THE NONPRIMACY OF STATUTES ACT: A COMMENT

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In March 1977 I gave the Oliver Wendell Holmes Lectures at the Harvard Law School. The theme of those lectures (and of the forthcoming book based on them, The Common Law Function in the Age of Statutes)¹ was the increasingly frequent assertion by courts of power over statutes in order to counter the "petrification" of law with which our "orgy of statute making"² has burdened us. In the book I canvass many possible approaches and solutions to the problem,³ but the one to which I clearly am most partial is the candid acceptance of the power of courts to treat certain statutes as having no more, and no less, authority than common law precedents. One may imagine my surprise and delight to learn some months after I had delivered the lectures of Senator Davies' proposed bill.⁴ 

To an academic lawyer the fact that an idea has enough practical significance to be made the subject of actual political debate is both pleasing and mildly troublesome. We are not, after all, mathematicians or classicists, and so cannot rest happily in having developed aesthetically satisfying models or constructs. Of course not. Yet to have our work tested, too soon, in the furnace of political life leaves us a little unprepared, a little untrained—even a little naked.

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2. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977) [hereinafter cited as GILMORE].
3. I examine: reliance on constitutional adjudication (especially use of the due process and the equal protection clauses to nullify outworn statutes); Bickel's passive virtues; statutory interpretation; administrative agencies; sunset laws and the indexing of statutes; revamping the legislative system to ease legislative updating of statutes; and a deliberate return to the legislative-judicial colloquy that is thought to have obtained in the 19th century. I conclude that none of these solutions can provide us with the balance between continuity and change for which the common law system is heralded. Cf. Lum v. Fullaway, 42 Haw. 500, 502 (1958), "[T]he genius of the common law . . . is its capacity for orderly growth."
4. See Davies, A Response to Statutory Obsolescence: The Non-Primacy of Statutes Act, 4 VT. L. REV. 203 (1979). Senator Davies' bill proposes that statutes 20 or more years old without significant amendment or modification within the last 20 years will be subject to judicial nullification.
So much the better then, to have an approach closely analogous to mine be developed and proposed independently by someone like Senator Davies who combines in a fashion more unique than rare the academic and the practical.

Before making a few comments on the bill itself and on Davies' discussion of it, I would like to muse a bit on that extraordinary phenomenon, the apparently radical idea that is "suddenly" proposed by several writers independently. The history of thought is full of such occasions. Some of the great ones are well known: when Darwin was writing, so was Wallace; the Calculus was "invented" contemporaneously by more than one; circulation of the blood, and the "Keynesian" theory are other candidates. At the trivial level at which most lawyers work, I was involved in a similar event some twenty years ago. A year or so after I published my first article on tort law, which caused something of a teapot tempest in its unusual use of law and economics, a book appeared in Italy, thought out and written completely independently I am certain, which mirrored my article even to the point of employing some of the same "practical" examples.

Why does this happen? The answer, of course, is that the idea propounded is in fact not a bit radical; and if one looks closely and deeply enough, one will invariably find that many others will have approached it much earlier. But the time for it (in law the need for it) was not right, and so its full development did not take place. Still, those "ancestors" do become a part of our culture; and as the problems—intellectual or practical—which gave rise to the first tentative approaches become more pressing, more and more writers will tend to find partial solutions which, in fact, tie in to the thinking of the more remote ancestors. When the egg is finally discovered (whether trivial or cosmic), it has in fact been laid in so many places that it would be unusual if only one person found it! And so it is with this proposal and with Davies', Grant Gilmore's, and my separate stumbling on to it.

7. Gilmore, supra note 2, at 97 & 143 n.58.
In my book I spend some time on the ancestors of the doctrine and find them to be among the most unradical of thinkers: the original proponents of the Restatement, Alexander Bickel, early commentators on the Field Code in California, and so on. I won't dwell on those here but rather on the similarity, in gestation and in sources, of Gilmore's, Davies', and my development of the problem.

I began thinking about it during my clerkship with Hugo L. Black in the 1958 term of the U.S. Supreme Court (in other words, precisely when Senator Davies did). What set me thinking was the Court's extraordinary treatment of the Federal Employees Liability Act, which was often before the Court in that term. That Act had been passed to give a group of tort victims (railroad employees) a better chance of recovery than the ordinary tort plaintiff. As time passed, and the common law of torts changed and became much more favorable to plaintiffs, there was a danger that the "favored" employees would lose that status because their special rights had been created by statute and hence, under traditional thinking, were "frozen." The Supreme Court, led by Justice Black, refused to permit this freezing and "interpreted" the (previously otherwise interpreted) statute so that it continued to give greater rights to railroad employees than to other tort victims. Justice Frankfurter was much upset by all this. He did not doubt that the old FELA law was out of date, but argued that the way to force an update was not to "misinterpret" the statute (as he thought Justice Black was doing). He preferred, instead, to "blackmail" Congress by reading the statute so narrowly and meanly as to create an interest group which would fight and die for a legislative review of the issue. Grant


10. "One's deep sympathy is of course aroused by a victim of the hazards of negligence litigation in situations like the one before us. But the remedy for an obsolete and uncivilized system of compensation for loss of life or limb of crews on ships and trains is not intermittent disregard of the considerations which led Congress to entrust this Court with the discretion of certiorari jurisdiction. The remedy is an adequate and effective system of workmen's com-
Gilmore's interest in the problem, he has told me, derives from his writings in admiralty (at about the same time) and from precisely the same issue which arose under the admiralty equivalent of the FELA law, the Jones Act.\(^1\)

Senator Davies mentions Justice Harlan's great opinion in *Welsh v. United States*\(^2\) as focusing his views.\(^1\) But Justice Harlan decided another case at the very same time as *Welsh* and used the same methods: *Moragne v. States Marine Lines, Inc.*\(^4\) This case involved wrongful death statutes which demanded judicial expansion. It was squarely in my field and was responsible for my decision to address systematically the problems I had first posed to myself in the FELA cases.

No, it is not chance that leads to the development of similar ideas at the same time. The reason is that, in a fundamental sense, those ideas are not new but are instead responsive to practical needs and are—once stated—even obvious. This practical basis for the ideas is also the source of their power once stated, whether the society accepts them candidly or, as it frequently will do instead, reaches the same result while denying that it is doing so.\(^3\)


\(^3\) Davies, *supra* note 4, at 206-07.


\(^5\) See G. CALABRESI & P. BOBIIT, *Tragic Choices* 72-79 (1978) (discussion of subter-
This is not the place to go in great detail into the similarities and differences between Davies' approach and mine. Some of them are of little interest since they reflect mainly the difference between the academic who is, also, in the best sense, a politician, and the academic who is, I hope also in the best sense, a theoretician. Others are, perhaps, more important but would require too much space. A few comments may, nonetheless, be in order.

In my book I spend a considerable amount of time on the difference between traditional common-law adjudication and what I call common-law adjudication in a world of statutes. The common law tended to strike down old rules only when a court could promulgate a new rule or when it judged that we all could live without a clear rule while the courts slowly worked their way toward one. That approach is probably too limited in a world of statutes. There are too many statutes which are, in Davies' sense, out of date, but which courts can neither rewrite nor nullify without giving us a substitute. Too often a common-law approach leading slowly and indirectly to a new rule creates too much uncertainty.

In such cases techniques need to be developed which will allow courts to induce a legislative reconsideration. Such judicial techniques are available and, in fact, have been used (indirectly or uncandidly) in recent years in the updating of both common-law and statutory rules. They present problems analogous to but not worse than those of the "fuges"). See also Calabresi, supra note 1, which applies that discussion to the problem of courts and legal obsolescence.

16. For example, in Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970), the Wisconsin Supreme Court considered whether plaintiff's negligence should ever be a bar to recovery in tort actions, in the face of a statute which allowed recovery only if "such negligence was not as great as the negligence of the person against whom recovery is sought." Wis. Stat. Ann. § 895.045 (West 1966). Appellant argued that the initial rule of contributory negligence was court-created, that it was this common-law rule which still barred some negligent plaintiffs from recovery, and that the legislature in adopting "limited comparative negligence" intended no more than to permit recovery by plaintiffs who were less negligent than the defendant while leaving the common law unchanged as to all others. But cf. Padway, Comparative Negligence, 16 Marq. L. Rev. 3 (1939), (an article by the draftsman of the bill which casts doubt on this reading of the statute). A majority of the justices held that the court had not been pre-empted from adopting full comparative negligence. All but one nonetheless decided to postpone consideration of a new rule until after the legislature, then considering the question, had acted. The clear message was that if the legislature did not act, the court might. The legislature did act that year, but only to change the words "as great as" to "not greater than." Wis. Stat. Ann. § 895.045 (West 1978). See
than those Davies raises with respect to legislative nonretroactivity. Unless litigants can be given an incentive to urge courts to force legislative reconsideration of timeworn laws (in those instances in which courts cannot simply “change” the law in the litigated case and thereby compensate the successful litigant), the pressure on the courts to update will be greatly diminished. For the common law function in the age of statutes to be truly effective, this and many similar problems must be solved.

Senator Davies’ article, I think, may be taken to understate the extent to which courts today are already doing—in a hidden way—what he would have them do openly (and not just for twenty-year-old statutes). I know, from correspondence with him, that he shares my view about how much judicial revision of statutes is already going on. My own approach emphasizes these current court

also Lupie v. Hartzheim, 54 Wis. 2d 415, 195 N.W.2d 461 (1972).

In Loui v. Oakley, 50 Haw. 260, 438 P.2d 393 (1968), the Hawaii Supreme Court made a similar “suggestion.” Justice Levinson noted in a footnote that contributory negligence, since it was a judge-made rule initially, could be judicially replaced by a full comparative negligence standard. Id. at 265 n.5, 438 P.2d at 397 n.5 (1968). The Hawaii legislature promptly compromised between the old common law rule and the threatened new rule by enacting a “limited” comparative negligence statute. HAW. REV. STAT. § 663-31 (1976). See also Bissen v. Fujii, 51 Haw. 636, 640, 466 P.2d 429, 432 (1970) (Levinson, J., dissenting).

Justice Frankfurter’s position in the FELA cases, see note 10 supra, can be viewed as a plea to the court to use a similar technique. In Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), the Supreme Court adopted an analysis comparable to that used by the Wisconsin court in Vincent, but rejected respondent’s argument that any expansion of remedies should be postponed until Congress had a chance to act. 398 U.S. at 405 n.17. Writing for the court, Mr. Justice Harlan construed the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1976), not to preclude the availability of a wrongful death remedy in situations explicitly not covered by the Act. That cleared the way for the Court to overturn the old common law rule of no recovery for wrongful death. The court felt free to expand the remedy, without waiting for Congress to act, in part because it found numerous and broadly applicable statutes, taken as a whole, [which] make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

398 U.S. at 390-91. In other words, the Court was prepared not only to strike down the old rule, but at the same time to adopt, in full, a new one.

17. Davies, supra note 4, at 214-19.
revisions and focuses on the dangers of having courts rework statutes through subterfuges and by misapplying—even bastardizing—other legal doctrines. The flight to the Constitution, which Davies properly notes and criticizes in his article, is but one way in which courts have attempted to fulfill their role as updaters of law in a world of aging statutes. The other techniques used by courts involve dangers different from those entailed by overly enthusiastic constitutional adjudication, but they are just as real. I would argue that courts, on their own, and by indirection, are starting to perform the function Davies would give them (and Justice Harlan's opinion is only one example), but there are real costs which flow from their indirect way of resolving the problem.\footnote{Compare Bickel, supra note 8, at 113-98, with Gunther, The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964).}

In his article, Davies spends much time defending the twenty-year threshold. I can understand it politically; as a theoretical matter, however, it could use more defense than Davies gives it. As he notes, different statutes age at different times. Statutes tend to age more rapidly if they are in a modern sense "in derogation of the common law" (that old judicial doctrine for controlling statutes that do not fit, applied after all mainly to new laws).\footnote{In traditional common-law thinking, legislatures were presumed to seek only particular results when passing statutes; they were thought to lack intent (or even competence) to make more fundamental changes in the common law. Thus each new statute underwent a process of interpretation by courts which often narrowed the scope of the statute's impact considerably. For a classic criticism of such judicial "jealousy," see Pound, Common Law and Legislation, 21 HARV. L. REV. 383 (1908).} Statutes that skate close to the constitutional line, that are inconsistent with our deeper, constitutional, legal topography are less deserving of long term respect than laws which (though they may be silly) in no way infringe the penumbra of the Constitution. And as Grant Gilmore has pointed out, statutes which represent the last exercise of power of a dying majority deserve different respect for a different time than statutes which are (though perhaps inconsistent with the rest of the law when first enacted) the early actions of a new and dominant majority.\footnote{See Gilmore, supra note 2, at 96.}

It is hard for me to see how mechanical rules for when statutes
"age" can be sophisticated enough to treat all these distinctions. It is precisely for this reason that the "sunset" law approach to judicial obsolescence is bound to fail. It is far too mechanical. The common-law approach is much more sophisticated. In effect, it decides when a particular law should be subject to sunset, i.e., should be revised by courts or when legislative revision should be induced as a result of judicial action. And it decides this on a judgmental rather than mechanical basis. It is this fact that gives Davies' proposal its great force. Of course, a common law approach to the sunsetting of laws immediately brings into discussion the whole relationship between "consistency in law" (the old common-law engine of change and continuity) and "majoritarian" demands for distinctions. And that relationship needs more attention than Davies in his brief article could give to it or, for that matter, than I can in this comment. I am not convinced, however, that the politically wise solution he suggests, the twenty-year threshold, (or any non-judgmental solution) can cope with the problem of when a law is "out of date"; and I fear that were it enacted courts would simply continue to destroy "younger" laws by subterfuges or by employing the constitutional meat-axe!

I could go on and on, and indeed I do in my book, and suggest other issues which a short article like Professor Davies' cannot treat. One last one that comes readily to mind is the role of the bureaucracy, of the administrative agency, in the updating of laws. That it has failed is, I think, obvious. That it was meant to play a crucial role in keeping law current is also indisputable. A full theory of a modern common law function in the age of statutes would have to cope with the failure of the agencies and the need—nonetheless—to

21. The "sunset" movement attempts to force legislative reconsideration of statutes every X number of years, by giving each statute when passed a fixed life span. The difficulty, of course, is that at a statute's birth one rarely knows what its useful life will be. Too often "lifespan" depends on factors extrinsic to the statute itself, like technological, social or even ideological changes. Thus, legislative reconsideration will usually come either too soon—before a statute has shown its age—or too late. If too many statutes are reconsidered too soon, "unsetting" will quickly become rubberstamp reenactment. If, instead, reconsideration as a general matter occurs too late, the problem we have been addressing will remain and the temptation to find inadequate solutions—like constitutional nullification—will persist. For a recent review of sunset legislation affecting administrative agencies, see Note, Sunset Legislation: Spotlighting Bureaucracy, 11 U. Mich. J.L. REFORM 269 (1978).
incorporate them and their strengths in the process of statutory updating.

To emphasize those things which Senator Davies' article and proposed bill do not treat, however, would be to fault the architect of a great cathedral because he did not design every statue for every niche. Not only is Davies' perception in my judgment the correct one, but his treatment of the problem is full of wonderful insights. His description of legislatures as being responsive rather than self-starting, for example, is not only accurate but also fundamental—all the more so because it runs against the mindlessly repeated "received wisdom." Here, as in so many places (the problem of legislative nonretroactivity comes readily to mind) his extraordinary capacity to combine knowledge of the world with an academic sense of perspective causes him to be not only creative but wise.

He has painted a great canvas in its particulars as well as in its broad conception. If it is true that the Venetian style emphasizes color and outlook but underplays detail, whereas the Florentine glories in detail and precision but sometimes shades the broader vision, Davies' painting combines the best of Venice and Florence. And that is no mean achievement!