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Calabresian Sunset: Statutes in the Shade [Book Review of A Common Law for the Age of Statutes, by Guido Calabresi]

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BOOK

Calabresian Sunset: Statutes in the Shade

A COMMON LAW FOR THE AGE OF STATUTES. By Guido Calabresi. Cambridge, Mass.: Harvard University Press, 1982. Pp. 319. $25.00.

Reviewed by Allan C. Hutchinson and Derek Morgan***

I have a horror of sunsets; they are so romantic, so operatic.
Marcel Proust, *Remembrance of Things Past****

Guido Calabresi is a juristic pioneer. In all his writings, he has operated on the frontiers of legal thought. His work has been described as the "recasting, in a stimulating and innovative way, [of] the concerns and doctrines of the common law."[1] His major field of endeavor has been the law of torts, to which he has made a unique contribution. In his most recent publication, *A Common Law for the Age of Statutes*,[2] based on the Oliver Wendell Holmes lectures he delivered at Harvard in March of 1977, Professor Calabresi has brought his ample juristic talents to bear on a foundational problem of the legal and democratic process. He has produced a monograph that in its quality, timeliness and provocativeness is likely to stand alongside the seminal works of Ronald Dworkin and Grant Gilmore. With characteristic pragmatism and candor, he offers a solution to the "orgy of statute making"[3] that currently swamps the American system of governance. *Statutes* is not intended to be a final solution; it is "no more than a start" (p. 3). If Calabresi's hope is

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***2 M. Proust, Remembrance of Things Past 840-41 (C.K. Scott Moncrieff trans., T. Kilmartin ed. 1981).

1. Elliott, Book Review, 44 Mod. L. Rev. 345, 345 (1981) (reviewing G. Calabresi & P. Bobbitt, Tragic Choices (1978)). From the publication of his first essay in 1961, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961), Calabresi has maintained a steady stream of important publications. In addition to his many articles in scholarly journals, his major contributions have been The Costs of Accidents (1970) and, with Philip Bobbitt, Tragic Choices (1978).

2. It is interesting to observe that, in an earlier article, Calabresi referred to his forthcoming book as The Common Law Function in the Age of Statutes. See Calabresi, The Nonprimacy of Statutes Act: A Comment, 4 Vt. L. Rev. 247, 247 (1979).

3. G. Gilmore, The Ages of American Law 95 (1977).

simply to initiate a public debate about the "dark places" of statutory petrifiction (p. 180), it can be confidently reported that *Statutes* will stimulate such discussion. Indeed, it is likely to provide a benchmark against which other proposals can be evaluated. Nevertheless, despite the clarity of insight exhibited in *Statutes*, we intend to take up Calabresi's invitation and, in a modest way, offer some critical responses to his thesis of judicial sunsetting. First, we will examine the increasingly disturbing problem of statutory obsolescence. Then, after a theoretical appraisal of the democratic legitimacy of Calabresi's proposal, we will evaluate the efficiency of his thesis. Finally, Calabresi's arguments and our criticisms of them will be put to a practical test in the context of a recent, controversial Supreme Court decision.

I. The Age of Statutory Pollution

The distinguishing feature of twentieth-century legal history has been the shift from the common law to statutes as the major source of law. In the final decades of this century, it can be reported that, while the common law tradition of deciding cases is arguably still the major characteristic of the Anglo-American judicial process, the common law as a source of law has been relegated to a secondary position.[4]

By 1947, Justice Frankfurter could claim that the number of controversies before the Supreme Court that did not involve a statute had declined to almost zero.[5] In the 1961–1962 Congress, 20,316 bills were introduced and more than 1,000 public bills were passed.[6] In 1975, more than 26,000 bills were laid before Congress, and in the California legislature alone more than 7,000 bills were introduced.[7] The New York legislature of 1977–1978 had to contend with nearly 40,000 new legislative proposals, of which 1,758 were enacted.[8] The channels of the legal process are steadily becoming blocked by this deluge of statutes. Regrettably, legislatures have been far more willing to enact statutes than to monitor the performance and continued pertinence of the enactments. The American legal process is straining under the weight of

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4. Aldisert, The Nature of the Judicial Process: Revisited, 49 U. Cin. L. Rev. 1, 48 (1980). Although the proliferation of statutes has reached epidemic proportions in only the past twenty years, its occurrence and the problems it gives rise to were prophesied in the late 1920's and early 1930's. For instance, in 1930 Max Radin opined that "Anglo-American law is in a fair way of becoming statutory . . . by the relentless annual or biennial grinding of more than fifty legislative machines." Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 863 (1930). See also, e.g., Landis, Statutes and the Sources of Law, *in* Harvard Legal Essays 213 (1934), and Stone, The Common Law in the United States, 50 Harv. L. Rev. 4 (1936). For an even earlier sighting of this problem, see Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908).

5. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 527 (1947).

6. Humphrey, To Move Congress Out of Its Ruts, N.Y. Times, April 7, 1963, § 4 (magazine), at 129.

7. Ehrlich, Legal Pollution, N.Y. Times, Feb. 8, 1976, § 6 (magazine), at 17, reprinted in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice—Resource Materials 47 (1976). See generally Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 Vt. L. Rev. 203, 209 n.24 & 212 n.34 (1979) (discussing growth in the size of Minnesota Statutes).

8. R. Neely, How Courts Govern America 56 (1981).

obsolete statutes, and legislatures have proved unwilling or unable to alleviate the burden; "the two most important forces in political life are indifference and its direct byproduct, inertia."[9] It is this legislative inertia that Calabresi addresses and seeks to circumvent by a novel theory of judicial sunsetting.

The tension flowing from the courts' struggle to interpret and enforce statutes is at the heart of the legal process. Throughout American history, differing interpretations have been placed upon the doctrine of the separation of powers,[10] and upon the force and nature of the obligations and responsibilities it imposes on each branch of government.[11] During most of the nineteenth century, the relationship was dynamic and fruitful. It was a "Golden Age" in which the courts addressed social issues and sought to resolve them in instrumental ways.[12] It was not until the later decades of that century that the courts began to take a wholly formal approach to the judicial function whereby "an abstraction dictates, objectively, apolitically, in a non-discretionary fashion, a particular result."[13] By the Second World War, it was accepted that abstract rationality could not account for judicial decisions; it masked the inescapable exercise of judicial choice. Yet, while legal reasoning is viewed as purposive and instrumental, there has not been a return to the political pluralism of the early nineteenth century. The present age is characterized by doubt and anxi-

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9. Id. at 25.

10. Anglo-American courts accept and uphold the dictates of constitutional democracy at the core of which lies the doctrine of the separation of powers, despite early attempts by the courts to gain the law-making and law-validating initiative, namely, the struggle between Parliament and the Court of Common Pleas, headed by Sir Edward Coke, for political supremacy in the early seventeenth century. As his famous dicta in Dr. Bonham's Case, 8 Co. Rep. 107, 118, 77 Eng. Rep. 638, 652 (1610), make clear, Coke's objective was to create for the courts the power to countermand the duly enacted statutes of Parliament:

> In many Cases, the Common Law will controll Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against Common Right and Reason, . . . the Common Law will controll it.

This differs from Calabresi's plea for a judicial-legislative colloquy. See infra text following note 30.

11. For accounts of such shifts and comments on the history of American legal thought generally, see, e.g., G. Gilmore, supra note 3; K. Llewellyn, The Common Law Tradition (1960); P. Nonet & P. Selznick, Law and Society in Transition: Toward Responsive Law (1978); L. Tribe, American Constitutional Law (1978); G. E. White, Patterns of American Legal Thought (1978); and Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

12. See G. Gilmore, supra note 3, at 19-40; see also M. Horwitz, The Transformation of American Law, 1780-1860 (1977); R. Unger, Law in Modern Society (1976); Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513 (1974).

13. Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 Research in L. & Soc. 3, 21 (1980). Although there is general agreement about the fact that there was a move from instrumental to formalistic reasoning, there is a wide divergence of opinion over the reasons for such a change. Some writers such as Kennedy, id., and M. Horwitz, supra note 12, at 253-56, maintain that formalism was an ideological construct utilized by the dominant classes, during the heyday of American capitalism, to preserve and legitimate their power by neutralizing the redistributive potential of the law. Other writers have striven to refute this analysis. See, e.g., G. E. White, Tort Law in America 3-4 (1980); Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972); Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717 (1981).

ety. The instrumentalism of judges remains tightly reined within a general subservience to legislators as the proper guardians of fundamental values.[14]

Within this relational context, several writers not only have grasped the urgency of the problems arising from statutory obsolescence, but have made tentative moves towards some kind of a solution. The leading proposals are to be found in the works of Friendly, Gilmore and Davies. Friendly, drawing on the suggestions of Pound[15] and Cardozo,[16] proposes the establishment of a law revision commission as the cure for the statutory ailment.[17] Believing that the problem of excessive statutory obsolescence will resolve itself,[18] Gilmore places his faith in the healing powers of codification.[19] Davies, in contrast, advocates the more novel and formal solution of legislative sunsetting with a new penumbral punch. He proposes the introduction of a general statute that permits the courts to modify and overrule statutes after a period of twenty years has elapsed.[20]

Calabresi prefers to wipe the slate clean. He is generous with his praise for these scholars, but rejects their proposals on both theoretical and pragmatic grounds. He finds Friendly's support for a revisionary agency misplaced. Because such agencies have power to recommend change, but no authority to implement it (pp. 63–64), their efficacy depends ultimately on legislative enactment. Yet it is precisely the legislature's constrained activity that has given birth to the agency. Gilmore's codification solution does not meet the problem head-on; a code is merely a special type of statute and will itself "fall out of date" (p. 83). Although Calabresi is effusive in his commendation of Davies,[21] he nevertheless feels that any imposition of a time-based sunset is self-defeating. It will catch some statutes that we would wish to

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14. There is very little agreement on the positive accomplishments of this modern period. See G. Gilmore, supra note 3, at 12, 68–98. For instance, Kennedy concludes that "we live *not* in a time of return to the sound practice of 1830, but in a post-Classical age of disintegration." Kennedy, supra note 13, at 5. Mark Tushnet is of the opinion that there is a new breed of neo-conceptualism emerging in the wake of realist scholarship. Tushnet, Post-Realist Scholarship, 15 J. Soc'y Pub. Tchrs. L. 20 (1980). A similar, although ideologically different, line is taken by G. Edward White, see G. E. White, supra note 13, at 211–43. Finally, Karl Klare takes the view that modern legal thought is a chaotic amalgam of different styles: a jurisprudential melange in which contrasting and antagonistic styles are simultaneously and unreflectively employed. See Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265, 334–36 (1978).

15. See Pound, Anachronisms, Law, 3 J. Am. Judicature Soc'y 142, 145–46 (1919).

16. See Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 114 (1921).

17. Friendly, The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787, 802–07 (1963).

18. G. Gilmore, supra note 3, at 96.

19. Gilmore, On Statutory Obsolescence, 39 U. Colo. L. Rev. 461 (1967).

20. Davies, supra note 7, at 204.

21. See Calabresi, supra note 2, at 255. Indeed, Calabresi's praise seems overplayed since he rejects the reform Davies has proposed:

> He has painted a great canvas in its particulars as well as in its broad conception. If it is true that the Venetian style emphasizes color and outlook, but underplays detail, whereas the Florentine glories in detail and precision but sometimes shades the broader vision, Davies' painting combines the best of Venice *and* Florence.

Id.

survive and fail to catch others that ought properly to be examined much earlier; "time does not serve as a good indicator of age . . . in all statutes" (p. 62).

Statutes is devoted to propounding a novel theory of judicial sunsetting. Anachronistic laws, whether statutory or judicial, must be eradicated. "Legislative inertia . . . [is] a fact of life" (p. 34). Consequently, judges should be entitled to rework legislative enactments to keep them in line with the current social and legal landscape. This is no more than the courts are already doing, albeit by subterfuge. Furthermore, although "this proposal may appear to be radical[, i]t is . . . conservative of traditional American legal-political values" (p. 2). Calabresi's presentation of this controversial thesis meets the very highest standards of scholarly exposition. He combines lucidity and eloquence with enthusiasm and rigor; his book is as compelling as it is important.[22] Yet its success requires qualification.

II. CALABRESIAN SUNSET

As Calabresi himself admits (p. 82), his theory is easy to state in summary form, but difficult to explain in convincing detail. Having identified the problem of statutory obsolescence, he surveys the past judicial solutions, bureaucratic responses, and possible legislative reforms.[23] He concludes that a

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22. This is meant as more than mere hyperbole or hollow praise. *Statutes* is much more readable than *Tragic Choices* which, in spite of its originality, is dense and difficult in parts. In style and turn of phrase, *Statutes* is reminiscent of R. Dworkin, Taking Rights Seriously (1979).

23. Alternative attempts to deal with statutory obsolescence have been made through a variety of non-judicial mechanisms. Calabresi focuses his critical attention upon administrative agencies, quasi-legislative bodies and two particular structural reforms. All of these options share one central tenet: the arrival of the "statutory state" (p. 69). Only one of the two structural reforms does not seek to work wholly within the framework of the "statutory state." It envisages instead a return to the golden age of the common law, a time when common law courts were the main agencies for modernization of the law. Calabresi dismisses this as unrealistic nostalgia. In a particularly punishing comment, he states that

> [t]he orgy of statute-making has not occurred by chance, even if its total effect has been to an extraordinary degree unintended and unself-conscious. . . . [T]he move to statutorification . . . becomes irreversible once the first statutory step is taken. . . . The very fact that statutorification has occurred at an increasing pace . . . is the best argument against thinking we can reverse the trend. (Pp. 73, 78, 79.)

The heyday of the common law is dead and gone. To hanker after such past glories is both futile and dangerous.

The second structural response advocates wide-ranging reforms of the legislative procedure. While such reforms would serve to shape the structure and philosophy of American government to fit the new statutory state, they would initiate the wholesale reallocation of political power in a way that the constitutional doctrine of separation of powers would prohibit. Moreover, "the unknowns of such reforms are too great" (p. 72). The choice for obsolete laws is preferable to such radical, constitutional reformation.

Calabresi's response to the administrative agency as a forum for law updating finds sympathy in contemporary analysis. Although an agency is initially perceived as a threat by those whom it has been established to regulate, the agency and its regulations will, over time, serve to protect existing interests and work as a barrier for those seeking to enter established markets (p. 47). Having accomplished their initial regulatory task, agencies become risk-averse. Innovation gives way to inertia. They are touched by "the same political forces that militate in favour of legislative inertia." Peltzman, The Benefits and Costs of New Drug Regulation, *in* Regulating New Drugs

judicial solution is the least-worst alternative. Indeed, he implies that it has "already been commonly used without explicit recognition" (p. 190 n.31) and that there is nothing deeply inconsistent with the practice of democratic government in this. Finally, he explores some of the difficulties of his proposal, paying especial attention to the question of whether the "honest and selfconscious adoption of a new, possibly far-reaching doctrine" (id.) is preferable to "continuing to use unselfconscious and occasionally uncandid or dishonest alternatives" (id.). With some reservations, he opts for candor.

A. *Judge-Made Law*

> If limits did not exist on judicial behaviour, it might be hard to justify a system that gave courts conditional power to make *common law* rules. But once such a power was taken for granted, it would be almost impossible to explain why it should not permit courts to force reconsideration of old statutes. (P. 256 n.37.)

Judges are either elected or appointed and ratified by elected officials. Although judges are relatively free from immediate and direct political pressure, long-term political awareness and acceptability forms one outward boundary on the discharge of the judicial function. In fulfilling their adjudicative task, judges are required to be personally disinterested in the outcome of each case. Furthermore, judges are relatively numerous and it takes many of them to act effectively in shaping the law. Accordingly, the growth of the

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208 (Landau ed. 1973) (quoted by Calabresi at p. 222 n.19). Calabresi points out that administrative agencies do not have self-executing legislative powers. Their proposals are channelled back into the legislative process, which is itself clogged by the dust of inertia. Moreover, when the "comparative institutional capacity to deal with anachronistic laws" (p. 51) of such agencies is assessed, they come out very badly. The difficulty with which agencies would be faced in an attempt to detect shifts in majoritarian demands make them unsuitable trustees of the power to initiate a reconsideration of timeworn laws (p. 51). It is not clear why this para-constitutional argument holds more validity than objections to Calabresi's proposed thesis; especially when Calabresi holds that possible constitutional objections to his thesis ought not to be taken "very seriously" (p. 114).

Finally, to allow the growth of such an amorphous fourth branch of government would grievously offend "the basic theory of the American Constitution that there should be three major branches of the government and only three." President's Committee on Administrative Management, Administrative Management in the United States 36 (1937) (quoted by Calabresi at p. 219 n.6).

Suggestions for legislative responses to statutory obsolescence range from the indexing of pecuniary sums given in statutes to proposals for the legislative sunsetting of old laws. To Calabresi, such devices seem a clumsy way of solving the problem. The fundamental difficulty with such alternatives is that they do not guarantee "that a current majority will rule or that only anachronistic laws will fail to be re-enacted" (p. 61). Hence, the approach of the automatic sunsetters is both too radical and too mechanical. In essense, legislative sunsetting does not pay sufficient respect to the conservative tradition of American democracy. For this reason, Calabresian sunsetting requires that courts observe a "retentionist" bias in the fabric of the law (pp. 123–24). Under Calabresi's proposed regime, the courts would only be able to initiate the judicial-legislative colloquy after they had appraised the particular factors that have caused the law to fall out of fit.

common law is carried out on an accretional, case-by-case basis (pp. 94–95); the courts respond to a "delayed popular will" (p. 96), acting rationally and within the bounds of principles. These principles weave together to form the "legal fabric" (p. 96). While the legal fabric is not an exact fit with prevailing majoritarian preferences, it sufficiently reflects majoritarian desires so as to be an appropriate starting point for lawmaking (p. 97). Judges are selected and promoted for their ability to gauge this popular will. Their primary task is to hand down principled decisions within the limits of the legal fabric. Those elevated to judicial office are qualified to discern the nature and texture of the fabric and to identify those laws which are out of fit with the overall weave. In this way the judiciary can keep the law up to date so that the fabric "can be a more accurate reflection of the popular desire" (p. 98). Having outlined this traditional role of the common law judge, Calabresi advances to the exciting and stimulating thesis that it should make no difference whether the law that does not fit the fabric is a judge-made rule or a statutory enactment. All law becomes out of date; yesterday's majoritarian preferences may not be today's.

In advocating his theory of judicial sunsetting, Calabresi proposes that the courts should have the authority to determine whether a statute is "obsolete." For Calabresi's purposes, a statute may be considered to be obsolete when a legislature would not now re-enact its provisions (pp. 121–23).[24] In such circumstances, Calabresi argues that there should be two courses of action open to the court. Either it should be recognized openly that the court may treat the statute as it would any part of the judge-made common law, or it should be given the power to induce a legislature to reconsider an obsolete statute (p. 2). Rules of law are not immutable. If anything, it is the methodological techniques by which rules of law are manipulated that approach immutability. If the guiding principle of the common law is that like cases should be treated alike, statutes and the common law should receive like treatment (p. 86). A late nineteenth century statute may have as little to tell us today as the opinion of an early twentieth century judge. Given the political fact of legislative inertia (p. 34), Calabresi urges that the over-arching and thoroughly democratic objective in all cases in which the courts use their sunsetting powers would "be to permit the courts to keep anachronistic laws from governing us" (p. 2). In short, Calabresi's work is devoted to re-establishing a symbiotic judicial-legislative colloquy[25] in which the courts would have the responsibility of keeping the law functional and up-to-date, without infringing upon the ultimate initiative of the legislature in lawmaking (pp. 3–7).

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24. It is in this rather special sense, common to most modern American political rhetoric, that the term "majoritarian" is used throughout *Statutes* (e.g., p. 186 n.13). Popular will is equated not with an aggregation of individual citizens' preferences, but with an aggregation of their representatives' views.

25. Calabresi's choice of "colloquy" to describe the court-legislature relationship has had an interesting etymology. In the late sixteenth and early seventeenth centuries a colloquy was an assembly of the Presbyterian polity. It fulfilled the functions both of a legislature and a court.

B. *The Choice for Candor*

A major thrust of Calabresi's thesis is that, while its adoption would involve "some significant changes in our legal-political system" (p. 166), it would merely "be recognizing the changes, not making them" (id.). Consequently, the earlier part of *Statutes* is devoted to a critical examination of techniques that are currently used or advocated to deal with statutory obsolescence. Among the more favored techniques have been a resort to straightforward constitutional adjudication, a modification of Bickel's "passive virtues,"[26] and a dynamic use of statutory interpretation.[27] Although each device has particular difficulties, a crucial drawback of all these approaches is that they require the courts to engage in subterfuge. This is an exercise that may be both too broad and too narrow in scope. In some instances the resort to subterfuge will give the courts too powerful a discretion over statutes, and in others it will leave the courts unable to reach obsolete laws. More importantly, the general use of subterfuge corrupts its usefulness in a particular, limited class of cases involving constitutional issues: "[t]he Supreme Court must occasionally lie; the courts by and large should not" (p. 179). It is only in those cases where there is a "fundamental value conflict, recognition of which would be too destructive for the particular society to accept" (p. 172), that the choice for candor may have to be abandoned.[28] In other words, Calabresi would countenance the resort to subterfuge in cases in which absolutes would produce results that a society would not wish to countenance.[29]

C. *The Judicial-Legislative Colloquy*

For Calabresi, the ever-increasing outpourings of legislatures, the activities of judges in making common law adjudications, jury decisions, administrative determinations, and scholarly criticisms all combine to give shape and color to the legal fabric (p. 98). It makes no sense to Calabresi that, when judges consider whether any part of the law is out of fit with the fabric, statutes should be excluded. Even though statutes represent the expression of some era's majoritarian preferences, the court should be free to treat such statutes with the same skepticism as any other part of the law. Calabresi insists that this is not because judges can legislate better than legislators, but because,

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26. See, e.g., A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 98–111 (1962); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957); Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961).

27. See, e.g., H. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (MS 1958); R. Keeton, Venturing to do Justice, Reforming Private Law 78–97 (1969); and Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 262–65 (1973). For a discussion of Calabresi's analysis of nonadjudicative alternatives, see supra note 23.

28. Such choices form the central theme of Calabresi's earlier work with P. Bobbitt, Tragic Choices (1978).

29. See, e.g., C. Black, Mr. Justice Black, The Supreme Court, and the Bill of Rights, Harper's Magazine, Feb. 1961, at 63 (discussing the "classical example" (*Statutes* p. 173) of a subterfuge which relies on both justifications).

acting in a principled and accretional manner, the courts are the least ill-equipped to set the starting points from which the legislative reconsideration can take place (pp. 103–05).[30] Calabresi makes it clear that "[o]ther things being equal, old statutes remain in force" (p. 102). This conservative, or "retentionist," bias in the law would remain. The objective of the courts would be to stimulate a democratic dialogue:

> [C]ourts . . . do not need to commit themselves so completely and all at once. They can in cases of doubt use these techniques that encourage legislatures, scholars, and even the public to engage them in dialogue and give back data stronger than hunches. (P. 267 n.3.)

Calabresi does not expect the courts to work in the dark. Some statutes may call for a "second" look either where there is asymmetry in the fit of the statute or where the lack of fit is not currently favored by the legislature (pp. 129–38). A move from a "retentionist" to a "revisionist" bias may be appropriate where there have been changes *around* the statute, where the nature of the statute advocates change, or where the statute now suffers from some constitutional infirmity. Changes around the statute may result from technological, social, or intellectual advances. The statute may be out of fit with other changes in the legal fabric. The consequences of applying the statute may now be different from when it was passed. Some statutes are enacted as "crisis laws" (p. 133), representing an ad hoc majoritarian response. Some, when passed, are *meant* to be out of fit with the legal landscape. The "retentionist" bias would ensure that such statutes will remain in force unreviewed, unless the courts find the "retentionist bias" unwarranted (p. 124). The courts' authority to initiate a dialogue would be to guarantee that the clash with the fabric is the result of "the genuine and *considered* wishes of majoritarian bodies" (p. 136). While the "retentionist bias" is particularly strong with respect to more recent statutes, the mere age of a statute is not decisive (p. 132).

Professor Calabresi relies on a judge's ability to assess all these general factors and thereby determine whether there might exist a need to sunset the statute. A host of specific factors are also relevant. The court's ability to use these guidelines in assessing the fit of the statute makes the courts, in their constrained reformatory role, the most acceptable agency to initiate a legislative reconsideration. The thesis is not a "nostalgic restoration of courts as the primary makers of law" (p. 163). The court's common law function

> *is no more and no less than the critical task of deciding when a retentionist or revisionist bias is appropriately applied to an existing*

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30. Cf. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979) (arguing structural reform litigation carries out function of adjudication: giving meaning to public values). The whole notion that courts act in a principled and objective manner has come under heavy "radical" attack. The Critical Legal Studies Movement, comprising such figures as Kennedy, Tushnet, Klare, Gabel, and Unger, alleges that law is simply politics in different garb. See Hutchinson & Monahan, Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought (1982) (unpublished manuscript on file at the offices of the Columbia Law Review).

> *statutory or common law rule.* It is the judgmental function . . . of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it. . . . In carrying out this task the courts would . . . be doing little different from what they have traditionally done. Their main job would still be to give us continuity and change by applying the great vague principle of treating like cases alike. (Pp. 164–65.)

III. Long Day's Journey Into Night: In Search of Calabresi's Theory of Democracy

The Calabresian thesis advocates a fundamental divesting of legislative authority—a shift in the balance of political power from the legislature to the judiciary. Acceptance of this proposal would constitute a significant change in the politico-legal system. Yet, Calabresi argues, as this change has already taken place (p. 166), its acceptance is merely a choice for candor. Notwithstanding this, it is a move that cannot be sanctioned until its democratic propriety is thoroughly made out.

In an arresting phrase, Calabresi maintains that the objection of constitutional incompatibility is one that he "cannot take . . . seriously" (p. 114). For him, his thesis does not demand a democratically unwarranted delegation of power. On the contrary, it is a delegation that would force legislatures to face up to their democratic responsibilities. Nor does he accept that his proposal "violates some general, structural notions of separation of powers" (p. 115). Courts do make law and have always exercised power over statutes, albeit through the use of subterfuge. How, then, can open recognition of their authority threaten any of the aims and functions of the separation of powers? A legal system that regards statutes as inviolable sources of law not only deludes itself, but ill serves a democratic state. For Calabresi, the separation-of-powers doctrine is functional not formal (p. 116).[31] The question is not whether judges should make use of statutes, but how they should make optimal use of them.[32] Yet Calabresi's very insistence on a "functional" doctrine of separation of powers renders his thesis democratically illegitimate.

Surprisingly, Calabresi does not consider the elaboration of a deep theory of liberal democracy to be a necessary requirement for his work in *Statutes*.

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31. There is an echo here of R. Pound, An Introduction to the Philosophy of Law 104 (1922): "Lawmaking, administration and adjudication cannot be rigidly fenced off one from the other and turned over each to a separate agency as its exclusive field. There is rather a division of labor as to typical cases and practical or historical apportionment of the rest." Cf. Fiss, supra note 30, at 32 ("Traditional separation of powers doctrine assumes a differentiation of judicial power from that of the executive and legislative branches, but it does not have to be along *formal* as opposed to *functional* lines, nor does it require that any branch be devoted to one function alone."). See L. Tribe, supra note 11, at 15–426.

32. See Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U.L. Rev. 401, 426 (1968). The "judicial lawmaking" debate is addressed in a recent summary and review by Hoffmaster, Understanding Judicial Discretion, 1 Law and Phil. 21 (1982).

Yet it is Calabresi who teaches us the importance and danger of starting points. They can often affect end points and sometimes even become end points (p. 52). Paradoxically, the starting point of his theory—i.e., the fact of legislative inertia—gives rise to the major infirmity of the version of liberal democracy implicit in *Statutes*. In view of legislative inertia, the starting points that Calabresi would have the courts set are too near the logical end. They blur the picture of the landscape that we are invited to contemplate. Viewing the focused picture, one can see that the distortions in Calabresi's picture are crucial. Accordingly, teasing the theoretical underpinnings from the rhetoric of pragmatic advocacy becomes a vital task. Calabresi's approach meets this blurred doctrine, not at its core, but in its penumbral regions. The fundamental problem, he argues, must be to give statutes a "dynamic, relational intent" (p. 33) and nothing in constitutional theory requires courts to be subservient to statutes long after the majoritarian basis on which they were enacted has died. For Calabresi, the central question is quite simple: "Should courts be allowed to force legislative reconsideration of anachronistic statutes or even to nullify such statutes without thereby precluding subsequent legislative reconsideration?" (p. 25). His response, to retain legislative initiative in lawmaking, while restoring to the courts their common law function of seeing that the law is kept up to date (p. 7), is attractive but misleading.

A. *Three Assumptions*

Calabresi's response is premised on three assumptions about democratic lawmaking. First, Calabresi assumes that courts enforce legislative enactments because those enactments represent majoritarian wishes. Second, Calabresi assumes that legislatures are required to act soberly (p. 26) or in a considered fashion (p. 136). Finally, Calabresi assumes that legislative inertia is a fact of life (p. 6) and, he implies, profoundly undemocratic. Each of these assumptions is of only questionable validity.

1. *The Majoritarian Basis of Legislative Legitimacy*. Calabresi asserts that it is in the nature of the judicial task to see law as responsive to current majorities, and as abhorring discrimination and special treatments not required by current majorities (p. 6). But this, of course, begs the fundamental question of why courts enforce legislative enactments in the first place. Only after answering this question satisfactorily can one see why courts may, consistently with democratic theory, depart from their prima facie democratic obligation; that is, that one may "come to accept this pragmatic boundary on the court's subservience to the legal fabric" (p. 114).

Calabresi provides no explicit explanation of why courts enforce legislation at all. The most that can be gauged from *Statutes* is that where a statute is duly enacted by the legislature, it represents majoritarian wishes. In some sense, a statute is an expression of, or approximation to, the people's will (pp. 92–97) and, as such, merits enforcement. But this approach to legislation is too simplistic. Many commentators remind us that popular sovereignty is a more subtle idea than majoritarian wishes imply; democracy is much more

than a commitment to popular sovereignty.[33] The traditional view of the legislative process ignores the bartering and horse-trading between the executive and the legislature. The process is, in fact, a complex transaction and results in compromise legislation that would not be passed by the very same legislature in the absence of those particular trade-offs. Much legislation results from a process of logrolling and could not be said to reflect anything that could be meaningfully called majority preference. In the legislative process, "popular sovereignty" is very attenuated indeed. Moreover, a view of legitimacy as based on majoritarian preferences ignores that democracy involves a commitment to and belief in the integrity and importance of the minority—a striving to safeguard its views and its rights.[34]

2. *The Requirement of Legislative Sobriety.* Calabresi's second assumption, legislative sobriety, is also highly questionable. Nothing in democratic theory requires that legislatures should act in a sober or considered manner. When this is tied to the freedom of common law courts to act in a flexible and political way, we are faced with a disturbing paradox. According to Calabresi, while courts must in certain circumstances be directly reactive in the way in which they address and resolve certain problems, the legislature's reaction to majoritarian preferences is constrained by the demands of sober reflection. Within the prevailing ideology of American democracy, it is surely the privilege of legislatures to perform in an arational, arbitrary, and partisan fashion, if they so choose.[35] They are accountable and can be removed. Why is it, for example, that the Connecticut legislature must act "soberly" in reconsidering the death penalty or the antiabortion law (pp. 26–27)?[36] What requires the

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33. L. Tribe, supra note 11, at 896; F. Frankfurter, John Marshall and the Judicial Function, *in* Government under Law 6 (A.E. Sutherland ed. 1956); Rostow, The Supreme Court and the People's Will, 33 Notre Dame Law. 573, 578 (1958). A curious bedfellow is 2 F.A. Hayek, Law, Legislation and Liberty 6–7 (1976):

> The whole history of the development of popular institutions is a history of continuous struggle to prevent particular groups from abusing the governmental apparatus for the benefit of the collective interest of these groups. This struggle has certainly not ended with the present tendency to define as the general interest anything that a majority formed by a coalition of organised interests decides upon.

See also 3 F.A. Hayek, Law, Legislation and Liberty 3 (1979); A. Marwick, British Society Since 1945, at 268–69 (1982) ("As modern society has become more complex, so the balance of forces behind political decision-making must become more complex.").

34. Minority laws may be precisely those that are out of fit with the legal fabric now, or were out of fit when enacted. They may, nonetheless, be paradigmatic examples of statutes that were intended to exercise, and do exercise, a strong gravitational pull.

35. Dworkin explains and criticizes how welfare economists, with whom Calabresi would be associated as evidenced by his earlier work in torts, supra note 1, have constructed such a theory to explain how individual preferences are translated into legislation by the institutions of representative democracy. Dworkin, Social Sciences and Constitutional Rights—The Consequences of Uncertainty, 6 J. Law & Ed. 3, 10 (1977). See also Kennedy, supra note 13, and Wellington, supra note 27.

36. It has been argued that the Connecticut legislators were unwilling to risk political disfavor by voting for repeal of their antiabortion law. See Berry, Spirits of the Past—Coping with Old Laws, 19 U. Fla. L. Rev. 24, 28 (1966). Indeed, it has been suggested that "[t]here is some evidence that . . . many Connecticut legislators preferred to have the Court, rather than themselves, make the decision to eliminate the statute." Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 219 n.2 (1965) (commenting on Griswold v. Connecticut, 381

Wisconsin legislators to take a "considered" stand on the review of their contributory negligence statute (pp. 35–37)? No guidance or justification is offered. Indeed, it can be argued with some plausibility and philosophical support that issues like capital punishment are emotive problems and should be decided accordingly.[37]

3. *The Unavoidability of Legislative Inertia.* Calabresi's third assumption, legislative inertia, while a fact of life, is by no means a fixed or unalterable one. Indeed, some might claim that such a state of legislative affairs is a democratic choice, in the sense that it is within the power of the majority to effect reform if it feels sufficiently moved. The fact that such "structural reform" is not likely (p. 70) does not undermine this point. Calabresi asserts that "to most people the unknowns of such reforms are too great" (p. 72). Yet it is likely that, in realpolitik terms, popular response to the true "radical" nature of his thesis would be equally fearful. Given a candid choice between judicial sunsetting and legislative reform, the electorate might well opt for the latter. The open granting of even greater judicial power seems at the very least contrary to the contemporary American political climate. It may thus be objected that Calabresi's theory, while masquerading as deeply conservative, is as radical as structural reform of the legislative process would be.

B. *The Legislative Timetable: A Separation-of-Powers Problem*

Even accepting that legislative enactments represent majoritarian preferences only in a complex manner that attenuates the concept of "popular sovereignty," it may nevertheless be argued that the judicial sunsetting approach is legitimate as a way of spurring the legislature to reconsider those anachronistic statutes that it has not consciously chosen to leave unrevised. Since, as to those statutes, legislative inertia is itself illegitimate, and since any exercise of judicial sunsetting remains subject to legislative reconsideration,

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U.S. 479 (1965)). The rather curious birth of the controversial Arkansas law, Ark. Stat. Ann. § 80-1663 (1947), which gave creation science equal school time with evolution science, points up the potentially capricious and fanciful operation of legislatures. For instance, the law was drafted by an x-ray technician, who was neither a lawyer nor a scientist. It went through the legislature on the nod. Pro tem senate president, Ben Allen, felt that "it was meaningless, just a piece of junk, so why not vote for it." Sunday Times (London), Dec. 13, 1981, at 13, col. 5. The state governor, Frank White, admitted that he had signed the law without reading it. Furthermore, Judge Overton's decision to strike down the law was greeted by the original sponsor of the Arkansas bill, State Senator James L. Holsted, as a triumph; the court case served to give national prominence to the "creationist" issue. In this way, the legislative process was being used merely as an opening gambit in a long-haul strategy. Such legislative performance was far from sober or considered. Nevertheless, however lax or irresponsible it may have been, this cannot be condemned as illegitimate or fraudulent. It is the process, as much as its manipulators, that is at fault.

37. Although currently viewed with professional disfavor, a prominent school of early twentieth-century philosophy held that moral judgments were simply expressions of raw emotions. See A. Ayer, Language, Truth and Logic (1936); C.L. Stevenson, Ethics and Language (1944). This view has been more recently championed by the Scandinavian legal theorist, Alf Ross. He maintains that concepts of justice are merely constructs through which to buttress emotional attitudes. In rather overblown terms, "[t]he ideology of justice is a militant attitude of a biological-emotional kind, to which one incites oneself for the implacable and blind defence of certain interests." A. Ross, On Law and Justice 275 (1959).

the courts under such circumstances would assertedly not be acting undemocratically. Calabresi defends the occasional allocation of the burden of legislative inertia to the courts on the basis that the courts are simply the least-worst alternative agency.[38] But while Calabresi's argument that to maintain the status quo is to accord legitimacy to legislative enactments that may now run counter to majoritarian preferences is compelling, it fails to address a very pressing practical consideration. At the very root of his thesis lies the fact that legislative time is a precious commodity in the governmental process. It is a scarce good.[39] Nevertheless, there is nothing in Calabresi's thesis that explains the relative importance and priority of the various demands on legislative time. What is it that makes an "obsolete" statute, which a court has by threat or amendment invited the legislature to reconsider, worthy of promotion in the legislative timetable to the exclusion of a major piece of policy-making, an interest-group bill or a debate on topics of substantial community concern? Indeed, as legislative time is a scarce good, there is already too little of it to accommodate some of these matters. What is it in the act of judicial sunsetting that will galvanize a previously indifferent legislator to sponsor the reform of such an "obsolete" statute? In effect, the response of the judicial "temporary guardians" (p. 95) may frequently become the final solution. In short, Calabresi fails to heed his own warning that "starting points may become end points" (p. 52). The decision where to allocate the burden of legislative inertia is equivalent to a reallocation of legislative power. As such it amounts to a real shift in the balance of political power.

Recognition of this shift in the balance of political power undermines Calabresi's summation of the democratic legitimacy and the appeal of his thesis: "There is nothing in itself deeply inconsistent with democracy in the delegation to a group of wise people of the job of setting the starting points, so long as the polity can reject the decisions of its guardians which it dislikes" (p. 95).[40] The American brand of democratic government is but one manifestation of the democratic ideal.[41] It draws its individual character from the peculiarly American doctrine of separation of powers. At the nation's birth, the American people agreed that over the long haul a system of "checks and balances" was the best compromise through which to achieve a governable

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38. For Calabresi's assessments of alternative approaches, see supra note 23.

39. Dworkin makes a similar point in the context of adjudication generally, when he states that "[l]egislative 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." Dworkin, Political Judges and the Rule of Law, 64 Procs. Br. Acad. 259, 270 (1978).

40. Calabresi's view receives some support from a British politician:

> I've always worked on the assumption that you can make democracy work by education and communication: by enabling people to be not merely formal voters but active participants, settling their own fortunes, taking part in collective decisions. But in this country people don't want to take part in collective decisions . . . . What we now have is mass-indifference and mass-alienation . . . . I now accept that the settled and just management of society by a progressive oligarchy is probably the best we can hope for.

2 R. Crossman, The Diaries of a Cabinet Minister 779-80 (1976).

41. See M. Cappelletti and W. Cohen, Comparative Constitutional Law (1979).

and stable society. Whereas a pure separation-of-powers doctrine allows no interaction between the different spheres of government, the American doctrine requires each sphere to monitor the operations of the other branches to ensure that their respective powers are not exceeded.[42] Calabresi justifiably castigates those who hide behind "the myth of an absolute separation of powers" (p. 178). Even the functional reading of the doctrine of separation of powers that Calabresi urges must, however, preserve some division of responsibility. Of course, this does not prevent courts and legislatures from operating on "common ground"[43] or with a degree of "interdependence [and] reciprocity."[44] Yet, if the doctrine is not to be robbed of meaning, it must prohibit the piracy of legislative power by the judicial branch. Within the American constitutional ideology, the separation-of-powers doctrine is a restraining rather than a facilitating device. The doctrine must work to prevent one branch's taking advantage of the structural infirmity of another.[45] Judicial aggrandizement cannot be allowed to thrive at the expense of legislatures laboring under a bout of inertia. For better or worse, the courts, at least when not acting as constitutional arbiters, are constrained by the separation-of-powers doctrine. Their direct resort to popular will is precluded by the earlier and more fundamental expression of that will in the notion of checks and balances. Calabresi's thesis must be seen for what it is: a radical shift in the distribution of governmental powers.[46]

IV. RENTS IN THE FABRIC

A. *On Calabresi's Methodology*

The Calabresian thesis of judicial sunsetting falls squarely within a liberal tradition that embraces and comprises some of the titans of American legal scholarship.[47] Like his intellectual predecessors, Calabresi seeks to address and resolve the crucial tension between the competing demands of the need for continuity and the desire for change; "[l]aw must be stable and yet it cannnot stand still."[48] While a settled legal order is a vital feature of a platform for

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42. See B. Bailyn, The Ideological Origins of The American Revolution 55-93 (1967); Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 697-701 (1978).

43. Green, Separation of Governmental Powers, 29 Yale L.J. 369, 375 (1920).

44. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring).

45. It can be argued, of course, that it is precisely when one branch is ailing that another branch should come to its assistance. For instance, it may be thought that the condition of legislative inertia is one that should oblige or encourage the judiciary to perform essential surgery for the good of the nation. Although there is much to recommend this view in universal terms, it is not an option that is available under the American scheme of government.

46. As Ely pithily notes, "[w]e may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures." J.H. Ely, Democracy and Distrust 67 (1980).

47. Yet, as Calabresi himself concedes, "[t]he existence of identifiable ancestors does not guarantee legitimacy" (p. 91).

48. R. Pound, Interpretations of Legal History 1 (1923).

social progress, such progress will inevitably necessitate changes in that legal order. The task for the courts is to act consistently with the dictates of the existing law, while keeping it, and its justification, up to date. The task of the jurist is to explain and advise how the courts can effect such a delicate operation. In tackling this essential dilemma, Calabresi draws upon an intellectual tradition whose basic beliefs and ideas rest upon the twin pillars of rationality and consensus.

1. *The Legal Fabric.* With different emphases, writers such as Bickel, Hart, Sacks, Wellington, and Dworkin have given their considerable academic support to the view that the courts may keep the law up to date by resort to conventional morality as revealed by the power of rational inquiry. American society is dynamic and pluralistic, yet different values interact to form a coherent, cohesive body of norms. For these writers, law comprises a great warehouse of values that have been individually catalogued and systematically shelved. During the course of business, values will shift in and out of the warehouse in response to the quantity and quality of legal and social trade. Apart from keeping a detailed inventory, the judge has to ensure that incoming values are "screen[ed]"[49] and "sift[ed]"[50] so that the stock of values is not contaminated by prejudice, bias, or passion. At any one time, however, the experienced judge will be able to point to a value or set of values that is appropriate to resolve a particular litigated dispute or be able to perform a thorough stocktaking and present an exhaustive account of the totality of values housed. Within such a general set-up, each writer holds a different view both as to the raw materials from which such warehoused values are derived and manufactured, and as to the ability of judges to fulfill their storekeeping duties effectively.

For Calabresi, the existing legal fabric,[51] to use his own metaphor, "reflects underlying values of a people" (p. 98) and is a "good approximation[ ] of one aspect of the popular will, of what a majority in some sense desires" (p. 97). This fabric is woven from many different threads and strands: statutes, common law decisions, jury actions, administrative determinations and scholarly criticisms.[52]

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49. Wellington, supra note 27, at 251.

50. R. Dworkin, supra note 22, at 255. See generally id. at 126, 240-58.

51. On one occasion he refers to this as being not only legal, but "social and legal topography" (p. 6).

52. In this regard, Calabresi constructs his fabric of conventional morality from much wider sources than Dworkin and from much narrower sources than Wellington. While Dworkin simply refers to the principles that best justify and explain the body of existing law, see R. Dworkin, supra note 22, at 66-68, Wellington prefers to cull from a whole range of disparate and informal sources, such as political speeches, legislative materials, public opinion polls and the media. See Wellington, supra note 27, at 237. Calabresi falls rather unsatisfactorily between the two. Having gone beyond the relative security and finiteness of formal legal sources, it is unclear why he should confine his sources to scholarly critics. There seems no cogent reason for according greater weight or influence to the thoughts of a Yale law professor than to the editor of the New York Times. Indeed, the academic and critical nature of professorial responsibilities seems far removed from familiarity with the popular will; moral philosophers and economists are not renowned for their worldliness.

2. *The Problems With Conventional Morality.* The shortcomings of the attempt to utilize conventional morality as a constraint on judicial endeavor to keep the law up to date have been well rehearsed: lack of any genuine consensus, impossiblility of reliable ascertainment, subjectivity of interpretation, and the like. All these criticisms are ably brought together by Ely[53] who mounts an irresistible attack on the consensus theorists. However, as Calabresi is quick to point out (p. 251 nn.2, 4 & 6), Ely's potent critique is directed at constitutional adjudication. Indeed, Ely appears to sanction the resort to conventional morality in nonconstitutional settings "where appeals to this sort of filtered consensus may make sense."[54] Ely, however, justifies his tolerance with a reason Calabresi cannot claim in his own support. Ely's rationale for tolerating a resort to conventional morality is that in such contexts, the work of the court is subject to reversal or alteration by the legislature; "[t]he court is standing in for the legislature, and if it has done so in a way the legislature does not approve, *it can soon be corrected.*"[55] As the assumption of legislative inertia lies at the base of Calabresi's thesis, this line of argument is not available to him without undermining the validity of his whole thesis. Further, he concedes as much, when he accepts the force of this argument in dismissing the idea that judicial lawmaking is democratic because it is always "subject to legislative or popular revision" (p. 92).

A more novel criticism, peculiar to Calebresi's thesis, is that the legal fabric may be completely unreflective and unrepresentative of prevailing communal morality, even of a conservative brand. On the basis of his assumption that a theory of judicial sunsetting is only required because of the reality of legislative inertia, it might well be that the only thing preserving or holding the present fabric in place is the legislative inertia itself. If legislative inertia could be reduced or removed, the present fabric of the law might be fundamentally changed by the gravitational force of the greater number of new statutes enacted.

As to whether judges are capable of identifying and isolating conventional morality with absolute precision, Calabresi refuses to accept the philosophical rigor of Dworkin's work[56] and prefers the more realistic assumption of Wellington.[57] He maintains that to imagine that one right answer is always forthcoming is to expect too much of judges. They should be sufficiently well-equipped to scan the fabric and to identify a selection of principles which will exclude the majority of answers, yet still leave some room within which to maneuver.[58] Calabresi is rather contradictory, however, as to the degree of difficulty attached to such a judicial task. At times, he concedes that the "multiplicity of sources and the confusion of the [fabric] make that task

53. J.H. Ely, supra note 46, at 63-69.
54. Id. at 68.
55. Id. at 4 (emphasis added).
56. See R. Dworkin, supra note 22, at 279-90.
57. See Wellington, supra note 27, at 240-45.
58. See G. Calabresi & P. Bobbitt, supra note 1, at 211 n.39, and *Statutes* at p. 255 n.37.

extraordinarily hard" (pp. 100–01); at others, he claims that a change in the fabric will most frequently occur as a result of "[a] combination of events, decisions, and theories, . . . *and usually in easily recognized ways*" (p. 131 (emphasis added)). Surely, on this count, Dworkin has it right when he admits that such a task, even when confined to the body of settled rules, is herculean in its demands and only capable of being carried out by "a lawyer of superhuman skill, learning, patience and acumen."[59]

3. *Treating Like Cases Alike.* If reference to conventional morality is the method by which the law is kept in line with contemporary trends and values, Calabresi relies upon "the great vague principle of treating like cases alike" (p. 165) as the perfect complement through which to ensure that any change will be made only incrementally. Like Dworkin,[60] Calabresi places great faith in the power and efficacy of formal rationality and goes so far as to say that "the fundamental role of common law courts is to keep like cases being treated alike" (p. 86). Such a concept of formal justice is far from uncontroversial or universal in its appeal.[61] At the core of the concept is logic and not fairness. It is a hollow principle which demands that a previous case should be followed regardless of its substantive fairness. As Raz notes, "fairness, if it is relevant at all, requires that the bad argument should not be applied to the new case."[62] This means that any bias in the law will be exaggerated further and any injustice will be perpetuated. Indeed, in an earlier article, Calabresi acknowledged not only the validity of this argument, but also accepted that some bias did in fact exist in the law, albeit residual and unintentional rather than pervasive and deliberate.[63]

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59. R. Dworkin, supra note 22, at 105.

60. Id. at 113–14. For a substantial critique of this principle, see Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 543–56 (1982).

61. See, e.g., C. Perelman, The Idea of Justice and the Problem of Argument 15–17 (1963); J. Rawls, A Theory of Justice 237–43 (1971); Carr, The Concept of Formal Justice, 39 Phil. Stud. 211 (1981); D.N. MacCormick, Formal Justice and the Form of Legal Arguments, 6 Etudes de Logique Juridique 103, 105–18 (1976).

62. Raz, Professor Dworkin's Theory of Rights, 26 Pol. Stud. 123, 135 (1978). Calabresi refers to this criticism but makes no response (p. 195 n.26 and p. 293 n.2).

63. As Calabresi notes in his discussion of legal aid for the lower-middle classes:

> There are those who would view the bulk of the legal system as precisely that kind of subterfuge, designed to give the illusion of impartiality (in the sense of allocations by acceptable rules) while effecting results totally biased toward those who are articulate or who have the means to purchase articulateness. I am not of that viewpoint, but this unwillingness on my part to see an evil *motive* does not mean that I cannot admit that, in at least some areas, the legal system can, in fact, have results which are just as bad and which might be cured, in part, if the goods involved were, at a substantial cost, made free.

G. Calabresi, Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class, *in* 3 Access to Justice 169, 187 (M. Cappelletti ed. 1979). See also Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y. Rev. 95 (1974); Hufstedler, The Future of Civil Litigation, 1980 Utah L. Rev. 753 (1980); Jacob, Black and White Perceptions of Justice in the City, 6 Law & Soc'y Rev. 69 (1971).

B. *Applying Calabresi's Thesis*

There are a number of problems that arise when Calabresi's thesis is put into practice. Examining a judge's role in judicial sunsetting will help to illustrate these problems.

1. *Three Questions.* A judge adopting Calabresi's advice would have to confront and answer three separate, yet equally difficult and important, questions:

(a) What does the pertinent statute say?;

(b) Does it fit the legal fabric at the time of the present litigation?; and

(c) If not, did it fit the legal fabric at the time of its enactment?

Although Calibresi provides an excellent account of the hazards of statutory interpretation and its appropriate use as a remedy for statutory obsolescence (pp. 31-44), he does not give any explicit instructions on what amounts to a proper and legitimate interpretation within the context of judicial sensetting. His analysis of the lattery of interpretation serves as an unintended criticism of the original and constructive part of his thesis: while acknowledging that "[w]ords do not interpret themselves" (p. 31), Calibresi offers only vague and unspecific guidance as to how the words should be interpreted. Like Hart and Sacks,[64] he pleads for honesty and recognizes the difficulty of trying to ascertain the original legislative intent. With enviable clarity, he outlines the major approaches to interpretation and reports that "[t]here is no consensus on what courts should be doing when they interpret statutes" (p. 214). Rather surprisingly, he asserts that, "[f]or the purpose of this book, it does not matter which of various theories of interpretation is accepted" (p. 214). But it does matter. Before any assessment can be made of the "fit" of any particular statute, it is inescapably necessary to place *some* construction on the statute. Without such guidance, Calabresi's whole theory is rendered unworkable. Indeed, in a new world of judicial sunsetting, a completely different approach will be required: judicial sunsetting will cast a long shadow over all aspects of the courts' handling of statutes.

Only after some initial interpretation is given to the statute will a judge be able to proceed to questions (b) and (c). The judge must determine not only whether the statute "fits in the current legal fabric" (p. 129), but also whether it fitted the legal fabric at the time of its enactment. The first point to note is that such a double task imposes labors that not only would be beyond Hercules, but would stretch the energies of Zeus. For a writer whose strength lies in his realistic and pragmatic outlook, Calabresi places an intolerable burden on judges by asking them to picture the legal fabric at some time in the past. Indeed, it is arguably impossible to look at the past except in the light of the present; the past, or at least our view of it, is shaped by the intervening events and developments.[65]

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64. H. Hart & A. Sacks, supra note 27, at 1148-1406.

65. This view of history has been advocated by no lesser figures than Edward Hallett Carr, What is History 123 (1961), and Hugh Trevor-Roper, History and Imagination (1980). Gerda

2. *Overcoming Inertia.* A judge who is able to decide that there is a lack of fit between the statute and the current legal fabric must then assume the burden of overcoming legislative inertia. According to Calabresi, at this stage, a "guess . . . as to majoritarian wishes will inevitably be made" (p. 113) by the judge. In making this guess, the court must be courageous enough not to succumb to "the desire to fill out the legal framework" (p. 114), yet it must not be so cavalier as to "stray too far from subservience to the [fabric], though, because it is unsure of its capacity to gauge majoritarian support" (p. 121). For instance, Calabresi envisages an occasional situation in which the court may believe that it "cannot define or feels it cannot evolve a new rule to fit the landscape" (p. 156). In such a situation, Calabresi asserts, the court may be justified in threatening to move to a rule that does not fit the judicial landscape "to force the legislative hand" (p. 156). While such a temporary hiatus may act as a possible but unlikely catalyst for legislative activity,[66] this potential intermediate stage between abandoning an old statutory rule and replacing it with a new judicial rule is a dangerous digression. Its existence can be obviated by stipulating that the court must be sufficiently confident of its ability to frame a new rule before it can abandon the old rule: this would be a necessary precondition that would have to be met before it could be claimed that the "retentionist bias" had been satisfactorily overcome. Indeed, it may be argued that the process of determining and declaring that the old rule is out of fit will, at the same time, reveal and make plain the nature of its replacement. If the court cannot define a new rule to fit the landscape, it is likely that it failed adequately to perceive the landscape in the first place.

3. *Thwarting Expectations.* There is a further infirmity at large in the Calabresian thesis. If a court holds a statute "obsolete" or out of phase, it does violence to that statute. While it does not do the same violence that Bickel suggested a holding of unconstitutionality does, with the courts "thwart[ing] the will of representatives of the actual people of the here and now,"[67] violence it does. The will of the obsolete statute is not that of the here and now, but of the there and then. Violence is done because the formal career of a statute is determined not by the legislature that enacted it, but by the unpredictable and unchartable forces of litigation, forces profoundly and

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Lerner, describing the process as "history making," has argued recently that this is an inevitable part of social existence:

> History is the means whereby we assert the continuity of human life—its creation is one of the earliest humanizing activites of *homo sapiens.*
>
> But history is more than collective memory; it is memory formed and shaped so as to have meaning. This process, by which people preserve and interpret the past, and then reinterpret it in light of new questions, is "history making." It is not a dispensable intellectual luxury; history-making is a social necessity.

Lerner, The Necessity of History and the Professional Historian, 69 J. Am. Hist. 7, 10 (1982). In a different vein, Jean-Pierre Lehmann has expressed the sentiment in this way: "[A] sense of reality is not necessarily an important vehicle of history." J. Lehmann, The Roots of Modern Japan 16 (1982). See also supra text accompanying notes 33–34.

66. See supra text accompanying notes 38–40.

67. See A. Bickel, supra note 26, at 17.

intrinsically nonmajoritarian.[68] Of course, litigation is but the very tip of the dispute-resolution process. Consequently, the operation and "vitality" of a statute must be gauged by the courts from a very unrepresentative sample of disputes that arise under the statute. Courts glimpse the world through the keyhole of litigation.[69]

Suffice it to emphasize that an obsolete statute, which does not fit the legal fabric, is nonetheless a clear marker against which parties can make their pitch. A legislative second-look judgment queers that pitch, even if temporarily, in a fashion that may do as much to defeat legitimate expectations as to champion them. Although the device of prospective overruling is available (pp. 279–80), "[t]he frightening difference between court action and political action is that courts frequently give no warning."[70] A statute that is never litigated may have as much gravitational pull on the field of litigation, and hence the legal fabric, as the FELA or Jones Act. Yet it is the belief of at least one party, both currently and even more so under the Calabresian regime, that litigation will modify a rule of law in his favor.[71] It is not clear why the updating of time-worn law should be left to the democratically and statistically unrepresentative forces of litigation.

This difficulty of frustrating legitimate expectations is compounded by the inherent limitations in judicial vision. As Calabresi would admit, not every judge is a Hercules who can grasp the intricate and detailed topography of the legal landscape. Many a stocktaking has missed a vital component. Fulfilling the primary judicial task (p. 113) depends on what the judge is looking for. Each judge brings to this judgmental task some sense of what is right or wrong for the country (p. 97). It may well be that most judges can fulfill the more limited but yet Herculean survey of the legal landscape, such that a given judge's "bizarre sense of values becomes relatively unimportant" (p. 97). However, this is a gamble that litigants would have to be prepared to take, and can offer no comfort to those whose legitimate expectations are involved in litigation before that judge.

Further, the problem of technique, as Ely has pointed out, is one of special importance here. It is as much a myth that courts can determine whether a statute fitted when it was passed, or fits today, as it is a myth that prescient courts can use the perceived values of tomorrow's majority in a

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68. Many factors conjoin and interact to determine whether litigation occurs. Although these determinants are extremely subtle and complicated, they can be reduced to four main types: sociopolitical, psychological, economic and legal. See Hutchinson, The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored, 19 Osgoode Hall L. J. 473 (1981).

69. P. Freund, quoted in Thomas, Have the Judges Done Too Much?, Time, Jan. 22, 1979, at 91.

70. Neely, supra note 8, at 7.

71. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977); Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977); Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205 (1982); Priest, The Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980). See also Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717 (1982), for an argument directing attention towards legislative and administrative arenas.

value-neutral way.[72] As much as shaping the present by predicting the future, courts will shape the present by interpreting the past.[73] To paraphrase Ely, by interpreting the past, courts will inevitably help to shape our view of it. By shaping the past, they will unavoidably shape the present. The fact that Calabresi claims this is done in a conditional way should not count as a defense. A judge can be as much a Nelson as a Hercules; a myopic or imagined view of the past fit can lead to a profoundly nonmajoritarian conclusion for the present.[74] The reply that in the overall legal landscape one judge can do little harm is unconvincing. If Calabresi is prepared to concede that unprincipled judicial decisionmaking can occur,[75] not only does the landscape become pitted with volatile and hidden landmines, it might be mapped by an unreliable and mercurial topographer.

V. *Weber* Revisited

The recent case of *United Steelworkers v. Weber*[76] provides a challenging testing-ground for Calabresi's thesis and a forcing-ground for our own criticisms. The facts and decision in the case are sufficiently notorious to warrant only a brief summary.[77] Brian Weber, a white employee of Kaiser Aluminum & Chemical Corp., was rejected for an on-the-job craft-training program that reserved half of its places for blacks. He sued Kaiser and his union, the United Steelworkers of America. Although Weber was successful in two lower courts,[78] the Supreme Court, by a 5–2 majority, rejected his claim and held that under title VII of the Civil Rights Act of 1964[79] employers were not precluded from giving special job preferences to minorities. This was the first case in which the Supreme Court had had to consider the legality of an affirmative-action program voluntarily introduced by a private employer without a judicial finding of past discrimination.[80] In his new world of judicial

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72. J.H. Ely, supra note 46, at 70. For a trenchant criticism see Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981).

73. In the purely common law context, Henry Hart and John McNaughton have noted that as regards precedents, "[a]t the moment of their making, they speak from the present to the future. At the moment of their application, they speak out of the past to the present." Hart & McNaughton, Evidence and Inference in the Law, Daedalus, Fall 1958, at 40, 41.

74. It will be remembered that, at the battle of Copenhagen, Admiral Horatio Nelson's famous quip, "Really, Hardy, I see no signal," was delivered while holding his telescope to his blind eye; a deliberate refusal by him to acknowledge the signal to retreat.

75. G. Calabresi & P. Bobbitt, supra note 1, at 211 n.39; *Statutes* at p. 256 n.37.

76. 443 U.S. 193 (1979).

77. For substantive analyses see, e.g., Dworkin, How To Read the Civil Rights Acts, N.Y. Rev. Books, Dec. 20, 1979, at 37; Neuborne, Observations on *Weber*, 54 N.Y.U. L. Rev. 546 (1979); Note, The Supreme Court, 1978 Term, 93 Harv. L. Rev. 1, 243–54 (1979).

78. 415 F. Supp. 761 (E.D. La. 1976), aff'd, 563 F.2d 216 (5th Cir. 1977).

79. 42 U.S.C. §§ 2000e-2(a), 2000e-2(d) (1976).

80. The Court had had occasion to consider past discrimination under title VII in a number of earlier cases, notably McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976), where the question of whether title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preference in the manner contemplated in *Weber* had been expressly left open, id. at 281 n.8. See also International Brotherhood of Teamsters v. United States, 431 U.S. 324, 347–48 (1977); Franks v. Bowman

sunsetting, how would Justice Crepusculum, our imaginary judicial alter ego of Professor Calabresi, deal with this case if it arose in 1982?

The first problem that he would have to address would be "What does the statute mean?"[81] In particular, he must decide what interpretation is to be placed upon section 703(d), which states that "[i]t shall be . . . unlawful . . . for any employer . . . to discriminate against any individual."[82] As the extent of the disagreement between members of the Supreme Court in *Weber* revealed, the task of fixing section 703(d) with a working meaning is far from straightforward. For instance Justice Brennan, giving the opinion of the Court, argued that a literal reading of the words would violate the spirit of the Act,[83] whereas Justice Rehnquist concluded, on the basis of the congressional debates, that the section "prohibits *all* racial discrimination"[84] and took the view that the majority went "not merely *beyond*, but directly *against* Title VII's language and legislative history."[85] As each of the opinions demonstrates, and as Calabresi perspicaciously notes (p. 37), the interpretive exercise

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Transp. Co., 424 U.S. 747, 762 (1976) (both concerning retroactive seniority with affirmative discrimination effects). See generally Belton, A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964, 31 Vand. L. Rev. 905 (1978).

In the celebrated case of Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978), the Court had considered affirmative action programs in the context of title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d (1976), and the fourteenth amendment. See R. Posner, The Economics of Justice 387–407 (1981); A. Sindler, Bakke, De Funis, and Minority Admissions (1978); Calabresi, Bakke as Pseudo-Tragedy, 28 Cath. U. L. Rev. 427 (1979); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Kaplan, Equal Justice in An Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw U.L. Rev. 363 (1966); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653 (1975); Symposium: *Regents of the University of California v. Bakke*, 67 Calif. L. Rev. 1 (1979); Symposium on Reverse Discrimination, 90 Ethics 81 (1979); Note, The Use of Racial Preferences in Employment: The Affirmative Action/Reverse Discrimination Dilemma, 32 Vand. L. Rev. 783 (1979).

81. Calabresi does not include this initial question in his thesis, but he is logically and practically committed to such a prior inquiry, see supra text accompanying note 64. As Dworkin, supra note 77, at 38 has noted:

> There is no agreement about theories of legislation among American judges, or indeed among judges of any developed legal system. On the contrary, the concept of legislation figures in jurisprudence as what philosophers call a "contested" concept. Theories of legislation are not themselves set out in statutes or even fixed by judicial precedent; each judge must himself apply a theory whose authority, for him as for others, lies in its persuasive force.

Although Calabresi surveys the possibilities, he offers little definite guidance.

82. 42 U.S.C. § 2000e-2(d) (1976).

83. 443 U.S. at 201. In pursuing such a line of interpretation, Brennan relied on Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892): "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." The dissenting opinion of Justice Rehnquist in *Weber* surveys the legislative history to the Civil Rights Act of 1964. 443 U.S. at 231–52.

84. 443 U.S. at 220.

85. Id. at 255 (emphasis in original). Rehnquist characterized the result arrived at by the majority as being "a *tour de force* reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini." Id. at 222. Calabresi would presumably see *Weber* as a vindication of his criticisms of subterfuge in the interpretation process, doing violence to "the core of honest interpretation" (p. 35) and reminiscent of what he then characterizes as Mr. Justice Black's "misreading" in, for example, Wilkerson v. McCarthy, 336 U.S. 53 (1949) (pp. 207–08 n.10).

is fraught with hazards. With studied understatement, commentators have asserted that "the *Weber* decision is difficult to reconcile with the language of Title VII"[86] and that "*Weber* was not a simple case to decide."[87] Nevertheless, before Crepusculum, J., can proceed to examine the "fit" of the statute, he is required to give it some meaning. Further, it is not open to him to interpret the words in the light of the fabric, for to do so would render the need to consider the statute's "fit" otiose. Without a stratagem of statutory interpretation, Calabresi's thesis will have serious difficulty in seeing the light of day.

Assuming that Crepusculum, J., has given a meaning to the statute, the next step will be to see if the statute "fits" the current legal fabric. The Civil Rights Act, passed eighteen years ago, has only recently reached the age of majority. While age is relevant, it is not conclusive. The Civil Rights Act, although a statute, is no ordinary statute. It heralded a fundamental and pervasive change in the legal and social order. Its objective was to effect a major redesign of the existing fabric, which in 1964 did not adequately or effectively control discrimination.[88] As such, it was designed to exercise, and has exercised, a much greater gravitational pull than other statutes. Unlike the FELA and the Jones Act, which were much more discrete in their scope of operation (pp. 32–33, 151–57), the impact of the Civil Rights Act ran through every fiber of the fabric. However, its impact was felt in different ways in different parts of the fabric. Some, such as Justice Brennan, believed that the Act was part of a campaign to improve "the plight of the Negro in our economy."[89] Others, such as Justice Rehnquist, maintained that the effect of the Act was to prohibit all forms of discrimination.[90] These contradictory signals were also experienced in the academic sector of the fabric.[91] Consequently, even though the Civil Rights Act had a profound impact on the legal fabric, while the strength of its gravitational pull was constant, its character varied. As the opinions in *Weber* show, gauging the current legal fabric is an extraordinarily difficult affair.[92] Justice Blackmun, for instance, appreciated the possibility of making an incorrect guess at this stage, but comforted

86. Note, supra note 77, at 249.

87. Dworkin, supra note 77, at 37.

88. The need to recognize and confirm basic civil rights was formally accepted in the epochal decision in Brown v. Board of Education, 347 U.S. 483 (1954). In the decade preceding the enactment of the Civil Rights Act, there was a maelstrom of legal and social activity. The Act of 1964 responded to and reflected these national concerns.

89. See 443 U.S. at 202.

90. Id. at 220.

91. See, e.g., I. Jenkins, Social Order and the Limits of Law 268–311 (1980); R. Posner, supra note 80; Dworkin, supra note 77; Calabresi, supra note 80; and sources cited supra note 80.

92. In *Bakke*, which Posner describes as "not a source of much guidance for the future," R. Posner, supra note 80, at 388, the Supreme Court held that while an explicit racial quota was unacceptable, race could be used as one of several determinants of selection for a state medical school. 438 U.S. 265, 272 (1978). In McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976), the question that arose for decision in *Weber* had been left open. It is against this legal background that Crepusculum, J., would have to initiate an analysis, even before moving to survey the critical literature on *Bakke* and *Weber*, see supra notes 77 & 80.

himself with the thought that "if the Court has misperceived the political will, it has the assurance that . . . Congress may set a different course if it so chooses."[93] As Calabresi's whole thesis is predicated on the fact of legislative inertia, such a redirecting would rarely occur.

On the further assumption that Crepusculum, J., has gauged the fabric and that a lack of fit is evident, he is obliged to step out into alien political terrain and gather a sense of majoritarian preferences with regard to affirmative action programs.[94] The dangerous and frankly Jovian nature of this expedition needs little comment. Indeed, this predicament is nicely caught in the dissenting opinion of Chief Justice Burger:

> The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.[95]

Finally, if it is assumed that the interpreted statute does not fit, Crepusculum, J., might be inclined to suggest or make an amendment of the Civil Rights Act—a state of affairs that is entirely compatible with the theoretical dictates of Calabresi's thesis. The political shockwaves that such a judicial response would likely create would be little short of seismic. Although claiming to act in the name and spirit of democracy, Crepusculum's radical judgment could expect short shrift from the electorate. It is difficult to understand how the Calabresian notion of democracy squares with its popular usage. Further, congressional commendation of and connivance with this course of action is hard to imagine.

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93. 443 U.S. at 216 (Blackmun, J., concurring). Dworkin, supra note 77, at 37, observes that the fact that *Weber* was concerned with the question of whether the plan was legal as opposed to constitutional is unimportant:

> If Congress disapproves a court decision interpreting a congressional statute, it can always reverse the decision by changing the statute. It cannot reverse a decision that interprets the Constitution. In the present circumstances, however, a Supreme Court decision on the statutory legality of affirmative action programs is, as a practical matter, almost as irreversible as a decision on their constitutional validity. It seems unlikely that Congress would now pass legislation either explicitly condoning or explicitly forbidding affirmative action in employment, at least so long as that issue remains politically as volatile as it is now. So the Court's decision about the legal consequences of what Congress has already done is likely to remain in force for some time, whatever that decision is.

See also Note, Congressional Reversal of Supreme Court Decisions: 1945-1957, 71 Harv. L. Rev. 1324, 1337 (1958) ("[A] recognition of the unusual unanimity of interest and opinion which is generally required to bring about a congressional reversal of a Supreme Court decision indicates that *reliance on legislative correction is rarely warranted.*" (emphasis added)).

94. See supra text accompanying notes 65-66.

95. 443 U.S. at 216 (Burger, C.J., dissenting).

VI. The Eclipse of the Judicial Sunset

It is in the nature of reviews that the stance adopted is generally critical, usually pedantic, and often persnickety. Yet fastidious attention to detail must not be allowed to eclipse the overall thrust and originality of a book's central idea. It would be methodologically misguided and intellectually unjust to assess *Statutes* purely in terms of its formal attributes of precision, detail, clarity, and exhaustiveness and to invalidate it on the basis of a single flaw or counterexample. The enduring quality of a book is surely to be judged by "the depth, the penetration, and the power of its central insight."[96] Although its elaboration and refinement are technical and sophisticated, the central insight of Calabresi's work is as simple as it is important, as profound as it is provocative. The problem he addresses and the thesis he propounds transcend the realms of academic discourse. As befits a scholar of Calabresi's stature, his work touches fundamental issues that affect all citizens who take democracy seriously.

Our substantive criticisms of Calabresi's thesis, to the effect that it is more radical than he is prepared to concede, are not to be taken as a condemnation of his proposal. A necessary prerequisite of any democratic choice is that it be informed; that is, any person who is asked to make an important choice ought to be made aware of the proper character and consequences of the options available. A critical scrutiny of any option is a vital facet of such information. The force of our critique has been to suggest that a choice for judicial sunsetting is as radical as reform of the legislative process. Judicial sunsetting would result in as basic a reallocation of power as Calabresi holds would flow from legislative reform (pp. 70–71). While Calabresi's plea for candor is wholeheartedly endorsed, he directs it at too restricted a category of governmental actors. His is a plea for judicial candor; ours is a hope for societal candor. The choice should not be one for the judges or legal community alone; the decision is one for the citizenry. Whether judges should be empowered to amend legislation is an issue for society at large. Mindful of the fact that judicial sunsetting is as deep a structural change as legislative reform, the responsibility for choosing between these options must be borne by that society. As Calabresi himself responds to the prospects of legislative reform, it "is not to say that such deep reforms are undesirable. It is only to assert that to most people the unknowns of such reforms are too great; *if forced to the choice*, they prefer structural conservatism . . ." (p. 72 (emphasis added)). Yet, the real magnitude of structural change entailed in judicial sunsetting demands that such a choice be faced and made openly.

Democracy demands open and responsive government. If more than lip-service is to be paid to this constraint, the shift in political power implicit in judicial sunsetting must be candidly presented to, and sanctioned by, the

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96. R. Wolff, Understanding Rawls 7 (1977).

electorate or its representatives.[97] It is for the governed to make an informed choice. They must determine whether statutory obsolescence is a greater or lesser evil than judicial sunsetting. They must decide whether the time is ripe to bite the legislative bullet and commence a program, even if limited in scope, to blow away the cloying dust of legislative inertia. Such structural reform must not be embarked upon lightly, but the drastic condition of statutory obsolescence requires drastic medicine. An ounce of legislative prevention is better than a pound of judicial cure.

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97. Davies's proposal for a Nonprimacy of Statutes Act would satisfy this criterion of societal candor. See supra note 7. However, the reliance on a fixed life-span for individual statutes is ill-suited to the complex problem of statutory obsolescence. See supra text accompanying notes 5–22. It has to be said that it is difficult to envisage anyone other than a lawyer proposing a theory of judicial sunsetting; it is a peculiarly lawyerly solution to a general, systemic illness.

Calabresi: An Addendum

A COMMON LAW FOR THE AGE OF STATUTES. By Guido Calabresi. Cambridge, Mass.: Harvard University Press, 1982. Pp. 319. $25.00.

*Reviewed by Alfred Hill**

Professor Calabresi has written an exhilarating and exasperating book. A full-scale review would be superfluous in view of the extensive discussion by Hutchinson and Morgan in the foregoing pages. What is offered here is an independent addendum.

Constitutional issues aside, Calabresi advances a proposal that is imaginative and sensible. His starting points are these: the problem of the obsolescence of statutes is becoming increasingly acute in our age of "statutorification" (pp. 1, 163); the nature of our legislative processes tends to hinder the repeal or updating of obsolete statutes long after majoritarian support for them has faded (even if majoritarian support is defined not in terms of the popular will but more narrowly in terms of the probable outcome of a current legislative vote on the particular statute) (p. 6); and courts are particularly suited to determine whether a statute is indeed obsolete, or seemingly obsolete, by reference to whether it "fits" into, or is "out of phase" with, the "legal landscape" (pp. 6, 121, 123, 166)—by which he means the dominant features our law has assumed, in consequence essentially of both statutory and judicial developments.[1]

Upon determining a statute to be obsolete, the role of the court would be to "induce" (p. 116) or "force" (id.) legislative reconsideration. Inducing legislative action might be accomplished by judicial threats. If these do not suffice, or are deemed inappropriate, the court would "strike down" (p. 147) the obsolete statute. It would then either substitute a rule of its own or a rule adapted from a statute not deemed obsolete, or leave the area without a substitute for the stricken rule, as circumstances require (pp. 147–48). Reenactment of the statute by the legislature would end the matter, because, within constitutional limits, the legislature is entitled to the last word. If the legislature does not re-enact the statute, there will have been accomplished the judicial "sunsetting" (pp. 109, 117, 176) of an obsolete law that does not command current legislative support.

This proposal is developed with great skill, marvelous clarity, and an elaboration of argument that is almost always persuasive.

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1. Calabresi would also have courts take account of "[s]cholarly criticisms . . . , jury actions that nullify or mitigate past rules, even administrative determinations" (p. 98).

But is it constitutional? This issue is first raised two-thirds of the way through the book, where Calabresi states that he "cannot take a constitutional objection very seriously" (p. 114). But it becomes apparent immediately that this remark is predicated upon "explicit delegation by legislatures to courts of the authority I have described" (id.). His argument in this connection is summary but convincing: there would be no violation of separation-of-powers doctrine because in essence the courts would be aiding rather than obstructing the performance of the legislative function, and this at the behest of the legislature itself.

Are courts to assume such a power *without* authorization from the legislature? The treatment of this point is puzzling. Towards the end of the book Calabresi asks the reader to assume, inter alia, that "[e]xplicit and limiting legislative authorization for such a doctrine could be made a prerequisite to its use" (p. 167). But the reader asked to make this assumption is one who is "not yet . . . convinced that an open promulgation of the doctrine I have been analyzing is appropriate" (id.). Earlier, Calabresi states that "[i]t would obviously be infinitely preferable to have a legislative sanction for the power" (p. 117). This remark is made in the course of discussion of the constitutionality of the "doctrine"; and to say in this context that something is "infinitely preferable" is to fall considerably short of saying that it is indispensable. On the other hand, Calabresi also states that he deems the validity of judicial "sunsetting" without legislative authorization to present a "serious" (p. 116) problem that is "not ripe for discussion" (p. 117). Can he possibly be asking courts to assume "sunsetting" authority prior to resolution of this problem?

Hutchinson and Morgan, in their review in the foregoing pages, evidently understand Calabresi to be advocating judicial "sunsetting" *now*, even without prior legislative authorization. Such a reading of the book is justifiable, despite considerable ambiguity on the point. Calabresi states that courts have been "sunsetting" obsolete statutes all along, albeit through "subterfuges, fictions, and willful use of inappropriate doctrines" (p. 166)—specifically through strained construction and dubious constitutional invalidation.[2] For this reason, he says, "living with anachronistic statutes is not really an option" (p. 110). The only question for him is whether the judicial power to "update" (pp. 120, 142) statutes shall be exercised deviously or "openly" (pp. 116, 161); and he repeatedly pleads for openness.[3]

In the context of the book as a whole, it is not certain in most instances that Calabresi is actually urging judicial "sunsetting" without authorization from the legislature. It appears that his primary interest is in the development of a model. His extensive discussion of the problem of legitimacy is devoted for the most part to showing that the model is compatible with basic demo-

2. Thus he remarks on "the race to use equal protection doctrines to strike down laws that are clearly constitutionally valid [and] the use of interpretations that would do honor even to the greatest of casuists" (pp. 170–71).

3. See, e.g., pp. 115–17, 137–38, 144–45, 164–66, 180.

cratic values. Most of his calls for "open" exercise by the judiciary of the "sunsetting" function can be read simply as supportive of the model, without any necessary implication that, from the constitutional point of view, the model is ready for instant adoption by the courts. Yet there are some passages that are difficult to interpret except as urging judicial arrogation of the "sunsetting" function.[4] The reviewer initially balked at such an interpretaton because of incredulity that this course could be contemplated without consideration of the underlying constitutional problem. The incredulity was not eliminated by Calabresi's remarks on this problem, which are set forth below in their entirety (and which, in the book, follow immediately upon the discussion of the constitutionality of legislative delegation of the function to the courts):

> The question of whether the authority to allocate the burden of inertia must be expressly granted by the legislatures to the courts or can be arrived at by courts in a common law way is much more serious. But to treat it adequately one would have to spend more time than I wish to devote to it, and even then any conclusion would be premature.
>
> First, one would have to develop a far more complete theory of when common lawmaking is appropriate than I can hope to do in this book. One would then have to analyze whether the indirect behavior (the subterfuges by courts and hints by legislatures) which had occurred to date would justify the courts in proclaiming as a doctrine what they could demonstrate had already occurred through the accretion of decisions and statutes. One would have to see, in other words, whether the gravitational field, which a theory of common lawmaking required, had become strong enough to permit this doctrine to be announced as an independent rule, which could in turn start exercising its own gravitational force; or if, instead, the field exerted a force sufficient to permit courts to act over statutes, but only if they continued to do so by indirection and subterfuge.
>
> I prefer to get on with the task of beginning a consideration of the limits and techniques appropriate to the judicial role I have been describing. That courts, in a common law way, have come to the point of exercising the authority here described through fictions, subterfuges, and indirection is, I think, manifest. Whether that way of dealing with the authority is more desirable than an open acknowledgment of the power will be discussed in the last part of the book. Whether it is then permissible for courts to make that declaration themselves or necessary to wait for a legislative sanction seems to me not ripe for discussion.

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4. Thus, he states at p. 166:

> If the courts and legislatures openly accept this common law function as appropriate to the age of statutes, they will be recognizing some significant changes in our legal-political system. But they will only be recognizing the changes, not making them. The statutorification and the concomitant tendency toward obsolescence of American law have already occurred. So have the judicial reactions to these changes. What remains to be done is only the taking of the last step, the seeing of the world as it is, and the giving of a name to what is already happening in indirect and often careless ways.

See also p. 117, quoted in the text.

> It would obviously be infinitely preferable to have a legislative sanction for the power. And under some justifications of judicial lawmaking it would be essential. (The straight-delegation theory is but the most obvious example.) And it is not clear that legislatures, if presented with the doctrine as a form of limited sunsetting, would necessarily freeze it. Senator Davies, for example, is optimistic about the enactment of his broad bill. This by itself would argue for waiting and seeing before urging any judicial declaration of the rule—even if one were to conclude that such a "common law" declaration could be appropriately made. To reach such a dubiously second-best conclusion before it is clearly needed would seem hasty.
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> Perhaps, in other words, the very suggestion that a problem currently exists will suffice to force the agenda in some legislatures. If enough legislatures act, that fact might itself strengthen the argument for common law adoption of the doctrine elsewhere. In the circumstances, a premature analysis of whether the courts could, in the absence of legislative action, declare the power themselves seems wasteful and even misguided. (Pp. 116–17) (footnotes omitted).

Preliminarily, it may be observed that when Calabresi speaks at the outset of judicial authority "to allocate the burden of inertia," he means authority to determine whether legislative reconsideration should be compelled in the particular case—in effect to determine whether the continued life of a statute shall depend on successful efforts within the legislature by the statute's opponents or proponents. Another preliminary point is that the quoted language makes no express reference to the federal and state constitutions. Indeed, Calabresi seems to suggest that no more is needed to solve the problem of legitimacy than a suitable "theory of common lawmaking." But it will be assumed that he understands full well that the scope of the judicial power vis-a-vis the legislature cannot be defined save in constitutional terms—that a constitutional issue of the most fundamental kind is posed if courts are to "strike down" legislative enactments solely on the ground that the courts deem them obsolete. For that matter, subject to valid authorizations and constraints by the legislature, the scope of the judicial power generally is at bottom a constitutional question.

These preliminaries aside, it should be noted that Calabresi is not content with saying that the problem of constitutionality (we shall use that term even if he does not) is a "serious" one that is "not ripe for discussion." The last paragraph advises that "premature analysis" of the problem would be "wasteful and even misguided." Why? Because if enough legislatures delegate "sunsetting" authority to the courts, "that fact might itself strengthen the argument for common law adoption of the doctrine elsewhere." Presumably Calabresi means that if there is sufficient legislative action of the indicated kind, the "legal landscape" will have changed to the point where courts may deem themselves justified in assuming "sunsetting" power on their own—and that this process should not be inhibited by "premature" speculation about constitutional obstacles. But will courts act constitutionally if they proceed in this fashion? The answer, we are told in the second paragraph, will depend on a "theory" yet to be developed.

It is hard to know what to make of all this. A strong case has been presented for legislative delegation of "sunsetting" authority to the courts. If there should be no significant movement in this direction, as seems likely, this will stem less from a perceived lack of merit in the proposal than from opposition by pressure groups of the left, right, and center, each concerned that its own treasured statutes could be doomed by judicial verdicts of obsolescence. As for the problem of judicial "sunsetting" without legislative authorization, this is treated with a casualness that is surprising in a scholar as able and serious as Calabresi.

The writer will venture some comments that are obvious to the point of banality. The evolution of the common law was long dominated by the myth that judges do not make law but simply apply it. For this reason among others, old doctrine was eroded through strained applications of precedent and other distortions, until it became apparent that a particular old doctrine had been supplanted by a new one, which was then proclaimed "openly." The common law still evolves largely in this fashion, and we deem the result to be valid because, by hypothesis (as it now seems to us), the area is one in which there is judicial competence to make law.

But if courts have in fact resorted to "subterfuges" and "fictions" in the reformulation or elimination of *statutes* deemed by them to be obsolete, this has not been by reason of a myth of lack of judicial lawmaking power, but rather by reason of the constitutional principle of legislative supremacy. The courts cannot claim validity for the "open" proclamation of new doctrine that they lack constitutional power to make in the first place. The courts cannot say, "We have the constitutional power to strike down statutes that we deem obsolete, as evidenced by the fact that we have long been doing precisely such a thing by indirection"—or at least they should not be urged to say this.[5]

"Subterfuges" and "fictions" are Calabresi's terms. They are epithets, and should not be used loosely. Past constructions and persistent modes of construction acquire a legitimacy of their own. This is particulary true with

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5. My colleague Bruce Ackerman has suggested a conceivable way out of this impasse—namely, that it may be possible to develop a theory for justifying judicial "sunsetting" on the basis of a rebuttable inference of legislative consent, drawn from a prolonged period of legislative silence.

Assuming that this approach to the problem may be warranted in cases of desuetude, it hardly seems warranted as to statutes that are very much alive, and that, from Calabresi's viewpoint, ought to be "sunsetted" precisely because, being "out of phase," they produce results violative of "the great vague principle of treating like cases alike" (p. 165). Consider some of Calabresi's favorite candidates for "sunsetting": workmen's compensation statutes (because of their inadequate payment schedules) and automobile guest statutes. Such laws, which affect people adversely every day, presumably have opponents as well as supporters. Even if the supporters are relatively weak, in the sense that they would not be able to persuade a *current* majority of the legislators to vote for these laws, it is fair to assume, in the circumstances, that they are strong enough to prevent legislative reconsideration. As Calabresi observes, all sorts of bottlenecks have been deliberately built into our legislative systems. Judicial decrees that bypass these bottlenecks by forcing items on the legislative agenda cannot realistically be justified in terms of legislative consent. More fundamentally, they would constitute improper intrusions by the judiciary into political processes established by constitutions and statutes, and by the rules under which our legislatures have chosen to govern themselves.

respect to constitutional interpretation; thus few would take seriously a suggestion that the first amendment should now be read as a limitation on only federal governmental action. And this is also true to a large extent on the legislative level; for example, a court today is most unlikely to give other than an exceedingly narrow construction to an automobile guest statute. To be sure, this does not explain or justify *initial* constructions or modes of construction that arguably misread statutory text, or arguably stretch constitutional doctrine as a device for invalidation. But even after account is taken of the gaping character of this omission, it is submitted that the violence done to statutes through what Calabresi chooses to call "subterfuges" and "fictions" has the legitimacy of Holy Writ, compared with the legitimacy of Calabresi's notion of judicial "sunsetting" without legislative authorization—if that is indeed his notion.