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COMMON SENSE ABOUT THE AGE OF STATUTES

Steve MacIsaac*

A COMMON LAW FOR THE AGE OF STATUTES. By *Guido Calabresi*.
Cambridge: Harvard University Press. 1982. Pp. 319. \$25.

"An Act of Parliament can do no wrong, though it may do several things that look pretty odd."

— Holt, C.J., *City of London v. Wood*,
88 Eng. Rep. 1592, 1602 (K.B.
1701)

Professor Calabresi's book, *A Common Law for the Age of Statutes*, tentatively formulates a doctrine that he believes will provide some relief for a legal system that is — to use his colorful phrase — "choking on statutes" (p. 1). Actually, "gagging" might be a catchword more appropriate to Calabresi's perception of the problem, because his concern is not with the sheer volume of legislation but instead with the unpalatable task that courts face when they are forced to apply obsolete or anachronistic statutes. He maintains that courts have resorted to a variety of techniques — some valiant, some disingenuous, all ultimately ill-advised — to cope with senile statutes, and argues that frank recognition of a judicial power to update or force legislative "reconsideration" of obsolete statutes is the only appropriate solution. The proposition that courts should actively prod legislators into facing up to their "majoritarian responsibilities" is decidedly upbeat in an era that finds many commentators fretting about how far legislatures can limit the courts.¹ As a result, the book is certain to be widely read. Critical response is equally certain: Calabresi writes and thinks in grand style, and so many of the concepts central to his doctrine are defined vaguely and some questions he "does not take too seriously" will be thought by others crucial to the doctrine's legitimacy.² The book is therefore likely to spark a dialogue in the legal community, a prelude to what Calabresi hopes will eventually be a dialogue between the courts and the legislatures.³

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1. See, e.g., Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations On Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

2. See Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534, 534 (1982) (stating that Calabresi's doctrine "patently confuse[s] articles I and III of the Constitution").

3. A recent outpouring of reviews already has made something of a start on such a dialogue. See Coffin, Book Review, 91 YALE L.J. 827 (1982); Cox, Book Review, 70 CALIF. L. REV. 1463 (1982); Hurst, Book Review, 67 MINN. L. REV. 563 (1983); Hutchinson & Morgan, Book Review, 82 COLUM. L. REV. 1752 (1982); Mikva, Book Review, 96 HARV. L. REV. 534 (1982).

The book opens with a prolegomenon that outlines the parameters of the problem, the responses Calabresi believes have failed, and his conclusion that “we are already doing, badly and in hidden ways, much of what this ‘radical’ doctrine [would] allow[]” (p. 7). He identifies “legislative inertia” — the tendency of legislatures to leave old laws intact despite changed circumstances that render the original rationale inapposite or the statute’s operation perverse — as the source of the problem. The result, according to Calabresi, is that “getting a statute enacted is much easier than getting it revised” (p. 6). He concludes that legislative inertia has upset an idealized balance between continuity and change, a duet between the courts and legislatures synchronized with the essentially conservative American tradition of law revision. The remainder of the book is divided about equally between examining and rejecting approaches Calabresi views as flawed attempts to recapture this balance, and exploring how a doctrine that would allow courts to update statutes could be applied and how it would be limited. The section that will be of most interest to many readers — the defense of the doctrine’s legitimacy — lies between Calabresi’s descriptions of what is and what might be.

I

Various scholars and jurists have expressed alarm at what the idiot wind of time does to statutory law. In addressing this problem Calabresi joins a distinguished line of individuals that includes Sir Francis Bacon,⁴ Roscoe Pound,⁵ Cardozo,⁶ and, more recently, Judge Henry Friendly⁷ and Grant Gilmore.⁸ But those who are not convinced that statutory obsolescence is the problem Calabresi thinks it is may be skeptical of his view that courts have taken “flight to the constitution” to eliminate statutory deadwood. He argues that courts have been tempted, in their desire to treat like cases alike, to use an equal protection approach to invalidate old statutes based on rationales or presumptions that now seem either outdated or constitutionally doubtful. The idea is provocative, and his discussion of the few cases he sees as illustrative of the trend is interesting, but there may be less here than meets the eye. Calabresi may be unusually prescient in spotting a trend, but his fear that courts will overextend themselves and thereby endanger “core” constitutional rights in their attempts to invalidate old statutes seems overdrawn.⁹ In the absence of a constitutional principle that would distin-

4. F. BACON, *An Offer to the King of A Digest to be Made of the Laws of England*, in LAW TRACTS 15, 20 (1737) (“The laws of the most kingdoms and states, have been like buildings of many pieces, and patched up from time to time according to occasions, without frame or model.”)

5. Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC. 142 (1920).

6. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

7. H. FRIENDLY, *The Gap in Lawmaking — Judges Who Can’t and Legislators Who Won’t*, reprinted in BENCHMARKS 41 (1967).

8. G. GILMORE, *THE AGES OF AMERICAN LAW* 95-97 (1977).

9. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[I]n invocation of the equal protection clause [as opposed to the due process clause] does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.”); Mikva, *supra* note 2, at 537. But see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 587-92 (1982).

guish between statutes on the basis of age alone,¹⁰ it is unclear that the contours of "current" constitutional doctrine are likely to be distorted by the tug of old statutes on the judicial conscience. Certainly the cases rejecting constitutional challenges to recent legislation shielding select groups from tort liability do not support such a thesis.¹¹

Calabresi also rejects the possibility of remedying obsolescence through the use of doctrines that, following Bickel,¹² he lumps under the rubric of "passive virtues." His primary argument here is that the techniques Bickel championed would lose their "true meaning" if they were used to force legislative reconsideration of statutes that, although obsolete, present no constitutional difficulty. Cynics, of course, might question what would be lost by "abusing" a doctrine like delegation of powers that is, at least at the federal level, virtually a dead letter.¹³ One also wonders whether other ap-

10. Calabresi hints at such a principle, but does not develop it:

The notion is that there may be some issues as to which the very structure of our government, or the requirement of a republican form of government, or concepts of due process and equal protection, demand a current answer by a relatively majoritarian body although there may be no constitutional requirement as to what the answer must be.

P. 266 n.99.

11. A number of states passed statutes in the 1970s in an attempt to slow the increase in health care costs generally attributed to large malpractice awards. Typically, these statutes required would-be plaintiffs to submit their claims first to arbitration panels — thus giving rise to right-to-jury challenges — and some of them imposed an upper limit on the amount that plaintiffs could recover. These statutes have generally been upheld. *See, e.g.*, *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Maryland v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978); *Paro v. Longwood Hospital*, 373 Mass. 645, 369 N.E.2d 985 (1977); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Halpern v. Gozan*, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976); *Parker v. Children's Hospital*, 394 A.2d 932 (Pa. 1978); *Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

At least two cases have struck down legislation limiting recoveries in medical malpractice suits. In *Wright v. Central Du Page Hosp. Assn.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), the Illinois Supreme Court found such a limitation violative of a state constitutional provision prohibiting "special laws." 63 Ill. 2d at 329-30, 347 N.E.2d at 743. Similarly, in *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) the North Dakota Supreme Court struck down a recovery limitation on state as well as federal equal protection grounds. The court noted that in enacting the statute the legislature had relied on national malpractice insurance rates and concluded that "either the Legislature was misinformed or subsequent events [lower insurance rates] have changed the situation substantially." 270 N.W.2d at 136. As might be expected, these decisions have been criticized. *See, e.g.*, *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 428-29 (N.D. Ind. 1979) (*Wright* and *Arneson* "severely criticized and rejected by courts and commentators," referring to jury trial denial claim), *aff'd.*, 603 F.2d 646 (1979); *Prendergrast v. Nelson*, 199 Neb. 97, 107, 256 N.W.2d 657, 665 (1977) (*Wright* not persuasive). *Cf.* *Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEXAS L. REV. 759, 782 (1977) (concluding that courts should not frustrate "social legislation developed by representative legislative bodies . . . by judicial speculation").

12. Bickel, *The Supreme Court 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

13. I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.1, at 149-50 (1978) ("Since 1935 the nondelegation doctrine has had no reality in the holdings, although remnants of the doctrine persist in judicial verbiage."); *see also* T. LOWI, THE END OF LIBERALISM 92-126 (2d ed. 1979); Bensef, *Creating the Statutory State: The Implications of a Rule of Law Standard in American Politics*, 74 AMER. POL. SCI. REV. 734 (1980) (suggesting what criteria statutes should conform to in order to satisfy "rule of law" standard); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 288-90 (1982) (advancing an economic

proaches he canvasses — void for vagueness, a modern day version of *cessante ratione legis, cessat et ipsa lex*, and desuetude — could not, if taken together and applied creatively, provide a reasonably effective means of addressing obsolescence.¹⁴ But he rejects all of these possibilities as either overinclusive or underinclusive, or both, or because they fail to focus on what he views as the critical question: whether an anachronistic statute enjoys current support. Vagueness fails because “[m]any anachronistic statutes are clear as can be” (p. 25), desuetude fails because “[m]any old laws that are out of phase and would not be reenacted are still enforced” (p. 21), and the *cessante ratione legis* rationale would produce invalidation where new rationales would support the law, and might not produce invalidation where, although the old rationale is “plausibl[e],” it is “out of tune with the total law” (p. 23).

The third and final judicial response that Calabresi rejects is the one most readers might suspect is the most efficacious — statutory interpretation. Briefly, he argues that the range of discretion courts can properly exercise in interpreting a statute prevents them from addressing the obsolescence problem squarely: “The limits of honest interpretation are too constricting, whereas the scope and dangers of unlimited interpretation are too broad” (p. 38). Surely this is correct, at least in those cases where a statute simply and unequivocally commands the courts to apply a particular decision rule — *e.g.*, contributory negligence bars recovery — in specific cases. How many statutes fall into this category is another question. Many statutes — perhaps most statutes — are vague enough to allow courts to keep them current without doing damage to the “core of honest interpretation.” In the hands of inventive judges, the reach of interpretation would seem broad indeed.¹⁵ Conversely, the “dangers of unlimited interpretation” are not themselves unlimited; the same limit that Calabresi argues would check an inappropriate use of his doctrine — legislative reversal of judicial decisions — certainly checks “unlimited interpretation.”

Calabresi then explores whether the “New Deal Response” — delega-

justification for delegation of legislative power to administrative agencies). *But see* *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 673 (1981) (Rehnquist, J., concurring in the judgment on nondelegation grounds).

14. *See, e.g.*, *Petteys v. Butler*, 367 F.2d 528, 536 (8th Cir. 1966) (holding a particular transaction to be outside the definition of “purchase” under § 16(b) of the Securities Act. “When the reason of the law ceases, the law itself ceases [to operate]. . . . Since the purposes of the Act are stated clearly and appear side-by-side with the literal demands [it is appropriate] to determine on an ad hoc basis whether the purposes of the Act are in any way being served by an application of the literal provisions.”), *cert. denied*, 385 U.S. 1006 (1967).

15. An obvious example is the River and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. §§ 403, 407, 411 (1976). *See* W. RODGERS, ENVIRONMENTAL LAW § 4.5, at 387 (1977) (Water pollution regulation is “influenced importantly by the humble specifics of a nineteenth-century statute that is almost an insult to the sophisticated wastes of modern technology. It has served nonetheless as a remarkably flexible deterrent to water pollution of every conceivable manner, shape and form.”). The Sherman Act is another example of a statute that has retained its vitality despite its age. For an example of a pinched and hidebound approach to statutory interpretation in a case involving a state counterpart of the Sherman Act, see *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464, 344 N.E.2d 357, 381 N.Y.S.2d 426, 428 (1976) (rejecting the argument that the term “arrangement” covers a price discrimination practice in the absence of “a reciprocal relationship of commitment between two or more legal or economic entities,” despite indications that state statute’s scope was intended to be broader than the Sherman Act).

tion of broad policy mandates to administrative agencies — is likely to offer a solution. He concludes that, as agents of change, administrative agencies have been “a dismal disappointment” (p. 45). Although he is quick to caution the reader at several points that the conventional wisdom about how and why bureaucrats “satisfice”¹⁶ is simplistic and sometimes misleading, most of this section does little more than summarize that wisdom. But there is a shift in emphasis here. Calabresi’s assessment of the possibility that agencies can tackle the problem of obsolescence necessarily entails a comparison: If courts suffer from the same problems that plague agencies they are unlikely to be any better at solving the problem. His definition of an obsolete statute — a statute that does not “fit” the legal topography and lacks current legislative support — guides the comparison.

He concludes that, on balance, agencies are less likely than courts to be able to discern lack of “fit” or gauge current support. Agencies cannot spot lack of fit because they are either too closely involved with their own statute or insufficiently familiar with the rest of the legal landscape. Somewhat paradoxically, it is precisely *because* they are politically accountable that their reading of majority wishes is, in Calabresi’s view, suspect: “Political accountability leads almost inevitably to an overblown faith in one’s capacity to know what the majority wants, and hence to a tendency to emphasize this aspect of lawmaking to the detriment of consistency” (p. 53). Courts, on the other hand, are trained to interpret the legal topography and are, by virtue of their relative insulation from the play of day-to-day politics, better able to follow it: “Strange to say, an elected court is more independent, less subject to the force and whim of particular legislators and executives, than even regulators on long-term appointments” (p. 53). At this point, readers will probably feel that the case for courts and against agencies is made out a little unfairly; it seems that courts are given the benefit of every doubt, while many recent developments that promise to promote agency accountability and efficiency are treated, if at all, only in footnotes.¹⁷

Calabresi then dismisses in rapid succession sunset laws, law revision commissions, and efforts to make lawmaking more representative through either reform of the legislative process itself or more frequent resort to direct lawmaking. Sunset laws are too mechanical and are likely to degenerate into a mere formality; law revision commissions steer clear of controversial issues; structural reform of the legislative process “would reallocate power and make law revision too easy” (p. 71); the initiative and referendum processes are dismissed as posing “dangers . . . [that] form a commonplace part of the literature” (p. 70).

His confidence in dismissing all of these alternatives as inadequate is striking. Although sunset laws are a relatively recent phenomenon, Cala-

16. See Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

17. See, e.g., Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975) (arguing that presidential control over independent agencies should be increased, subject to a one-house congressional veto). Presidential control over the rulemaking of executive agencies has been effected by Executive Order 12,291, 3 C.F.R. 127 (1982), but independent agencies remain free from such oversight. The constitutionality of a one-house veto is currently before the Supreme Court in *Immigration & Naturalization Serv. v. Chadha*, 51 U.S.L.W. 3453 (U.S. Dec. 14, 1982) (reargument) (No. 80-1832).

Calabresi concludes that sunseting will "defeat itself" (p. 61).¹⁸ He relies on dated support for his assertion that law revision commissions avoid making controversial recommendations, and ignores other evidence that tends to contradict this assertion (pp. 62-63).¹⁹ Structural reform of the legislative process is dismissed as out of keeping with an ideal construct of the legislative/judicial balance despite the wide variance in state legislative structures and despite evidence indicating that states are pursuing reform efforts to streamline the legislative process.²⁰ Finally, the resurgence of direct legisla-

18. Certainly the state legislatures are not as pessimistic about the sunset approach as Calabresi — some forty-four states have enacted sunset legislation of one sort or another. See COUNCIL OF STATE GOVERNMENTS, 1982-83 BOOK OF THE STATES 228-31 (Table #27, Summary of Sunset Legislation). For an example of a particularly ambitious sunset statute, see FLA. STAT. ANN. § 11.61 (West Supp. 1982, at 105-12) (listing over 3,000 statutory provisions that are to be phased out absent legislative action between 1982 and 1991). The Florida statute avoids one of the primary faults Calabresi finds with sunset statutes — the possibility of a statute being "bottled up" in committee — by providing that "each appropriate subcommittee shall begin a review . . . 15 months prior to the date set for repeal . . . and shall make a recommendation . . . for continuation, modification or repeal of the program or function" FLA. STAT. ANN. § 11.61(3) (West Supp. 1982). The most dramatic effect of the Florida legislation to date has been the deregulation of the trucking industry, see Deffenbaugh & Hayman, *Motor Carrier Deregulation in Florida: Before, During and After*, 8 FLA. ST. L. REV. 681 (1980). Trucking interests challenged the statute's operation on various constitutional grounds, but the deregulation was upheld. See *Alterman Transp. Lines, Inc. v. State*, 405 So. 2d 456 (Fla. Dist. Ct. App. 1981) (upholding repeal of motor carrier regulation pursuant to sunset act against constitutional challenges based on contract clause, fair notice and court access grounds).

19. See, e.g., Report of the Law Revision Commission for 1980, 1980 N.Y. Laws 1597, 1613 (McKinney) (urging elimination of "impermissible sex distinctions with respect to the obligations of parents to support their children and husbands and wives to support each other"); Report of the Law Revision Commission for 1981, 1981 N.Y. Laws 2235, 2336 (McKinney) (urging amendment or repeal of thirty-one state statutes "which discriminate, in a constitutionally impermissible manner, against aliens who have been lawfully admitted for permanent residence in the U.S. under federal immigration laws"). See also Abrams, *New York's Legislature Tries Harder*, 46 STATE GOVT. 256, 258 (1973) (establishment of Task Force on Critical Problems aimed at "focus[ing] on key issue areas that need long-range assault, such as reducing welfare costs or providing universal health insurance. The evolution of this office will be watched carefully by legislators around the country for its implications as an "inspector general" type function in the . . . [l]egislature, or it may evolve into a new type of program development agency.").

20. Although the committee system is well established in state legislatures, recent research suggests that its importance varies significantly from state to state. See Francies & Riddlesperger, *U.S. State Legislative Committees: Structure, Procedural Efficiency, and Party Control*, 7 LEGIS. STUD. Q. 453 (1982) (Table 3, "Committee Centrality Scores by State and Chamber" indicating "rather sharp differences in committee importance among the 99 legislative chambers"). Few states use subcommittees extensively, see M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 203 (1977), and this is one area where it is hoped reform efforts might bear fruit. For a study that concludes that a change in committee structure will not necessarily lead to greater legislative efficiency — efficiency being measured by the congruence between committee recommendations and full floor votes — see Hamm & Montcrief, *Effects of Structural Change In Legislative Committee Systems on their Performance in U.S. States*, 7 LEGIS. STUD. Q. 383 (1982). Calabresi, along with many other observers, views the committee system as largely responsible for the dysfunction of the legislative process, see generally Brenner, *Congressional Reform: Analyzing the Analysts*, 14 HARV. J. ON LEGIS. 651, 664-70 (1977), and so he gives little attention to structural and procedural reforms aimed at dovetailing the committee system with the larger legislative process. Legislators, on the other hand, understand that the committee system is inevitable, given the volume and complexity of legislation, and accordingly view the proper purpose of reform as strengthening the

tion spanning an issue spectrum ranging from nuclear disarmament to den-turism is barely considered.²¹ And Calabresi never explains why the legislative reconsiderations his doctrine would induce would not also be bottled up in committee, receive greater attention than issues considered by law revision commissions or "blue-ribbon" committees that work closely with the legislature,²² or simply fall victim to the same structural obstacles all legislation confronts.

All of these objections, of course, are little more than nit-picking. Calabresi's thesis obviously does not depend on the utter absence of workable judicial, administrative or legislative responses to the problem of obsolescence. Nor is it necessary for him to prove that his doctrine is the most attractive approach. It is enough if the doctrine merely contributes to a solution. Why then does he categorically reject all of these alternatives as insufficient? One suspects that Calabresi's approach is rhetorically one-sided for two reasons. First, he is attempting to convince readers — many of whom are likely to be skeptical²³ — that statutory obsolescence is a problem. Second, Calabresi states at several points in the book that his intention is to offer only a tentative formulation of the doctrine, a formulation he hopes will prompt reaction and discussion. In devoting the first half of the book to rejecting what he perceives to be unwitting or misguided attempts to keep statutory law current, he has elevated the level of discussion by setting the standards against which his proposal will be evaluated. But how does his doctrine work?

committee system to facilitate the flow of legislation, *see* Montcrief & Jewell, *Legislator's Perceptions of Reform in Three States*, 8 AMER. POL. Q. 106, 116-18 (1980).

21. *See generally* REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (D. Butler & A. Raney eds. 1978). Calabresi should have spent more time addressing the direct legislation process as an alternative, if only because the small show of support necessary to lodge a question on the ballot — in California, for example, well under 5% of the voting public can force reconsideration of a statute, *id.* at 92 — seems to cast doubt on his assumptions concerning "majority sentiment" and failure of the legislative process. There are, of course, analysts who suggest that direct legislation suffers from the same problems that beset the conventional legislative process, *see, e.g.*, Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to do About it*, 32 FED. COM. L.J. 315, 319-20 (1980), but the returns so far seem to indicate that corporate and other "special interests" groups have been unsuccessful in their attempts to use the initiative or referendum to "buy" legislation. Compare Calabresi's offhanded dismissal of direct legislation with the conclusions of those who have studied the process more thoroughly. *See, e.g.*, Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914-1973*, 28 W. POL. Q. 330, 349 (1975) (concluding that direct legislation has been successful as an alternative to the legislative political process); Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 261-62 (1975) ("The initiative does provide a last resort to the public to bypass a recalcitrant legislature and/or governor. . . . Clearly, initiatives do allow for decisive decisions on particularly sensitive, hard to resolve, issues.").

22. *See, e.g.*, Ratchford, *Red-Letter Achievements from Blue Ribbon Panels*, 51 STATE GOVT. 59, 59 (1979) (lamenting the fact that valuable reports of panels assigned to study various problems meriting legislative attention often "gather dust and the scorecard is poor for having recommendations translated into law and meaningful programs" and documenting the successful efforts of a blue-ribbon panel in Connecticut charged with studying the nursing home industry).

23. *See* Coffin, *supra* note 3, at 837.

II

Calabresi defines an obsolete statute as one which (1) no longer fits the legal topography and (2) lacks current legislative support. Courts using his doctrine would be on the lookout for statutes that "not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape" (p. 2). The centerpiece of Calabresi's doctrine, then, is the notion of a "legal fabric, topography, or landscape" (p. 51).

Ultimately, Calabresi believes it is appropriate to grant courts the power to call old statutes due because courts are better than other political actors at the "rational application of legal principles" (p. 96).²⁴ It is therefore reasonable to ask whether the central principle of his doctrine, the notion of a legal topography, is capable of consistent, rational application. If courts are not capable of applying the concept consistently, the essential justification for exercising the power Calabresi would grant them is undercut. This is not merely an analytic nicety. As long as courts can agree on the principles they apply, decisions in individual cases that are inconsistent with those principles or simply wrongly decided work only limited damage. But the danger of inconsistent application of a concept that would "induce" or "force" a legislative reconsideration is much greater, both because of the number of individuals affected and the likelihood that legislators will re-

24. Calabresi's perspective on the legitimacy question is functional. He states that the skills the court would be called on to use . . . remain judicial skills, and hence the legitimacy of their exercise remains the same as the common law. The power is legitimate because it results from the use of special judicial skills — analysis of the legal topography — and because employment of these skills tends, albeit indirectly and imprecisely, to adjust the law to deep majoritarian wishes.

P. 108. Compressed a little, Calabresi's argument is that courts can legitimately do whatever it is they are capable of doing as courts, because they are courts. Whether the arguments made for judicial intervention where failure of the legislative process threatens individual rights or the validity of the process itself from a participational perspective, *see generally* J. ELY, *DEMOCRACY AND DISTRUST* (1980), possess the same force when applied to mundane, workaday statutes is another question. Although Calabresi argues at length that adoption of his doctrine would not require courts to perform functions different from those performed at common law, his scheme surely represents a radical departure from existing practice. His reliance on a purely functional as opposed to a normative justification for the doctrine leaves him open, of course, to criticism from a functional as well as a normative perspective. Readers who believe that the judiciary should be limited to interstitial lawmaking because it is simply not "representative" will probably reject the doctrine on normative grounds, without regard to snazzy functional arguments. For them, Calabresi's legitimacy arguments will fail because they never progress beyond arguments of competency to address questions of political theory. *See generally* Dahrendorf, *Effectiveness and Legitimacy: On the Governability of Democracies*, 51 *POL. Q.* 393, 396 (1980) ("Effectiveness is a technical concept. It simply means that governments have to be able to do things which they claim they can do, as well as those which they are expected to do; they have to work. Legitimacy, on the other hand, is a moral concept. . . . This takes us straight into the confusions of moral philosophy, of course."); Grafstein, *The Failure of Weber's Conception of Legitimacy. . . Its Causes and Implications*, 43 *J. POL.* 456 (1981). Readers who equate competency with legitimacy will still have to evaluate the doctrine in terms of the plausibility of the claims Calabresi makes about the judiciary's ability to follow the "topography" and plumb majority sentiment.

Calabresi, of course, must reject the traditional wisdom that statutes are to be revered because they have been left undisturbed (p. 102). *See* J. ROUSSEAU, *THE SOCIAL CONTRACT* 135 (Penguin Books ed. 1968) ("Why then do ancient laws command so much respect? Precisely because they are ancient. We must believe that it is only the excellence of such laws that has enabled them to last so long; if the sovereign had not continually recognized them as salutary, they would have been revoked a thousand times.").

spond to "wrong" decisions by attacking the doctrine directly rather than by merely "correcting" courts.²⁵

The legal topography would include common-law decisions, statutes, administrative determinations, jury verdicts, enforcement patterns, scholarly criticism — in short, just about everything except the legislator's mail bag. But he offers no more than an enumerative definition of the topography; he lists virtually every conceivable landmark that might be found on an all-encompassing legal landscape²⁶ but provides no roadmap or compass to guide courts in their journey. Readers will have to judge for themselves whether Calabresi's topography is comprehensive and coherent enough to guide a judicial decision to induce legislative reconsideration *and* make that decision appear to a legislature to be a principled one. He anticipates the criticism that, as defined, his topography is "a confused landscape . . . a ragged map" (p. 99). His only response is a demure reminder that "limits as a practical matter remain" (p. 100).²⁷ One's willingness to embrace Calabresi's doctrine will probably depend on one's perception of where those limits might lie.

For Calabresi, the topography is both a comparative and a normative reference point. He would use it comparatively, as a sort of template, to gauge how far out of line a statute is with existing legal practice. Thus, workman's compensation laws or wrongful death statutes that limit the amount, or against whom, plaintiffs may recover might be inconsistent with

25. The risk of legislative repudiation of the doctrine is reduced somewhat by limiting the doctrine's use to the highest court of a jurisdiction and by imposing a "comity" limitation. Although Calabresi feels that an explicit delegation from the legislature would be desirable, he believes that this is not necessary. Whether the existence of law revision commissions or standing committees charged with performing the same function courts would perform under Calabresi's doctrine amounts to a negation of the discretion he feels courts have to adopt the doctrine without explicit delegation is nowhere considered. *See, e.g.*, MICH. COMP. LAWS §§ 4.311-4.327, 4.324 (1979) [Legislative Council Act] ("The law revision commission shall . . . [e]xamine the common law and statutes of the state . . . for the purpose of discovering defects and anachronisms in the law . . . [, and] recommend . . . such changes in the law . . . necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state . . . into harmony with modern conditions.").

26. Narrower, more precise definitions of topography are possible. Both Ronald Dworkin and George Christie have defended modelling the system of precedent as a set of data points; the judge's mission is to find the best fit among them. Both these theorists, however, confine the data points to cases, statutes, and constitutional provisions, the traditional elements of positive law. *See generally* G. CHRISTIE, LAW, NORMS AND AUTHORITY (1982); note 31 *infra*.

27. The footnote supporting this statement refers to "outside boundaries" that prevent judges from "decid[ing] cases as they would were they legislators or even disinterested guardians" (p. 256 n.37), without suggesting the limits of these boundaries. Ultimately, one must take comfort in the consolation that "[o]ne judge's views would win out only if enough other judges either found that they conformed to the legal landscape or, finding no adequate guidelines in the landscape, still shared the judge's guess of what the majority wanted or of what was right for the country." P. 100. The latter factor sounds a lot like what legislators are supposed to do. The first factor — consistency with the legal landscape — reformulates at a fairly high level of abstraction that characteristic of adjudication upon which legitimacy is generally premised — reasoned elaboration of a result from generally agreed upon premises. *See* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 116 (1922); Friedrich, *Authority, Reason, and Discretion*, in NOMOS I: AUTHORITY 28 (C. Friedrich ed. 1958). Whether the "topography" is clear and stable enough to function as such a premise is questionable; it seems more likely that each obsolescence determination will be largely *sui generis*, particularly in cases where a statute has preempted large portions of common law.

tort law developments allowing recovery without regard to fault or the plaintiff's relationship to the defendant. Calabresi believes that using the topography comparatively is justified because the topography also represents a normative datum or "starting" point: He argues that the topography fairly accurately "reflect[s] the underlying desires of a society as these have evolved" (p. 97).

Those who believe that judges inevitably indulge their own values regardless of the ordering principles they purport to rely on will probably dismiss the concept of a topography as an atavism of the formalist's theory of jurisprudence.²⁸ Even those who concede that judges cannot shed their values when they don their robes, but nevertheless welcome the countermajoritarian influence of judges as "disinterested generalists"²⁹ might question whether the topography can, as a practical matter, be applied.³⁰ It bristles with so many varied elements that it is difficult to be optimistic about the possibility of systematically defining its contours. Assuming that one is prepared to accept that there is a topography — an "out there" that can be discussed meaningfully — there is little in Calabresi's description of it to indicate any ordering principles.³¹ Thus, should the research suggesting that jury selection procedures result in unrepresentative

28. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1982). According to Unger, formalism supposes an immanent moral rationality whose message [can] be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories and tacitly presupposed by the unreflective common sense of orthodox lawyers. Most often, the sanctification takes the form of treating the legal order as a repository of intelligible purposes, policies, and principles, *in abrupt contrast to the standard disenchanting view of legislative policies.*

Unger, *supra*, at 571 (emphasis added).

29. Wellington, *The Nature of Judicial Review*, 61 YALE L.J. 486, 493 (1982). See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 102 (1982) (arguing that in cases involving individual rights "the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer . . . than is the political process left to its own devices").

30. This is not to say, however, that there is no support for the notion that judges can accurately apprehend the legal topography. Dworkin's theory of judicial mistakes turns on just such perceptions of the legal landscape; a precedent should be overruled, he argues, whenever the best justification for the entire legal system is stronger after overruling a decision than it would otherwise be. Dworkin applies this reasoning in two forms; a case or statute now simply inconsistent with the legal topography, but not fundamentally unfair, retains its specific authority but loses its gravitational force. That is, the principles of the old decision will not be extended in the decision of new cases, but situations precisely within the facts of the prior holding will still be resolved accordingly. Where fundamental fairness is at stake, Dworkin deems the inherent costs of overruling justified by eliminating the precedent complained of. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 110-23 (1978).

Interestingly, Dworkin does not go so far as Calabresi in repudiating *statutes* that are inconsistent with the legal topography. Hercules' "theory of legislative supremacy . . . will insure that any statutes he treats as mistakes will lose their gravitational force but not their specific authority." R. DWORKIN, *supra* at 122. But the comprehension of the legal topography involved in evaluating cases and statutes is of course the same. Those persuaded by Dworkin's account of precedent should not object to Calabresi's reliance on judicial perceptions of the legal topography.

31. Absent such principles, the value of Calabresi's contribution seems problematic: The topography is all content and no form, and therefore largely useless no matter how accurately it might be mapped. See M. POLANYI, *PERSONAL KNOWLEDGE* 139-40 (1962) (striving for "universal knowledge" of a world composed of "exactly determined particulars . . . is mis-

juries³² temper a judge's evaluation of their place on the topography? Should the prominence of a trend of common law decisionmaking in tort cases depend on whether a judge accepts Horwitz's, Posner's, or Schwartz's interpretation of the trend?³³ Are the determinations of an independent agency to be given greater weight than those of, say, the NLRB, on the theory that they are less subject to factious influence? Or vice versa?

Calabresi of course recognizes that these difficulties are, so to speak, part of the territory. He concedes that courts will sometimes err, and is careful to emphasize throughout the book that a judicial determination of obsolescence is "conditional" because it is subject to legislative reversal. He notes that in applying the topography courts will occasionally "ignore it . . . follow the election returns or their own values," but concludes that "these values, and their guesses on majority wishes, are not all that bad" (p. 101). Legislators, of course, feel the same way about their "values" and "guesses on majority wishes," and this suggests that the real question is whether legislatures are likely to be persuaded that courts, in employing the doctrine, would be doing something more than substituting their own values and assumptions for those that animated an old statute. The efficacy of the various "second look" doctrines Bickel urged probably derives from the context of their use — in cases that might be dubbed unconstitutional. But Calabresi's doctrine is not necessarily limited to statutes that, as he puts it, skate close to the constitutional line. Whether legislatures are likely to "view [an] issue soberly" (p. 26) on the basis of a finding that a statute does not fit a topography that only a court can chart, or that different courts chart differently, is the critical question. Legislatures that balk at honoring decisions that turn on constitutional "penumbras" are likely to be equally suspicious of such "topographical" holdings.³⁴

Suppose, however, that Calabresi's faith in the ability of judges to discern and follow the topography in a reasonably consistent fashion is by-and-large well-placed. The examples he draws on — a guest statute floundering in the wake of common-law developments, a statutory comparative negligence gloss that the common law bypassed, and others — suggest that in many cases the topography will be manageable because most of it will be irrelevant. But this is only half the battle: Even if a statute snags the

taken, since it substitutes for the subjects in which we are interested a set of data which tell us nothing that we want to know").

32. See, e.g., Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982).

33. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 67-108* (1977) (tort doctrine effected subsidy to developing industries); POSNER, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (tort doctrine accords with notions of economic efficiency); SCHWARTZ, *Tort Law and the Economy in Nineteenth-Century America: a Reinterpretation*, 90 YALE L.J. 1717, 1774 (1981) (concluding that tort doctrine evinced concern for victims).

34. Consider, for example, the proposed amendment to the Massachusetts Constitution which would extend the legislature's authority over abortion laws to the "outer limits" of constitutional doctrine:

Nothing in this Constitution shall prevent the General Court from regulating or prohibiting abortion unless prohibited by the United States Constitution, nor shall anything in this Constitution require public or private funding of abortion, or the provision of services or facilities therefor, beyond that required by the United States Constitution.

Massachusetts Senate Journal, Jan. 3, 1983, at 1375 (on file with the *Michigan Law Review*).

legal fabric, a judge must still determine whether the statute would be reenacted, whether it enjoys current legislative support.

Calabresi admits that "if the object were . . . to pick a body that could discern the current majority's wishes . . . we almost surely would not pick judges for the task" (p. 100),³⁵ but he argues that in deciding whether a statute is "no longer desired by a current majority," courts would be exercising a judgmental function analogous to the one they exercised at common law (p. 112). He observes that "[i]ncreasingly . . . it seems that courts are relying on their sense of what the majority wants to define the outward boundaries of their lawmaking," and concludes that as long as courts first "look to the landscape" to ascertain lack of fit, because this "reflect[s] a deeper popular will," the "guess, increasingly made at common law, as to majoritarian wishes will inevitably be made" (p. 113). Thus Calabresi completes the circle, tying the legitimacy of deciding when a statute lacks current support to the topography as an alembic for deep majoritarian wishes. Bringing statutes into conformity with the topography therefore partakes of the same legitimacy as common-law decisionmaking.

Unfortunately, the circle has been completed at a level of generality and abstraction that is miles above the nitty gritty of legislative politics. One therefore wonders if the "majority support" component of the obsolescence inquiry can really assist courts in deciding whether there is current *legislative* support for a statute, or whether, instead, courts would be operating as reversible Councils of Revision. In this connection, some readers might question in just what sense Calabresi is arguing that courts are capable of discerning majority wishes. Early in the book, in a footnote, he promises that he will use "majoritarian" in a "rather special sense"; he defines "majoritarian preference" to mean "whatever a current representative legislature would decide on a question to which it gives its full consideration" (p. 186 n.13). But the passages quoted above, with one exception, all seem to stand for the proposition that courts, when confronted with what are essentially policy choices, will often decide a question with reference to what they believe to be prevailing public sentiment, on the theory that this is likely to maximize utility or, at the least, minimize the antidemocratic consequences of judicial review. There is a world of difference between this inquiry and one which asks whether a legislature would reenact a particular statute unchanged or how the statute might be modified. The latter inquiry

35. Happily, Calabresi does not harangue the reader with an extended addition to the "courts are more democratic than . . ." debate. His doctrine straddles the uncertain line between article I and article III and his approach is accordingly fully comparative. The eloquence with which he frames the inquiry makes it dangerous not to quote him at length:

Not so readily resolved is the question of whether skill at discerning current popular support, capacity to analyze and follow the legal topography, or endowment with a trustworthy sense of values is most important in the updating of timeworn laws.

The decision must depend, in part, on how common are the situations that are well handled by each approach. It must also depend on how poorly each approach would deal with those situations it is not best suited to handle. . . . Ideally, the task of deciding when the burden of inertia should be shifted would be placed on a body that has all three qualities.

Such a body is not available. . . . Courts do, however, have an advantage over alternative institutions. They are not clearly unsuited to the tasks at which they are not particularly good.

Pp. 110-11.

would involve courts in analyzing committee politics, interest group positions, whether there have been any efforts to change the statute in the past and why those efforts have failed, etc., — in short, a review of the complexities of the legislative process, preferably from the perspective of those interests associated with the specific issues the statute reflects.³⁶

The potential for rather wide divergence between a court's perception of majority sentiments and the majoritarian forces actually operative in the legislative arena suggests that, in all but the simplest of cases, the former is unlikely to be a useful surrogate for the latter. The majority sentiment prong of the obsolescence test appears to be mere window dressing, designed to appease those who would reject the proposition that courts should be able to force legislative reconsideration of a statute whenever it does not fit the topography. But how can the doctrine amount to anything more than this if the courts rely on a notion of majority sentiment that ignores the vagaries and distortions of the legislative process itself? Calabresi's answer to this is that a court's perception of majority sentiment is adequate to serve as a starting point. From this starting point, the argument goes, legislative reconsideration can proceed and the reconsidered statute will at least be the product of a more recent majoritarian decisionmaking process, and it might even fit the legal topography better.

The first point is true, but trivial. It is true because whenever a legislature reconsiders a statute the outcome is by hypothesis a "majoritarian"

36. Clearly, courts are not capable of undertaking the "majoritarian" analysis necessary to decide whether a particular legislative committee or legislature would countenance a statute's current lack of "fit" with the legal topography. They are not privy to the information needed for such an analysis, and the intricacy and uncertainty of the legislative process would reduce such an effort to a guessing game. Accepting Calabresi's premise that judicial review of the common-law variety is legitimate because courts are in some way restrained by majority wishes does not lead one smoothly to the conclusion that courts are also capable of deciding when a statute is no longer desired by a legislative majority; this transmutes what is most often offered as an apology for judicial review into a positive virtue. *See, e.g.,* L. HAND, *THE BILL OF RIGHTS* 15 (1958); Cooper, *Mr. Justice Hugo L. Black: Footnotes to a Great Case*, 24 *ALA. L. REV.* 1, 5 (1971).

If one adheres to the view that there is often no real majority sentiment on most issues, but only an ongoing tussle between constituencies that is occasionally settled by legislation, the proposition that courts can discern majority sentiments better than legislators on such issues seems weak indeed. The judicial assessment of majority wishes therefore seems to add very little one way or the other to the doctrine, at least in cases involving statutes that are more complicated than the straightforward, single-issue affairs that Calabresi uses as his primary examples. Guest statutes, contributory negligence statutes and statutes that limit wrongful death recoveries present attractive cases for arguing that courts can assess majority sentiment because the issues are simple and preferences can be easily hypothesized since they divide neatly into obvious categories. It is difficult to believe that, for more complicated statutes, the majority sentiment prong of the obsolescence inquiry can lead to determinate answers. If a statute involves several issues with respect to which individual rank order preferences among individuals may vary, or with respect to which the rank order preference of a single individual may vary, depending on what preferences will be honored, it is essentially meaningless to speak of a single, identifiable "majority preference." *See generally* K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); A. MACKAY, *ARROW'S THEOREM, THE PARADOX OF SOCIAL CHOICE* (1980). And of course courts cannot take account of the various interests extrinsic to any single piece of legislation that inevitably engender compromise and trade-off in the actual legislative process. There may be some Burkean merit to considering single statutes in a rarified manner, but it is difficult to conclude that this comports with traditional modes of assessing majority preference.

one. It is trivial because it tells us nothing about whether a court was "correct" in remanding the statute. Whenever a legislature does anything more than pass a *pro forma* resolution indicating that a statute stands, warts and all, the new statute will almost always differ from the old one, if only because the legislative environment — the coalitions that form around the legislation, the logrolling, the vote trading, etc., — shifts from one session to the next. Thus, if the remand is taken seriously, *i.e.*, if the issue is tossed back into the legislative hopper, the law probably will not resurface in precisely the same form. If this is the criterion for deciding whether the guess as to majority sentiments was correct, courts will rarely be demonstrably wrong. Why a new pluralist mishmash is better than an old one, however, is unclear, unless we have some reason to suspect that in addition to being newer the revised statute will have something else to offer. That "something else," of course, must be derived from the reasons that caused a court to send the statute back in the first place if Calabresi's doctrine is to have any internal validity.

The "something else" a new statute should have, if Calabresi's doctrine is to be distinguished from the approaches he rejects, is consistency with the topography. It is not enough to say that the doctrine is desirable because it causes legislatures to consider issues that have not been considered for some time. This is just what sunseting does, and Calabresi rejects sunseting precisely because it ties reconsideration to a calendar. And it doesn't add much to the doctrine to argue that it will tend to select out those statutes that are most in need of reconsideration from a "majoritarian sentiment" perspective if, as is likely to be the case in practice, a court's perception of majority sentiment is blind to the far narrower majoritarian forces that will inform the process of reconsideration. Newer is not necessarily better;³⁷ a decision that an abstract majority would prefer a different statute is a rather poor predicate for sending a statute back into a legislative cauldron that might yield up any number of different brews, some savory, some not. And even if courts *were* able to plumb majority sentiment better than legislatures on issues that most people have no opinion on one way or the other, the deficiencies of the judicial system as a representational arena³⁸ surely caution against granting courts the power to displace the legislative agenda unless some very real gains in terms of consistency with the topography are

37. And the old law may be better than no law at all, depending on who is left holding the power. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95, 139 (1974) (citing study concluding that liberalization of censorship law "did not make censorship boards more circumspect; instead, many closed down and the old game between censorship boards and distributors was replaced by a new and rougher game between exhibitors and local government-private group coalitions").

38. That courts attract interest groups which are incapable of achieving their objectives through the political process is well known. See, e.g., M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 34-37 (1966). The death penalty cases illustrate that devoted advocates are as adept at pressing their cause as lobbyists, see Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1112 (1973), and courts adopting Calabresi's doctrine should expect interests that have lost in the legislature to turn to litigation. At a minimum, the doctrines governing standing and intervention would have to be reappraised in light of the obvious need for a balanced perspective on the question of a statute's obsolescence.

likely to result. How likely is the application of the doctrine to produce such a result?

III

The short answer to that question is: it depends. It depends on how the doctrine is applied. In its simplest form, the doctrine would amount to no more than remanding a statute — *i.e.*, sending it back for legislative reconsideration. In other cases, if the courts knew what form a new rule should take — what would be consistent with the legal topography — they would merely begin to update the statute themselves. Or courts could nullify a law, or some portion thereof, if they were sure that the law was important enough that the legislature would reconsider it promptly.³⁹ They could borrow statutes from other jurisdictions, if they thought this was appropriate, and they could give all of this retroactive or prospective effect, depending on what they thought was most likely to elicit legislative response. And “[p]erhaps most important, they can *do* none of these things, but *threaten* to do any or all of them, if a legislature or administrative agency does not act quickly. They can shape that legislative or administrative action by announcing, or by failing to announce, what they will do in the absence of such action” (p. 148) (emphasis in original).

This is dialogue with a vengeance. The aim is “to ask, cajole, or force . . . the legislature . . . to define the new rule or reaffirm the old” (p. 166). If there are “asymmetries in inertia,” courts can properly place the “burden of inertia” on the side that can more easily obtain majoritarian consideration of the statute (p. 126); if a recent statute was the “result of inadvertence, overreaction to a particular set of events, or a legislative response to a temporary majority at war with more persistent social views,” courts can send it back for reconsideration; if a statute presents “constitutional, paraconstitutional, or deep structural doubts” (p. 135) and courts are themselves unwilling to invalidate the statute on constitutional grounds, they can question whether it might have been “enacted hastily and without the full consideration that would suggest more than temporary majoritarian support” (p. 136). If all of this suggests that courts would be doing more than humbly submitting statutes for reconsideration — a vote of confidence if you will — the examples Calabresi uses will do little to dispel any doubt that he, too, has an agenda. Thus we are informed that “correct use of the doctrine may do away with [obsolete] statutes that are themselves a major cause of court congestion” (p. 143) by eliminating, for example, “outworn compensation laws” that have resulted in the “expensive and court-burdening end run represented by product liability suits” (p. 143). And “crisis laws” such as “fair trade” legislation, “emergency rent controls,” and “emergency malpractice laws that place restrictions on recoveries alien to the rest of tort law” which do not find support in the topography are de-

39. The somewhat lax congressional response to the Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), may leave readers unsure of when legislation is so “important” that swift reconsideration is certain. *See* 41 CONG. Q. WEEKLY REP. 79 (Jan. 8, 1983). *See also* F. COFFIN, *THE WAYS OF A JUDGE* 176 (1981) (noting wistfully that judicial suggestions for legislative reform are almost always ignored).

scribed as the “very statutes that most justify the use of the doctrine here described” (p. 133).

Not surprisingly, Calabresi is most comfortable with statutory examples he is familiar with, and those with respect to which he has definite opinions. The reader is left to guess what the topography might dictate in other areas of the law — particularly areas like property and criminal law — that are stubbornly state-specific despite centuries of debate over what ends these laws should serve and how those ends might best be effected. No matter; other scholars can perform the cartography necessary to map these areas. Everyone has an agenda. If the current literature on constitutional law teaches anything, it is that, and it is hard to shriek “eureka” with much feeling anymore when one peels a doctrine bare to find values at the core.⁴⁰ And it is difficult to fault the value Calabresi is pursuing, despite whatever quibbles one might have with the examples he uses. The value his doctrine hews to, after all, is one that goes to the heart of the legislative process: a deliberation that is both representative and reasoned.⁴¹

Because Calabresi accepts legislative supremacy, a current legislative decision is a representative one. That much, then, is out of the way, despite the fact that the majority sentiment portion of the obsolescence inquiry is a crude predictor of whether a statute lacks current legislative support and despite the fact that the doctrine is blind to laws that “fit” the topography but might lack current support. “Reasoned” deliberation is another story.

Calabresi’s suspicion that the legislative process is anything but reasoned is manifest throughout the book. He questions whether “one [can] truly say that legislatures viewed the [death penalty] issue soberly” in the wake of *Furman*⁴² (p. 26), and he exhorts courts to use the doctrine to ensure that a “clash [with the topography] is the result of genuine and *considered* wishes of majoritarian bodies” (p. 136 (emphasis original)), and that constitutionally doubtful laws are enacted “clearly, openly and responsibly.” In sum, the courts would assume a role that “encourages the legislatures to act responsibly” (p. 165). But if legislative responsibility means an end result that is either more consistent with the legal topography or the product of a different level of legislative attention, a simple remand of the statute is likely to yield neither.

The reason why simple reconsideration will not necessarily yield greater consistency with the topography hearkens back to the phenomenon of legislative inertia. Calabresi employs legislative inertia as a setpiece in his analysis; in his haste to prescribe a cure, he devotes little time to exploring the cause of the problem his doctrine addresses. He cites another commentator for the proposition that “getting a statute enacted is much easier than get-

40. See Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1109 (1981) (“most of our writings are not political theory but advocacy scholarship — amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good”).

41. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 212 (1967) (“Political life is not merely the making of arbitrary choices. . . . It is always a combination of bargaining and compromise where there are irresolute and conflicting commitments, and common deliberation about public policy, to which facts and rational arguments are relevant.”).

42. 408 U.S. 238 (1972).

ting it revised" (p. 6) and proceeds with his analysis.⁴³ But the proposition is demonstrably false, as a glance at either a cumulative "table of statutes affected" or the statistics on the volume of legislation — state or federal — will quickly reveal. Most legislation adds to or amends existing legislation; very little tills totally new ground.⁴⁴ That Calabresi devotes little attention to what legislative inertia is, and how it operates, is best illustrated by his discussion of the Supreme Court's struggle to keep the Federal Employer's Liability Act abreast of then current tort law by consistently interpreting it to allow plaintiffs to get to a jury with their claim:

One may well ask why Congress did not revise the laws and save the Court the trouble. But the reasons, grounded in the complex interplay of interest group politics, are of no special significance. Legislative inertia, absent Court action, was a fact of life in this area. [P. 34.]

Far from being "of no special significance," the "complex interplay of interest group politics" is the very stuff of legislative inertia; and there is little reason to suspect that, in most cases, it will be any less a fact of life when a statute is bounced back for reconsideration.

It simply is not plausible to argue that statutes, even very old statutes, are negative sum games, imposing useless costs that everyone would simply rather do without. They are, instead, most often zero sum games: one group's loss is measured by another's gain. They distribute benefits to some at the expense of others; those who bear the expense will not hesitate to shift their burden if they can make out an argument that *they* are now the relevant majority. And legislators know, as courts can never know, the peril of ignoring such arguments. Once passed, a particular statute often remains in force for precisely the same reason it was enacted originally: A small number of intensely interested individuals or groups will devote much time, effort and money to an issue because they have a much greater stake than the public at large in the statutory outcome.⁴⁵

Indeed, Calabresi's own examples illustrate this best. The economist may know that rent control debilitates housing stock and narrows consumer choice, but it is obvious why those laws remain in force. And it is equally obvious that neither microeconomic nor macropolicy arguments ("a still predominantly 'free price' society" (p. 133)) are likely to dislodge such laws. The "emergency" legislation Calabresi is concerned with may be borne of crisis, but it creates its own constituency.⁴⁶ And if the passage of legislation capping recoveries in products liability and medical malpractice suits indi-

43. P. 6 (citing G. GILMORE, *supra* note 8, at 95).

44. See, e.g., Rosenthal & Forth, *The Assembly Line: Law Production in the American States*, 3 LEGIS. STUD. Q. 265, 269 (1978) ("Very few [statutes] create policies or programs from scratch; most amend existing law. Many add to already substantial regulations. Many are local legislation having only limited impact. Only a handful of all those introduced command widespread interest; not many more provoke intense controversy.").

45. See Pennock, *Another Legislative Typology*, 41 J. POL. 1206, 1208-09 (1979) (analyzing statutes conferring particularized benefits and exacting generalized costs as unlikely to produce either intra-interest group conflict or taxpayer resistance).

46. The sixty-year-old American antidumping statute, 19 U.S.C. §§ 1202-1677 (Supp. II 1979), is a classic example. In recent years the statute has been most frequently invoked by industries that have suffered from competitive imports, see Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean to U.S. Trade Policy*, 11 LAW & POL. INTL. BUS. 1361, 1364, 1374 (1979) (brackets in original)

cates anything, it is that defendants know an "end run" when they see it.⁴⁷ And what of the obsolescence of fair trade laws now, when the latest word is that resale price maintenance is no longer taboo?⁴⁸ The only really good example of out-and-out legislative perversity that Calabresi adduces is the persistence, in several states, of limitations on wrongful death recoveries. But the example is dated, as he concedes, because "[t]his particular problem has been remedied by the legislatures" (p. 40). He is correct in pointing out that inflation has taken legislatures by surprise (p. 40), but it seems that courts have also had a little difficulty with the concept.⁴⁹

But all this goes only to reinforcing the point made earlier regarding the "mismatch" between the vague majority-sentiment inquiry courts would conduct and the rather sharp jumble of majoritarian forces a statute would confront upon reconsideration. This mismatch augurs poorly for the predictive power of the doctrine, to be sure, but it does not militate against using the doctrine if one is confident that courts can, and *should*, redirect the legislative agenda. And if we assume that the topographic concept can be operationalized in a manner that will persuade legislators as well as the courts, it is possible that legislatures might make a concerted effort to reconsider those statutes brought to their attention by the courts.

This is an empirical question; different states will respond in their own way to such suggestions. Calabresi notes in passing the existence of law revision commissions, but fails to note that many states have committees or commissions charged with evaluating the statutory landscape for obsolescence.⁵⁰ Some of these commissions and committees also monitor state court decisions, bringing suggestions and criticisms to the attention of the relevant legislative committee.⁵¹ His doctrine may add some urgency to such requests, but the staggering volume of legislation, at least at a state level, makes one less than sanguine that legislatures are likely to give a more reasoned consideration to an open-ended judicial request for reconsideration than they have in the past to the detailed suggestions from their

(most antidumping cases initiated by steel and chemical industries; cases are "pimples on the trade landscape").

47. In fact, there has been considerable pressure for a uniform federal law on products liability; opposition to date has come, as one might expect, from lawyers. See 51 U.S.L.W. 2474, 2475-76 (Feb. 15, 1983) (report of Mid-Year Meeting of the American Bar Association) (committee reaffirms ABA's opposition to proposed national products liability legislation).

48. See R. BORK, *THE ANTITRUST PARADOX* 288-91 (1978).

49. See, e.g., Comment, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U. CHI. L. REV. 1003 (1982); Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 YALE L.J. 297 (1981).

50. See note 19 *supra*.

51. See, e.g., ALASKA STAT. § 24.20.065(a)(1-3) (1979 Supp.) (requiring state legislative council to "annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes . . . to determine whether or not . . . the courts and agencies are properly implementing legislative purposes . . . [, or whether] there are court or agency expressions of dissatisfaction with state statutes . . . [, or whether] the opinions or regulations indicate unclear or ambiguous statutes."); cf. ALASKA LEGISLATIVE AFFAIRS AGENCY, REPORT OF EXAMINATION OF COURT DECISIONS CONSTRUING ALASKA STATUTES RENDERED BY THE SUPREME COURT OF ALASKA ii (1977) (introduction of report states that "Part Two consists of cases where the court specifically requests legislative guidance on an issue which is unsettled under existing law").

own staff as to how a law — even a fairly picayune law — should be modified.

Calabresi would skirt many of these difficulties, however, by suggesting how courts might best promote dialogue between themselves and the legislatures. The disadvantages of this, of course, are that if courts assume the more active role in this dialogue they risk displacing from the legislative agenda other issues that might have been considered and they invite a legislative response that will, in time, be no response at all. The first point may seem trifling unless one appreciates just how many statutes a typical legislature considers, and under what sort of constraints it operates.⁵² Adding a “sub-docket” of statutes that courts are troubled by may well leave less time for issues that legislatures have addressed because — is it possible? — the courts have not.⁵³ Shield laws, legal death statutes and school refinancing bills come to mind. The second point, however, is more bothersome. Again, a glance at the statistics on state legislation is helpful, if somewhat depressing. Whatever problem statutory obsolescence presents now, it is sure to grow worse in the future. The well-known tendency of Congress to pass the buck to the federal courts through vaguely worded statutes may make readers less than comfortable about accepting a doctrine that would let legislators comfort themselves with the notion that courts can also decide how an old statute should be modified. Then instead of courts telling litigants that they should argue their case to Congress, Congress can tell constituents that they should argue their statute to the courts.

IV

There can be no doubt that this book should be read by everyone concerned with the legal process. The scholarly interest that this book has already produced⁵⁴ suggests that it will be widely read, if not widely accepted. Debate about the role of judges will no doubt continue, and Calabresi's novel theory is likely to become a point of reference. Whatever the ultimate merits of Calabresi's doctrine, his lucid and scholarly exposition is

52. In New York, for example, 21,682 bills were introduced in the 1979-1980 regular session; 734 of these bills were enacted into law. And of course there are resolutions — generally these are of little moment, but they do take up legislative time. Again, New York leads the pack with 1,503 resolutions introduced and 1,408 passed for the 1979 portion of the 1979-1980 session. See COUNCIL OF STATE GOVERNMENTS, 1981 BOOK OF THE STATES 206-7 (Table 13) (1982). The 50 state average for bills enacted in 1975-1976 was 853, Rosenthal & Forth, *There Ought to be A Law!*, 51 STATE GOVT. 81 (1978). Although the number of bills introduced in state legislature has increased sharply in recent years, see Rosenthal & Forth, *supra* note 44, at 272, the number of bills enacted has not increased proportionately. This suggests that many legislatures might be functioning at or near institutional limits.

53. See, e.g., Kurfess, *State Legislatures: A Record of Accomplishment*, 47 STATE GOVT. 247 (1974) (citing campaign finance reform (40 states), conflict of interest legislation (36 states) comprehensive land use planning (12 states), and public financing of education as areas where state legislatures had taken policy initiatives.); *Legislating Death*, 49 STATE GOVT. 130, 134 (1976) (“Medical developments over the last several decades have created situations raising legal questions which are not adequately resolved by common law or existing statutes. In addressing the issues of criteria for the determination of death and guidelines for dealing with dying persons state legislatures will face many problems . . . [T]he need to confront these issues . . . is inevitable.”).

54. See note 3 *supra*.

valuable for the light it casts into the misty area which separates legislative from judicial functions.

But Calabresi's doctrine is too big for the small problems, and too small for the big problems. The small problems — wrongful death limitations and archaic contributory negligence rules — do not justify revamping the legislative/judicial balance. For the big problems — those resulting from the inherent dynamic of majoritarian politics — provoking legislative reconsideration of senile statutes is unlikely to produce a more consistent body of positive law.

The failure, however, is not one of vision on Calabresi's part. He is "a man who wishes to make a profession of goodness in everything" and he therefore "must necessarily come to grief among so many who are not so good."⁵⁵ Let the people complain to those who make the laws if the laws fail to pace the times. Meanwhile, courts ought to keep quiet about the subterfuges they use to do justice when someone is caught between a rock and a statutory hard place.

55. N. MACHIAVELLI, *THE PRINCE* ch. XV (Modern Library ed. 1968).