home to attend Tulane's Law School. Wisdom served as a board member of the New Orleans Urban League, had been President of the New Orleans Council of Social Agencies, and had been a member of the President's Committee on Government Contracts.

15. *Herndon v. Lowry*, 301 U.S. 242 (1937).

16. 304 U.S. 458 (1938).

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Judge John Brown, a native of Nebraska, went to Texas after finishing Michigan Law School, and later became a senior partner of a law firm that specialized in admiralty law. He had not seen racial prejudice growing up in Nebraska, and recalled his friendship with the only black in his hometown. Brown, like Tuttle and Wisdom, helped to build a Republican Party in Texas, and also worked for the election of Eisenhower, who appointed him to the Fifth Circuit in 1955.

Thus, three of the Fifth Circuit's four liberal judges, as well as District Judge Frank Johnson, were Republican appointees of President Eisenhower, who had received little of the predominantly Democratic black vote, and whose own record in civil rights left much to be desired.¹⁷ In each case, political performance and connections were more important than professional accomplishments, judicial potential, or civil rights orientation in gaining the nomination.

Certainly any expectation that these appointees would favorably consider civil rights petitions played little part in their nominations. The coincidence of a liberal majority on the Fifth Circuit during this crucial period in the South's racial history was the result of neither political pressures brought by black voters nor a strong commitment by President Eisenhower to eliminate racial injustice.¹⁸

Predictably, the Eisenhower administration's record of judicial appointments was not without blemish. Surviving lengthy questioning by Deputy Attorney General William Rogers, Mississippi attorney Ben Franklin Cameron received, at age sixty-four, an appointment to the Fifth Circuit in 1955. Cameron was a member of neither the Citizens Council movement nor other secret groups involved in racial matters; Eisenhower deemed him a most unusual judicial nominee because, as he told Cameron, "You have the endorsement of both Senator Eastland and the NAACP."¹⁹

But Cameron was an ardent believer in state's rights, and as Bass accurately assessed his position, "He never accepted *Brown* as based on legal precept, and from the beginning he positioned himself on the court as stalwart defender of a way of life that was dying."²⁰ Bass records in gossip detail the resulting clashes, private as well as public, between Cameron and the Fifth Circuit's liberal wing,²¹ to whom Judge Cameron re-

17. Both Judge Rives and Judge Skelly Wright were appointed by President Harry Truman.

18. Bass does report that Eisenhower's Attorney General, Herbert Brownell, a Wall Street lawyer with a strong background in liberal Republican politics, possessed a quiet commitment to civil rights and influenced the Eisenhower administration's support for the civil rights laws enacted in 1957 and 1960. Pp. 151-52.

19. Pp. 85-86.

20. P. 88.

21. Pp. 88-96, 233-47.

ferred in one of his bitter dissents as "The Four."²²

Against a background of liberal Republican judicial appointments by fortuitous circumstance, it is interesting to compare the judicial selections of President John F. Kennedy, who received decisive support from black voters. In signing the Omnibus Judgeship Act in May 1961, President Kennedy promised to fill the seventy-one new positions with individuals possessing "professional skill, incorruptible character, firm judicial temperament, the rare inner quality to know when to temper justice with mercy, and the intellectual capacity to protect and illuminate the Constitution and our historic values"²³

Unhappily, President Kennedy felt he had to observe the Senate's courtesy system regarding judicial appointments. Thus, because of the opposition of Louisiana's senators, he failed to promote district Judge Skelly Wright to the Fifth Circuit despite Judge Tuttle's strong plea that "We need him. He'd be a great boost to those of us on the Fifth Circuit."²⁴ The two Fifth Circuit vacancies the Omnibus Judgeship Act created went to Griffin Bell in Georgia and Walter Gewin in Alabama. Neither were rigid segregationists, but both were far from progressive on civil rights issues.

The Kennedy administration filled the seat Skelly Wright vacated²⁵ by appointing Frank Ellis, a conservative who had proven incompetent in the government job he received after serving as Kennedy's Louisiana state campaign manager. Ellis, who promptly diluted Judge Wright's New Orleans' school desegregation plan, was, according to one Kennedy official, "the only appointment we knew was bad when we made it."²⁶

This is a telling admission given the high standards Kennedy promised in his judicial selections. Kennedy's abject surrender of these standards under pressure from Mississippi's Senator James Eastland and other Southern conservatives led to the approval of Harold W. Cox in Mississippi, E. Gordon West in Louisiana, and Robert Elliott in Georgia. Cox, equally famous for his racist comments from the bench as for his predictable rejection of all civil rights petitions placed before him, was appointed,

22. P. 231. Dissenting in *Armstrong v. Board of Educ.*, 323 F.2d 333, 353 n.1 (5th Cir. 1963), Judge Cameron cited a newspaper article indicating that Rives, Tuttle, Wisdom, and Brown had stood together consistently in decisions on civil rights cases, and proclaimed, "These four Judges will hereafter sometimes be referred to as The Four." Cameron charged Chief Judge Tuttle with rigging the three-judge panels in civil rights cases to achieve a desired result by assigning panels "composed of some combination of The Four" Pp. 235-36.

23. P. 155.

24. P. 156. Deputy Attorney General Byron White called Judge Wright to convey personally his regrets that he had been unable to win approval from Louisiana's senators for the appointment.

25. A few months after the appointment of Frank Ellis, Wright was named to the District of Columbia Circuit Court of Appeals. This action, Bass notes, recognized Wright's performance and pleased Southern senators by removing him from the South. *Id.*

26. P. 171.

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despite suspicions that Senator Eastland's strong support for him raised, because he assured Robert Kennedy that he would enforce the Constitution as interpreted by the Supreme Court.²⁷

Judge West ignored civil rights precedent, and once revealed his determination not to follow the *Brown* decision by characterizing it in a judicial opinion as "one of the truly regrettable decisions of all time . . ."²⁸ But West, who denounced desegregation efforts from the bench as Communist-inspired, was not a more committed segregationist than Judge Robert Elliott, whose reversal rate in civil rights cases was 90% during Robert Kennedy's tour as Attorney General.²⁹ Later, Bass reports, the Kennedys learned that it wasn't necessary to accept poor recommendations from Southern senators. More moderate appointments followed, including Lewis Morgan in Georgia, Robert Ainsworth in Louisiana, and William McRae in Florida.

But was there a message in the Kennedy administration's "slow read" of Southern segregationist sympathies? Why did the quite real debt owed to black voters not prevail over the administration's sense of responsibility to Southern campaign officials and senatorial customs long used to preserve the South's stranglehold on black rights? Here was an opportunity to enhance efforts by blacks to seek in federal court protection of constitutional rights neither the executive nor legislative branches had been willing to provide. The administration tried to further this end, yet the effort was so puny as to make one question whether the Kennedy appointments would have been any worse from a civil rights standpoint had blacks voted overwhelmingly Republican in the 1960 presidential election.

The Kennedy experience provides the basis for at least an argument that black political support for a successful national candidate does not translate into guaranteed support for even basic black needs. Although there is little evidence that the Kennedy administration felt no obligation to blacks, the priority assigned to black interests, given society's commitment to resist real civil rights reform, was simply inadequate. Explaining why the Kennedy administration had been unwilling to fight for his nomination to the Fifth Circuit, Skelly Wright told Bass, "Politically, they needed some votes in the Senate. And that was the end of it."³⁰ To be

27. P. 165. Kennedy later admitted that Cox had misled him. The NAACP's Roy Wilkins warned at the time of Cox's appointment that for Mississippi's million Negroes, Judge Cox "will be another strand in their barbed wire fence, another cross over their weary shoulders and another rock in the road up which their young people must struggle." P. 166.

28. P. 169.

29. In 1952, Elliott, then a floor leader in the Georgia legislature, had declared "I don't want these pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws and traditions." P. 169.

30. P. 156.

sure, some decisions presented difficult dilemmas. Kennedy may have feared, for example, that unless he capitulated to Eastland's demand that Judge Cox be appointed to the district court in Mississippi, Eastland's Judiciary Committee would never approve NAACP chief counsel Thurgood Marshall's appointment to the Second Circuit.³¹

Politics is compromise, and judicial appointments are the fine edge of politics. Kennedy viewed himself as a politician. Despite his debt to black voters and his genuine concern for their plight, he did not view as politic the all out risk required to appoint federal judges who had themselves risked their legal careers in defense of the civil rights cause.

Unswerving opposition to racism in this country requires both courage and, for those involved in or responsive to the political process, a willingness to pay a price. As the Skelly Wright experience revealed, a strong civil rights record can prove a barrier to professional advancement that the political strength of blacks is inadequate to overcome. By a mammoth effort during the Nixon administration, civil rights adherents did manage to scuttle the appointments of Clement Haynsworth and Harrold Carswell; but Bass also tells us that when a moderate Republican governor suggested Judge Wisdom's name to Attorney General John Mitchell, the response reportedly was, "He's a damn left winger . . . He'd be as bad as Earl Warren."³² Tuttle wrote to Mitchell protesting the statement, and Mitchell in his reply denied making it, but no serious consideration was given to Wisdom's elevation to the Supreme Court.

While the outlook of these judges on racial issues was too forthright for much of the country, some aspects of their lives might give pause to the purists among integration proponents. Judge Rives, active in state politics, had attended a few meetings of the Ku Klux Klan after World War I. While, unlike his friend and mentor Justice Hugo Black, Rives had not joined the Klan, he has candidly admitted that he had not always been "pure on this question of bigotry . . ."³³ He had once advised the Montgomery Board of Registrars on how to thwart an early registration drive by blacks; in the early 1930's, he was involved in a case seeking the disbarment of Arthur Shores, one of Alabama's first black lawyers, for allegedly soliciting a case of a black woman who was trying to vote. Both events occurred, Rives reportedly said, "before he developed a real understanding of the racial situation."³⁴ Certainly, his record on the court provides impressive proof that he learned much over the years.

More surprising is the revelation in *Unlikely Heroes* that Judge Wis-

31. P. 168.

32. P. 42.

33. P. 73.

34. Pp. 73-74.

dom, perhaps the most militant and most outspoken of the Fifth Circuit's liberal wing, has retained his associations in exclusive private clubs and Mardi Gras crews that discriminate against blacks and Jews. In explaining the seeming paradox of his behavior to Bass, Wisdom said: "The people I see in these clubs are guys that I went to school with and have known all my life. I would not resign from any such club. I think that my private life and people I go with is my own. They know how I stand on these matters . . . I certainly wouldn't change their views by getting out of the club."³⁵

It is not clear what response to Wisdom's statement will be made by proponents of an amendment to the American Bar Association's Code of Judicial Conduct requiring judges to resign from private clubs with admission rules that discriminate on the basis of race, sex, and religion.³⁶ While those who urge adoption of the amendment contend that minorities and women are entitled to have their cases heard by judges whose impartiality is not placed in question by their association with organizations that invidiously exclude members of these groups, what can be said to a judge like Wisdom whose actual performance in civil rights cases over two decades entirely rebuts any presumption of bias raised by his associations?

Whatever the answer, the question suggests the importance of a character trait all those honored in *Unlikely Heroes* proudly possess. That trait is their fierce independence and an almost obsessive willingness to stand behind unpopular positions, come what may. This quality was needed, for the South did not lack individuals and groups ready and willing to convey to liberal judges in the strongest and most threatening terms their profound disagreement with pro-civil rights decisions. In the face of such judicial determination, however, these critics would not have been reassured had they known that Judge Rives once gave his assistance to a scheme to keep blacks from registering to vote, and that Judge Wisdom has not seen fit to resign from private clubs with bigoted membership policies. Yet the question remains, in a society in which the customs and forms of white supremacy are so deep and diverse that even white men like Judge Rives and Wisdom are not untouched, how can we evolve measures for identifying others with potential for unselfish service in the cause of racial justice?

No one familiar with the South's racial etiquette in the pre-*Brown* years, or for that matter even during the first decade after *Brown*, can

35. P. 46.

36. Canon 2 of the Code of Judicial Conduct provides that "A judge should avoid impropriety and the appearance of impropriety in all his activities." Whether this prohibition should specifically include membership by a judge in an organization that practices invidious discrimination is discussed in Bell, *Private Clubs and Public Judges: A Non-Substantive Debate About Symbols*, 59 TEX. L. REV. 733 (1981).

view the region now and find it unchanged. Without citing the chapter and verse of progress, even a critic would be hard pressed to deny that the South has caught up and perhaps surpassed the North in both racial accomplishments and attitudes.

But neither the antidiscrimination principle of *Brown* nor the myriad of civil rights laws and agencies enacted in the wake of that still controversial decision has brought lasting relief from the societal pain of racism. Now that the Second Reconstruction is being dismantled, where are the successors to Rives, Tuttle, Wisdom, Brown, Wright, and Johnson who will save from imminent destruction the work of thirty years?

It is not beyond hope that so fortuitous a coalition will rise again in the courts, but it is beyond reason and bordering on cowardice that we should sit passively and wait for a second miracle. Furthermore, in the 1980's the challenge of racism will likely take forms that are mostly immune to judicial attack. It is unlikely that prestigious figures, on or off the bench, will serve as surrogates of pleas for racial equality or as scapegoats for the multitudes who view white supremacy as essential to the nation's functioning. What those committed to the vision of a nonracist America must do is less clear than that we must be willing to do it on our own.

"Nobody can free us but ourselves." The very real accomplishments of these Fifth Circuit judges transform Preston Wilcox's message from friendly admonition to a most stern warning.

The Problem of Obsolete Statutes: A New Role for Courts?

A Common Law for the Age of Statutes. By Guido Calabresi. Cambridge, Mass: Harvard University Press, 1982. Pp. 181, \$25.00.

Frank M. Coffin†

I. The Grand Tradition

A major difference between civil law and common law systems of jurisprudence has been the disparate influence exercised on each by judges and legal scholars. The scholars, we are told, dominate the development of civil law, while the judges control the evolution of common law. This description may well approach reality as far as substantive doctrine is concerned. But it seems that academics have had and still maintain an edge over judges on the subject of the proper role of courts in our system.

One must begin in 1871 when Dean Langdell, in his *Cases on Contracts*, declared that law is a science.¹ A decade later, Oliver Wendell Holmes, the scholar, demonstrated in *The Common Law* that law was not such a science after all. Later on, Dean Pound and Professor Frankfurter gave body to "sociological jurisprudence." Then a judge, Jerome Frank, launched "legal realism," but he had professional help from academics such as Karl Llewellyn. In recent times, we have seen the Legal Process school, with H.L.A. Hart, Albert Sacks, Herbert Wechsler, Alexander Bickel, Harry Wellington and a fecund generation of disciples. All have contributed mightily to illuminating the options and charting the hazards for practicing judges as they engage in the lifelong quest for their proper role.

There seems to be no slackening in the tide of scholarly writing on the role of judges. As Judge McGowan points out, however, "the central pre-occupation" of many leading scholars is not the role of courts generally but the nature and scope of the role of the United States Supreme Court.²

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1. A. SUTHERLAND, *THE LAW AT HARVARD* 174-75 (1967).

2. McGowan, *Constitutional Adjudication: Deciding When to Decide*, 79 MICH. L. REV. 616

Two recent offerings are from gifted law teachers on both coasts. Harvard's (now Stanford's) Ely in *Democracy and Distrust*³ would have the Court husband its prestige and concentrate its efforts on enhancing the individual's participation or representation in the process of national policymaking. Berkeley's Choper in *Judicial Review and the National Political Process*⁴ would have the Court stick to protecting individual rights, and the integrity of its own functioning, and abjure decision of controversies between states and the national government and between the legislative and executive branches.

Ely and Choper are both primarily concerned with defining the proper function of the Supreme Court in our society. Each strongly advocates Court action in those areas deemed most appropriate for constitutional decisionmaking, and each urges withdrawal from cases not within those areas. Each also exhibits a concern that the Court not unduly strain citizens' trust in and acceptance of its decisions.

It is only fitting that distinguished Yale Professor Guido Calabresi should make these new offerings into a trilogy with his new book, which germinated as the Oliver Wendell Holmes Lectures at Harvard Law School in 1977. But his is a book with a difference. Although its focus is how courts should act, it steps down from the Olympian heights of constitutional doctrine and—refreshingly, for this reader—explores an upland meadow of nonconstitutional adjudication, the problem of outdated statutes and what can be done about them—specifically, what *courts* should be permitted to do about them. Reflecting the author's wide-ranging interests, but also drawing on the rich vineyard of common law learning in which he nurtured innovative contributions to the theory of tort liability, the book speaks to all judges, supreme and inferior, state and federal.

II. The Doctrine

Although Professor Calabresi may have stepped down from the heights of Olympus and constitutionalism, his horizon has by no means shrunk. He urges that courts exercise with candor, subject to certain limiting principles and guidelines, "the judicial power to force legislative agendas":⁵ to identify, nullify, and thus require legislative reconsideration of statutes that are seen to be inconsistent with the circumambient "legal topography" of the times. In an epoch when legislators are demonstrating endless

(1981).

3. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

4. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

5. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 20 (1982) [hereinafter cited by page number only].

ingenuity in proposing ways to limit, hobble and divest courts of jurisdiction over politically controversial matters, the approach appears as a welcome, albeit a lonely, reaffirmation of confidence in the judicial process. The fact that this approach might score low in a current public opinion poll is beside the point. Like any original thinking, it is bound to be different from the conventional wisdom. It deserves the most serious consideration, untrammelled by tactical or political prejudgments.

Professor Calabresi's book begins with recognition of the societal values that are his major concern. Next comes his perception of a major threat to these values, followed by his systematic analysis of the efficacy of existing protections—all of which are found wanting. Finally comes Professor Calabresi's new doctrine, first justified by defending the capacity of courts to act in a new role, then refined by discussions of its hazards, limitations, and techniques of application.

The Values Served. Professor Calabresi views the health of our body politic as best served by restoring the balance between continuity and change in the legal system that is said to have prevailed in the nineteenth century, when stability was fostered by the fact that legislatures made and revised laws sparingly. Continual but non-convulsive change was provided by the incremental processes of common law adjudication. Although we now live in a vastly different world, the goal of Professor Calabresi's approach is to erect "a modern version of . . . the traditional legislative-judicial balance, on the assumption that the aim of such a balance is the thoughtful allocation of the burden of inertia in a system of checks and balances which seeks both continuity and change."⁶

The Problem. The classical balance between continuity and change has been lost with the onset of the welfare state, economic and other crises, and the proliferation of legislative responses. We live in an age of statutes.⁷ These statutes, enacted within a particular social and political context, generally carry the seeds of their own mortality, gradually losing their relevance and utility as technology and social values change. They almost inevitably cease to match the legal landscape of pertinent statutes, case law, and scholarly commentary. The result, to invoke the author's colorful language, is "statutory petrification." The increasing frequency with which courts encounter the frustration of anachronistic statutes in the disposition of cases elevates the problem to one of grave concern: Hence the Holmes Lectures and this book.

6. P. 82.

7. To describe our current condition in one word is a challenge that might frustrate the Academie Francaise. Professor Calabresi has chosen "statutorification." One's immediate reaction is that this is a word that is mercifully soon forgotten. Yet, what is the alternative? "Statutization" has the merit of being two syllables shorter, but is hardly an ornament to the language.

The Inadequacy of Present Efforts. Having stated the problem, Professor Calabresi examines, in six incisive chapters, the existing ways in which superannuated statutes are dealt with: (1) courts too easily resort to strained constitutional equal protection analysis to deal with a nonconstitutional statutory problem; (2) even when courts attempt to invoke the "passive virtues" by refraining from action in the hope of inducing a legislature to take a second look at a statute, their reasoning and language partake of a "rhetoric of constitutional dubiety,"⁸ thus unnecessarily chilling or aborting creative legislative responses; (3) judicial reliance on the canons and processes of statutory interpretation is unavailing if the statute is crystal clear; indeed this limitation has led courts to "creat[e] false uncertainty where it does not exist";⁹ (4) administrative agencies are too committed to existing rules, too dependent on legislative committees, and too parochial in their vision to undertake timely and independent renovation that would carry a conviction of legitimacy; (5) legislative mechanisms such as sunset laws to assure periodic reevaluation and indexing to keep monetary ceilings in line with inflation substitute rigidity where flexibility and judgment are needed and therefore are excessively burdensome, ineffective, and inappropriate; (6) radical structural responses—such as adoption of the European model of making statutory revision and updating as easy as passing new laws, or returning to a "pure golden age of the common law"¹⁰ by increasing the obstacles to legislative lawmaking—are not realistic possibilities. In short, Professor Calabresi concludes that the existing ways of dealing with obsolete statutes are largely disingenuous, ineffective, and without a sense of limits.

The New Doctrine. The starting point for Professor Calabresi's approach is to take as the measure of a statute's legitimacy its likely concord with a contemporary legislative majority. A workable litmus test is the consistency of the statute with "the legal fabric, and the principles that form it, [for they are] a good approximation of one aspect of the popular will, of what a majority in some sense desires."¹¹ Even though society may in fact currently prefer some action inconsistent with this fabric, "consistency with the legal fabric is an appropriate starting point for lawmaking";¹² its absence is sufficient to summon a contemporary majority to re-think the issue.

With this foundation laid, Professor Calabresi points to what judges do in exercising their common law power. They attempt, in a principled

8. P. 26.

9. P. 38.

10. P. 69.

11. P. 96-97.

12. *Id.*

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way, treating like cases alike, to adapt precedents to a current problem. In defining what a “like” case is, they take into account ideological, technological, judicial, and even statutory developments. In short, they reach an outcome consistent with the existing legal fabric. He then adds that there is no valid reason to limit such judicial scrutiny to previous common law cases. Statutes (and to a varying degree scholarly criticisms, jury actions, and even administrative determinations) also “reflect changes in underlying popular attitudes.”¹³ Therefore, courts should have “the power to treat statutes in precisely the same way that they treat the common law”¹⁴—by altering part of a statute, nullifying it, or threatening such actions—and, by so doing, courts should be able to force the legislative agenda by shifting to the legislature the job of repassing a law if the legislature really wants it.¹⁵

Perhaps the most tightly packed summary of this book is the following, to which mere paraphrase could only do injustice:

What, then, is the common law function to be exercised by courts today? *It is no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule.* It is the judgmental function (which cannot successfully be accomplished by sunset laws or automatic updatings) of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it. It is to be the allocator of that burden of inertia which our system of separation of powers and checks and balances mandates. It is to assign the task of overcoming inertia to that interest, whose desires do not conform with the fabric of the law, and hence whose wishes can only be recognized if current and clear majoritarian support exists for them. It is this task (so like that exercised by courts in updating the common law) which desperately needs doing in a checked and balanced statutory world like ours, and it can be done by courts using traditional judicial methods and modes of reasoning.¹⁶

The new doctrine thus arrived at, Professor Calabresi devotes labor and learning to anchoring it in the mainstream of thinking about the role of courts. He identifies limits on the proper use of his doctrine, indicates the range of techniques available in applying it, and discusses whether it should be candidly acknowledged or fostered only by subterfuge. I leave

13. P. 98.

14. P. 82.

15. P. 80.

16. P. 164 (emphasis in original).

the discussion of the limits of this doctrine and questions as to its application to the readers of the book, observing only that much prudential wisdom and sensitivity are reflected. My own reflections range from doubts about the book's underlying premises and the extent and seriousness of the problems raised, to speculation as to the workability of his doctrine in the hands of judges, and the existence of more viable alternative solutions.

III. The Theory And Its Fit With Our Scheme of Things

As an introduction to his doctrine, Professor Calabresi, in a familiar common law way, takes pains to show that he is rowing in the mainstream of tradition. It is no surprise that Landis is recognized as an important progenitor. In his seminal *Statutes and the Sources of Law*,¹⁷ Landis's discussion of the "gravitational pull" that statutes exert on courts' common law decisions is really the obverse side of Calabresi's doctrine, which would subject statutes to judges' common law lenses. Professor Calabresi also seeks to identify supporting resonances in the writings of Chief Justice Stone, Chief Justice Traynor, and Judge Henry Friendly. Quite unexpectedly, support is said to come from the Harvard Legal Process School, by reason of "[i]ts open recognition that courts not only make law but that they also do and should update statutes."¹⁸

I doubt that Professor Calabresi's doctrine can claim any meaningful descent from these sources, or that, even if it could, any real luster would be added. The fact that others may have foreshadowed one's thought or that others have been on the same wavelength is interesting, but unimportant in the assay of it. In its present forthright form, the doctrine is genuinely new, not derivative; it therefore deserves judgment on its merits, not on its possible antecedents.

A threshold question to test one's perspective is whether the judicial review of statutes for anachronism is an anachorism. In plainer language, is judicial review of statutes for being out of date out of place in our political system?

The underlying defense for this form of judicial review is that statutes are not inherently different from common law rules and that statutes can easily be subjected to the principled, incremental, and conditional assessments that our democratic society has entrusted to courts in developing and updating common law. In one sense, I share the author's view that the distinctions between statutory and common law adjudication are mini-

17. Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (1934).

18. P. 88.

mal.¹⁹ Indeed, while we live in a time of government by statute, I do not see that courts are being called on to act in any essentially different way than when the grist for their mill had more of a common law origin. The courts' task is still to fill gaps, to adapt general mandates or precepts to special and unforeseen situations, to devise substantive and procedural safeguards, prerequisites, caveats, and balancing tests, to allocate and define burdens, to articulate standards of review, and to decide innumerable other interstitial details. Even though a large chunk of my work as a federal judge centers around one statute, 41 U.S.C. § 1983, I feel very much like a common law judge when deciding such issues as "color of state law," nature of property or liberty right, extent of process due, existence of qualified or absolute immunity, and subjective and objective tests of knowledge of constitutional violations.

Yet, as Professor Calabresi acknowledges, "[j]udges have been taught to honor legislative supremacy and to leave untouched all constitutionally valid statutes."²⁰ Is there anything more to this teaching than mere tradition? The answer is not a simple one. It is not predetermined by measuring judicial oversight of statutes against absolute majoritarian or democratic theory. After all, purely majoritarian values are difficult to reconcile with judicial common law making and gap filling, not to mention constitutional review of statutes. I prefer to consider our governmental structure, both state and federal, for want of a better word, "mixed";²¹ its genius is not ideological purity but its pragmatic combination of powers and rights distributed among the branches as well as among minorities, individuals, and the current majority. Yet, despite the difficulty of finding bright lines in such a complex governmental scheme, the special nature of written laws enacted by a (usually) bicameral legislature and signed by an executive seems at first blush to be basic. Immediate frustration by executive action is carefully regulated by veto provisions. The processes of repeal and amendment are also carefully regulated by legislative ground rules and provisions for popular initiative and referendum. In sum, it seems that a very high burden rests on one who would accord the judiciary a new albeit non-final power to nullify the statutes that are the ultimate product of agreement between the legislative and executive branches.

19. The distinction, such as it is, has been described as follows:

The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.

Westen & Lehman, *Is There Life for Erie After the Death of Diversity?* 78 MICH. L. REV. 311, 332 (1980).

20. P. 6.

21. F. COFFIN, *THE WAYS OF A JUDGE* 216 (1980).

To be sure, even before *Marbury v. Madison*,²² courts exercised a power to strike down legislation if it offended a "higher law," that is, a constitution. But to countenance a judicial power to strike down a statute merely for lack of fit with something less than such higher law requires a new perspective. This Professor Calabresi endeavors to give us. He emphasizes that his primary aim is to force "legislatures to face up to their majoritarian responsibilities,"²³ and that such a goal "serves precisely to maintain the balance between the traditional court role of keeping the fabric of the law consistent and up to date and the legislative role of reversing judicial misperceptions of majoritarian demands."²⁴ The author dismisses any constitutional objection to his scheme by observing that an explicit delegation of such power to courts would not diminish the legislature's ultimate responsibility. Professor Calabresi does not directly discuss the constitutional problems raised by courts taking on the power of reviewing statutes for obsolescence without an explicit delegation. But, having satisfied himself that such an explicit delegation would be constitutionally permissible, he is confident that even if courts proceed without such delegation, "our constitutions will not stand in the way."²⁵ Nor, he feels, would either legislatures or courts be impeded in their basic functions.

Passing any constitutional problems, I wonder about the "fit" of all this with our scheme of things. In other words, even assuming that a legislature *could* tell the courts to carry out Professor Calabresi's doctrine, I wonder if it *should*. Courts in the hey-day of common law rules were not notoriously energetic about updating. Sometimes centuries passed without more than glacial movement. The dominant values of certainty, stability, and predictability that were served then are equally important now. Furthermore, the laws on the books of the states and the nation are heavily encrusted palimpsests of the hard-won victories of many, many different majorities over the past decades and centuries. It is hard to imagine that the validity of the current accretion of statutes should depend on whether they would be theoretically voted in today by tens of thousands of successive computerized roll calls.²⁶ In any case, even though the power of courts to force a legislative reconsideration is merely a non-final burden shifting

22. 1 U.S. (Cranch) 137 (1803).

23. P. 115.

24. P. 116.

25. *Id.*

26. The antipodal view is that of Edmund Burke, as summarized by Professor Bickel:

The people, as Burke used the term, was a body in place, gathered, led, manifesting its temper in many ways and over a span of time as a whole, or as one or another sizable community within the whole body, not speaking merely on occasion in momentary numerical majorities.

BICKEL, THE MORALITY OF CONSENT 17-18 (1975).

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in theory, realistically it would often be the power to nullify statutes finally or for lengthy periods, depending on the amount of legislative interest, time and energy needed to secure repassage. In short, the capacity to force agendas must not be taken lightly—it is a considerable power. One might even, perhaps unfairly, push Professor Calabresi's doctrine to its logical extreme and imagine courts sizing up the landscape, discerning an unfilled need, and promulgating a new and consistent rule, a judicial statute, which the legislature could of course nullify.

Professor Calabresi's confidence in the critical abilities of judges in "exploring and mapping the legal landscape"²⁷ does not seem to have been notably shared by the Founding Fathers. A lineal ancestor of the doctrine of judicial scrutiny for "statutory petrification" was the idea that judges should evaluate brand new statutes. A proposal for a Council of Revision contemplated that the Supreme Court would be "associated with the Executive in the Revisionary power."²⁸ James Wilson, of Pennsylvania, in advocating such a Council, commented that although "judges, as expositors of the Laws would [under other provisions] have an opportunity of defending their constitutional rights[,] . . . the power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the judges in refusing to give them effect."²⁹ Madison seconded the motion. Ellsworth chimed in, saying that judges "will possess a systematic and accurate knowledge of the laws, which the Executive cannot be expected always to possess."³⁰ Madison added that the motion "would be useful to the legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity and technical propriety in the laws, qualities peculiarly necessary; and yet shamefully wanting in our republican codes."³¹

Luther Martin, shrewd lawyer of erratic brilliance and influence, seemed to put the quietus on the proposal:

A knowledge of mankind, and of legislative affairs cannot be presumed to belong in a higher degree to the judges than to the legislature. And as to the Constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative in the laws. Join them with the Executive in The Revision and they will have a double negative.³²

27. P. 97.

28. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (M. Farrand ed. 1966).

29. *Id.*

30. *Id.* at 74.

31. *Id.*

32. *Id.* at 76.

The motion was then defeated, as it was on later occasions. Granted, the idea was not precisely that of updating, but it did involve a remarkably similar appeal to judges' ability in "preserving a consistency."

IV. The Need for New Doctrine

On a theoretical level, then, I am not yet persuaded. Perhaps this is because I do not share Professor Calabresi's sense of the magnitude of this problem. Most federal statutes that I encounter seem reasonably current; our problem, of course, is not generally with the old ones but with the remorseless tide of new laws. I suspect, however, that statutory petrification may pose a somewhat larger problem for state courts.³³ Professor Calabresi suggests that the problem is "frequently (what used to be called) one of private law";³⁴ if so, this would point to a greater incidence in state courts. But how much greater?

Throughout the book there are examples of judicial efforts to deal with anachronistic statutes. In a number of instances Professor Calabresi argues that better results would have been possible if these efforts had been couched in terms of his new doctrine. But I am not convinced that the problem is faced very often or that the approaches actually taken are usually inappropriate.³⁵ For example, in Chapter II, which treats the over-

33. Indeed, examples from my own experience that readily come to mind are diversity cases involving possibly antiquated state court announced rules, where the first circuit certified the question of law to the state court. See, e.g., *Raymond v. Eli Lilly*, 556 F.2d 628 (1st Cir. 1977) and *Raymond v. Eli Lilly*, 117 N.H. 164 (1977) (time of accrual of cause of action for ingestion of drugs is time of discovery); *D'Ambra v. United States*, 518 F.2d 275 (1st Cir. 1975) and *D'Ambra v. United States*, 144 R.I. 643 (1975) (non-impact associated mental and emotional harm suffered by mother in witnessing death of child can be basis for cause of action); *Hendrickson v. Sears*, 495 F.2d 513 (1st Cir. 1974) and *Hendrickson v. Sears*, 365 Mass. 83 (1974) (time of accrual of cause of action for legal malpractice is time of discovery of title defect). In all these cases the state court revised its own law in accordance with current trends in case law.

34. P. 16.

35. My comments on the magnitude of the problem posed by statutory petrification are limited to the cases mentioned in the book. But Professor Calabresi generously identifies and gives credit to the two other scholars who have independently navigated these waters, Minnesota Senator (and Professor) Jack Davies and former Yale Professor Grant Gilmore.

Senator Davies' article, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979), describes his legislative proposal, which would, after a statute in a "private law" field has aged twenty years without significant amendment, allow courts to modify and overrule it as they modify and overrule common law precedents. Senator Davies relies on GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977), as having adequately demonstrated that "statutory obsolescence creates serious problems." Davies, *supra*, at 203-04 n.5.

Professor Gilmore, his interest sparked by Supreme Court nullification of the exclusive (if obsolete) liability provisions of the Longshoremen's and Harbor Workers' Compensation Act in the 1950's and 1960's, see GILMORE, *supra*, at 143-44 n. 58, foresees that "we will come to see that the reformulation of an obsolete statutory provision is quite as legitimately within judicial competence as the reformulation of an obsolete common law rule." *Id.* at 97.

Nowhere, however, do these authors attempt to canvass contemporary court decisions to ascertain how frequently the problem is significantly encountered.

tilization of equal protection clauses to deal with superannuated statutes, I see references to only three cases,³⁶ and a bald statement that a significant part of the recent increase in equal protection adjudication is “related to the problem of statutory obsolescence,”³⁷ the latter principally supported by an unpublished student paper describing such adjudication in one state.³⁸

The suggestion that there has been constitutional overkill in dealing with obsolete statutes when a milder approach would have been preferable is illustrated by a discussion of whether Judge Newman, in the three-judge court decision in *Abele v. Markle*,³⁹ could more fruitfully have dealt with a Connecticut statute barring abortions if his rationale had frankly been a nonconstitutional one that allowed a colloquy with the legislature. Both the opinion for the court and Judge Newman’s concurring view⁴⁰ precluded the legislature from concluding that the original purpose of the statute—protecting the health of pregnant women—was no longer valid. Moving over the difficulty, recognized by the author,⁴¹ of a federal court making any credible threat of nullifying a state statute on nonconstitutional grounds, I am still unsure that the passive virtues have frequently become vices in the cause of updating.

The same point can be made regarding the alleged abuses of statutory interpretation. We are told that one function of interpretation, “as Keeton and many recent court decisions have demonstrated, is the updating of laws, the avoidance of the ‘legislative deep freeze.’”⁴² Here, as elsewhere, the examples of what happened and what might have happened amply illustrate what Professor Calabresi means. But when he writes, “I have said enough to indicate why I believe the problem of legal obsolescence is a serious one, why simply living with anachronistic statutes is not really an option,”⁴³ I am not as ready as I wish I were to join him in this assessment.⁴⁴

36. The cases are *Griswold v. Connecticut*, 381 U.S. 479 (1965), where nullification for lack of fit would arguably have been more satisfactory than invoking six constitutional amendments; *California v. Goldfarb*, 430 U.S. 199 (1977), where Justice Stevens’ concurrence is said to have approached the new doctrine; and *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), in which the California Supreme Court invalidated a statute limiting the liability of car owners to guests.

37. P. 13.

38. P. 194 n.25.

39. 342 F. Supp. 800 (D. Conn. 1972).

40. The author misspeaks in referring to the decision as Judge Newman’s, perhaps because it was his concurring opinion that contained a thorough historical review of the purposes sought to be advanced by the state’s abortion statute. In fact, Judge Lumbard wrote for the court. Judge Claire, completing the triumvirate, dissented.

41. P. 201 n.43.

42. P. 32.

43. P. 110.

44. Near the end of the book we find a similar quantitative conclusion that may factually be true but, so far as the references reveal, deserve the Scotch verdict, “not proven”:

V. Workability Questions

Another range of questions comes into focus when we ignore for a moment doubts regarding the validity and necessity of the new doctrine and ask ourselves whether the doctrine is workable. The threshold question involves what Professor Calabresi terms the traditional judicial task of discerning the legal landscape or topography. This landscape is "an acceptable starting point [for determining when legislative reconsideration of statutes should take place], because it reflects underlying values of a people."⁴⁵

When I contemplate what is embraced in the term "legal landscape," I am struck by its capaciousness. Here is a fair summary of that landscape:

Statutes, no less than the common law decisions, reflect changes in underlying popular attitudes. The gravitational force of such statutes should surely affect courts seeking to keep their map current. Nor should the input be limited to statutes. Scholarly criticisms (both in law and derived from such related fields as philosophy, economics, and political science), jury actions that nullify or mitigate past rules, even administrative determinations, all can be appropriate reports of changes in the landscape in response to changed beliefs or conditions.⁴⁶

I recognize that a judicial perspective approaching this amplitude has informed the very occasional decisions of supreme courts overruling ancient judicial precedents relating to spousal or charitable immunity, liability for mental and emotional harm absent impact, contributory negligence, and other common law doctrines. In other words, courts have used such detailed topographic maps when they have had to scale an Everest. To expect them to use such maps to monitor thousands of statutes in fifty-one jurisdictions whenever the fit of those statutes is thrown into issue invites many tremulous queries from the would-be traveller.

As with other possible objections, Professor Calabresi phrases the inquiry as eloquently as a critic could wish:

We have seen the race to use equal protection doctrines to strike down laws that are clearly constitutionally valid; the use of interpretations that would do honor to even the greatest of casuists, and the development of passive virtues into devices for a "virulent variety of free-wheeling interventionism." We have seen, in other words, that the tools at hand are nowhere near sufficient to the task courts feel pressed to do.

Pp. 170-71.

45. P. 98.

46. P. 98 (footnotes omitted). To the legal landscape may also be added the occasions when "prosecutors use their power to ignore the law." P. 108.

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When we combine all these different sources of law with the fact that the nation has fifty-one jurisdictions, . . . we may well ask: What kind of confused landscape, what kind of ragged map, have we got? Is it realistic to assume that courts are limited at all? Can they instead—under the guise of seeking to map the landscape or to weave the fabric of the law—do precisely what they wish, responding primarily to their own values or to the majorities that selected them?⁴⁷

His answer is that judges are best suited and usually can be trusted to assess conformity with a complex legal landscape, that they can be criticized if they err, that their lawmaking is incremental, and that legislatures have the last word.

My own concern, however, is whether the job is *manageable*. Professor Calabresi notes that while many states might want to limit the judicial “updating power” to the highest court of the state, the lower courts could deal with this problem as they have dealt with “obviously dead” higher court decisions.⁴⁸ But shouldn’t Professor Calabresi focus for a moment on the effect his scheme will have on *litigants* as well as on *judges*? If a civil litigant or criminal defendant has the added arrow of “anachronistic statute” in his quiver, I can see elaborate looseleaf services for “Legal Landscape Advocacy,” standardized reports of jury verdicts and administrative determinations, possibly newsletters narrating prosecutors’ *nolle prosequis*, an exponential use of computer-assisted research, burgeoning new specialties, and—this from my parochial viewpoint—vastly expanded briefs and appendices crammed with statutes of various jurisdictions and other “topographical” exhibits.

How would an appellate court review a trial judge’s ruling? On the one hand, the very scope of the decision as to “lack of fit” and the inchoate nature of the data base suggest wide discretion. On the other hand, it would seem odd to force a legislature to reconsider a long-standing statute where a reviewing court did not exercise its discretion to the same extent as the trial court. Yet if litigants are to have a *de novo* consideration, appeals will tend to be automatic. In any event, the field is likely to be fertile, disagreements plentiful among districts, circuits, and lower state courts, and the resulting caseload for the state supreme courts and the Supreme Court not inconsiderable. All of these concerns are prudential and would not be decisive if the need for a new doctrine were truly health—if not life—threatening, and if no other approaches, singly or collectively, could sufficiently control the problem.

47. P. 99.

48. P. 142.

VI. Other Approaches

This leads me to my last point. In addition to a modicum of skepticism as to the magnitude of the problem and the inadequacy of the various judicial or non-judicial approaches discussed in the book, I wonder also about alternative techniques. One kind of updating activity that seems to be constantly bubbling in the legislative cauldrons of the country is the recasting and renovation of whole bodies of statutory law. Professor Calabresi is skeptical of entrusting renewal to legislative committees that might generally be reluctant to initiate change, or to separate advisory law reform commissions, whose recommendations he fears would be "systematically ignored."⁴⁹ Yet we have recently altered the entire structure of bankruptcy law and we may yet see the culmination of a decade-and-a-half of efforts to update the federal criminal code. I am not a close observer of statutory reform efforts in state legislatures, but I suspect that there is substantial activity. Indeed, one observer reports that since 1960 no fewer than thirty-four states have enacted substantive revisions of their penal laws.⁵⁰

Such efforts are undoubtedly particularistic, somewhat random, and incapable of guaranteeing modernity to the entirety of statutory warp and woof. I also have no doubt that courts in dealing with flesh and blood cases occasionally have to deal with statutes that time and other factors have made uncouth. It has, therefore, long seemed to me desirable to institutionalize the colloquy with the legislature that Professor Calabresi seeks to stimulate.

My own suggestion is more modest, perhaps too modest to have any impact. But it seems worth trying. Simply put, each court system, federal and state, should have a procedure to collate published judicial opinions in which the reasoning or even dicta indicate that, in the court's view, a particular statute is hopelessly anachronistic, has problems of constitutional dimension, or has other problems such as lack of drafting precision and clarity. To winnow out minor or questionable chaff from the wheat of solid judicial concern, a committee of the judicial conference of the state or nation might edit and organize the report. The report of such judicial commentary would then be systematically forwarded to the appropriate officials or committees of the relevant legislature for their use.

The Federal Judicial Center has offered to perform such a collating function for the federal judiciary.⁵¹ Obviously, shared concern by the judi-

49. P. 64.

50. Obermaier, *It's Time for a New Code*, NAT'L L.J., Jan. 25, 1982, at 13.

51. See *Opinions Seeking Rules Changes Invited*, THIRD BRANCH, Apr. 1982, at 4 (the Center

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ciary and the Congress at high levels will be required to make this mild avenue of communication an effective device. One might hope that Professor Calabresi's book would upgrade the priority of such projects by calling attention to the problems they seek to address.

Conclusion

One finishes this book with the conviction that he has been led into territory that has not been overplowed. The problem addressed is one that only a few have recognized in serious commentary. The probing here is so meticulous and comprehensive that the reader is given a searching examination of the entire structure of government, with sophisticated judgments as to the strengths and weaknesses of the several branches. Indeed, there is a book within a book, for the 118 pages of footnotes are a rich lode of legal history, leading cases, and literature on various current issues of law and government. The numerous cases discussed illuminate the options available to sensitive courts, even apart from the new doctrine of the role of courts in forcing the reconsideration of petrified statutes. That doctrine is, through text and narrative footnotes, tightly constructed with every effort to insulate and weatherstrip for leaks. To the extent that my comments have exhibited skepticism or criticisms, they have been intended to show the utmost seriousness regarding this advocacy of a new and important proposition—in order to stimulate the reading, pondering, and colloquy that the book deserves.

will serve as a "clearinghouse" to which judges might send opinions noting "defects or gaps in statutes"; it will channel them to the appropriate committee of the Judicial Conference or the Congress).

Sea Changes

United States Foreign Policy and the Law of the Sea. By Ann L. Hollick. Princeton: Princeton University Press, 1981. Pp. xxi, 496. \$32.50 (paper, \$15.00).

Jon L. Jacobson†

Ann Hollick is one of those valuable people who occasionally remind the blind and nearsighted among us that the elephant is not a rope or a snake or a wall. While her new book focuses primarily on official United States attitudes towards the law of the sea, she successfully demonstrates not only that the law of the sea is one large, interconnected animal, but also that it lives in a jungle with other beasts, all of which are constantly and rapidly evolving. This is an especially important lesson for those who are now attempting to assess final-stage developments in the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹

It is a common opinion nowadays that, from a United States perspective, the U.N. Conference has failed: that the United States never should have entered the Conference process, that at least we should have abandoned the process long ago, and that it is probably too bad we cannot now scuttle the whole leaky tub.² It is, on the other hand, entirely possible to disagree with that assessment, and I think Hollick's book helps show why. To be honest, I must admit that Ann Hollick herself seems to share part of the attitude just described; she appears, in her final chapter, to accept the basic assumption that the United States is something of a loser in the U.N. Conference negotiations.³ Yet her book's historical review of chang-

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1. The Conference, which technically began its sessions in 1973 but only after several years of preparation by the General Assembly's Seabed Committee, had nearly succeeded in adopting a comprehensive law of the sea treaty by late 1980. The Reagan Administration then placed UNCLOS III in virtual limbo while it reviewed U.S. national interests in light of the Conference's Draft Treaty. This year-long policy review was recently completed and, on January 29, 1982, the President announced that the U.S. would return to the role of active negotiator in the conference session beginning in March, 1982. White House Press Release (January 29, 1982). The new administration's principal concerns with the Draft Convention were with the proposed deep seabed mining regime. See *infra* note 4.

2. For some justification for this view, see Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373 (1978).

3. Much of Ann Hollick's analysis, and especially that section of the final chapter entitled "United Nations Negotiations," seems to be based on the assumption that the U.S. and other developed countries would have been happier with customary law developments than with the results of UNCLOS III. A. HOLLICK, UNITED STATES FOREIGN POLICY AND THE LAW OF THE SEA 377-81

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ing United States policies should warn against such judgments, even if a temporary, narrow focus—especially on the deep seabed⁴—seems to substantiate the negative attitude.

Although less than 500 pages long, including appendices, the book is packed with more information than some multi-volume treatises. It is a pity, still, that many of its topics are not treated at greater length. Nevertheless, the book is an extremely valuable source for anyone interested in learning about the recent (and ongoing) revolution in the international law of the sea, with special emphasis on United States roles. It is also useful for those of us who purport to be close observers of law of the sea developments; for us it fills gaps, paints backgrounds, and traces connecting threads.

The book is written in Ann Hollick's characteristically clear and exceptionally well-organized style. After an overview introduction, she sets to the task of describing the evolution of United States ocean policy over the past 40 years or so. Her exposition of the background to the 1945 Truman Proclamations, which marked the beginning of the new directions in ocean law, is a highlight of the book. This is followed by a chapter on United States fisheries problems in the immediate post-World War II decade, including the disputes with Latin American nations claiming 200-mile offshore zones. A sort of sidebar discussion on the state-federal controversy concerning jurisdiction over the United States continental shelf resources leads to a lengthy chapter on the First (1958) and Second (1960) U.N. Conferences on the Law of the Sea. Although the four trea-

(1981) [hereinafter cited by page number only].

4. HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON U.N. THIRD CONFERENCE ON THE LAW OF THE SEA app. 1 (Comm. Print 1981) (Statement of James L. Malone, President's Special Representative to U.N. Conference on the Law of the Sea). Secretary Malone, who has been acting as head of the U.S. UNCLOS III delegation under President Reagan, has summarized current U.S. objections to the Draft Convention, nearly all of which are directed at the proposed deep seabed regime:

[I]n order to meet U.S. interests, the draft treaty would have to be transformed into a document which fosters the development of deep seabed mineral resources, avoids monopolization by the Enterprise [the proposed International Seabed Authority's operating arm], establishes a system of political governance commensurate with our perception of America's role in international affairs, avoids unjustifiable regulatory interference in mineral development, allows free market principles to operate and is incapable of being amended without U.S. consent. The draft treaty falls short of meeting those goals.

Speech by James L. Malone, University of Virginia Ocean Policy Forum, Washington, D.C. (Nov. 12, 1981).

Professor John Norton Moore, a former U.S. negotiator in UNCLOS III, has identified three basic U.S. concerns with the draft treaty in its present form: (1) obstacles to permanent assured access to seabed minerals by U.S. mining firms; (2) institutional defects in revenue sharing, in the International Seabed Authority (ISA) voting system, and in the prospective phasing out of private mining through the device of a future review conference; and (3) mandatory transfer of technology to the ISA's operating agency, the Enterprise. Moore, *Charting a New Course in the Law of the Sea Negotiations*, 10 AM. J. INT'L L. & POL'Y 207 (1981) (sixth annual Myres S. McDougal Distinguished Lecture). Again, the concerns are directed only to the deep seabed regime.

ties that emerged from these Conferences have been cited as successful examples of the codification and progressive development of international law,⁵ Hollick then demonstrates that their essentially backward-looking provisions were inadequate to cope with technological and international political developments in the 1960's. That decade saw the old Grotian order really begin to crumble for the United States and for a world community now populated by a growing number of developing or Third World nations. For the United States, the old East-West foreign policy orientation began to shift towards a North-South alignment.⁶ The U.N. declarations and resolutions declaring the seabed the "common heritage of mankind"⁷ set the stage for the Third U.N. Conference on the Law of the Sea, "the most complex, ambitious multilateral treaty negotiation ever attempted."⁸ Hollick's chapters on preparations for UNCLOS III and on the Conference itself, through its (pre-Reagan) 1980 Geneva session, are must reading for anyone attempting to make sense of that fascinating, frustrating, complex and grand political experiment. Finally, Hollick's last chapter—thoughts on 1970's United States ocean policy and her lessons for the future—is almost worth the price of the whole book.

Few people, maybe especially those deeply involved in the UNCLOS III proceedings, have as comprehensive a grasp of those proceedings as has Ann Hollick. *United States Foreign Policy and the Law of the Sea* has several lessons for those United States decisionmakers now trying to make sense of UNCLOS III and to chart future directions. At least a few of these lessons can be mentioned here.

By tracing United States involvement in ocean law matters from the 1930's down to the near present, Hollick shows us, without a doubt, that the presently perceived United States "dilemma"⁹ regarding the law of the sea is largely of the United States's own making. The fact is that United States decisionmakers and their attitudes, as well as the internal processes by which options are weighed and decisions made, have changed somewhat over the past handful of decades. Much of this evolution is attributable to new ocean uses brought on by advancing technology in the post-

5. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

6. See p. 11.

7. E.g., G.A. Res. 2574D, 24 U.N. GAOR Supp. (No. 30), at 11, U.N. Doc. A/7630 (1969) (purporting to impose moratorium on deep seabed mining); G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28), at 24, U.N. Doc. A/8028 (1970) (declaration of common heritage principles).

8. P.14.

9. The term is used by Secretary Malone in describing the U.S. situation. See Speech by James L. Malone, *supra* note 4.

World War II period,¹⁰ but perhaps more is attributable to other events and to the changing self-perception of the United States role in global affairs.¹¹ The United States entered the Second World War as a middle-level power that, when it had addressed ocean issues, had done so with emphasis on its coastal nation status. It emerged from the war as a major power with a global orientation. As Hollick stresses, the two Truman Proclamations—viewed widely as the beginning of the recent upheaval in the law of the sea¹²—are products of the transitional period. As such, “[t]he proclamations embody both the coastal and the global perspectives.”¹³

The first Truman Proclamation,¹⁴ while explicitly leaving untouched the traditional freedom of navigation on the high seas, claimed for the United States the natural resources of the underlying continental shelves adjacent to United States coasts. The second proclamation¹⁵ did not go even this far, but seemed to assert United States competence over certain fishing activities in the high seas near United States shores; again the newly emergent naval power was careful to preserve freedom of navigation as a general high seas principle.¹⁶

The Truman Proclamations were, of course, really “Roosevelt Proclamations,” having been developed during the Roosevelt years and coming only months after FDR’s death. It is fascinating to learn that, had Franklin Roosevelt had his way, the United States might have claimed, for various purposes, jurisdiction extending “halfway across the oceans.”¹⁷

The Truman Proclamations are often cited as precedents for the 200-mile zones claimed by South American nations in subsequent years.¹⁸ Hollick reports again, as she did in an earlier comment,¹⁹ that a more direct precedent for the 200-mile assertions—and that, in fact, relied upon

10. Pp. 9-10, 175-87. See also Jacobson, *Future Fisheries Technology and the Law of the Sea*, in *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 51-92 (H. Knight ed. 1975).

11. *E.g.*, pp. 18-61; Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT’L L. 23 (1976).

12. This is especially true with respect to the trend toward expanded coastal state jurisdiction. See, *e.g.*, Young, *The Over-Extension of the Continental Shelf*, 47 AM. J. INT’L L. 454 (1953); T. Wolff, *Peruvian-United States Relations Over Maritime Fishing: 1945-1969* (March 1970) (Occasional Paper No. 4, Law of the Sea Institute).

13. P. 18.

14. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

15. Proclamation No. 2668, 10 Fed. Reg. 12,304 (1945).

16. “The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.” *Id.* at 12,304. A similar statement appeared in the first Truman Proclamation, 10 Fed. Reg. 12,303 (1945), with respect to waters above the continental shelf.

17. P. 29. Roosevelt was thinking specifically of naval oil reserves, but Japanese fishing in the North Pacific off Alaska was also a concern. See, *e.g.*, pp. 34-35.

18. See, *e.g.*, Young, *supra* note 12; T. Wolff, *supra* note 12.

19. Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT’L L. 494 (1977).

by the first of such claims, Chile's in 1947²⁰—was the 1939 Declaration of Panama.²¹ This declaration, which purported to establish neutrality zones in most of the waters adjacent to the American continents, was, like the later Truman Proclamations, attributable to United States initiative:

The defense zone which was proposed by the United States and agreed to in this declaration extended 300 miles and more from shore. President Roosevelt personally delimited the connecting straight lines of the zone which extended the defense area well beyond 300 miles in some areas.²²

Hollick establishes, then, that the rash of expansive coastal nation jurisdictional and territorial sea claims during the 1950's and 1960's, which were so abhorrent to predominant United States foreign policy interests in the post-war period, were actually the flowering of seeds planted by the United States during its middle-power years when near-shore interests were considered more important. In light of this background, it is perhaps fitting that the United States's own 200-mile claim, asserted by the Fishery Conservation and Management Act of 1976,²³ finally ensured the international customary law validity of the 200-mile resource zone.²⁴

In the meantime, though, the United States took other steps that helped to shape the UNCLOS III dilemma now perceived by the Reagan Administration. For it was the United States, in its role as the foremost naval power, that saw the threat of "creeping jurisdiction" so vividly in the 1960's that it promoted several of the very sins it now bemoans. During the 1960's and 70's, four presidential administrations, two Republican and two Democratic, clearly shared a bipartisan concern for preserving the broadest freedom of ocean navigation. Consider, for example, the following response to the anguished question of why the United States ever agreed to participate in the Third U.N. Conference:

The decision to convene a Third U.N. Law of the Sea Conference found its antecedents in the negotiations on territorial sea, straits, and fisheries matters. These negotiations began in 1967 at the initia-

20. *Id.* at 498-99.

21. P. 20.

22. *Id.*

23. 16 U.S.C.A. §§ 1801-1882 (Supp. 1980). The FCMA claimed for exclusive U.S. management, *inter alia*, a "fishery conservation zone" extending to 200 miles from shore. *Id.* § 1811.

24. In 1976, less than a majority of coastal nations claimed 200-mile offshore zones; this quickly changed to a majority after the FCMA and the similar Soviet 200-mile claim. Now even Japan, and close to 90 other nations, assert 200-mile offshore zones of one sort or another. *See generally* U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTIONS (4th rev. ed. 1981). Customary international law, established by the practices of nation states, certainly recognizes today the validity of the common-core claim to exclusive fisheries management.

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tive of the United States and the Soviet Union. The two maritime powers were eager to see international agreement on a twelve-mile territorial sea if freedom of navigation through straits covered by a twelve-mile territorial sea were guaranteed. . . .

After two and a half years of discussions, the United States and Soviet Governments agreed to begin actively promoting an early international conference to deal only with territorial sea issues.²⁵

The two maritime powers' concern with navigation rights through and over international straits was the result of the failure of the 1958 and 1960 U.N. Law of the Sea Conferences to resolve the issue.²⁶ It soon became clear, however, that a new, third conference would have to take into account the growing ocean demands, mainly by Third World nations, regarding fisheries off their coasts.²⁷ In addition, the seabed question, under the new "common heritage of mankind" banner, was not to be ignored in any new law of the sea conference.²⁸

Now, in 1982, it is the emerging resolution of that seabed question, as proposed in the Third Conference's Draft Convention, that most concerns the United States administration.²⁹ Yet, again, much of the responsibility for the shape and even the particulars of the Draft Convention's deep seabed regime rests with United States foreign policy. The basic structure of the draft treaty's International Seabed Authority finds its source in a 1970 Nixon Administration proposal.³⁰ That proposal was, in many respects, such a generous concession to Third World "common heritage" demands that, had the current U.N. Conference adopted it outright, United States opposition to the draft treaty might even be more vociferous. For example, the international common heritage area in the Nixon proposal began at the 200-meter isobath, a boundary far shoreward of that found in the UNCLOS III draft treaty provisions. The Nixon initiative was, of course, designed to protect the nation's primary concern with the "creeping jurisdiction" threat to free navigation. The Nixon proposal, while thereafter providing the basis for seabed negotiations in the new conference, was rejected by developing nations largely *because* it was a United States proposal. That rejection has been, in fact, the cause of some

25. P. 234.

26. *See generally* pp. 126-95.

27. Pp. 235-36.

28. Pp. 237-39.

29. *See, e.g.*, HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 4; Moore, *supra* note 4; Speech by James L. Malone, *supra* note 4.

30. The proposal was in the form of a draft treaty on the seabed. Hollick's description of how this strange document was developed within the Nixon Administration is found in Chapter 7. *See also* Comment, *The Nixon Proposal for an International Seabed Authority*, 50 OR. L. REV. 599 (1971).

private regret among Third World negotiators.

Not only the basic structure, but also some of the objectionable specifics in the Draft Convention's seabed provisions are attributable to the United States and to the only direct intervention by a United States Secretary of State in the conference negotiations. In 1976, Secretary Kissinger presented several concessions that the United States would be willing to make in exchange for guaranteed access by states and private parties to deep seabed minerals:

The first concern was that an international Enterprise would be given the right to mine the seabed under equal conditions. The second was that each prospective miner was to propose two sites to the [International Seabed Authority], one of which could be reserved for mining by the Enterprise or by developing countries. In addition, revenues would be generated for the poorest countries based either on royalties or on a system of profit sharing. [Further,] Kissinger proposed that incentives should be established for private companies to share technology with and train personnel from developing countries that wanted to mine the seabed He [also] indicated U.S. willingness to agree to a means of financing the Enterprise so that it could begin mining concurrently with states. To this end he reiterated United States willingness to transfer mining technology. And, as a further inducement, he proposed periodic review conferences where the mining system might be reexamined. A final area in which Kissinger made new proposals was on limiting production of seabed minerals.³¹

Once again the United States, this time in the person of Henry Kissinger, was planting the very seeds that would grow into the weeds it finds so odious today: the "parallel system," whereby the Enterprise competes with private miners, financed by the United States and other industrialized nations; the "compulsory" transfer of mining technology to the Enterprise and developing countries; seabed mineral production controls in favor of land-based producers of the same minerals; and periodic review conferences.³² What Kissinger was attempting to do in 1976 was to ensure the successful conclusion of a law of the sea treaty that would include non-seabed provisions (especially those on navigation and overflight) already negotiated favorably for other United States interests and that would still allow access for United States miners to seabed minerals. "Unfortunately," Hollick notes, "the practice of bestowing concessions on the opposing side simply increased the appetite for more United States conces-

31. P. 356.

32. See HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 4; Moore, *supra* note 4; Speech by James L. Malone, *supra* note 4.

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sions without evoking a corresponding response from the coastal states or [the developing countries].”³³ By 1976, however, this Third World trick should not have been surprising.

The point of reviewing, through Ann Hollick’s book, the heavy United States role in bringing about the elements of the “dilemma” perceived by the Reagan Administration is to demonstrate not just that it hardly lies in the mouth of the United States to complain too loudly about the Draft Convention (a good case to the contrary can be made), but that the “United States attitude” toward the Law of the Sea Conference and its proposed treaty is not necessarily that of the people who happen to be now in charge. Nor is it that of the people who happen now to have the closest access to the people in charge. To revert to the elephant metaphor: a sighted person viewing the whole law of the sea animal in its natural setting should not conclude that the United States is clearly a loser in the UNCLOS III process. Maybe it has not won, but neither has it lost. Like everyone else, it has compromised.

In assessing the accuracy of this proposition, one must take into account some important realities, including the following:

(1) Third World nations exist and are treated by international law as sovereign, equal, and independent, due in large measure to United States-led efforts to end colonialism through the United Nations system;³⁴

(2) The United States has an important stake in virtually every ocean activity, from the traditional uses of the sea for navigation and fishing to the most advanced resource-recovery activities. The United States is not just a one-dimensional seabed mining power or even just a maritime power. It is both of these, but it is also a coastal nation with vast and valuable offshore resources,³⁵ and it thus shares many ocean interests with developing coastal nations;³⁶

33. P. 359.

34. This reality, now that some in the industrialized North have come to dislike it, does not mean that the U.S. should seriously consider boycotting one-nation-one-vote fora on the ground that we are actually more powerful and important than small, poor nations. In fact, U.S. influence and power are still considerable in today’s international arenas, as demonstrated by UNCLOS III. What developing nation could have put the whole conference virtually on hold for a year while it considered its law of the sea options? (As is true in one-person-one-vote national democracies, some voters vote “heavier” than others.) Yet it can be conceded that the U.S. might have used its real influence to its own better advantage in the conference. See pp. 377-81.

35. The U.S. fishery conservation zone includes over two million square miles and contains fifteen to twenty percent of the world’s traditionally harvested fishery resources. U.S. DEP’T OF COMMERCE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., CALENDAR YEAR 1979 REPORT ON THE IMPLEMENTATION OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 1 (1980).

36. For example, the U.S. shares with developing coastal nations the following interests, among others: an interest in conserving and managing coastal fisheries and the economic and social health of coastal fishing communities; an interest in developing offshore mineral resources; an interest in national security threats in offshore waters; an interest in observing and participating in foreign scientific research in and under those waters; the interest in preventing offshore pollution.

(3) The *priorities* within this array of United States ocean interests shift over time, often because of observable shifts in national interests but just as often because of changes in the people and processes by which one interest or another is promoted to the national decisionmakers;³⁷

(4) Nevertheless (that is, despite (3) but because of (2)), a stable and uniform law of the sea regime—or set of regimes—is clearly in the United States's general interest;

(5) Such a stable, uniform law of the sea regime probably cannot exist in today's world without something like UNCLOS III.³⁸

In view of these realities, a case can be made for the proposition that the United States is not faring so badly as a result of its participation in UNCLOS III, even while admitting that it might have fared better and could still fare better in the final-stage negotiations. To make that case, one must compare the UNCLOS III Draft Convention scheme—in *all* major areas of United States interest—with international ocean law as it would be (or will be) otherwise. Such a project involves, of course, much guesswork, albeit educated guesswork, and nothing like a full-scale analysis can be attempted in the present format. Nevertheless, the following suggestions are offered.

Navigation and Overflight. It is clearly important to the United States, if no longer absolutely vital, that naval and air mobility remain as unrestricted as possible, especially through and over international straits. United States passion for this national interest has apparently diminished from the time when it formed the core of our early UNCLOS III strategy, partly due to the increased range of our submarine fleet's missiles and the consequent decrease in the importance of submerged straits passage.³⁹ But it is still a high priority. Commercial mobility at sea is also at stake and in the United States's interest. In these regards, United States negotiators in the Third Conference have basically achieved what they set out to do: the Draft Convention will preserve high seas navigation and overflight free-

37. As Hollick states:

When one looks beneath the label "U.S. government" to discover the agency and interest group actors that determine national policy, the source of the discontinuity in policy becomes intelligible. A host of incompatible and self-interested coastal and distant-water concerns are vying constantly to determine national policy. On any given set of issues one side may prevail; then the other may win the next policy victory.

P. 374.

38. In fact, much of the criticism aimed at UNCLOS III today maintains that such a regime cannot exist even with a new UNCLOS III treaty. *E.g.*, Gamble, *Where Trends the Law of the Sea?* 10 OCEAN DEV. & INT'L L. 61 (1981). This may indeed be the ultimate reality facing UNCLOS III, but it does not by any means establish that the U.S. or the international community would be better off without the treaty.

39. Hollick also blames a U.S. return to "a more limited view of its capabilities in the wake of the Vietnam War, growing Soviet power, and the dispersion of economic power to Japan and Western Europe." P. 12. *See also* pp. 240-389 (chapters 8-10).

doms in 200-mile exclusive economic zones,⁴⁰ and it will establish transit passage rights through and over international straits⁴¹ and archipelagic waters.⁴² Without UNCLOS III, the United States would have great difficulty maintaining these freedoms and rights in the face of emerging customary law trends toward restricting navigation within the expanding zones of coastal nation jurisdictions.⁴³

Fishing. As the nation with the world's longest coastline and with some of the world's richest ocean fisheries off its shores, the United States benefits from the extended jurisdiction trend insofar as that jurisdiction encompasses exclusive management of fisheries. The Draft Convention will codify the right of the United States and other coastal nations to manage fisheries within their 200-mile exclusive economic zones.⁴⁴ Admittedly, this right has already been established as a matter of customary law, but it can hardly be denied that: (1) the UNCLOS III negotiations created an international political climate that hastened the customary law development; and (2) the new treaty could at least impose some uniformity on the messy inconsistencies of the current claims.⁴⁵

Continental Shelf. Immense and resource-rich lands extend undersea from the United States continent. Much to the outrage of certain groups in the United States, the 1970 Nixon proposal for an International Seabed Resource Authority would have assigned most of these lands to the international common heritage. To the satisfaction of these same groups, the UNCLOS III draft treaty will instead establish that the resources of virtually the entire continental margin (shelf, slope and rise, down to the deep seabed) are under coastal state jurisdiction.⁴⁶ As in the case of the

40. See U.N. Third Conference on the Law of the Sea, Draft Convention of the Law of the Sea, arts. 58, 86-115, U.N. Doc. A/CONF. 62/L.78 (1981), at 22, 35-43 [hereinafter cited by article number only].

41. Arts. 34-45. Unfortunately, these articles have interpretation difficulties that will probably present some problems for the U.S. in the future. See Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980); Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48 (1980).

42. Arts. 46-54.

43. See Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980).

44. Arts. 55-75. Also in the U.S. interest is the general prohibition on fishing for salmon in the high seas beyond the exclusive economic zone. Art. 66. The FCMA, 16 U.S.C.A. §§ 1801-1882 (Supp. 1980), asserts exclusive U.S. management and enforcement jurisdiction over U.S.-source salmon beyond 200 miles, but this claim is almost certainly not consistent with general international law. See Jacobson & Cameron, *Potential Conflicts Between a Future Law of the Sea Treaty and the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 451, 490 nn.206-07 (1977).

The draft treaty would present obstacles, however, to U.S. distant water fishermen. They are a minority of U.S. fishermen, but an economically important minority. See Art. 64.

45. Current claims range from mere assertion of management authority for fisheries to 200-mile territorial sea claims. See generally U.S. DEP'T OF STATE, *supra* note 24; Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L. 289 (1981).

46. Arts. 76-85. In fact, because the draft treaty's "continental shelf" extends a minimum of 200

fishing interest, it can be argued that UNCLOS III, if not necessary to achieve this result, helped speed up the process and can provide some desirable uniformity.

Scientific Research. As a preeminent oceanographic nation, the United States should rightly bemoan the fact that recent trends in the law of the sea—both within and outside the UNCLOS III proceedings—have led to severe assaults on the freedom of scientific research in the oceans.⁴⁷ Yet again, however, these trends are part of the general trend toward more extensive coastal nation jurisdiction. Without an UNCLOS III treaty, this trend would undoubtedly lead to a claim pattern supporting complete control by coastal nations over ocean research within 200 miles from shore. The proposed treaty, while establishing a “consent regime” in favor of coastal jurisdiction over the conduct of oceanographic research within exclusive economic zones.⁴⁸ Consequently, the scientific community in the United States now generally favors the Draft Convention over any likely alternative legal regime.⁴⁹

Marine Pollution. As already noted, the United States is a naval and maritime power. Many people in the United States, however, are also strongly in favor of protecting and preserving the marine environment, especially off United States shores. The result has been a schizophrenic United States approach to the question of how much jurisdiction international law should allow to coastal nations to control polluting activities within the exclusive economic zones. Too little local control, and the marine environment could suffer; too much local control, and freedom of navigation could suffer. The draft treaty provides a carefully negotiated compromise that is not entirely satisfactory to either interest.⁵⁰ Furthermore, it does not come to grips with ocean pollution from sources on land. But without a widely acceptable international treaty, an unwieldy kaleidoscope of claims and conflicts over marine pollution problems could result, despite the efforts of the Intergovernmental Maritime Consultative Organization and the U.N. Environment Programme.⁵¹

Marine Mammals. The United States is one of the few actors on the international stage to take any special interest in the preservation of

nautical miles from shore, some deep seabed areas will be included within national jurisdiction. See art. 76.

47. See, e.g., *Science, Technology, and Ocean Development*, 9 OCEAN DEV. & INT'L L. 187-333 (1981) (special symposium) [hereinafter cited as SYMPOSIUM].

48. Arts. 238-265; Jacobson, *Marine Scientific Research Under Emerging Ocean Law*, in SYMPOSIUM, *supra* note 47, at 187; Mangone, *The Effect of Extended Coastal State Jurisdiction Over the Seas and Seabed Upon Marine Coastal Science Research*, in SYMPOSIUM, *supra* note 47, at 201.

49. See Wooster, *Research in Troubled Waters: U.S. Research Vessel Clearance Experience, 1972-1978*, in SYMPOSIUM, *supra* note 47, at 219.

50. Arts. 192-237.

51. See Burke, *supra* note 45, at 311.

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marine mammals, again because of the large numbers of United States citizens promoting that interest. As a result, the Draft Convention contains a special article—weak, but nevertheless *there*—furthering the cause of mammal protection.⁵² Perhaps the plight of whales and other sea mammals will be no less precarious with the treaty in place, but no general protective principle is likely to exist without it.

Dispute Settlement. The United States has led the laudable UNCLOS III fight for inclusion in the new treaty of a comprehensive system for compulsory settlement of ocean law disputes between nations. The resulting provisions of the Draft Convention⁵³ are a disappointment when compared with the ideal goal; many important disputes will not be subject to compulsory settlement. Nevertheless, when viewed from an historical perspective, the treaty provisions are a creditable success. A special International Tribunal for the Law of the Sea will be established to augment the International Court of Justice and arbitration tribunals; and where compulsory settlement is not required, the Draft Convention generally provides for compulsory conciliation. Of course, no such dispute settlement regime can exist without a treaty.

Deep Seabed Mining. This difficult subject has been saved until last so that it may be viewed in broad perspective. As the foregoing discussion illustrates, deep seabed mining is just one among many United States ocean interests. At the moment it is being touted to United States decisionmakers as the most important United States interest. This is not necessarily true.

The deep seabed beyond 200 miles is international space. No one today seriously disagrees. But the old idea that international law should allow minerals of the seabed—even “strategic” minerals⁵⁴—to be taken freely by those who got there first with the necessary technology is simply unrealistic. Even the loosely analogous freedom-to-fish rule, to which the Western world paid lip service from the time of Grotius, lasted only until the post-World War II development of large distant-water fishing fleets. Because of the 200-mile zones, most commercial fish are no longer free for the taking, and the minerals of the deep seabed will almost inevitably suffer a similar fate. Indeed, one of the likely effects of the international community’s failure to devise an accommodation of interests on the seabed would be vastly extended coastal nation claims to seabed areas, along the pattern

52. Art. 120.

53. Arts. 279-299, annexes V-VIII.

54. See, e.g., Statement of Theodore G. Kronmiller, Deputy Assistant Secretary of State for Oceans and International and Environmental and Scientific Affairs, before the American Mining Congress Mining Convention, Denver, Colo. (Sept. 30, 1981). These “strategic” minerals—manganese, copper, cobalt, and nickel—were somehow not considered so strategic when the U.S. made its earlier plans for UNCLOS III negotiations.

of the earlier 200-mile claims.⁵⁵

This is not to say the United States should automatically approve the accommodation that has been worked out so far in the UNCLOS proceedings. The United States *should* negotiate for removal of or improvement in those elements of the proposed seabed regime that are most objectionable.⁵⁶ Beyond achieving such improvements, the United States must face the finally adopted UNCLOS III treaty and make its decision. It can view the objectionable portions of the seabed regime—and there will still be some, even with brilliant last-phase negotiating victories for the United States—as the price to be paid for the gains made elsewhere in the agreement.⁵⁷ On the other hand, the United States can take a hard look at alternatives to the treaty: The alternative with respect to seabed minerals, assuming the other mining states will not become parties to the UNCLOS convention, might be a “mini-treaty” among the mining states, who will be beset by Third World pressures to curtail such other ocean activities as straits passage and marine scientific research.

Very recent developments in UNCLOS III, however, indicate that a United States refusal to participate in a new treaty will prevent neither the adoption of the treaty by the conference nor the eventual participation by virtually every other member of the world community, including other seabed mining countries. The result, therefore, even without United States participation, will be the effective establishment of an International Seabed Authority; furthermore, United States mining companies would apply for and receive ISA licenses under the sponsorship of treaty nations who will continue to be members of international ocean mining consortia. The United States would thus be deprived of treaty benefits with few compensating advantages other than the satisfaction of having held on to its ideological purity in the face of the UNCLOS III attack on the free enterprise philosophy.

All in all, then, I think Ann Hollick teaches us that serious United States disappointment over the directions taken by UNCLOS III is not well-founded. Many of our national ocean interests have clearly been en-

55. The “precedent” for such a move might already have been established, again by the U.S. In 1980, Congress enacted the Deep Seabed Hard Mineral Resources Act, 30 U.S.C.A. §§ 1401-1473 (Supp. 1981), which authorizes a procedure for licensing U.S. miners to mine the deep seabed beyond national jurisdiction. Although the act is labeled as “interim” and carefully limits its effects to U.S. nationals and companies only and makes no territorial claims, similarly careful drafting of the 1945 Truman Proclamations did not prevent other nations from citing them as precedents for the 200-mile zones. See *supra* TAN 12-18.

56. See, e.g., Moore, *supra* note 4, at 213-16.

57. Besides, even from a U.S. perspective, the proposed deep seabed regime is not all bad, especially when compared with alternatives and with analogous mining concession rules now encountered in many countries. See Katz, *A Method for Evaluating the Deep Seabed Mining Provisions of the Law of the Sea Treaty*, 7 YALE J. WORLD PUB. ORDER 114 (1980).

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hanced; others have not, but this has not been entirely unplanned or unbargained for by the United States. In today's world, no single nation can expect to have its cake and eat it too. Any expectation to the contrary is not just unrealistic; it might also be dangerous.

Whatever the outcome of the Third Conference, the long period of confusion in the law of the sea is far from over. The Conference may fail to adopt a treaty,⁵⁸ or the treaty it adopts may never come into force, or the treaty may never receive the large number of ratifications and accessions necessary for it to become a meaningful legal document,⁵⁹ or it too may be overtaken by time and events and become irrelevant. The uncertainties will last for at least several more years, and the United States role will be, as usual, crucial. It will continue to be a fascinating process to observe, and one much in need of analysis and explanation. Amid the confusion, we can optimistically entertain the hope that Ann Hollick's *United States Foreign Policy and the Law of the Sea* will someday be labeled Volume One in a most valuable set.

58. On April 30, 1982, just as this Review was going to press, the Conference adopted a new Convention on the Law of the Sea. The Conference vote was 130 in favor, 4 against, with 17 abstentions. The United States was among the four delegations that voted against the treaty. See *Los Angeles Times*, May 1, 1982, at 1, col. 1. The United States vote reflects the Reagan administration's views; but a subsequent administration might, of course, sign the new treaty and submit it to the Senate for advice and consent to ratification.

59. Sixty ratifications or accessions will be required before the new treaty becomes binding. Art. 308.

