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Judicial Modification of Statutes: A Separation of Powers Defense of Legislative Inefficiency

I. Introduction

The separation of powers scheme prevents any branch of the federal government from exercising authority constitutionally delegated to another branch. Beyond this, the separation of powers scheme also defines particular procedures for each branch to follow in exercising its own constitutional authority. While Article III confers some jurisdiction on the Supreme Court to decide particular cases, Article I confers on a bicameral Congress of elected representatives the power to make laws subject to executive veto. These procedures create unique institutional interests in each branch. To exercise its judicial power under Article III, the Supreme Court must resort to principled extrapolations from existing law to find rules of decision fitting the specific facts of each case.

This institutional concern with consistency of principle is not a primary concern in Congress, where the representation, debate, and compromise of opposing principles are the hallmarks of the procedure set up by Article I. Hence besides ensuring that Americans will not be governed by one body, the separation of powers scheme guarantees that they will be ruled by diverse philosophies of just government enshrined in co-equal branches. In the interest of diversity, deliberation, and compromise, the Constitution requires a certain degree of inconsistency in our national policy.

Contrary to this view, certain scholars have urged that federal and state courts impose consistency of principle upon legislatures.

1. U.S. Const., arts. I, III.
2. Professor Alexander Bickel acknowledged something similar to this when he wrote that "'[t]he search [for the Supreme Court's role] must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions . . . [and] which is peculiarly suited to the capabilities of the courts . . . ." A. BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962); see also Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L. J. 221, 246-47 (1973).
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Professors Guido Calabresi, Jack Davies, and Grant Gilmore argue that American legislatures have enacted innumerable laws in this century, thereby transforming our legal system from one dominated by the common law to one dominated by statutes. They chastise legislatures for insisting that every proposal to revise these statutes in accordance with changing social conditions be extensively debated. Such adherence to the procedural inefficiencies of legislative process, they believe, has resulted in a backlog of "obsolete" statutes. As a result, courts have had to choose between applying anomalous statutes, which often lead to unseemly results in particular cases, and nullifying those statutes by various means of subterfuge, including the misuse of constitutional law. Although their proposals differ, Calabresi, Davies, and Gilmore agree that courts should openly modify inconsistent statutes as if they were outdated common law precedents. Calabresi adds that courts should make such modifications of statutory law only when the current legislative majority would support them.6

These proposals are defective because they use judicial criteria to judge legislative process. The primacy of debate and compromise in our legislatures necessarily implies that stalemate is a desirable feature of legislative process. Only the threat of prolonged stalemate can help legislative minorities extract concessions from the majority, and thereby prevent easy majoritarianism. When stalemate is broken the price is naturally some compromise between the contending ideals represented in the legislature. Courts cannot ethically nullify these features of the legislative branch merely to satisfy their institutional interest in consistent rules for deciding cases.

II. The Origins of Current Proposals for Judicial Updating of Statutes

Academic endorsement of systematic judicial modification of valid statutes is a recent development. In The Ages of American Law Gilmore observes that from 1900 to 1950 our legal system experienced "an orgy of statute making,"7 a phenomenon which Professor Alex-

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5. Here the term "inefficiency" refers to legislatures' inability to establish the will of a majority of their members and turn it quickly into law.

6. CLAS, supra note 4, at 91-119.

7. AGES OF LAW, supra note 4, at 95. See also Davies in Context, supra note 4, at 238 ("Conservatives and liberals alike had come to think that the road to salvation was paved with statutes").
ander Bickel called "the natural trend . . . toward the transfer of
policy-making authority on one subject after another from judges to
legislatures." Besides this proliferation of statutes, Gilmore also
identifies a related problem involving legislatures' inability to up-
date the law:

One of the facts of legislative life, at least in this country in this cen-
tury, is that getting a statute enacted in the first place is much easier
than getting the statute revised so that it will make sense in the light of
changed conditions.  

As a combined result of the proliferation of statutes and legisla-
tures' inability to modify them "in the light of changed conditions,"
Gilmore argues that our legal system is experiencing a crisis of stat-
utory obsolescence. To illustrate his definition of statutory obso-
lescence and its remedy, Gilmore refers to a series of Supreme
Court admiralty cases of the 1950's and 1960's which play a leading
role in the development of the school of thought on judicial updat-
ing of statutes. One of these is Reed v. Steamship Yaka. There the
Court considered an admiralty libel in rem brought by a longshore-
man against a steamship. Reed had been injured aboard the vessel
while loading it, and sought to recover damages for unseaworthi-
ness. The Yaka's owner brought Reed's employer into the suit as
an additional defendant, alleging that the employer had been oper-
ating the vessel as owner pro hac vice pursuant to a bareboat char-
ter, and that the employer was therefore the proper party to
answer for the vessel's condition.  

The United States Court of Appeals for the Third Circuit held
that the longshoreman could not recover damages for unseaworthi-
ness against the vessel's owner because the vessel had been demised
to the employer pursuant to a bareboat charter. The Court also

9. AGES OF LAW, supra note 4, at 95.
10. Id. at 93-96.
11. These cases are important in the development of the school because they first
suggested judicial updating to Gilmore. See, e.g., Jackson v. Lykes Brothers Steamship
13. Id. at 410-ll.
14. Id. at 410-12. Under a "bareboat" charter the charterer is treated as the owner
for most purposes, has "full possession and control of the vessel" for a specific time, and
is generally called the owner "pro hac vice." Id. at 412.
15. Reed's employer admitted in brief that "[w]hether we call him bareboat char-
ter, owner pro hac vice, or demisee, it is he who 'is the warrantor of seaworthiness.' "
Id. at 412, n. 7. In this case there was an indemnity clause in the bareboat charter agree-
ment. Id. at 411.
16. Id. at 4ll.
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held that, in turn, the Longshoremen’s and Harbor Workers Compensation Act (LHWCA)\(^7\) expressly protected the employer from all liability except that imposed by the Act.\(^8\)

In reversing the Court of Appeals, the Supreme Court, per Justice Black, noted that the employer relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to [the employer’s] construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area . . . the holdings of which have been left unchanged by Congress.\(^9\)

In these “prior cases,” the Court had gradually expanded harbor workers’ right to recover from shipowners on the basis of unseaworthiness,\(^20\) and shipowners’ right to recover in turn from independent contractors.\(^21\) These precedents had thus shifted the economic burdens of maritime accidents increasingly to employers. Defending the pro-labor policies articulated in these precedents, the Court held in \(Reed\) that a harbor worker could recover damages for unseaworthiness directly from his employer. Justice Harlan, joined by Justice Stewart, dissented, arguing that “[t]his decision goes further than anything yet done by the Court in . . . admiralty cases . . . to do what it considers ‘justice’ . . .”\(^22\) Harlan characterized Black’s majority opinion as having “effectively ‘repealed’ a basic aspect” of the Act, with “violence done to the statutory scheme.”\(^23\) Harlan’s choice of strong words might be best understood in light of the relevant section of the Act, which provided that “[t]he liability of an employer prescribed in section 4 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death.”\(^24\)

In opposition to that clear statutory language, however, stood the Court’s evolving conception of “justice.” Relying on an earlier dissent by Justice Black, Harlan noted that when Congress passed the Act in 1927, it “struck what was considered a fair and constitutional balance [between workers and employers]. Injured employees thereby lost their chance to get large tort verdicts against their em-

\(^{17}\) 33 U.S.C. §§ 901-950 (1927).
\(^{18}\) The act did not provide recovery for unseaworthiness. Reed v. The Yaka, 373 U.S. at 411-12.
\(^{19}\) Id. at 414.
\(^{20}\) Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
\(^{22}\) Reed v. The Yaka, 373 U.S. at 416 (Harlan, J., dissenting).
\(^{23}\) Id.
ployers, but gained the right to get a sure though frequently a more modest recovery.” Yet Harlan admitted it would have made “little economic sense” for the Court to have favored harbor workers in one set of cases and not in *Reed*, even though the language and history of the Act directed the *Reed* court to decide against workers. The majority in *Reed* believed that as the case law had evolved, justice required that the plaintiff recover because the alternative outcome would have disadvantaged a worker on the basis of what had become an anomaly in the evolving structure of legal recovery. For his part, Harlan stated in *Reed* that “any anomaly between [earlier Court decisions] and [*Reed*] should be left to Congress to remedy.”

Gilmore sees that episode in admiralty jurisprudence as part of a broader picture. In cases applying the Jones Act, which provided that seamen or their representatives “may recover for death or injury caused by ‘negligence’ attributable to their employers,” the Court gradually nullified the requirement that seamen plaintiffs prove negligence. Similarly, cases involving the LHWCA gradually nullified the Act’s protections for employers. Gilmore’s endorsement of these cases suggests that for him the more recent developments in case law set a standard against which to measure older statutory rules. Even Congress’ original intent should be subject to such scrutiny. In the Jones Act and LHWCA cases, as in *Reed*, the Court reasoned that Congress’ original intent to benefit labor was consistent with subsequent court decisions, while original countervailing benefits for capital were not. This theory of obsolescence in these cases suggests that an original statutory intent, expressed clearly in the statute, is obsolete if it has become inconsistent with legal developments since the statute was enacted. The appropriate remedy for such obsolescence, according to Gilmore, is judicial modification, “as legitimately within judicial competence as the reformulation of an obsolete common law rule.”

The attractiveness of these notions to the judiciary should not be

26. *Id.* at 418
27. *Id.* at 417.
28. *Id.* at 419.
29. *AGES OF LAW*, supra note 4, at 143-44, n. 58; *GILMORE & BLACK*, supra note 14, at § 6-56.
31. *See AGES OF LAW*, supra note 4, at 144.
32. 33 U.S.C. §§ 901-950; *AGES OF LAW*, supra note 4, at 144.
33. *AGES OF LAW*, supra note 4, at 95.

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underestimated. In 1970 Harlan wrote an opinion for a unanimous Court in which he abandoned the premises of his Reed dissent.44 An old Supreme Court precedent, The Harrisburg, had held that no remedy for wrongful death existed in general maritime law.35 State and federal statutes had attempted to provide such a remedy in limited circumstances.36 In Moragne v. States Marine Lines,37 a plaintiff found herself caught in a “gap” in the federal and state wrongful-death statutory scheme resulting from legislative rejection of the old rule.38 Writing for the Court, Harlan determined that “Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner.”39 He then “remove[d] a bar to access” to the substantive provisions of the Death on the High Seas Act40 by extending its scope to cover the plaintiff’s situation.41

37. 398 U.S. 375 (1970). For the Court’s reading of the relevant statutory scheme, see id. at 388-90.
38. Edward Moragne was a longshoreman working aboard a vessel owned by States Marine Lines, Inc., when he was killed in Florida territorial waters. His widow brought suit in state court against States Marine for wrongful death and for the pain and suffering of her husband prior to death. Mrs. Moragne advanced two claims: negligence and the unseaworthiness of the vessel. States Marine obtained removal of the case to federal district court on diversity grounds, and filed a third-party complaint against the decedent’s employer, Gulf Florida Terminal Co., on the basis of the stevedoring contract. The district and appellate courts agreed that Mrs. Moragne’s unseaworthiness claim against both defendants had to be dismissed. They relied on the rule of The Harrisburg that “general” maritime law provided no wrongful-death recovery within a State’s territorial waters, and on Florida’s rule excluding unseaworthiness as a basis of liability. Moragne v. States Marine Lines, Ltd., 398 U.S. at 376-77. In that sense, then, one of Mrs. Moragne’s bases for claims against the co-defendants “fell through a gap” in the law. If her husband’s death had occurred outside Florida’s territorial waters Mrs. Moragne would have been “covered” by the statutory scheme and her unseaworthiness claim may have survived on the merits.
39. Id. at 393.
41. Moragne v. States Marine Lines, Ltd., 398 U.S. at 405-06. The Court noted that since The Harrisburg had been decided “[a] development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule’s injustice that generated so much criticism of its original promulgation.” Moragne v. States Marine Lines, Ltd., 398 U.S. at 388. The Court went on to discuss judicial and legislative rejections of the ancient rule. After examining related statutes, see supra note 36, the Court concluded that “[t]his legislative establishment of policy carries significance beyond the particular scope of
Moragne represents a victory for the jurisprudential theory which Gilmore identified in the Jones Act and LHWCA cases. The Court applauded Congress' intent to provide some wrongful-death remedies under the Death on the High Seas Act, but rejected as unjust the harm inflicted upon the plaintiff by Congress' failure to legislate broadly in favor of wrongful-death remedies. The Court did not consider important the possibility that Congress had left gaps in the federal statutory scheme in deference to the discretion of the states to regulate wrongful-death recovery within their territorial waters.42

III. Calabresi's Twist: Democracy Versus Checks and Balances

Calabresi endorses Gilmore's analysis of these admiralty cases, but goes further by adopting Black's emphasis in Reed on congressional acquiescence to judicial 'updating' of statutory law.43 For each of the statutes involved." Id. at 390. The Court did not, however, go on to explain why or how this was so.

42. With regard to federal preemption of State law, the Court noted that "[t]he void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem." Id. at 398. However, since 1920 "[t]he unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act. . . . The resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be damnum absque injuria unless the States expand their remedies to match the scope of the federal duty." Id. at 399-400.

This reasoning presents new problems in light of the Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985). There, the Court stated that the best guarantor of States' rights should be the political process rather than the federal courts. In Moragne, 398 U.S. at 401 n. 17, however, the Court acknowledged that the precise issue before it was then pending in a bill in the Senate, but nevertheless decided to shortcircuit the legislative process. There exists a conflict between these two decisions: Congress cannot serve as the guarantor of States' rights if the Court so preempts legislative process. See Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 COLUM. L. REV. 1024 (1967); Cf. Note, The Federal Common Law, 82 HARV. L. REV. 1512, 1523-26 (1969).

Although the Moragne Court invoked the principle that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," 398 U.S. at 405 n.17, earlier in its opinion the Court had dedicated considerable effort to showing that Congress had preempted judge-made law in this area because Congress had found unjust the Court's use of its subordinate admiralty powers to bar wrongful-death recovery. Id. at 388-405.

43. Vermont Comment, supra note 4 at 250. See also Davies in Context, supra note 4 at 241. Davies's efforts have focused on the passage of a Judicial Modification of Statutory Law Act in Minnesota. The Senate of Minnesota Committee on the Judiciary recommended passage of such a bill, and the Senate of Minnesota has voted accordingly. Minn. S.F.
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Calabresi an obsolete statute is not only "in some sense inconsistent with our whole legal landscape," but also lacks "current legislative support."\(^4\) Even if a constitutionally valid statute presents consistency problems for the courts, Calabresi recommends that courts not nullify it if the statute is supported by the governing legislative majority. Whether such a majority exists in support of the anomalous statute is a difficult matter for judges to ascertain, but Calabresi believes that recent legislative acts may signal the current political mood.\(^4\) Calabresi's reasoning sets in motion a process which would measure the consistency of all statutes against the policies of the current legislative majority, and would inevitably result in new law implementing these policies, except of course where these policies are already in statutory form. The implicit goal of this approach is to help the current legislative majority make law within a consistent and coherent policy program. In Calabresi's view, this scheme is truly democratic, despite the superficial appearance of judicial tinkering with legislative process, because it elevates the policy objectives of the legislative majority of today over those of an earlier generation.

Calabresi finds support for this approach in various cases, among them *Califano v. Goldfarb*\(^4\) and *Griswold v. Connecticut*.\(^4\) Calabresi is particularly interested in Justice Stevens' concurrence in *Califano*. The case involved an attempt by a widower to collect survivor's benefits under the federal Old-Age, Survivors, and Disability Insurance (OASDI) benefits program.\(^4\) OASDI distinguished between widows and widowers for purposes of obtaining survivor's benefits, and

\(^4\) CLAS, *supra* note 4, at 2. Calabresi defines the "legal landscape" to include not only case law, but also other statutes and even social practices. *See infra* text at n.59.

\(^4\) See *id.* at 8.


\(^4\) 981 U.S. 479 (1985).

required only widowers to prove that they depended financially on their spouses at the time of the latter's deaths.\textsuperscript{49} Four justices voted to strike down the gender distinction on the grounds that it violated the Equal Protection Clause, while four voted to uphold it. Stevens joined neither approach but wrote that "this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females."\textsuperscript{50} He found the distinction between widows and widowers inconsistent with more recent congressional enactments that were gender blind, and voted to void the gender distinction on due process grounds.\textsuperscript{51} But Stevens hinted that he might uphold the distinction if Congress were to pass legislation affirming its intent to discriminate against widowers.\textsuperscript{52}

Stevens's argument was essentially that if Congress had enacted OASDI shortly before Goldfarb applied for survivor's benefits, Goldfarb probably would have been included in OASDI. Somehow due process required that Goldfarb should not have to suffer because of what a past Congress had done when the current Congress most likely would be more generous. Yet Stevens did not consider why the current Congress had not simply revised OASDI to make it more consistent with the national legislature's supposed new gender consciousness. His tacit assumption was that Congress had intentions beyond those it articulated through the legislative process. Stevens implied that Congress was as concerned with updating laws as the Court, but was hamstrung by the disappointing inefficiency of legislative process. His stated reasoning would have supported denying benefits to both widows and widowers equally, but he chose a result favoring both gender equality and recovery. He simply concluded that Congress' original intent to provide welfare benefits was consistent with evolving norms favoring welfare programs, while its original intent to treat men and women applicants differently was not.

In \textit{Griswold v. Connecticut} the Court took a similar approach, but used the Constitution to foreclose the possibility of a legislative reenactment of the "outdated" statute. Griswold was the director of a New Haven birth-control counselling center for "married per-

\textsuperscript{49} Id. at 201-17, 217-24.

\textsuperscript{50} Id. at 223. Stevens wrote further that "[i]t is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms of a widow and 'dependent surviving spouse'" when Congress enacted OASDI. \textit{Id.} at 222.

\textsuperscript{51} Id. at 224 (basing authority for concurrence on holding of \textit{Weinberger v. Wiesenfeld}, 420 U.S. 636 (1975), a due process case).

\textsuperscript{52} Id. at 223 n.9.
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sons," and Buxton was a licensed physician working at the center. Both Griswold and Buxton were arrested ten days after the center opened, charged as accessories to violations of the Connecticut anti-contraception statute, found guilty, and fined $100 each. The statute prohibited the use of devices "for the purpose of preventing conception."

Considering the merits of Griswold's and Buxton's appeal from the conviction, the Court found that the case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Even though that zone of privacy, like the analogous zone of rights of association, is "not expressly included in the [Constitution,] its existence is necessary in making the express guarantees fully meaningful." The Court thus invalidated the statute as an unconstitutional infringement on this "penumbral right."

Calabresi finds both cases illustrative of obsolescence analysis at work, except that in Griswold the Court relied on constitutional grounds to justify invalidating the statute. In regard to Griswold, Calabresi believes that the Connecticut anti-contraception statute was obsolete and could have been invalidated as such. The statute "could not be repealed and yet it would never be reenacted. It was inconsistent with practice, common law, and other Connecticut statutes." Hence it was obsolete in Calabresi's dual sense; it was "inconsistent with . . . our whole legal landscape" and it lacked "current legislative support."

While making his consistency point here, Calabresi substitutes "practice, common law, and other Connecticut statutes" for the various constitutional provisions from which the Court drew support for a constitutional right to privacy. Reviewing the statute in reference to this non-constitutional framework, he finds the statute inconsistent with it.

54. Id. at 480.
55. Conn. Gen. Stat. §§ 53-32 (1960). The statute read in full: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." See also CLAS, supra note 4, at 190, n.2.
58. In Califano, Stevens found it necessary to base his opinion on due process grounds, while in Griswold the Court relied on a newly-discovered constitutional right to privacy. Of course, the cases differ in that Stevens' approach allowed a legislative response, while the result in Griswold did not.
59. CLAS, supra note 4, at 8.
60. Id. at 2.
In spite of the similarity of that approach to traditional judicial review, Calabresi claims that his method hinges on a definition of statutory infirmity - obsolescence - which protects rather than thwarts legislative will. In this sense his proposal attempts to remedy the "countermajoritarian difficulty" which Professor Alexander Bickel perceived in judicial review. However, at least in his discussion of Griswold, Calabresi cannot be truly interested in protecting the legislature's will, but rather in protecting the will of the majority of legislators. Referring to the Connecticut anti-contraception statute, Calabresi asserts that "the court did everyone—including the Connecticut legislature—a service by interring it." The fact is that the Connecticut legislature had refused to revise the statute in every legislative session from 1942 to 1959, in spite of a 1942 decision of the Supreme Court of Errors which invited legislative amendment by holding that the statute barred a doctor from administering contraceptives to a woman whose life might be endangered by pregnancy. Indeed, the statute had survived intact two complete revisions of the Connecticut General Statutes in 1949 and 1958. This history suggests that sufficiently powerful forces existed in the legislature to stalemate any proposal for reform on this issue. Calabresi's equation of the Connecticut legislature with the alleged majority supporting repeal assumes that legislative procedure counts for nothing. For Calabresi, legislative procedure itself contains a counter-majoritarian difficulty. When "checks and balances still work" they enable "interests served by these outdated laws [to] successfully block their amendment or repeal." He proposes to eliminate this counter-majoritarian difficulty by employing a new theory of judicial review.

IV. Understanding Calabresi's Consistency Analysis

Calabresi's response to Bickel is premised on the notion that courts are interested in "consistency," and that in pursuit of that interest they can manipulate statutory law without counter-majoritarian difficulty. However, the institutional interests of the ju-

61. Id. at 1-2.
62. A. BICKEL, supra note 2, at 16. Bickel explained that, in his view, the Court "thwarts the will of representatives of the actual people of the here and now [to exercise] control, not on behalf of the prevailing majority, but against it." Id. at 17.
63. CLAS, supra note 4, at 9.
64. Tileston v. Ullman, 26 A.2d 582, 585 (Conn. 1942); Buxton v. Ullman, 156 A.2d 508, 511, 513 n.2 (Conn. 1959).
65. Buxton v. Ullman, 156 A.2d at 513 n.2.
66. CLAS, supra note 4, at 6.
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diciary with respect to older statutes cannot be adequately con-
tained in the consistency principle. These judicial interests concern
the ability of the courts, in particular cases, to reach results that ap-
pear just. Hence Calabresi admits that "[i]t is hard for me to see
how mechanical rules for when statutes ‘age’ can be sophisticated
enough to treat all these distinctions” concerning obsolescence. 67

In keeping with that approach, Gilmore and Calabresi do not de-
fine “obsolescence” with precision. Reed, Moragne, Califano, and Gris-
wold present materially different analyses of statutory consistency,
and therefore different theories of obsolescence. Reed involved a
problem of obsolescence going to the heart of a legislative compro-
mise embodied in a statute. The Reed Court gauged the consistency
of only one element in that compromise, the limitation on employ-
er's liability, against a relatively broad conception of the “legal land-
scape.” 68 Moragne involved a theory of obsolescence similar to the
one evident in Reed, except that in Moragne the background of norms
against which the Court measured the statute’s consistency was ec-
lectic. Considering a broad area of federal and state law, the
Moragne Court ignored any possible role for issues of states’ rights
in gauging whether the “gap” in which Mrs. Moragne found herself
was inconsistent with “justice.” 69 Stevens’ theory of obsolescence
in Califano focused on a relatively narrow implementing provision in
a complex welfare program. He evaluated OASDI against general
social attitudes which were not directly related to the subject and
purpose of the statute. In Griswold Calabresi sees a fundamental
problem with the legislative goal of the statute, not merely as in Reed
with only one of the elements in a legislative compromise. He meas-
ures the consistency of this legislative goal against very broad but
related norms about reproductive privacy.

Calabresi’s treatment of these different theories of obsolescence
as basically analogous confirms that the concept of obsolescence is a
pliable tool serving ulterior concerns. In Moragne the plaintiff
widow had asserted two claims in her complaint. Only one of them
depended on the issue of recovery for unseaworthiness. The

67. Vermont Comment, supra note 4, at 253-54.
68. In Reed, the “legal landscape” against which the Court found the statute anom-
alous consisted of a few recent decisions of the Court in that area of law. See supra notes
20, 21, 29.
69. The Moragne Court stated that “[w]here existing law imposes a primary duty,
violations of which are compensable if they cause any injury, nothing in ordinary notions
of justice suggests that a violation should be nonactionable simply because it was serious
enough to cause death. On the contrary, such a rule has been described in such terms as
‘barbarous’.” Moragne, 398 U.S. at 381.
Court's decision to create a remedy could not have been motivated only by a desire to give her some chance to recover. Rather, it appears that the Court sought to avoid the appearance of having sacrificed a widow on the altar of strict constructionism. Similarly, Stevens' reasoning in *Califano* could have supported a denial of survivor's benefits to widows and widowers alike, but such a result would have seemed less just than opening the Treasury's pursestrings.

Calabresi acknowledges that the nature of the courts' problem with obsolete statutes is institutional, and that, consequently, only a flexible concept of obsolescence can be truly useful. He explains this by referring to the Harvard Legal Process School, and particularly to Professor Henry Hart. "In a deep sense," writes Calabresi, "we are all followers of Henry Hart." According to Calabresi, Hart believed that "the legislative intent to be enforced by courts must...[serve] functions...that reflect realistically the institutional capacity of courts and legislators." One of these "functions of interpretation was, of course, maintaining the fabric of the law; in other words, keeping statutes up to date." Hart explained his position in a 1959 article, reasoning that

[o]nly opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. . . .

The Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law and impersonal and durable principles for the interpretation of statutes. . . .

Thus, in Gilmore's words, the Court cannot be tied down by statutes which no longer "make sense in the light of changed conditions" because that would reduce its decisions to mere fiat. Strict adherence to the relevant statutory language in *Reed*, *Moragne*, *Califano*, and *Griswold* would have simply amounted to telling the plaintiffs "you lose because the statute says so." In those cases the Court had no compelling reason available to explain either why the

70. CLAS, supra note 4, at 87.
71. Id.
72. Id.
74. AGES OF LAW, supra note 4, at 95.
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particular statute in each case "said so," or why the highest Court in the land was required to obey what it did not understand.

What the Court did in those cases, to use terms familiar to the Harvard Legal Process School, was to read recent constitutional trends, statutes, and common law precedents not as "statements of a finite rule of law," but as affirmations of "special values at the edge of legal progress. The Court then measured against these broad values the statutory enactments of years "long past, with problems very different from our own," and found the latter ill-fitting, anomalous, or "obsolete." While under the regime of traditional judicial review the courts would invalidate an anomalous statute if it contravened the latest construction of the Constitution, under this new theory of judicial review courts would use current non-constitutional norms to identify ill-fitting statutes. And while the old theory drew its legitimacy from the special role of the Court in interpreting the Constitution, this new theory purports to draw its legitimacy from the general institutional role of the judiciary as a source of legal consistency and from the majoritarian effect of revising laws to fit current legislative policy.

V. Separation of Powers Problems

Having analyzed the proposals put forth by Gilmore and Calabresi, and hinted at their weaknesses, it is now appropriate to consider more carefully the separation of powers problems they pose. Two different problems exist in this regard. The first relates to Gilmore's observation that judicial updating of statutes is just as "legitimately within judicial competence" as the updating of common law precedents. The second concerns Calabresi's majoritarian attack on checks and balances.

Gilmore's observation amounts to an assertion that the judiciary is as competent to update statutory rules as to revise common law precedents. This assertion is fundamental to Calabresi's proposal, and is the source of their first separation of powers mistake. This error blurs the critical distinction between judicial process and legis-

75. H. Wechsler, supra note 3, at 26.
76. Id.
77. Id.
78. AGES OF LAW, supra note 4, at 97.
79. Calabresi states that he proposes "a new relationship between courts and statutes...restoring to courts their common law function of seeing to it that the law is kept up to date." CLAS, supra note 4, at 7 (emphasis added).
lative process, and, as a consequence, confuses values which under our system of government are not only distinct, but adversarial.

Calabresi argues that what justifies judges "in following their own values in evolving the common law . . . is their educated and disinterested sense of what is right." For him judges are "wise people," and "principled decision-making within a legal landscape is the primary judicial task." This suggests that judicial "updating" of a common law rule is legitimated by the inconsistency of that law as measured against a broader jurisprudential framework. The courts' source of legitimacy for "updating" laws is the situation of inconsistency itself. That situation arises from two sources: the rule under scrutiny and the "legal landscape." Each common law rule, in this sense, is a source of legitimate judicial authority to update, as well as an object of that authority. Moreover, while the rule is relatively static, the legal landscape evolves constantly. Hence in common law process the question constantly recurs whether a rule is implicated in a "situation of inconsistency." It is a question attaching to the rule from the moment it appears upon the "landscape." Decisions must be made continually whether to reconsider and reform that common law rule.

On the other hand, nothing in legislative process creates a primary institutional interest in the updating of statutes. Every legislative act is the result of a competition for power among political factions represented in the legislature. The revision of older laws is no different from any other legislative act in the sense that whether it takes place or not depends on the outcome of a competition between different normative visions. And unlike courts, American legislatures base the legitimacy of their acts and omissions on the representation of divergent policies in a process of debate designed

80. Id. at 95.
81. Id.
82. Id. at 96. Calabresi adds that this judicial task is democratically attractive because the legal fabric and the principles "that flow from it, are good approximations of one aspect of the popular will, of what a majority in some sense desires. It cannot be an exact fit, but it must reflect enough of what is wanted so that it is a good starting point for lawmaking. Then it follows that those who by training and selection are relatively good at exploring and mapping the legal landscape can appropriately be given the task of evolving the law, and inevitably of allocating the burden of overcoming the inertia of that law." Id. at 96-97. This observation contradicts Bickel's view that all judicial actions leading to the principled nullification of a statute necessarily thwart "the will of representatives of the actual people of the here and now . . . ." A. BICKEL, supra notes 2, 62. Whether common law process, as Calabresi describes it above, and Bickel's judicial review are distinguishable forms of judicial process will determine whether that contradiction is fatal for Bickel's premise.
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to lead, on most occasions, either to a brokering of competing principles, or to no decision at all.

When Calabresi encourages courts to use common law process to update statutes, he is asking them to transfer to the legislative context the notion that rules are sources of authority for their own updating. Yet, in legislative process the source of authority for the updating of rules is not found within each rule, but in the uniqueness of the legislative process itself. Here is the first source of error in both Calabresi and Gilmore’s line of thinking.

The second problem is more troubling. It concerns a bias against what Calabresi calls “interests served by these outdated laws” that use checks and balances to “block their amendment or repeal.”

Are checks and balances a refuge for scoundrels or an essential component of legislative process? This question cannot be answered formalistically by invoking the text of the Constitution. Professor Stephen Carter has recently noted that even the relatively clear provisions of the Constitution defining the separation of powers scheme cannot be interpreted without some normative presuppositions. Thus the ultimate verdict on whether strong checks and balances are an essential part of the Constitution must be a matter of value preference. The most severe criticism that can be levied against Calabresi and Gilmore is that they have not even acknowledged the possibility that checks and balances have any intrinsic value.

The Framers of the Constitution provided the federal government with a legislative branch divided into two houses, each similar to the other in internal process but autonomous, and granted the President a powerful role in the legislative process through his veto power. While interpreting the constitutional provisions setting up that scheme may in particular cases depend upon normative choices, once one accepts the view that the legislative process is internally divided among autonomous centers of authority, the general theory of checks and balances is objectively mandated. The primary effect of internally separating the legislative powers of government is to

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83. CLAS, supra note 4, at 6.
85. Calabresi asks: “on what does the majoritarian legitimacy of an old statute rest? No more and no less than on two facts: in a system of checks and balances it has gone unrepealed; and it once commanded a majoritarian basis. The first is of no consequence. . . .” CLAS, supra note 4, at 101-02. See also AGES OF LAW, supra note 4, at 97, 143 n.58.
86. U.S. CONST., art. I.
prevent the easy control of the whole government by one hand prescribing one policy at any one time.\textsuperscript{87} The values behind this constitutional design are concisely defended in Federalist 51:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating [a hereditary monarchy]; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.\textsuperscript{88}

This second method is an attempt to break “society . . . into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”\textsuperscript{89} That dispersal will often make improbable and impractical any combination of the majority which the minority finds “unjust” and hence will oppose.\textsuperscript{90} In practice, this

\textsuperscript{87} Justice Rehnquist has noted that “[e]ven the neophyte student of government realizes that legislation is the art of compromise, and that an important, controversial bill is seldom enacted by Congress in the form in which it is first introduced.” American Textile Manufacturing Co. \textit{v.} Donovan, 452 U.S. 490, 547 (Rehnquist, J. dissenting).

\textsuperscript{88} \textit{The Federalist}, No. 51, at 400-01 (J. Madison) (J. Hamilton, ed. 1871) (emphasis added). Madison did not seriously consider the possibility of a post-revolutionary hereditary monarchy in the United States. \textit{Ibid} at 401. \textit{See also id.}, No. 47, at 573-74 (J. Madison) (“The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny”).

In Immigration and Naturalization Service \textit{v.} Chadha, 462 U.S. 919, 949 (1983), the Court adhered to the Madisonian philosophy, stating that “[i]f the Legislative authority be not restrained there can be neither liberty nor stability; and it can only be restrained by dividing it within itself . . . .” (quoting James Wilson in \textit{I Farrand, Ed., Records of the Federal Convention} 254 (1911)). Justice Powell stated that one “abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the ‘tyranny of shifting majorities.’ It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” \textit{Chadha}, 462 U.S. at 961 (Powell, J., concurring). For the facts of the \textit{Chadha} case, \textit{see infra} note 90.

\textsuperscript{89} \textit{The Federalist}, No. 51, \textit{supra} note 94, at 339. The principal lines of division are between legislative, executive, and judicial branches. As stated by the Court in \textit{Chadha}, the “very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . .” 462 U.S. at 946.

\textsuperscript{90} The defense of impracticality found in \textit{The Federalist}, No. 51, \textit{supra} text at note 88, carried a majority of the Court in \textit{Chadha}, 462 U.S. at 946. In that case Chadha, a deportable alien, obtained the suspension of his deportation from the Attorney General of the United States pursuant to authority delegated to the latter by Congress through the Immigration and Nationality Act, 8 U.S.C. § 1254(b) (1982). The Act further provided, however, that either house of Congress, acting singly and without possible presidential veto, could extinguish by simple majority vote the delegated power of the Attorney General to suspend a particular deportation. Pursuant to this provision, § 244(c)(2) of the
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means that if a party controls one house of Congress in addition to the executive branch, the other house has power to force compromises of the stronger party's policies.91 Checks and balances leave the definition and preservation of "outdatedness" to the legislative process, whose primary institutional concern is not consistency and principle, but debate and compromise.

On the other hand, the primary objective of common law process, according to Calabresi, is incremental legal change governed by principles derived in part from "approximations . . . of the popular will."92 Common law process values prescription above silence because judges must decide cases. In addition, judges must decide cases while appearing to be "wise people"93 who are "neutral."94

Act, the House of Representatives resolved, without debate or recorded vote, to "veto" the Attorney General's suspension of Chadha's deportation. The Court held that § 244(c)(2) of the Act was an unconstitutional exercise of powers not conferred upon the Congress by Article I, since it failed to comply with the Bicameral Clauses, Article I, §§ 1, 7, and the Presentment Clauses, Article I, § 7, cl. 2, 3. The Court rejected Justice White's suggestion that the one-house legislative veto is a "useful "political invention," Chadha, 462 U.S. at 972 (White, J. dissenting), stating that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or hallmarks—of democratic government. . . ." Chadha, 462 U.S. at 944 (emphasis added). The Court reiterated this theme, noting that "[i]n purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. . . . There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step deliberate and deliberative process." Id. at 958-59. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Black, J.) (cumbersome of statutory procedure for Executive seizure of industries in wartime cannot be avoided without violence to the separation of powers scheme).

91. Because of this design of the federal government, American politics may experience periods of relative stagnation in policy direction, alternating with periods of rapid change precipitated by the capture of the presidency and at least one house of Congress by the same reformist party. Cf. Cutler, To Form a Government, 59 FOR. AFFAIRS 126 (1980/81) (favoring British parliamentary government to overcome stalemate typical of United States Government).

92. CLAS, supra note 4, at 96-97. Professors Westen and Lehman have a narrower view. They have stated that "the very justification" for the lawmaking authority of federal courts, in non-constitutional cases, "is to give effect to legislative will." Westen & Lehman, Is There Life for Erie After the Death of Diversity?, 78 MICH. L. REV. 311, 337 n. 86 (1980). They argue that "[i]f the courts were motivated only by the fear of actually being legislatively overruled, they would feel free to disregard their best assessment of what legislators would probably desire and to substitute their own judgment instead, except where their own judgment so dramatically departed from what legislators desired that the legislature could be expected to overrule them" Id. They criticize "such substitution of judicial judgment for legislative judgment" as "based on an unprincipled exploitation of legislative 'inertia'. . . ." Id. The authors fail to recognize that while such substitution of judicial for legislative judgment may be unprincipled, it is likely to be the opposite. In the pursuit of principled consistency the judiciary can carry out that substitution in good faith, thinking that it is actually giving effect to what legislators would do if liberated from the presumptively unwanted shackles of 'inertia.'

93. CLAS, supra note 4, at 95.
and "disinterested." The combination of the need to decide cases and to appear wise, neutral and disinterested makes common law courts particularly concerned with their institutional credibility, since cases that sorely try judicial virtue cannot be shirked. They will tend to expand principles to reach areas where there are none so as to appear to decide cases virtuously. The statutory principles they will expand will be those which seem most consistent with current trends in the law, and which are often those most consistent with the current legislative majority's policies.

94. See Deutsch, supra note 3.

95. CLAS, supra note 4, at 95. Chief Justice Marshall observed that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

96. An argument could be made that the Supreme Court is in fact able sometimes to shirk difficult cases. Among the differences between the United States Supreme Court and other courts is that, in the view of Bickel and others, it should aspire to higher virtues than the basic requirements of "wisdom," "neutrality," and "disinterestedness." The Court has a principled "educative mission" in American society, which Bickel compared to Lincoln's "principled opposition to slavery." Kronman, Alexander Bickel's Philosophy of Prudence, 94 YALE L.J. 1567, 1583-84 (1985). See also Rostow, The Democratic Character of Judicial Review, 66 HARV. L. REV. 193, 208 (1952) (the Court must be our teacher "in a vital national seminar"); Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 501 (1984) (parallel between role of judges and pedagogical goal of father in Christ's parable of prodigal son). In spite of this mission, according to Kronman, Bickel believed that "the Court must [also] exercise prudence in advancing principle." Kronman, supra at 1584. To resolve that tension between its educative mission and the demands of prudence, Bickel's theory of the "passive virtues" offers "techniques for [avoiding] adjudication." Id. According to that theory, the Court may properly shirk its duty to decide "difficult" cases to avoid "legitimating" legislation which is barely constitutional. Id. at 1584-85. See also C. Black, THE PEOPLE AND THE COURT 56-86 (1960). Certain adjudications—what one may call "hard cases"—may damage the Court's educative efforts because it is hard for the Court to communicate its reservations about a decision as well as its reasons for it. However, Bickel's passive virtues are controversial. See, e.g., Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 213, 222 (Bickel's ultimate purpose is "to accomodate the sterner demands of principle to the perceived needs of expediency" and is, as such, a failure).

Yet using jurisdiction to avoid reaching the merits under a troublesome statute will not change that statute and may preserve the role of legislative process.

97. Here "expand" refers to extrapolations of principle. In Moragne the Court considered the statutory framework for wrongful death recovery, and found that those statutes created an amorphous standard of justice against which dismissal of Mrs. Moragne's unseaworthiness claim would have been intolerably anomalous. A strict reading of the statutes, however, would have left Mrs. Moragne without an unseaworthiness claim. The Court solved its quandary by extrapolating from existing law a principle of justice to reach situations of fact like Mrs. Moragne's that were previously outside the scope of any single statute. This extrapolation of principle is evident also in Reed, Griswold and Stevens' concurrence in Califano.

98. This is not to say that courts extrapolate principle only from current trends in the law. However, if recent precedents suggest a gradual departure from earlier decisions, a new decision more consistent with old precedents than the recent trend will cause confusion among lawyers. In Hart's words, "[o]nly opinions which are grounded in reason and not on mere fiat or precedent can . . . be worked with by other men who
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When courts broaden the legislations of the current majority to reach areas of social activity previously outside their scope so as to avoid inconsistencies in the law, they confer upon the majority a power to legislate in those areas unchecked by the counter-principles of the opposition.99 Similarly, when courts nullify statutory provisions that contradict current majority policy, but which the current majority has not been able to repeal, they expand its legislative power beyond the capacity of any legislative opposition to check through the legislative process.100 Hence in this statutory age courts must choose between enforcing "obsolete" though constitutionally valid statutory law, and facilitating easy majoritarianism in a way which is itself inconsistent with traditional readings of our federal and state constitutions.101

99. Justice Rehnquist, joined by Chief Justice Burger, has argued that courts should not extricate Congress from its duty to make hard compromises between popular and unpopular interests. In American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), the Court considered the constitutionality of the Occupational Safety and Health Act, 29 U.S.C. § 651-678 (1970), which authorized the administrator of OSHA to promulgate mandatory federal standards regulating employment health and safety. Section 6(b)(5) of the Act directed OSHA to "set the standard which most adequately assures, to the extent feasible, [that] no employee will suffer material impairment of health . . . even if such employee has regular exposure to the hazard." Justice Rehnquist dissented from the majority's upholding of the provision and argued that § 6(b)(5) "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature." 452 U.S. at 543 (Rehnquist, J., dissenting). Rehnquist added that "[t]he words 'to the extent feasible' were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit, or prohibit [OSHA] from engaging in a cost-benefit analysis, there would have been no bill for the President to sign" Id. at 546. He explained that the hard policy choice was "whether and to what extent" the statistical possibility of future deaths should be disregarded in light of economic costs of preventing those deaths," Id. at 547 (quoting Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring)). In Reed, 373 U.S. 410, the Congress had made a policy compromise between labor interests and shipping companies which openly protected the interests of the latter. The Reed Court 'sanitized' the statute at issue by effectively erasing the arguably less popular aspects of the policy.

100. For example, a conservative minority in Congress in 1977 may have wanted to preserve traditional family values in OASDI until a subsequent election delivered at least one house of Congress into their hands. That minority might have relied on the inefficiencies of legislative process to prevent the majority from revising OASDI until that election. Stevens' 1977 concurrence in Califano circumvented the inefficiencies of the legislative process to give the congressional majority of 1977 what Stevens thought they would have enacted.

101. It is possible to defend judicial modification of statutes against the accusation that it violates the principle of separation of powers. Calabresi's main defense is that legislatures can always override common law decisions. CLAS, supra note 4, at 92-93; see also Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 22 (1985). A weak counterpoint is that the ability of the legislature to "protect itself against judicial invasion of its sphere does not justify that invasion in the first place." Schroock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1128 (1978). Cala-
Inherent in this dilemma is the fact that any substitution of judicial process for legislative process also constitutes a substitution of judicial justice for legislative justice. While judicial justice favored Reed and Moragne, legislative policy favored shipping companies and a standoff between federal and state governments on the issue of maritime wrongful-death recovery. To argue that legislative justice does not deserve as much respect as judicial justice is to question the fundamental premises of the separation of powers system. The separation of powers scheme balances divergent value systems and ensures not only that Americans will not be ruled by one power, but also that they will not easily be ruled by one system of substantive values.

Calabresi nevertheless argues that his proposal should be accepted because without it judges will covertly resort to more dangerous means of nullifying outdated statutes. Yet surely the integrity of the ideal in law cannot be so easily surrendered for the sake of expediency. The burden of intellectual leadership which Calabresi has assumed in the past requires much more. Even if the institutional needs of judicial power were the starting point for a discussion of principle, it is far from clear that the courts today are eager to embrace the covert activism Calabresi fears.

For example, the Supreme Court recently refused to allow the
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Federal Reserve Board to stretch the wording of an old statute to accommodate new conditions. The case arose out of the efforts of the Federal Reserve Board to regulate "non-bank" financial institutions which provide services invented since the passage, and hence outside the wording, of the Bank Holding Company Act. The Court rejected the Board's expansive interpretation of the statute, and reasoned that "[i]f the statute is clear and unambiguous, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Rejecting the Board's contention that "a statute must be read with a view to the 'policy of the legislation as a whole' and cannot be read to negate the plain purpose of the legislation," the Court stated that the

application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

This deference to the strict separation of Congress and the Court is striking both for its formalism and its unanimity. The Board was eager to imbue the statute with a flexible, continually evolving meaning, yet no justice on the Court deemed it within the Court's power to avoid a strict construction of the statute.

VI. Conclusion

Legislative process is not a particularly efficient source of consistent legal principles. Courts and their friends would like it to be so because it would make the job of judges easier. But to resemble common law process, legislative process would have to be stripped of stalemate, which is the mother of compromise. The compromise of principle between the majority and the minority is in turn the best guarantee of the Framers for protecting dissent in a society where every citizen will on occasion dissent, and demand respect while do-

105. Id at 688-89. It should be noted that the Board had determined that failure to regulate "non-bank banks" might endanger the nation's financial security. Id. at 685.
Courts which would modify statutes to make them better sources of consistent principle should consider the costs of becoming a majoritarian force in American politics.

Legislatures considering whether to encourage and authorize courts to modify statutes should weigh additional risks. In particular, our formal constitutions have in recent decades lost a measure of stability and continuity. Courts have increasingly resorted to constitutional law in adjudicating legal disputes and in attempting to solve social problems. In this context, the proliferation of statutes in such numbers and complexity that no department of government can easily change them may provide the stability which judicial “flight[s] to the Constitution” have undermined. Certain statutes in particular are so fundamental to our legal system that they enjoy quasi-constitutional status, and the undisturbed inefficiencies of legislative process are likely to make it difficult to tamper with them to suit passing trends. Less august statutes may be depositories of old social attitudes which, when they surface in litigation, remind Americans of the limits of change, enrich our political discourse, and anchor the starting points for progress.

It may be that American government, as traditionally envisioned, is not structured to function well as an activist state. Well-meaning attempts to alter that structure to resolve the “crisis of obsolescence” call for a debate on whether one prefers an activist state, or a state of separated powers exercising checks and balances against each other to produce respect for dissent through stalemate and compromise (and hence imperfect activism). So far the debate on judicial modification of obsolete statutes has proceeded with scant consideration for the more profound problems of separation of powers inherent in this new form of judicial review.

—Michael Socarras*

106. CLAS, supra note 4, at 8-15. The author would like to thank Dean Calabresi for suggesting this point. The structural origins of this type of stability in our legal system may make it a more stable organic law than the Constitution, especially when one considers the recent ‘politicization’ of that instrument.


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