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STATUTORY ANACHRONISM AS A CONSTITUTIONAL DOCTRINE

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I. INTRODUCTION

The Internet is rife with examples of seemingly absurd laws still on the books from past generations,[1] and many efforts to officially erase laws declared unconstitutional have failed.[2] But while the existence of these laws on the books is merely symbolic, a larger swath of outdated statutory law often causes problems. Some statutes lose their efficacy as inflation renders numerical prescriptions moot, as has been seen in wrongful-death statutes with defined payouts.[3] With other statutes, it is difficult to imagine modern sentiments permitting the statutes to pass if introduced today.[4] Still others suffer from the problem that subsequent developments in the law, whether constitutional or statutory, have partially or completely eliminated the purposes for which those statutes were initially passed.[5]

These problems stem from the difficulty of removing statutes once they are in place,[6] and the problems have only increased as statutes have

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1. *E.g.*, Stephanie Morrow, *Top Craziest Laws Still on the Books*, LEGALZOOM (Oct. 2009), https://www.legalzoom.com/articles/top-craziest-laws-still-on-the-books.

2. A bill in the Louisiana State Legislature seeking to repeal certain statutes held unconstitutional recently failed. H.B. 12, 2014 Leg., Reg. Sess. (La. 2014). *See also* Julia O'Donoghue, *Louisiana House Votes 27-67 to Keep Unconstitutional Anti-Sodomy Law on the Books*, TIMES-PICAYUNE (April 15, 2004), http://www.nola.com/politics/index.ssf/2014/04/ post_558.html.

3. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 39 (1982).

4. To take but one of numerous examples, sixty years after the communist McCarthyism scare, membership in a Communist party remains a bar to citizenship. Immigration and Nationality Act of 1952, 8 U.S.C. § 1424(a) (2012).

5. For example, Connecticut passed a series of statutes making it difficult for townships to leave regional school districts once they had joined them, but when the State Supreme Court required the one-person, one-vote rule for school board elections, the purpose behind the original statutes were severed from the actual legislation. CALABRESI, *supra* note 3, at 130, 274 nn.28–29.

6. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977) ("One of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is

largely supplanted American common law. Much of early American legal history was defined by common law, but a proliferation of statutes soon arose to the point where, midway through the twentieth century, Justice Frankfurter claimed that almost every single case before the Supreme Court involved at least one statute.[7] The trend did not reverse. The 1977–78 New York legislative session saw the introduction of about 40,000 legislative proposals.[8] Congress also had a substantial workload around the same time with 21,000 bills introduced between 1969 and 1971 in the House alone.[9] While that number has decreased over the last 40 years,[10] the dominance of statutory law persists.

To deal with the increasingly important issue of statutory anachronism, Professor Guido Calabresi, before his ascension to the bench on the Court of Appeals for the Second Circuit, proposed that courts "treat statutes as if they were no more and no less than part of the common law" or simply to "encourage, or even [ ] induce, legislative reconsideration" of statutes deemed to be anachronistic with regard to the framework of legal doctrine.[11] A push for such a significant change in the judiciary's role could hardly be made without opening the door to criticism. Nevertheless, some of the Court's *constitutional* decisions, both before and after Calabresi's work, bear reasoning remarkably similar to that which Calabresi suggested courts should use in the *statutory* context. One notable and recent example is *Shelby County v. Holder*,[12] which declared that the preclearance formula for the Voting Rights Act (VRA) as reauthorized in 2006 exceeded Congressional authority under the Reconstruction Amendments because the preclearance formula was based on antiquated data that did not reflect the current state of the subjected jurisdictions.[13]

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much easier than getting the statute revised so that it will make sense in the light of changed conditions."); *see also* Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979) (arguing that the primary cause of statutory obsolescence is a scarcity of legislative resources to deal with those statutes, and that statutes ought to have sunsetting clauses authorizing courts to adopt a common law approach to them twenty years after they have passed).

7. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947).

8. Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1753 (1982).

9. NORMAN J. ORNSTEIN ET AL., THE BROOKINGS INSTITUTION, VITAL STATISTICS IN CONGRESS tbl.6-1 (2013), http://www.brookings.edu/research/reports/2013/07/vital-statistics-congressmann-ornstein.

10. The number of bills introduced into the Senate has not changed as much. Although the number of bills introduced into the Senate has, and continues to be, much lower than that of the House. In particular, the 91st Senate saw just shy of 5,000 introduced bills, compared to the House's 21,000. *Id.* tbl.6-2.

11. CALABRESI, *supra* note 3, at 2.

12. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627 (2013).

13. Professor Philip Bobbitt has also noticed the remarkable similarity of the *Shelby County* reasoning to Calabresi's. Philip C. Bobbitt, *The Age of Consent*, 123 YALE L.J. 2334, 2378 (2014)

Calabresi was motivated to define a statutory obsolescence doctrine because he believed courts were already striking down statutes deemed anachronistic but were doing so by liberally stretching constitutional doctrines beyond their elasticity in order to encompass the statutes. Calabresi instead thought courts should deal with these issues statutorily, and he sought to create an analytic framework for this purpose. For example, Calabresi postulated that rather than creating a foundation for a constitutional right to birth control, the *Griswold v. Connecticut*[14] Court could more appropriately have decided the case through statutory common law adjudication.[15] This approach, in Calabresi's estimation, would have been more restrained because it would have permitted a legislative response, unlike the Court's constitutional decision.[16] This argument bears some resemblance to the Court's constitutional avoidance doctrine.[17]

This Article shows that despite Calabresi's concern that the Court would deal with anachronistic statutes by stretching constitutional doctrines, the Court has nonetheless adapted Calabresi's analytic framework into a coherent constitutional doctrine that runs across several substantive legal areas. While the original Calabresian doctrine encouraged courts to strike down obsolete statutes under a common law justification, the pseudo-Calabresian doctrine of *Shelby County* and other cases instead promulgates a *constitutional* limit on how anachronistic certain statutes can become.[18] In some cases, this pseudo-Calabresian doctrine serves as an alternative view to living constitutionalism analysis. In all cases, this doctrine, though constitutional as opposed to statutory,[19] is less susceptible to many of the criticisms levied against the Calabresian doctrine.

Part II briefly outlines Calabresi's argument. Part III surveys some cases in which the Court heavily mirrored Calabresian reasoning. Part IV examines statutes where the Court remarked on the changes in circumstances that justified the statutes as well as statutes where the Court has largely extrapolated a theory that the Constitution itself has changed. Part

(noting that the reasoning employed in *Shelby County* "is not so very far from . . . Guido Calabresi").

14. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

15. CALABRESI, *supra* note 3, at 8, 166.

16. *Id.* at 11.

17. *See, e.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) and subsequent cases.

18. Calabresi writes that the adoption of the full nineteenth-century common law approach was politically unlikely to occur because the increased utilization of statutes had not been random; it had been responsive to other political needs and desires. CALABRESI, *supra* note 3, at 79. But while Calabresi does not endorse a complete common law function, he advocates for the use of Calabresian reasoning *outside* constitutional analysis, which the Court declines to do.

19. Though this Article maintains a distinction between Calabresi's call for a statutory common law analytic framework and the Court's creation of a constitutional doctrine, the distinction ultimately boils down to one of substance. Calabresi's doctrine *is* constitutional in that it seeks to define the role of a federal judge, but it does not seek to put substantive constitutional limits on statutes, unlike what the Court has done.

IV extrapolates from several of those cases a coherent pseudo-Calabresian doctrine. Part V shows why the pseudo-Calabresian doctrine, being relegated to the constitutional realm, is less susceptible to criticism. Part VI applies the doctrine to the cases analyzed in Part V to show how cases involving statutory change and some cases involving textual-based standards fit within the doctrine. Part VI also shows how the doctrine cannot be consistently used to wrap around some other cases that are grounded less textually.

II. CALABRESI'S THESIS

Calabresi's main thesis is that the courts ought to "decid[e] when a retentionist or a revisionist bias is appropriately applied" to a law.[20] Courts are to decide which laws, both common law and statutory, are so out of line with the framework of legal doctrine as to be dismissed unless a legislature can reaffirm them.[21]

Calabresi rests this thesis partly on the claim that legitimacy is ultimately a question of practicality and argues that statutory common law adjudication is essentially no different from the regular common law method entrusted to judges.[22] According to Calabresi, the same justification for the original common law function validates statutory common law adjudication.[23] That justification contends that evaluating laws for anachronism necessarily requires judgment.[24] One must decide whether to presume majoritarian support of a statute or rather to presume a lack of majoritarian support. This is an inherently judicial function, but it carries pragmatic benefits as well; allocating this burden to the courts reduces the risk of abuse because it is a substantially similar risk as that abuse associated with entrusting judges with common law interpretation in the first place.[25]

Legitimacy, however, precludes unfettered discretion. Thus, Calabresi argues that statutory common law adjudication should be based on a determination of whether the statute "fits the legal landscape"[26] and should primarily be exercised where courts determine a legislative response to judicial action is feasible.[27] Additionally, courts should have more room to engage in judicial lawmaking where the procedures in place make legislative review onerous or impractical. As an example, Calabresi notes that Washington, D.C. used to have no local elected representation; therefore,

20. CALABRESI, *supra* note 3, at 164 (emphasis omitted).
21. *Id.*
22. *Id.* at 118–19.
23. *Id.*
24. *Id.*
25. *Id.*
26. CALABRESI, *supra* note 3, at 121. Calabresi interchanges several terms to denote the same concept of judges determining whether statutes are out of line with other laws. "[L]egal fabric" and "framework" are among some of the other terms Calabresi uses. *Id.* at 98.
27. *Id.* at 126.

the District's statutory laws had to be processed through the House D.C. Committee before Congress reviewed them. It was exceedingly difficult for a statute to obtain Congressional review because the Committee was largely made up of white individuals from rural districts and thus was unrepresentative of the predominantly black, urban District. Calabresi contends this situation justified the D.C. Court of Appeals, acting as the Supreme Court of Washington, D.C., in striking down statutes in order to force their legislative review.[28]

The courts should also be constrained to dealing with aged statutes. However, "aged" should not be judged solely in the number of years since a statute's enactment; rather, it should be judged based on whether the legal landscape has changed significantly. For instance, judges could consider recently enacted statutes to be "aged" if they were passed in response to an emergency situation or a now-obsolete problem.[29] Finally, the courts should assume a bias in favor of setting aside a statute when it impinges on a structural or otherwise fundamental aspect of the Constitution, unless there is sufficient evidence for the constitutionality of the provision.[30] In other words, legislatures should have to prove constitutionality.

Calabresi justifies his theory in part on its practicality. Thus, the doctrine would hardly serve the overarching legal framework if the doctrine could easily be abused. Alexander Bickel, for instance, wrote that relying on judges to honestly apply a doctrine was insufficient grounds for justifying a doctrine because—despite insistence otherwise—judges tend to disregard doctrinal limits when serious cases arise.[31] Calabresi notes that this danger occurs in most methods of constitutional interpretation and can only be limited, not eliminated entirely.[32] Thus Calabresi seeks to limit the use of his doctrinal framework to situations where a legislature can feasibly respond. This allegedly mitigates the concern that the doctrine places one more weapon, a potent and expensive one at that, into the arsenal of lawyers because lawyers will have less incentive to bring impact lawsuits if a legislative response is possible.[33] More so, however, Calabresi argues that the dangers of this approach may be acceptable simply because the other dominant approach—courts stretching constitutional doctrines to encompass anachronistic statutes—is less honest.[34]

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28. *Id.* at 127–28.

29. *Id.* at 132–33.

30. *Id.* at 135.

31. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 22–42 (1970).

32. *See* CALABRESI, *supra* note 3, at 168.

33. *Id.* at 169–70.

34. *Id.* at 176–81. Some of these abuses have occurred in the Court's willingness to misapply equal protection, and, as Calabresi argues, are reminiscent of the Court having inadequate tools to do what it thinks it must do. *Id.* at 170–71. Calabresi argues that the Court, in addition to misusing doctrine, also engages in subterfuge when a linguistic dishonesty gives a society an outcome closer to the ideal than would practically occur under an honest policy. *Id.* at 173 (citing C. Black,

III. Supreme Court Cases That Emphasize Elements of Calabresian Reasoning

While the Calabresian doctrine was never adopted in the statutory realm, several of the doctrine's elements are found in a number of Court cases. Many of these employ Calabresian reasoning so heavily that one can extrapolate from them a constitutional, pseudo-Calabresian doctrine of statutory anachronism. This can be seen in two categorical areas: cases where the factual circumstances underlying statutes changed significantly and cases that have often been analyzed under a framework that emphasizes constitutional change.

A. Cases Involving Change in a Statute's Underlying Justifications

This subsection analyzes two situations where the Court has invalidated statutes in part because the factual underpinnings upon which the statutes were initially justified disappeared.

1. Remarkable Similarity to Calabresi's Thesis: Shelby County v. Holder[35]

Most notably, the reasoning employed in *Shelby County* bears a remarkable resemblance to the reasoning upon which the Calabresian doctrine of statutory common law adjudication is built. The *Shelby County* Court took a different approach, though, and invalidated § 4(b) of the VRA on constitutional grounds rather than adopting Calabresi's strict statutory-invalidation framework.[36] Section 4(b) had set forth a formula defining which voting districts had to obtain federal preclearance under § 5 before making changes to their voting laws.[37] While the coverage formula had been upheld

Mr. Justice Black, The Supreme Court, and the Bill of Rights, Harper's Magazine, Feb. 1961, at 63 (defending absolutism)).

35. *See generally* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

36. Often, a statutory decision is assumed to be more "restrained" than a constitutional decision. *See, e.g.*, Escambia County v. McMillan, 466 U.S. 48, 49–53 (1984) (per curiam) ("It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose the case."). In this case, however, adopting the Calabresian doctrine in the statutory realm would be less restrained because that adoption would not simply affect the statute in question; it would promulgate a structural pronouncement concerning the role of federal judges. *See* note 19. In contrast, constitutionalizing the doctrine is more limited because doing so merely interprets Congress's powers. For instance, Calabresi's statutory doctrine dictates the constitutional structural role of judges regardless of the statute in question, but *Shelby County* only adjudicates the question of the limits of Congressional power under Section 5 of the Fourteenth Amendment.

37. 42 U.S.C.A. § 1973(b) (2012).

in earlier cases,[38] its continued application based on 40-year-old data proved too much for the Court.[39]

In 2006, Congress had the opportunity to draft a new preclearance formula when the VRA sunset clause required congressional renewal, but after compiling an extensive record exhibiting the success of the VRA (although the record showed racial discrimination still existed to a lesser degree),[40] Congress failed to use the record to shape a new preclearance formula. The outdated coverage formula it did use had "no logical relation" to the national circumstances of 2006 and therefore exceeded congressional power under the Reconstruction Amendments.[41] In large part, the coverage formula, which was considered dramatic and exceptional when first passed, was originally justified because of "an insidious and pervasive evil which had been perpetuated . . . through unremitting and ingenious defiance of the Constitution."[42] Such dramatic conditions justified "legislative measures not otherwise appropriate,"[43] but the disappearance of many of those "insidious" factors rendered the preclearance formula obsolete and therefore contrary to the enumerated powers of Congress.

Although the Court specifically held that the data was too anachronistic for the preclearance formula to be constitutional, the Court did not discuss how often Congress would need to update the coverage formula. Congress had re-passed the VRA multiple times, though, and the Court dwelled on Congress' failure to update the preclearance formula in 2006, a failure that left the Court "no choice but to declare § 4(b) unconstitutional."[44] The Court had expressly declined to rule on the constitutionality of the preclearance formula when requested to do so a few years earlier in *Northwest Austin v. Holder*—the first Supreme Court case on the issue after Congress re-passed the VRA in 2006—but the Court did note in that case that the VRA raised serious constitutional concerns; in particular, there was "considerable evidence" that § 4 "fail[ed] to account for current political conditions," notably that there was a *smaller* racial gap in voter registration in covered states than in the country as a whole.[45] By withholding judgment on the statute's constitutionality, the Court communicated a warning to Congress and granted Congress an opportunity to fix the statute. The Court noted that Congress' failure to act after the Court's warnings in *Northwest Austin* compelled the Court to declare the preclearance formula unconstitu-

38. *See generally* Lopez v. Monterey County, 525 U.S. 266 (1999); City of Rome v. United States, 446 U.S. 156 (1980); Georgia v. United States, 411 U.S. 526 (1973); South Carolina v. Katzenbach, 383 U.S. 301 (1966). All of these cases were abrogated by *Shelby County*.

39. *Shelby Cnty*, 133 S. Ct. at 2631.

40. *Id.* at 2635–36.

41. *Id.* at 2629.

42. *Katzenbach*, 383 U.S. at 309.

43. *Id.* at 334.

44. *Shelby Cnty*, 133 S. Ct. at 2631.

45. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009).

tional despite the Court's avowed commitment to preserve statutes whenever possible.[46] Thus, it is reasonable to infer that the amount of time the Court would have allowed the preclearance formula to stay in place may have been different had the VRA not been subject to a sunset clause that required Congress to readopt it. Whereas the Court would have retained the main tool by which it struck down § 4—the preclearance formula's failure to speak to "current conditions"[47]—the Court would not necessarily have been "compelled" to act in 2013 because the Court might not have had the opportunity to warn Congress of the constitutionally sensitive nature of § 4.

The *Shelby County* Court did not find the anachronistic nature of the preclearance formula or Congress' inaction to be dispositive, though. The Court instead found that portions of the VRA were constitutionally suspect to begin with. The VRA had enacted "legislative measures not otherwise appropriate" in the absence of exceptional situations[48] because the VRA encroached upon fundamental structural values: the equal sovereignty of the states and federalism.[49]

Thus, the analysis employed in *Shelby County* bears striking resemblance to Calabresi's thesis in several ways. The Court, by refusing to rule on the issue of constitutionality in *Northwest Austin*, allocated the "burden of inertia which our system of separation of powers and checks and balances mandates"[50] onto Congress, allowing Congress the opportunity to update the preclearance formula.[51] By the time the Court delivered its *Shelby County* decision, it appeared Congress may not have been willing or able to properly review the VRA, thus compelling judicial action.[52] Finally, it was

46. *Shelby Cnty*, 133 S. Ct. at 2631. ("Striking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'" (citing Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

47. *Id.*; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2594 (2012) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

48. *Katzenbach*, 383 U.S. at 334 (1966).

49. *Shelby Cnty*, 133 S. Ct. at 2621 (citing *Northwest Austin*, 557 U.S. at 202–03).

50. CALABRESI, *supra* note 3, at 164.

51. Under Calabresi's doctrine, it is not important that the legislature *does* respond. All that matters is that the legislature *can* respond. While it is certainly the case that legislatures may block a new preclearance formula in committee, it is no different from what other legislation must go through. Congress is responsible for its own legislative agenda and theoretically could address a statute—so long as the Court leaves them with reasonable procedural opportunity—if political pressure to do so were high enough.

52. The Court believed Congress would not have been able to adopt a definition of preclearance that met current needs and still kept all the then-current jurisdictions covered. *Shelby County*, 133 S. Ct. at 2630. Thus, the Court rejected the government's argument that it was permitted to "reverse-engineer" the coverage formula to choose the jurisdictions it wanted to cover by only drafting the coverage formula after such a decision was made. *Id.* at 2628. This bears similar markings to Calabresi's thesis. *See supra* Part II (discussing a justification of the use of the common law method in areas where it would be unlikely the legislature could properly review a statute). Furthermore, in the oral arguments for *Northwest Austin*, Justice Scalia expressed skepticism concerning the VRA's unanimous passing and asked counsel, "[D]o you ever seriously expect Congress to vote against a reextension of the Voting Rights Act? Do you really think that any

not just that the data underlying the preclearance formula was anachronistic; the preclearance formula itself was constitutionally sensitive. The Court's holding was much more reserved than Calabresi's idea, however (other than that the holding adjudicated on constitutional grounds instead of statutory grounds). The constitutionally sensitive nature of the subject was not just a helpful factor, as suggested in Calabresi's model;[53] rather, it was the predominant factor. Constitutional sensitivity was required because the coverage formula was justified only on the initial showing in *Katzenbach* of extreme and pervasive discrimination.[54] Additionally, the Court's method elected to displace a law based on anachronistic data *only* after giving the legislature notice of the constitutionally sensitive nature of the Act. Instead, Calabresi's doctrine merely encourages the judiciary to warn the legislature.

2. *Government Action Based on Old Data: The Reapportionment Cases*

Shelby County is just one bookend of the Court's use of pseudo-Calabresian reasoning. Taken together, several of the 1960s-era reapportionment cases—which fashioned the one-person, one-vote rule—emphasize elements of Calabresian reasoning. Following *Baker v. Carr*, which held that questions concerning redistricting were justiciable within federal courts,[55] the Court in *Reynolds v. Sims* justified its own holding, in part, on a failure of the legislature to overcome inertia.[56] Alabama voters had sought to force the state to redistrict according to population.[57] Demographic changes that had occurred since the districts had last been drawn (more than a half-century before) created population disparity ratios as high as 41-to-1 in the Alabama Senate.[58]

Concluding that the Equal Protection Clause guaranteed individuals a right to relatively equal voting power, the Court held: 1) that the laws drawing the legislative districts were impermissibly anachronistic because they

incumbent would—would vote to do that?" Transcript of Oral Argument at 51, *Northwest Austin*, 557 U.S. 193 (2009) (No. 08-322).

53. *Supra* Part I.

54. *Katzenbach*, 383 U.S. 301, 309 (1966).

55. Baker v. Carr, 369 U.S. 186, 232–33 (1962).

56. Reynolds v. Sims, 377 U.S. 533, 540 (1964).

57. *Id.* at 540–41.

58. *Id.* at 545. Disproportionate representation was not relegated only to Alabama. Other states such as Connecticut, Indiana, and Mississippi had explicit constitutional provisions requiring reapportionment yet had disproportionate representation rates. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 58–62 (1963) (providing state apportionment procedures). *See also* Manning J. Dauer & Robert G. Kelsay, *Unrepresentative States*, 44 NAT'L MUN. REV. 571, 571–75 (1955) (showing disproportionate representation rates). For an article listing several disproportionately represented districts, see Arthur L. Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90 (1962). Among the more disproportionate examples is Los Angeles County, which in 1961 had apportioned one state senator for over six million people while the 28th senate district was apportioned one senator for less than 15,000 people. *Id.* at 90.

relied on population data that no longer represented reality; and 2) that inertia made it very difficult for the legislature to update those anachronistic laws.[59] Despite having a state constitutional requirement to reapportion its districts decennially, the State of Alabama had not done so in nearly sixty years.[60] The demographic changes that had occurred in such a wide period of time made the earlier districting impermissibly anachronistic. Apportionment based on sixty-year-old data—similar to *Shelby County*—was not itself dispositive, though. The Court also expressed displeasure in Alabama's historical reluctance to fix the situation[61] and questioned whether Alabama *could* fix the situation following several Alabama Supreme Court opinions indicating that the state's constitution precluded certain amendments and would require a constitutional convention.[62] Furthermore, the Court did not buy the argument that Congress, under Article I of the U.S. Constitution, had authority to proceed over the question of apportionment by virtue of its Guaranty Clause power.[63] The legislative inertia, the Court found, was both statewide and federal: "Congress simply lack[ed] the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights."[64]

The Court also made prolific references to the constitutional sensitivity of voting protection, noting that a statutory scheme that created unequal representation "touche[d] a sensitive and important area of human rights."[65] *Wesberry v. Sanders*, another reapportionment case decided around the same time as *Reynolds*, expressed a similar idea, reasoning that the principle of equally weighted votes ran deep into the fundamental structure of the Constitution.[66] Such structural and fundamental constitutional concerns thus gave more weight to the Court's ability to declare districting based on old population data to be unconstitutionally anachronistic.

Unlike in *Shelby County*, however, the *Reynolds* Court issued a clear statement as to when the Court would presume that population data had become anachronistic. The Court held that redistricting every ten years would "meet the minimal requirements," whereas doing so less frequently would be "constitutionally suspect."[67] But *Reynolds* was not as explicit as *Shelby County* was in giving legislatures notice of the constitutional sensi-

59. *Reynolds*, 377 U.S. at 577.

60. *Id.* at 569–70.

61. *Id.* at 570 ("Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism.").

62. *Id.* at 548–49.

63. *Id.* at 582.

64. *Reynolds*, 377 U.S. at 582.

65. *Id.* at 561 (quoting Skinner v. State of Okla. *ex rel.* Williamson, 316 U.S. 535, 536 (1942)).

66. Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964) (requiring the one-person, one-vote rule for Congressional districting).

67. *Reynolds*, 377 U.S. at 583–84.

tivity of the subject. *Baker* had provided warning to the legislatures that redistricting issues were justiciable in federal courts.[68] To this extent, the legislature had been given notice that the courts could intervene if the legislatures did not resolve the issues. *Baker* and *Reynolds*, however, were not as clear as *Shelby County* and its preceding cases as to exactly what the legislatures needed to do. *Baker* did not resolve the case's merits, so legislatures could not rely upon a Supreme Court merits decision. Instead, they had to rely on the district court's opinion after *Baker* was remanded. That court—while holding that one house of the legislature had to be apportioned based only on population—specifically declined to adopt the one-person-one-vote rule by stating that legislatures were free to use non-population apportionment criteria in order to make sure urban areas did not overwhelm the voting power of other communities and geographic areas.[69] In this sense, the legislatures had notice, but it was less than that which Congress had received after *Northwest Austin*.

B. Cases Often Viewed Under a Living Constitutionalism Paradigm

Many of the following cases have often been viewed as fitting into a living constitutionalism paradigm, but a close analysis reveals that they also emphasize Calabresian reasoning and thus represent cases that Calabresi might have hoped courts would deal with via statutory common law adjudication rather than constitutional law.

1. Eighth Amendment Cases Involving Textual-Based Standards

Eighth Amendment death penalty cases are good examples of the Court adopting statutory common law adjudication on the possible authority of potentially vague text.[70] In 1958, the Court interpreted the Eighth Amendment to "draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[71] While on first glance this interpretation merely appears to be living constitutionalism, the approach directly invites judges to use Calabresi's analytic framework because the approach asks whether a statute maintains current majoritarian support.[72]

68. Baker v. Carr, 369 U.S. 186, 237 (1962).

69. Baker v. Carr, 206 F. Supp. 341, 345–46 (M.D. Tenn. 1962).

70. In other words, a judge might plausibly interpret the Eighth Amendment as creating a standards-based approach that allows for Calabresian reasoning.

71. Trop v. Dulles, 356 U.S. 86, 101 (1958) (emphasis added). Chief Justice Warren's opinion has not been met without controversy. For an argument castigating the legal instability that has resulted from the "evolving standards of decency" analysis, see John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1816 (2008) (arguing that the "evolving standards of decency" analysis betrays the purpose of the Eighth Amendment by allowing for punishments that have historically been unusual to be implemented when inflamed by popular support).

72. Again, this approach still departs from Calabresi's "strong form" of statutory common law adjudication, which would not offer an interpretation of the Constitution except insofar as the Constitution regards the judicial role. Instead, statutory common law adjudication would merely

While debate concerning the "evolving standards of decency" interpretation of the Eighth Amendment continues,[73] the interpretation has been used to strike down several laws deemed anachronistic,[74] and it will be adopted for the purposes of this Article.

One method for determining current standards of decency involves looking at how the states (and sometimes other countries) treat a matter.[75] Thus, the Court in *Coker v. Georgia* invalidated the death sentence of a person convicted of raping an adult woman, where the rape did not result in death, in part because Georgia was the only state that authorized such executions.[76] Thus, the court concluded, the Georgia statute was unrepresentative of national ideals concerning decency in punishment.[77] In *Coker*, the Court noted that its earlier decision in *Furman v. Georgia*,[78] which created a short, de facto moratorium on the death penalty, had helped the states overcome legislative inertia. Additionally, *Furman* may have served the function, albeit probably unintentionally, of providing notice to the states that the Court would closely watch death penalty procedure. At the time of *Furman*, sixteen states had held rape to be a capital offense.[79] Only three of the sixteen states reenacted the statutes after *Gregg v. Georgia*,[80] which had lifted the moratorium on the death penalty. In two of those states, the statutes were overturned in the courts, and the states did not re-pass the legislation.[81] The *Coker* Court also noted that, as of 1965, only three countries out of sixty surveyed worldwide implemented capital punishment for rapes not resulting in death.[82]

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place the burden on the legislature to re-pass a statute and thus reassert majoritarian support. In *Trop*, the Court essentially did the same thing, albeit constitutionally.

73. *See* Harmelin v. Michigan, 501 U.S. 957, 966–85 (1991) (Scalia, J.) (examining historical evidence on the original meaning of the Eighth Amendment and concluding that the Eighth Amendment sets forth a rule-like requirement that contains no proportionality provision despite modern sentiments on proportionality). *Contra* JACK M. BALKIN, LIVING ORIGINALISM 31–33 (2011) (rejecting a "rule-like" interpretation of the Eighth Amendment in favor of a paradigm that sees the original constitution as a "skeleton" that can be built upon through the development of standards).

74. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of an intellectually disabled convict); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that the execution of a minor less than 18 years of age was barred by the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153 (1976) (affirming that the Eighth Amendment does not prohibit the use of the death penalty).

75. For an argument that state legislation is not a good indicator of society's moral values, see Michael D. Dean, *State Legislation and the "Evolving Standards of Decency": Flaws in the Constitutional Review of Death Penalty Statutes*, 35 U. DAYTON L. REV. 379, 381 (2010).

76. Coker v. Georgia, 433 U.S. 584, 594–96 (1977).

77. *See id.* at 596.

78. Furman v. Georgia, 408 U.S. 238 (1972).

79. *Coker*, 433 U.S. at 594.

80. Gregg v. Georgia, 428 U.S. 153 (1976).

81. *Coker*, 433 U.S. at 594.

82. *Id.* at 596 n.10.

Other cases have even more explicitly utilized the interpreted standards-based view of the Eighth Amendment to invalidate statutes that are deemed obsolete with regard to societal views. After the Court held in *Penry v. Lynaugh*[83] that executing an intellectually disabled[84] person convicted of a capital crime was not cruel or unusual punishment, the Court specifically ruled in the reverse thirteen years later in *Atkins v. Virginia*.[85] The most notable portion of the *Atkins* opinion with regard to statutory anachronism, however, was that the Court—despite coming to a contradictory ultimate result—did not overrule *Penry*. Instead, the Court merely noted a consensus had emerged since *Penry*, with numerous states consistently moving in the direction of eliminating capital punishment for intellectually disabled offenders.[86]

An almost identical situation occurred concerning the execution of minors. *Stanford v. Kentucky* upheld executions of individuals older than sixteen years,[87] but *Roper v. Simmons*, just over fifteen years later, barred executions of individuals younger than eighteen.[88] Again, the Court looked to state statutes, noting that most states prohibited execution of minors entirely and that the rest of the states executed minors infrequently.[89] As before, the Court refused to specifically overrule the previous case, finding instead that such statutes no longer fit with modern standards of decency.[90]

Thus, each of these cases appears to have explicitly overruled laws, in part, due to their anachronism. But, while Calabresian doctrine permits court involvement based on the existence of anachronism alone (though the courts could be tempered by analyzing other factors such as the possibility of judicial response), the *Roper* and *Atkins* Courts, like the *Shelby County* and Reapportionment Courts, did not find anachronism in itself to be a sufficient cause for adjudication. *Roper* stated that a determination of anachronism was the starting point for analysis but that the Court would have to exercise its "own independent judgment" to render a statute unconstitu-

83. Penry v. Lynaugh, 492 U.S. 302 (1989).

84. Although the *Penry* Court (and other Courts in the era) used the term "mentally retarded," the Supreme Court has recently begun using the term "intellectually disabled." Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).

85. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

86. *Id.* at 314–16.

87. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

88. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

89. *Id.* at 564–65.

90. Justice Scalia criticized this quick turnaround. "What a mockery today's opinion makes of [Alexander] Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*." *Id.* at 608. While Justice Scalia's criticism was levied against the living constitutionalism paradigm of this case, the criticism seems equally applicable when applied to the Calabresian anachronism factors employed in the case. The Calabresian interpretation of the case, however, would suggest not that the Constitution had changed but that the Constitution required death penalty statutes to comport with contemporary norms and that statutes that no longer represented those norms would be struck down.

tional, signaling that a developing consensus alone would not be dispositive.[91] Indeed, *Roper* determined that, in addition to the changing norms regarding punishment, minors were less culpable than adults due to minors' general immaturity, increased susceptibility to external pressures, and more fluid quality of character.[92]

2. *Other Cases Involving Textual-Based Standards*

Claims of textually established statutory common law adjudication are not limited to the Eighth Amendment. Other cases draw their holdings, although perhaps less explicitly, in part from the evolving understandings of Constitutional text.

In *Lawrence v. Texas*, the Court held that laws criminalizing sodomy were unconstitutional because the concept of liberty within the Due Process Clause of the Fourteenth Amendment had evolved to prohibit such criminalization.[93] The Court pointed toward an emerging consensus among the states that showed the understanding of "liberty" permitted the federalized protection of a wider array of sexual choices than was traditionally granted; although every state outlawed sodomy prior to 1961, only thirteen states retained such legislation in 2003, and those states rarely enforced the statutes.[94] The Model Penal Code also discouraged criminalization, and the European Court of Human Rights recognized the evolving standard.[95] The *Lawrence* Court chastised and specifically overturned *Bowers v. Hardwick*,[96] *Lawrence's* precursor by just seventeen years, for not discerning the "emerging recognition" of liberty as protecting more forms of sexual activity.[97]

Similar to the Death Penalty cases, *Lawrence* explicitly overruled the Texas criminalization of sodomy in part because the Court deemed the law anachronistic. *Lawrence*, however, did not fulfill a similar signaling function as did the Reapportionment cases, *Shelby County*, and possibly *Furman*. Nevertheless, most of the anti-sodomy statutes had disappeared; those few that remained were rarely enforced, and it was difficult to justify those statutes as representative of current majoritarian principles.

Similarly, in *United States v. Windsor*, the Court invoked the "evolving understanding of the meaning of equality" in its decision.[98] The Court argued that the "essence" of the Defense of Marriage Act (DOMA), which

91. *Id.* at 564.
92. *Id.* at 569–75.
93. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
94. *Id.* at 573.
95. *See id.* at 572–73.
96. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing homosexual sodomy).
97. *Lawrence*, 539 U.S. at 572–73, 578.
98. United States v. Windsor, 133 S. Ct. 2675, 2692–93 (2013).

barred federal recognition of same-sex relationships defined by a state or states as "marriage," was to prevent such relationships from achieving the same "dignity" status as traditionally defined marriages.[99] While such a statute may have comported with the understanding of equality in 1996 before any state—or any country—had statutorily changed its definition of marriage to include same-sex relationships, the concept of equality and "dignity" that certain states were seeking to place on same-sex relationships had changed rapidly in the short time since DOMA was passed, rendering DOMA unconstitutional because its definition of equality had become incompatible with current ideas.[100] Under the changed understanding of equality, the Court stated that DOMA's "principal purpose" now imposed inequality.[101] DOMA's recent enactment (1996) did not necessarily favor retention of the statute because a statute's "aged" status is not automatically dependent on how many years have passed since its enactment; it is instead dependent on how much the legal fabric has changed in the interim.[102] Societal views on the nature of marriage certainly changed between 1996, when no state or country recognized same-sex marriage, and the Court's decision in 2013, when a growing number of states and countries statutorily had redefined marriage to recognize same-sex couples.

Thus, like the other cases described in this section, the holding in *Windsor* turned on what the Court perceived to be DOMA's incompatibility with the then-current legal framework—specifically with regard to the Court's view of the prevailing modern concepts of equality and dignity.

IV. Defining the Pseudo-Calabresian Doctrine

The cases examined in Part II.A, most notably *Shelby County*, and Part II.B.1 lead to the main doctrinal definition outlined in this Article: the pseudo-Calabresian framework. To fall within that framework, a court must find one of the following conditions to be present in order to declare a statute impermissibly anachronistic and thus unconstitutional:

A. The issue at hand is sufficiently close to a fundamental or structural judicially enforceable constitutional limit (referred to, for brevity, as "constitutional sensitivity"); or

B. A law's text can fairly be interpreted as authorizing statutory common law adjudication.

While one of these factors, according to the cases analyzed, is necessary to strike down a statute for impermissible anachronism, neither is fully sufficient. The following additional factors, which may be a partial list,[103]

99. *Id.*

100. *Id.*

101. *Id.* at 2694.

102. Calabresi, *supra* note 3, at 132–33.

103. Fully formulating a list of factors that would allow a court to justify striking down a statute as impermissibly anachronistic would require an exhaustive analysis of case law. It suffices

can push a court from having necessary justification to having sufficient justification:

1. Prior judicial rulings have warned a legislature that an issue should be fixed; or
2. Legislative inertia is so biased in favor of retaining a statute that a legislature's ability to perform its obligations is highly suspect, requiring the other branches to use their checking powers on the legislative branch to keep it functioning.

As far as the remedy goes, the Court's rejection of the strict Calabresian model represents a rejection of Calabresi's call for the courts to expand their constitutional role. Thus, cases within the pseudo-Calabresian model necessarily must be viewed under the auspice that the courts have not altered their function. The pseudo-Calabresian paradigm, therefore, only includes cases that frame rulings narrowly so as to afford the legislature an opportunity to respond to the Court and thus avoid separation of powers issues.

A. Constitutional Sensitivity

Calabresi's doctrine notes that a court merely has *greater* justification to exercise statutory common law adjudication where a statute is constitutionally suspect (thus allowing adjudication based on anachronism in the purely statutory realm).[104] The Court, however, has declined to adopt this strong version of Calabresi's doctrine. Instead, it has opted to *require* constitutional sensitivity—that is, cases must implicate constitutionally enforceable limits. Many of the cases discussed in Part III exhibit this requirement well.

In *Shelby County*, for instance, the Court noted there were "underlying constitutional concerns" in the VRA that "impose[d] substantial federalism costs" and violated the notion of equal sovereignty between the states.[105] Therefore, while the Fifteenth Amendment had granted Congress appropriate powers to pass the VRA,[106] the Court was concerned with the power's real potential to encroach on other structural portions of the Constitution. Such a situation called for the *Shelby County* Court to tread carefully, deferring less to Congress than it otherwise might have in areas where statutory authority was less constitutionally suspect.

The Court in the Reapportionment cases also stressed constitutional sensitivity, noting that unequal representation encroached upon fundamen-

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to show for the purposes of this Article that factors *A* and *B* above are generally not seen as sufficient themselves to strike down a statute as impermissibly anachronistic.

104. CALABRESI, *supra* note 3, at 135.

105. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2621 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202, 203, 207 (2009)).

106. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

tal human rights guaranteed by the Constitution.[107] The Death Penalty cases hardly needed any additional finding of constitutional sensitivity as the Constitution, under certain judicial philosophies, made death penalty statutes per se constitutionally sensitive.

B. Textual Authorization of Statutory Common Law Adjudication

If a plausible textual reading of the appropriate materials invites the reasoning employed in statutory common law adjudication, then the Court has been more willing to adopt that reasoning. This approach is seen in the Death Penalty cases and less explicitly in *Lawrence* and *Windsor*. For instance, the Death Penalty cases spawn from the Court's interpretation in *Trop* that the text "cruel and unusual" creates an "evolving standards of decency" standard.[108] Similarly, both *Lawrence* and *Windsor* interpreted "liberty" and "equal" as evolving standards from which to judge whether statutes were impermissibly anachronistic.

C. Bolstering Factors

Based on the cases analyzed in Part III, constitutional sensitivity and textual authority are the starting places for analysis, but neither of those factors is sufficient to invalidate a statute for impermissible anachronism. The Court has determined that additional, bolstering factors are needed. The Court, however, has not clearly identified whether *both* bolstering factors identified in this section are necessary or even whether additional bolstering factors exist. Both *Shelby County* and the Reapportionment cases appeared to use both bolstering factors. Still, serving notice to legislatures was less apparent in the Reapportionment cases than in *Shelby County*, and legislative inertia played a less-central role in *Shelby County*.

If a court has given notice to a legislature that the court is skeptical of the constitutionality of a statute, then the legislature has been granted an opportunity to respond before the court rules on the constitutionality of a statute. Such a factor bolsters the justification for using statutory common law adjudication. Arguably, this is due to the decreased risk of falling into separation-of-powers issues because of the initial deference to the legislature in the task of fixing a statute.

For instance, the *Shelby County* Court remarked that the Court had taken a reserved, notice-based approach in *Northwest Austin* by avoiding ruling on the constitutionality of the VRA but noting that the VRA was constitutionally sensitive.[109] This provided notice to Congress, allowing Congress the opportunity to act before *Shelby County*. The process of serv-

107. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

108. Trop v. Dulles, 356 U.S. 86, 101 (1958).

109. *Shelby County*, 133 S. Ct. at 2621.

ing notice to the legislature, as seen in *Northwest Austin*, helped mitigate the concern that the Court would declare too many things to be close to a judicially enforceable constitutional limit.

Perhaps more difficult is extrapolating from the analyzed cases a definition for when legislative inertia has obtained such a high retentionist bias that its ability to properly perform its function has halted, inviting a response from the judiciary. Extremely high levels of legislative inertia may perhaps justify greater use of statutory common law adjudication. This falls under the idea that proper checks and balances requires a governmental body to apply pressure in due proportion to the obstinacy of another branch. Still, pseudo-Calabresian adjudication introduces a variety of serious concerns, and it may be for this reason that it is less clear what level of inertia the Court has required in order to justify adjudication under a pseudo-Calabresian paradigm. One of the concerns, of course, is separation of powers. Furthermore, it is not immediately clear what indicators a court can use to determine when legislative capacity has completely stalled, although there is some crossover between this factor and that involving the signaling of the legislature.

It is perhaps easy to locate situations where the majority of legislators would be unlikely to vote to re-pass a statute,[110] but this is hardly the end of discussion. First, statutes are by design meant to be at least somewhat enduring and not based entirely on majoritarian support. A system set up otherwise would subject the country to a high degree of instability brought on by frequent legal changes whenever any new type of majority formed. Additionally, it can be argued that the government is structurally designed to make legislation—or, at the very least, unconstitutional legislation—difficult.[111] The legislature was bifurcated because "[a]mbition must be made to counteract ambition."[112] Such protections and procedural rules mean that legislative hurdles will often not be cleared despite majority support.

Consequently, a legislature's inability to re-pass a statute does not necessarily implicate the legitimacy of that statute. It would be absurd to hold otherwise. Specifically, consider the Patient Protection and Affordable Care Act, for example. The Act passed the House by just seven votes with every

110. *See, e.g.*, Immigration and Nationality Act of 1952, 8 U.S.C. § 1424(a) (2012).

111. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 427–28 (2012) ("A priori, it is hard to say whether [bicameralism and presentment] will lead to more or fewer intrusive rules. . . . This . . . system was designed to result in fewer *unconstitutional* or *unconscionable* laws than other systems.") (emphasis in original); *see also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 15 (1993) ("[I]nstead of writing into the Constitution a direct prohibition of regulation for private purposes, [the Framers] sought to discourage such regulation by making it difficult to enact laws that lacked broad public support.").

112. THE FEDERALIST NO. 51 (Madison or Hamilton).

Republican and thirty-four Democrats voting against it.[113] It is highly unlikely the legislation would have passed if it had been introduced in 2011 after Republicans gained a substantial majority in the House. But had a court knocked down the statute on that basis alone, it would have faced justifiably severe criticism.

Determining the level of legislative inertia, then, appears to rest on something much higher than the inability to re-pass a statute. Cues from Part III prove instructive. Recall that, in the Reapportionment cases, many of the concerned states already had constitutional provisions requiring redistricting; the problem was that those mandates were not being followed.[114] This stagnant situation primarily benefitted incumbents, so there was a strong incentive to maintain inertia. The *Shelby County* Court, likewise, placed emphasis on the belief that Congress could not have adopted the same preclearance formula if the VRA were initially passed in the twenty-first century.[115] Additionally, Calabresi's example of Washington, D.C. laws being de facto unreviewable by Congress provides another good example.[116] Strong political interests that essentially prevent a legislature from engaging in its legally required duties (like redistricting) are good evidence that the judiciary is justified in overcoming legislative inertia.

D. The Requirement of Narrow Rulings

The Court has refused to apply statutory common law adjudication in the strictly statutory realm. Therefore, the pseudo-Calabresian doctrine must be predicated on an assertion that the doctrine comports with traditional judicial functions and does not reallocate legislative power to the courts. The pseudo-Calabresian doctrine extrapolated here is limited to cases where the judiciary adopted narrow rulings to encourage or induce the legislature to take action. Adopting wider rules greatly reduces the availability of remedies for judicial error and pushes the Court closer to the separation-of-powers boundary. Thus, the insistence on narrow-rule limitation helps to avoid some of the separation of powers criticisms levied against Calabresi.

Consider *Furman* again. While some Justices did conclude that the "evolving standards of decency" prohibited all executions,[117] the Court's ruling was fractured and consequently narrow enough to apply only to the

113. Final Vote Results for Roll Call 165, OFFICE OF THE CLERK: U.S. HOUSE OF REPRESENTATIVES (Mar. 21, 2010), http://clerk.house.gov/evs/2010/roll165.xml.

114. *See supra* text accompanying note 58.

115. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

116. *See supra* note 28 and accompanying text.

117. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (arguing that the rarity of the application of the death penalty made the death penalty unconstitutional in all circumstances under the evolving standards of decency test); *id.* at 360 (Marshall, J., concurring) ("[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.").

consolidated cases at bar, although the ruling created a de facto moratorium on executions for a short while.[118] The legislative response was enormous. At least thirty-five states re-enacted death penalty statutes,[119] signaling disagreement with the Court.[120] The narrow holding of *Furman* allowed for this legislative response. Of course, *Furman*, had to fashion *some* rule; otherwise, the Court would not have adjudicated the case. But the rule in *Furman* allowed the states to democratically respond. In doing so, the Court induced the states to play their legislative hands and backed off somewhat once they did.

In contrast, many other cases precluded legislative action. In *Atkins*, for instance, the Court ruled that executions of intellectually disabled individuals were unconstitutional partially because recent legislation had moved in one direction: toward the elimination of the death penalty for those individuals.[121] Justice Scalia criticized the majority by noting that the consensus, being firmly on one side of the issue to begin with, could really only move in one direction.[122] The creation of broader rules in cases such as *Atkins*, especially when the creation is based on standards of decency, effectively dictates the direction in which standards must evolve. Therefore, these cases are excluded from the pseudo-Calabresian doctrine because they come much closer to the separation-of-powers boundary.

V. The Superiority of the Pseudo-Calabresian Doctrine

Calabresi's promulgation of statutory common law adjudication failed to gain traction, but this Article shows that the Court has formulated much of the reasoning behind Calabresi's thesis into a coherent constitutional doctrine of impermissible anachronism. Perhaps not surprisingly, Calabresi's doctrine was criticized for, among other things, violating separation of powers.[123] It is no wonder, then, that the Court's pseudo-Calabresian

118. The Court's narrow ruling stemmed more from accident than design. While five Justices agreed that the death penalty was unconstitutional in the consolidated cases the Court was reviewing, the Justices were unable to agree on a rationale. *Id.* at 238 (per curiam opinion). Regardless, the aftermath of *Furman* proves instructive for the effect of narrow rulings.

119. *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976).

120. Calabresi notes that the legislative response to 'this case cannot necessarily be deemed symptomatic of majority support for the death penalty. Calabresi contends that many legislatures believed *Furman* had entirely invalidated the death penalty, thus allowing individual legislators the freedom to vote for a statute for political purposes without violating their own consciences because they believed the Court would strike the law down. *See* Calabresi, *supra* note 3, at 27, 201 n.41. While salient, Calabresi's observation is similarly applicable to a variety of other legislative considerations. It is specious to say that a legislator's motivations for passing legislation must ordinarily be reasonably geared toward the actual bill's policy. The political nature of legislative bodies likely creates a multitude of motivating factors for legislators, not all of which coincide with a legislator's own personal opinions on the matters.

121. Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

122. *Id.* at 344–45 (Scalia, J., dissenting).

123. *See infra* Part V.B.

doctrine departs from the strict Calabresian doctrine. This Part shows how the pseudo-Calabresian doctrine is superior to the strict Calabresian doctrine—at least insofar as the former is less susceptible to some of the criticisms levied against the latter.

A. Legitimacy

Arguably, the most important criticism of statutory common law adjudication is the separation of powers criticism. Before showing how the Court's pseudo-Calabresian doctrine is less susceptible to separation of powers issues, though, it is necessary to respond to one readily available criticism of both Calabresi's formulation and the Court's formulation of the doctrine. This criticism asserts that statutory common law adjudication looks a lot like general judicial activism, which, apart from perhaps violating separation of powers, may not be judicially prudent. Much of this likely derives from the notion that common law methods involve the judiciary creating law.[124]

In a recent book review, Randy Barnett, Professor of Legal Theory at the Georgetown University Law Center, criticized the governmental practice of Congress declining to analyze the constitutionality of a statute only to have the judiciary defer to Congress' judgment.[125] The effect, what he calls "double deference," is that neither the legislative nor the judicial branch actually enforces the Constitution. The principle may be extended to the executive branch as well. In signing the McCain-Feingold Act in 2002, for instance, President George W. Bush said he had "reservations about the constitutionality" of the bill but deferred to the judiciary to "resolve these legitimate legal questions."[126]

If "double deference" is a problem, the immediate solution appears to be a reduction in deference—at least in certain situations if "[i]t is emphatically the province and duty of the judicial department to say what the law is."[127] In this sense, even though the Court has recognized that the Constitu-

124. *See* BLACK'S LAW DICTIONARY 334 (10th ed. 2014) (defining American Common Law).

125. Randy Barnett, *Book Review: "Terms of Engagement," by Clark M. Neily III*, WALL ST. J. (Nov. 19, 2013), http://online.wsj.com/news/articles/SB10001424052702303680404579141781929962584.

126. Presidential Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503 (Mar. 27, 2002). Some individuals have argued that the President has a constitutional duty—found in the Oaths Clause or the Take Care Clause or by implied obligation—to veto bills he or she believes are unconstitutional. *E.g.*, Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 82–83 (2007). Prakash notes that it was not historically uncommon for Presidents to reserve their veto powers largely to veto matters they deemed unconstitutional. For instance, President Madison expressed the sentiment that he was obligated to veto unconstitutional bills even if he agreed with the policy prescriptions. *Id.* at 87.

127. Marbury v. Madison, 5 U.S. 137, 177 (1803).

tion favors Congress as a constitutional interpreter in some instances,[128] the Court should depend less on Congress to determine a statute's constitutionality. If the role of the Supreme Court is to enforce the provisions of the Constitution as the supreme law of the land,[129] the Court ought to hesitate to defer to the legislature when the case involves constitutionally sensitive areas, either fundamentally or structurally or when the Court arguably has been tasked with the obligation to not defer. The Court ought to especially hesitate where judicial deference would perpetuate a legislative retentionist bias that greatly hinders a legislature's functionality.[130]

B. Separation of Powers

One of the more salient criticisms of the strict Calabresian doctrine is that it reallocates legislative power[131] and spurs increased litigation, which further politicizes the courts by shifting lobbying away from Capitol Hill.[132] The legislature, at least in the eyes of some critics, is specifically designed to make it difficult to legislate, thus purposefully setting up the possibility of statutory obsolescence. Legislative inertia largely stems from a scarcity of legislative time, which causes high demand and political pressure for that time and excludes consideration of many statutes.[133] Part of the nature of legislative politics is that interest groups must fight for legislative time. Other than by appealing to majoritarian ideals, the Calabresian doctrine offers no justification for why some statutes should bypass politics and the lobbyists. Because the funneling of bills is strictly a legislative function, allowing courts the option to bypass the normal legislative procedural hurdles amounts to a usurpation of legislative power.[134] Not only does that usurpation allocate legislative functions to courts, it also infringes on legis-

128. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009) ("The Fifteenth Amendment empowers " Congress," not the Court, to determine in the first instance what legislation is needed to enforce it.")

129. *Marbury*, 5 U.S. at 178 ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.").

130. "Functionality" should not be taken as a measure of the legislative output of Congress. A Congress that passes twice as many bills as the previous Congress cannot accurately be said to be more productive. Rather "functionality" refers to situations like the reapportionment cases discussed in Part II.B.2. where the legislature was essentially incapable of performing its legally prescribed duties.

131. Hutchinson & Morgan, *supra* note 8, at 1765.

132. *See* Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for A Statutory Age*, 57 N.Y.U. L. Rev. 1126, 1165 (1982).

133. Hutchinson & Morgan, *supra* note 8, at 1765. *Cf.* Ronald Dworkin, *Political Judges and the Rule of Law*, *in* Arguing About Law (Arguing About Philosophy) 193, 200 (Kavanagh ed., 2009) ("Legislative time is a scarce resource, to be allocated with some sense of political priorities, and it may well be that a judicial decision would be overruled if Parliament had time to pass every law it would like to pass, but will not be overruled because Parliament does not.").

134. *See* Hutchinson & Morgan, *supra* note 8, at 1765.

lative structure. Legislative procedure is not only designed to govern legislative enactment; it is also intended to govern repeal.[135]

The scarcity of legislative time is written into the legislative system to prevent the rapidly changing policy that would occur if a bare majority could enact all its prescriptions without procedure.[136] The high House population, the bifurcation in Congress, and the existence of Congressional procedural rules all enable the retentionist bias. A political body so designed need not always pursue common goals. However, Calabresi insists otherwise, thereby violating the separation-of-powers doctrine by first expanding legislative powers beyond their enumerated constraints and then by sweeping those expanded legislative powers under the judiciary. Because judicial resources preclude a legislature from always reviewing legislation, the strict Calabresian doctrine fundamentally alters the character of the legislative process.[137]

No similar foundational claim of a violation of separation of powers can be levied against the constitutional sensitivity or textual establishment of the pseudo-Calabresian doctrine. With regard to the latter, a textual-based grant of authority to nullify obsolete statutes can hardly be deemed to be a separation of powers violation; the Court, after all, has the power to interpret the Constitution's text. Analysts may disagree as to whether and where such textual grants exist, but that topic is best handled in debate over interpretive philosophy. Where an interpretive consensus has not arisen, the limitation of this doctrine to narrow rulings—inducing or encouraging a legislature to act—provides sufficient protection to avoid a serious separation of powers issue.

The limitation of this doctrine to statutes that are constitutionally suspect also helps mitigate the separation of powers issues. The Constitution does not explicitly say how deferential the Court should be to Congress. The Constitution does say, however, that judges are bound by oath (or affirmation) to uphold the Constitution.[138] In addition to declining to adopt Calabresi's strict statutory model, the only other thing the constitutional sensitivity prong of the pseudo-Calabresian doctrine does is shift the burden of proving constitutionality to the legislature. This shift helps ensure that Congress examines the constitutionality of a bill before passing it. Placing the burden of proof on the legislature thus allows the Court to keep a firm check on the legislative branch. Admittedly, this may enable lawyers to argue that the legislature has failed to meet the burden of constitutional proof; however, such a risk would not necessarily bring the Congressional policy lobbyists into the Court's chambers because a commitment to very

135. *See* Estreicher, *supra* note 132, at 1135.

136. *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 301 (First Harvard University Press ed., 1993).

137. *See id.*

138. U.S. CONST. art. VI, cl. 3.

narrowly tailored rulings creates an incentive for lobbyists to focus their political efforts on the legislature. Furthermore, legislatures, knowing they bear the burden of proof, would be induced to back up constitutionally suspect statutes with sufficient evidence.

Additionally, including legislative notification as a factor for determining whether to use the pseudo-Calabresian doctrine promotes democratic values. The pseudo-Calabresian doctrine recognizes that policy decisions are best left with the branch that is most accountable to the electorate. Thus, the doctrine seeks to interfere only where the legislature has had ample opportunity to act on its own accord but has shown itself incapable or unwilling to do so.

C. Majoritarian Support

While Calabresi argues that the legal landscape is based on majoritarian support, legislative design and reality are much different. In actuality, the scarcity and value of legislative time causes legislation to rarely, if ever, reflect an actual majoritarian wish. Instead, legislation is produced by an elaborate set of bartering, trades, lobbying, and compromise—ending in a result that can hardly be deemed majoritarian.[139] Furthermore, the congressional legislative process is filled with a variety of procedural "vetogates" (e.g. the filibuster, committee assignments) that provide an opportunity for legislation to be killed.[140] The legislative product more closely resembles the result of a skirmish of several ambitious forces.[141] Furthermore, democracy ordered in this way can actually be characterized as anti-majoritarian because the procedure governing legislative enactment is designed to make the passage of legislation difficult (by bifurcating the legislature, etc.). Calabresi also does not discuss the argument that a virtue of having won the legislative debate in the first place is the right to impose those statutes on others, even when the foundations for those statutes have been rendered obsolete.[142]

Additionally, Calabresi does not adequately address the idea that it is permissible for a statute's justification to evolve over time. For instance, the physical limitations of the electromagnetic spectrum, as well as the problem of different radio frequencies interfering with one another, served as the catalyst for certain FCC broadcast regulations. With the advent of greater technology and greater scientific understanding, the legislation has remained, but the justification legislators promulgated for the statute has

139. Hutchinson & Morgan, *supra* note 8, at 1762–63.

140. William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-48 (2008).

141. *See* THE FEDERALIST NO. 51 (Madison or Hamilton) ("Ambition must be made to counter ambition. . . . [A] double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

142. Estreicher, *supra* note 132, at 1140.

changed. Now, legislators profess to grant the public greater access to media.[143]

Unlike the strict Calabresian model, the pseudo-Calabresian doctrine abandons the idea that statutes derive legitimacy from majoritarian support. Rather, statutes are legitimate because they have successfully navigated the enactment procedure. That process, however, is not limited to formal congressional hearings and the signing of a bill by the President. Part of the process is getting a law through all three branches of the government.[144] With that in mind, a majoritarian argument does not preclude the Court from applying pseudo-Calabresian statutory common law adjudication. In fact, it has the duty to strike down a statute that does not comply with the Constitution,[145] whether or not the Court uses this method. The lawmaking procedure does not necessarily end if the Court has already reviewed a statute. The framework of legal doctrine is continually changing, and part of the validity of a statute must necessarily depend on the statute not being struck down.

Because the pseudo-Calabresian doctrine does not fundamentally depend on majoritarian support, it is less susceptible to critiques stemming from counter-majoritarianism.

D. Feasibility

Calabresi argues that his doctrine would simply recognize the Court's behavior, at the time of his writing (as he believes the Court previously engaged in subterfuge to achieve what it felt it needed to without having the doctrinal power to do so overtly).[146] His argument for the formal adoption of the technique, then, implies a belief that the doctrine would gain value by its legitimation.

The Calabresian model is criticized for claiming that judges are particularly well-suited for discovering where statutes are out of place with the legal framework.[147] This Article's more limited thesis instead seeks to extrapolate a doctrine that uses similar reasoning to Calabresi's doctrine but

143. *Id.* at 1140 n.40.

144. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid."). Because the Court is permitted to determine the constitutionality of statutes, the view expressed by Hamilton means that a statute's validity is dependent either on the Court upholding it or not being challenged.

145. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Barnett, *supra* note 125.

146. CALABRESI, *supra* note 3, at 16–30.

147. *See, e.g.*, Estreicher, *supra* note 132, at 1169 (arguing that the foundation for the idea that judges would be capable of discerning the framework of legal doctrine has not been adequately established, that the "majority" that creates a statute is often—politically—simply an interest group, and that these realities give people good reason to fear that judges will use statutory common law adjudication merely to enact their policy prescriptions); Hutchinson & Morgan, *supra* note 8, at 1770–73 (arguing that Calabresi's failure to ground his idea in a theory of judicial

which does not extend the structural function of judges. This limits the pseudo-Calabresian doctrine to the Court's current obligation: upholding the Constitution under oath of office by avoiding improper deferment. As seen from the examples mentioned in this Article, the passage of time—in addition to other factors—is often enough to render a statute unconstitutional. If the Court is to fulfill its duty to uphold the Constitution, clear guidelines and a definition of the doctrine will be of aid. In short, it is not enough to say the Court is incapable of conducting the analysis that this Article suggests. If the Constitutional oath and cases like *Marbury* are to be taken seriously, it is a truism to say the Court is required to strike down legislation that is contrary to the Constitution. Discussing the feasibility of a current (instead of proposed) requirement makes little sense, for the Court already has an obligation to abide by its duties. A discussion of feasibility is thus better relegated generally to political science and legal philosophy rather than a critique of the pseudo-Calabresian doctrine.

Still, critics may contend that a doctrine of statutory common law adjudication that uses narrow rulings lacks bite. After all, if the Court rules narrowly, it will take longer to come to any consensus on what the law is. This efficiency-based criticism, however, fails because the doctrine requires narrow rulings in order to square with the constitutional doctrine of separation of powers. One cannot take judicial efficiency to an extreme logical nexus. Furthermore, the pseudo-Calabresian doctrine does not displace other constitutional doctrines that might permit wider rulings; instead, the doctrine merely prohibits wide rulings where the Court relies on anachronism for its holding.

VI. Applying the Pseudo-Calabresian Doctrine

Not every case from Part III that exhibits some Calabresian reasoning can fit within the pseudo-Calabresian doctrine. But some cases would have turned out the same way if the pseudo-Calabresian doctrine were the *only* grounds used by the Court in adjudication. This Part shows that, while elements of Calabresian reasoning were prevalent in all of the Part III cases, Calabresian reasoning was only dispositive for some.

A. Cases That Fit within the Doctrine

1. Shelby County

Shelby County is most in line with the pseudo-Calabresian doctrine. While it does not appear the text of the Fourteenth Amendment authorized adopting Calabresian reasoning to adjudicate the case, the Court repeatedly emphasized the constitutionally sensitive nature of the VRA. Additionally,

interpretation makes his idea feasibly "unworkable" and that it is impossible for courts to utilize statutory common law adjudication in a value-neutral manner).

the Court employed one of the doctrine's bolstering factors when it provided notice to Congress in *Northwest Austin* that the VRA was constitutionally suspect.

Having displayed constitutional sensitivity and having bolstered it by showing that the Court had provided notice to Congress in *Northwest Austin*, the Court's ruling is sufficient to fit within the pseudo-Calabresian doctrine. The Court probably could not have further bolstered *Shelby County* on the basis of legislative inertia. To be sure, the VRA did suffer from some legislative inertia, but it is far from clear that the level of inertia rose to constitutionally impermissible levels. The Senate passed VRA preclearance formula 98-0 in 2006,[148] but it is easy to envision why the situation surrounding the VRA—or analogous situations—would make legislative change improbable. The Court found as much, going so far as to say it would have been impossible for Congress to come up with the same preclearance formula had it started from scratch.[149] As a political matter, it is difficult to imagine any senator supporting a formula that would cover his or her state if it had not been covered before.[150] Additionally, a senator seeking to remove his or her state from coverage would probably receive significant political pressure from opponents. Nothing about this level of legislative inertia, however, appears to warrant judicial interference. Political pressure is integral to the legislative process, and the political situation of the VRA was a far cry from the political situation in the state legislatures prior to the Reapportionment cases.

The Court also avoided separation of powers concerns by ruling narrowly, thus encouraging Congress to act. The holding only requires that Congress use current data to define the preclearance jurisdictions (without specifying what constitutes "current"). Despite criticism that *Shelby County* scaled back important gains made in voting rights over the last half-century,[151] the Court merely forced the definition issue back onto Congress. Thus, while political gridlock itself would not be sufficient grounds for intervening, the constitutional sensitivity of the issue and the repeated signaling of Congress under the pseudo-Calabresian doctrine vindicated a breaking of political gridlock. Even if it is politically unlikely for Congress

148. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635 (2013).

149. *Id.* at 2631.

150. *Cf.* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (2007) ("The most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would sufficiently disrupt settled expectations *that it is better to go with the devil we know than one we do not*." (emphasis added)). The Court quoted a portion of this sentence in *Northwest Austin*. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009).

151. *See, e.g.*, Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement* (June 25, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html; David Jackson, *Obama "Disappointed" in Court's Voting Rights Decision* (June 25, 2013), http://www.usatoday.com/story/theoval/2013/06/25/obama-supreme-court-voting-rights-act/2455939/.

to reestablish a preclearance formula,[152] the Court should not parse the political intricacies of Congress unless legislative inertia is so severe that it is constitutionally impermissible. The pseudo-Calabresian doctrine only requires that the Court draft a narrow ruling that allows a legislature the opportunity to respond. Whether the legislature responds or not is left to the lobbyists and political bodies affecting Congress.

2. The Reapportionment Cases

Most of the Reapportionment cases fit within the framework of the statutory common law adjudication doctrine. Whether the lack of redistricting rises to the same level of constitutional sensitivity as the *Shelby County* case is open to debate, but *Baker* did create notice that highly disproportionate representation was constitutionally sensitive and justiciable. Additionally, although Reapportionment cases such as *Reynolds* have no apparent textual grant beneath them, they contain one important bolstering factor: the presence of severe retentionist bias in light of the legislatures' stalled ability to perform their obligations. In *Reynolds*, the Alabama legislature had a significant incumbency interest that pressured it to refrain from redistricting despite a state constitutional mandate to do so decennially. The one-person, one-vote pronouncement might arguably be too broad of a rule to fit within the pseudo-Calabresian doctrine, but the rule that legislatures reapportion according to their constitutional mandates certainly fits within the doctrine.

B. Cases That Do Not Fit within the Doctrine

1. The Death Penalty Cases and Lawrence

While the following cases may very well have come out the same way on other constitutional grounds, they do not fit within the defined pseudo-Calabresian doctrine. First, the cases did not purport to deal with a situation of fundamental or structural constitutional sensitivity. They may have contained textual support for the pseudo-Calabresian doctrine, though. The Death Penalty cases followed a line that adopted the "evolving standards" analysis. "Liberty" in *Lawrence*[153] could be viewed similarly, but the term is broader than "cruel and unusual punishment" and should require a higher level of interpretive justification. Without a clearer claim to a specific text-based justification to enforce such a general term, the Court would have needed to bolster its justification on notice or legislative inertia grounds, but it did neither.

While an argument may be made that *Furman* notified Congress that the Court was taking death penalty cases seriously, the fractured opinion

152. Gerken, *supra* note 151 ("Roberts left open the possibility that Congress could make a different record and start over, thereby bringing Section 5 to life again. Almost no one thinks that's going to happen. Section 5 is dead.").

153. *Lawrence*, 539 U.S. at 564.

could hardly have clued legislatures into anything substantive. Furthermore, none of the cases appeared to suffer from anything more than normal legislative inertia. In fact, these opinions depended in part on the notion that the statutes in question were being revoked in other states.[154]

Most importantly, the cases would run into separation-of-powers issues under the pseudo-Calabresian doctrine because the rules they fashioned were expansive. The cases did not merely place the burden on the legislature to prove that the statutes still enjoyed majoritarian support; instead, the Court precluded legislatures from having the opportunity to say that "cruel and unusual" or "liberty" meant something different from what the Court defined them to mean.

What, then, is to be made of the idea set forth in Part IV that part of the pseudo-Calabresian doctrine includes as one factor a textual-based standards approach such as the Eighth Amendment? While none of the cases fit the doctrine entirely, the Courts' reasoning in many of the cases contributes to the doctrine because the cases would have fit within the doctrine save for the breadth of their rulings.[155]

2. *Windsor*

Windsor arguably served as an inducement or encouragement of the legislature to act if it disagreed with the Court, thus satisfying the narrow rule test. The Court initially noted its belief that the government had failed to proffer a legitimate government interest.[156] Presumably, then, the Court left the legislature free to pass statutes similar in effect to DOMA but under a different stated purpose, although it is unclear what level of scrutiny would have applied.[157] Because *Windsor* allowed for a possible legislative response, the Court dictated less policy than did some of the Death Penalty cases.

However, *Windsor* probably still falls outside the pseudo-Calabresian framework because it is unclear whether either of the mandatory pseudo-

154. *E.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005); Penry v. Lynaugh, 492 U.S. 302, 314–15 (1989); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

155. *Lawrence* encounters the same problem. There, instead of narrowing the ruling, the Court created a blanket prohibition on criminalizing many forms of consensual private sexual conduct, thus prohibiting a legislative response. It is likely that fashioning the narrower rule would have created a similar outcome. The Court demonstrated that statutes criminalizing sodomy were rare and infrequently enforced. Allowing a legislative response, though, even if that response was unlikely to come, would take a stronger stance in avoiding separation of powers issues.

156. *Windsor*, 133 S. Ct. at 2696.

157. While the Court did not specifically detail what level of review was required, the Court of Appeals for the Ninth Circuit interpreted *Windsor* to require heightened scrutiny. "In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014), *reh'g denied*, No. 11-17357, 2014 WL 2862588 (9th Cir. June 24, 2014).

Calabresian prongs were satisfied. The textual-based prong most likely was not satisfied. "Equality" is perhaps just as broad a social term—but not a mathematical term—as "liberty," so *Windsor* bears a similar bolstering burden to *Lawrence*. However, *Windsor* arguably provided much less evidence that the standard of the meaning of "equality" was evolving as *Lawrence* did with "liberty," so *Windsor* still falls out of the doctrine even with the possible bolstering achieved by serving notice on the legislature.[158] The *Lawrence* Court buttressed its claim that "liberty" had evolved by citing a fair amount of evidence, but evidence of a shift in the understanding of "equality" was absent at the time of the Court's *Windsor* decision. In *Lawrence*, thirty-seven states had eliminated the criminalization of sodomy, and the states that did criminalize sodomy rarely enforced those statutes.[159] In *Windsor*, the consensus was precisely in the other direction. Thirty-eight states specifically enforced prohibitions against statutorily redefining marriage to cover same-sex couples,[160] many of them through constitutional amendments and all of them within the previous few years. Perhaps the tide was moving in the direction of changing the statutory definition of marriage to recognize same-sex couples, but this runs into the difficulty that Justice Scalia outlined in *Atkins*[161]; because no state granted marriage licenses to same-sex couples before 2004, there was only one direction the tide could move—at least initially. Additionally, many of the constitutional amendments prohibiting the recognition of same-sex couples as married couples had occurred shortly before *Windsor*. Just one year before *Windsor*, North Carolina voted, by a twenty-two point margin, to ban statutorily redefining marriage to include same-sex couples.[162] The twenty-two point margin was despite opponents of the measure spending twice as much as supporters.[163]

It is a closer question whether the *Windsor* Court established that the issue was close to a constitutionally enforceable limit—i.e., constitutionally sensitive. While the Court did note some general federalism concerns with DOMA[164] (which could be interpreted as creating a constitutionally sensitive issue), it is unclear (1) how much, if at all, this factored into the holding[165] and (2) how much precedent had been established declaring DOMA-

158. Furthermore, it is far less clear in *Windsor* that the Court served notice to the legislature than it is in other cases, such as *Shelby County*.

159. *Lawrence*, 539 U.S. at 573.

160. *Windsor*, 133 S. Ct. at 2689.

161. *See* Atkins v. Virginia, 536 U.S. 304, 344–45 (2002) (Scalia, J., dissenting).

162. Amanda Greene, *North Carolina Approves Ban on Same-Sex Marriage*, WASH. POST, (May 9, 2012), http://www.washingtonpost.com/national/on-faith/north-carolina-approves-ban-on-same-sex-marriage/2012/05/09/gIQAdbDnDU_story.html.

163. Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES, (May 8, 2012), http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html.

164. *Windsor*, 133 S. Ct. at 2690–93.

165. *Id.* at 2705 (Scalia, J., dissenting) ("[T]he opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure,

like statutes to be constitutionally sensitive. A stronger argument for a finding of constitutional sensitivity would have hinged not on general federalism principles but on the enforceable constitutional limit of federalism with regard to state marriage policy. While the Court has often looked toward the states to dictate marriage policy,[166] the Court—even before it later declared a right to same-sex marriage in *Obergefell v. Hodges*[167]—had recognized upper boundaries for the enforceability of federalism policy with regard to marriage.[168] In this regard, the Court's past jurisprudence may have made marriage into a constitutionally sensitive issue, particularly where cognizable equal protection claims are concerned.

Any such notice, however, was less distinctive than that in *Shelby County*, which relied on notice *precisely* concerning the VRA as signaled in *Northwest Austin*. Additionally, the Court's previous jurisprudence probably did not sufficiently signal the legislature. For instance, the landmark case invalidating anti-miscegenation laws, *Loving v. Virginia*,[169] arguably had much more to do with the constitutional sensitivity of race classifications than any constitutional sensitivity concerning state marriage policy in general. Thus, even if one conceded the issue's constitutional sensitivity, the evidence largely establishes that the Court had not served notice to Congress.

Finally, it is difficult to bolster *Windsor* under a legislative inertia analysis. If anything, the past few years have shown that the states were very active in this area of law immediately before *Windsor*.[170]

VII. Conclusion

Shortly after Professor Guido Calabresi wrote *A Common Law for the Age of Statutes*, his idea was met with criticism. While his strict doctrine of statutory common law adjudication was never adopted within the purely statutory realm, the Court has adopted reasoning that parallels Calabresi's but within a constitutional doctrine. That constitutional doctrine is more reserved than the pure statutory doctrine that Calabresi sets forth.

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into thinking that this is a federalism opinion."). *But see id.* at 2697 (Roberts, C.J., dissenting) ("[I]t is undeniable that [the Court's] judgment is based on federalism.").

166. *See, e.g.*, *Windsor*, 133 S. Ct. at 2689–90 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority of the realm of the separate States."); Loving v. Virginia, 388 U.S. 1, 7 (1967) ("[M]arriage is a social relation subject to the State's police power . . . ."); Pennoyer v. Neff, 95 U.S. 714, 734–35 (1877) ("The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

167. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

168. *E.g.*, *Loving*, 388 U.S. at 7 (holding that the U.S. Constitution places limits on how the states can dictate marriage policy and holding anti-miscegenation laws to be unconstitutional).

169. *Id.*

170. *Same-Sex Marriage State-by-State*, Pew Res. Ctr., (Feb. 9, 2015), http://www.pewforum.org/2015/02/09/same-sex-marriage-state-by-state (providing a timeline of same-sex marriage legal changes since 1995).

The pseudo-Calabresian constitutional doctrine can be extrapolated as follows: statutes may be deemed impermissibly anachronistic where (1) the issue at hand is constitutionally sensitive, or (2) a law's text supports statutory common law adjudication; and (a) a court has served notice by prior judicial rulings to a legislature to fix an issue, or (b) legislative inertia is so severe that the legislature is prevented from abiding by its obligations properly. Because the Court has declined to adopt Calabresian analysis in the pure statutory realm, this pseudo-Calabresian doctrine thus implicitly rests upon the idea that the Court's function has not changed; therefore, the doctrine excludes cases with broad rulings.

One of Calabresi's major justifications for promulgating his doctrine is that he believed courts had already expressed a willingness to adjudicate anachronistic statutes but were stretching other constitutional doctrines to try to encompass the statutes they wanted to address. In this sense, the ability to extrapolate a pseudo-Calabresian doctrine at least shows that Calabresi's perception that many cases can be viewed under a statutory anachronism paradigm was not off the mark.

Ultimately, by constitutionalizing Calabresi's method of reasoning instead of using the reasoning to address statutes in general, the Court declined to shape the structural role of federal judges within the government. Instead, the Court's use of Calabresian reasoning has further delineated the boundaries of certain constitutional provisions.