

## BOOK REVIEW

OBSOLETE STATUTES, STRUCTURAL DUE PROCESS,  
AND THE POWER OF COURTS TO DEMAND A SECOND  
LEGISLATIVE LOOK

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

RICHARD NEELY†

Guido Calabresi is a distinguished professor of law at the Yale Law School who has previously written critically acclaimed books and articles about tort law, with particular focus on the economics of loss spreading.<sup>1</sup> The style of his new book, *A Common Law for the Age of Statutes*, is not calculated to make it must reading in airport waiting rooms, but the book is well written with the treasure trove of citations that we would expect from a former *Yale Law Journal* editor and law clerk to Mr. Justice Black.

As I read *A Common Law for the Age of Statutes* I was reminded of Merlin's book of magic in Tennyson's *Idylls of the King*. No one, not even Merlin, could read the text; Merlin, however, could read the commentary and that is what gave Merlin his power. It was from this arcane and incomprehensible scribbling of commentary that Merlin built Arthur's Camelot. Merlin's book built an empire although only one person had read it.<sup>2</sup>

---

† Justice, West Virginia Supreme Court of Appeals; Chief Justice, 1980. A.B. 1964, Dartmouth College; LL.B. 1967, Yale Law School; Former member of the West Virginia Legislature; Professor of Economics, University of Charleston.

<sup>1</sup> See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

<sup>2</sup> Thou read the book, my pretty Vivien'  
O, ay, it is but twenty pages long,  
But every page having an ample marge,  
And every marge enclosing in the midst  
A square of text that looks a little blot,  
The text no larger than the limbs of fleas;  
And every square of text an awful charm,  
Writ in a language that has long gone by,  
So long that mountains have arisen since  
With cities on their flanks—thou read the book'  
And every margin scribbled, crost, and cramm'd  
With comment, densest condensation, hard

A *Common Law for the Age of Statutes* is obviously a specialist's book; however, the specialists for whom it is most useful are judges who do not read much specialized material. Yet while I suspect that few judges will read this book from cover to cover, its principles will ultimately illuminate the collective consciousness of the judiciary through popular commentaries on the basic text. I doubt, for example, that very many card-carrying members of the Communist party either here or abroad have read Marx's *Das Kapital*. Like Merlin's charms, Marxist economics is largely understood through commentaries.

Professor Calabresi's principal thesis is that our law is becoming increasingly rigid as a result of "statutorification," by which he means a proliferation of statutes that over time become obsolete. Although old statutes no longer reflect a political consensus concerning the area they address, they will not be changed by the legislature because of inertia, and cannot be changed by the courts because of "separation of powers." In states with active legislatures, everything from eviction procedures to the time within which a mother must bring a bastardy action is now governed by one statute or another, many of which were passed long ago and are today entirely inconsistent with the prevailing legal landscape. Consequently, the flexibility that the common law once had to respond to changes in economic and social conditions, or changes in moral values, is now confounded. Every social issue that has ever received legislative attention has become locked in stone unless an organized, militant lobby can be found to force legislative reconsideration.

Calabresi's book is in one regard like the commentaries to Merlin's book of magic charms because he explains a charm that common law courts have traditionally conjured to require Congress and the state legislatures to give obsolete statutes a "second look." Activist courts have long understood this charm, but because of the litany of "separation of powers" that judicial ceremony demands, courts have infrequently articulated a "second look" rationale. Calabresi argues that the updating of legislation through subterfuges, the most obvious of which is a declaration that a particular statute is unconstitutional, makes it extremely difficult for the legislature to respond appropriately.

Calabresi argues that forcing courts into subterfuge does far greater violence to real, as opposed to liturgical, separation of powers than a forthright acceptance of a principled judicial power to invalidate

---

To mind and eye; but the long sleepless nights  
Of my long life have made it easy to me.  
And none can read the text, not even I;  
And none can read the comment but myself;  
And in the comment did I find the charm.

or even modify statutes that over time have become topographical monstrosities in a changed legal landscape. Calabresi has been criticized for being an advocate of judicial supremacy;<sup>3</sup> however, his book is far more descriptive than normative. He accurately observes that courts currently have the power to destroy statutes and frequently use that power. His primary concern is that this power to invalidate statutes be used intelligently and with as little injury to legitimate legislative authority as possible.

The underlying postulate of Calabresi's book is that legislatures are incapable of modernizing statutory law. I suspect that I was invited to write this review because I have addressed the mechanics of Calabresi's legislative inertia at tiresome length in my book, *How Courts Govern America*.<sup>4</sup> Calabresi does not explain the mechanics of why legislatures cannot update statutes, but rather assumes that any intelligent reader understands the process. For Calabresi, therefore, legislative inertia is a postulate whose accuracy is demonstrated only by "reader notice." Nonetheless, because this review is one of the commentaries by which Calabresi's work will become known, it is worth dwelling for a moment on the mechanics of legislative inertia.

A legislature is an organization designed to do nothing. From the days of the Assizes of Clarendon, the war cry of the priests and barons who established our first primitive legislatures was *nolumus leges Angliae mutare* (traditionally translated, "the laws of England shall never change"),<sup>5</sup> and they meant it. Legislatures were not designed to pass good laws but rather to prevent the passage of bad laws. They were intended to be, and still are, like a local health department that prevents far more illness than all of the skilled doctors since time out of mind have ever cured.

Almost everyone who goes to a legislature to get the law changed is a predator: bulk mailers want to send heavy junk for less than a housewife can send a postcard; oil, coal, and timber companies want to rape the public lands; labor unions want to have authority for third party boycotts; employers want "right to work" laws; teachers want to work less, be paid more, and have greater job security; groups like plumbers and barbers want complicated licensing procedures to limit competition; industry wants more favorable tax rules; and taxpayer lobbies want lower taxes and fewer public services for the poor. Nobody, in short, except an occasional League of Women Voters chapter, ever

---

<sup>3</sup> See, e.g., Hughes, Book Review, THE NEW REPUBLIC, June 2, 1982, at 32.

<sup>4</sup> R. NEELY, HOW COURTS GOVERN AMERICA (1981).

<sup>5</sup> See F. POLLOCK AND F. MAITLAND, 1 THE HISTORY OF ENGLISH LAW 102, 111, 167 (1895).

comes to the legislature to further the public interest (whatever the hell that is); they come to further their own selfish, private interests. They seek to subvert the power and money of government to their own personal ends.

Yet if you are in the business of being a legislator, you had better be damned careful how you say "no" to any of these vicious predators because in lightly attended party primary elections, almost any militant, well-organized interest group can cause you to lose your legislative job. Obviously some interests have either more voters or more money than others; however, the effects of annoying vested interests are cumulative. So, what any intelligent legislator has to do is always say "yes" to any request, no matter how predatory or utterly inane. But, if a legislator says "yes" and predatory statutes pass, what happens to the welfare of the community? Well, obviously, bad things happen, and that is to be avoided, even by the most cynical legislator.

The way legislators avoid ever having to say "no" personally, or being on record as opposing any of the myriad self-serving schemes of their constituents, is to construct elaborate institutional machinery that says "no" automatically. This machinery is known as the committee system, and when the committee system is combined with the seniority system (through which certain members of the "leadership" determine the agendas of different committees) spectacular nay-saying results can be achieved with almost every individual legislator privately saying "yes." Thus a legislature is not a neutral, majoritarian body that impartially studies all intelligent suggestions for law changes; rather, it is a machine deliberately, intelligently, and efficiently designed to say "no" unless some Herculean force kicks it in its institutional tail.

Furthermore, legislatures are not much interested in social issues because, in general, the political support that translates either into the delivery of voters to the polls on election day (labor unions) or campaign contributions for the slick media blitz (corporations) does not flow from social issues, but rather flows from economic issues. It is teachers' salaries, worker's compensation, dog and horse racing, and landlord and tenant laws that inspire legislative attention because they are the central concern of constituencies that have big bucks and lots of votes on election day. There are concrete political rewards and punishments to individual legislators based on how they handle economic, as opposed to social, issues. Big money does not ride on social issues. Who cares whether the legislature updates the procedure for bringing a bastardy action or modifies the exceptions to the statute of frauds? Nobody except a few lawyers and litigants who happen to be wrestling with these problems at the moment.

Any legislative body is a machine designed to perform two incompatible functions: first, pass all necessary "good" legislation; second, prevent all "bad" legislation from being passed. It is as if some mad scientist invented a machine that shoveled the horse manure from your barn by day and then, in the evening, with another attachment, cooked your dinner for you. It would take a strong-willed consumer with a deficient aesthetic sense to eat very much of the dinner that particular machine prepared! So it is with a legislature. In the nature of these things a legislature must opt for machinery that either passes too many laws, or machinery that passes too few. As we all know, legislatures have opted for the latter, which is why courts have the volume of business they have.

Whenever we are confronted by an old statute, therefore, there is a force of inertia that will keep that statute in effect indefinitely unless some *organized* political constituency urges change. Even then, if an organized political constituency fights the change, the odds are a hundred to one in favor of the status quo (and those are *literally* the odds). According to Calabresi, the institutional imperative of a legislature causes an entirely unprincipled allocation of the burden of inertia. When most of our law was made by common law courts such an unprincipled burden of inertia presented no problem. Although common law precedent was slow to change in deference to reliance interests, common law did, at least, change incrementally in response to the oft-times reviled "hard case."

Calabresi's point is that the doctrine of separation of powers does not necessarily present an absolute bar to judicial updating of statutes when those statutes are obsolete.<sup>6</sup> Rather, he argues that the fabric of the law is woven from strands of statutory and common law, but that the fabric must be taken as a whole. Today's common law strands are manufactured according to modern technology; however, old statutory strands do not meet today's quality standards, causing a deterioration in the overall strength of the fabric. This is not an argument for judicial supremacy; certainly Calabresi does not assert that the quality of current decision making by courts is superior to current decision making by legislatures. His point is that current decision making by courts is superior to outdated, obsolete decisions *made* by legislatures decades or centuries ago.

Calabresi, however, recognizes that often the force of inertia is entirely justified. The fact that it has been a crime to murder another for eight hundred odd years is no reason, *ipso facto*, to conclude that the

---

<sup>6</sup> See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 114-16 (1982).

murder statute is obsolete. Calabresi would be the first to admit that as far as most statutes are concerned, a retentionist bias is entirely justified. His complaint is that there is no principled decisionmaker to determine on a continuing basis whether a retentionist, as opposed to a revisionist, bias is called for. Courts, Calabresi argues, are ideally qualified to determine whether a given statute should enjoy a retentionist bias or a revisionist bias.<sup>7</sup> When a court determines that a statute should have a revisionist bias, the court should have the power to strike the statute—conceivably with warning to the legislature—so that the legislature must take a “second look” at the subject covered by that and related statutes. If, after a second look, the legislature decides to reenact the old statute, that’s it. A statute recently enacted is *prima facie* not obsolete.<sup>8</sup>

The problem that Calabresi recognizes, of course, is that the same forces of inertia that cause old statutes to stay on the books will prevent a new statute on the same subject from being passed if the court strikes the old statute. Thus, in an area where a court chooses to strike a statute—particularly one involving social issues—the likelihood is that the subject originally controlled by the statute will be controlled for a long time by judge-made, decisional law.

The central problem can be no better stated than by Calabresi himself:

Most laws create their own landscape or become increasingly out of place. If, however, a law does neither, it is then that the difference between a court’s power over a common law rule and a court’s power over a statute seems most in point. An *ad hoc* common law rule that has, in time, failed to become principled is ripe for overruling. Yet only if one is prepared to say that courts are good at gauging current majoritarian feelings, or ought to follow their own values, can one feel easily comfortable with a judicially induced sunset of such a *statute*. The traditional basis of judicial common law power does not exist.

It does not, however, follow that such a statute should remain in force. After all the statute has, by hypothesis, found no new support in other statutes or in common law. It is, in a real sense, out of phase. Its basis, its legitimacy, depends simply on the fact that an old majority enacted it. Is this sufficient and, if so, for how long? Or is it better to allow courts after a time to force a reconsideration of such a law based on their direct judgment as to the existence of current majoritarian support for the law? Alternatively,

---

<sup>7</sup> See *id.* at 163-66.

<sup>8</sup> See *id.* at 132.

would it be better to establish yet another judgmental body to decide when such a law was ripe for review?<sup>9</sup>

The advantage that a judge has over a law professor is that all he has to do when he sees a good idea is lobby a few colleagues and the new idea is law. Law professors think about everything but usually do nothing. Judges, on the other hand, do everything but usually don't think about much. Law professors are in the speculation business and Calabresi's book contains a universe of speculations concerning which method of statutory review is most appropriate. Although a host of methods are available to confront satisfactorily the problem of statutorification, the only one that will work is for the courts to take the bull by the horns and start nullifying statutes explicitly on a second-look basis, rather than by interpreting them out of existence, declaring them unconstitutional, or declining to enforce them by looking to their rules.

Calabresi, in the 116 pages of notes that accompany 181 pages of text, cites scores of cases in which the courts have declared obsolete statutes unconstitutional when such a conclusion could not be justified by any cogent constitutional analysis: examples, if you would, of doing without thinking. The problem has traditionally been that due process and equal protection are the only constitutional theories available to unimaginative courts. Calabresi argues forcefully that when only a due process or equal protection rationale is available to a court, the court is in a philosophically untenable position because the legislature *cannot* repass the same statute regardless of how much it comports with current majority sentiment.

In my experience judges are usually result-oriented politicians; when they see a bad statute they get rid of it and let the future take care of itself. It doesn't particularly bother judges that bad law is on the books and the constitutional currency has been depreciated by an infusion of garbage. Furthermore, in my experience it also is of little concern to judges that through poor craftsmanship—namely, the use of constitutional due process or equal protection overkill—they have done a real violence to legitimate legislative prerogatives.

Consequently, if we can find a respectable constitutional theory that does not preclude legislative reenactment, but requires only a second legislative look, the courts will not be required to perform constitutional legerdemain. Not only that, but the new constitutional theory will have developed within the common law tradition of case-responsive adjudication, so that it will itself be an incremental, entirely expected,

---

\* *Id.* at 109.

and largely welcomed, change in the existing legal landscape.

The theory that accomplishes this purpose is "structural due process."<sup>10</sup> Although Calabresi does not use this term, he has finely crafted the legal theory to which the term applies. We have all come to know and love both both procedural due process and substantive due process. Although substantive due process is seldom denominated as such any more, the concept is alive and well under the sobriquet "equal protection."<sup>11</sup> Structural due process analysis proceeds basically along the lines Calabresi suggests: it assumes that either the federal or state constitutions imply a right to periodic, intelligent review of obsolete laws. Thus, when a law is entirely at odds with the prevailing legal landscape, a right arises in the citizen to be free from institutional inertia. The structural due process theory, therefore, would permit a court to send the statute back to the legislature for a second look.

My original observation about *A Common Law for the Age of Statutes* being like the book of Merlin is related to my conclusion that courts are ready to articulate such a structural due process doctrine. In order to do this courts must have weighty academic tomes combined with extensive commentary that can be cited in obfuscating footnotes to make the theory respectable. Like all common law doctrines that effect a dramatic departure from existing practice, it is necessary that the doctrine of structural due process sneak up on the law.

In West Virginia we have already begun to insinuate structural due process into the same company with the more traditional constitutional doctrines. In the case of *West Virginia ex rel. S.M.B. v. D.A.P.*,<sup>12</sup> we struck down a West Virginia statute requiring that bastardy proceedings be commenced against the putative father within three years of the birth of a child. We held the statute unconstitutional because it invidiously discriminated against illegitimate children whose mothers failed to file paternity actions within three years of birth while legitimate children had a right to support throughout their minority. Although we relied primarily upon equal protection and substantive due process analysis, we also included the following paragraph:

Finally, there is an argument to be made for striking this statute founded in the evolving concept of structural due process which recognizes that statutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social struc-

---

<sup>10</sup> I first encountered the use of this term in an article by Lawrence Tribe. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

<sup>11</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring).

<sup>12</sup> 284 S.E.2d 912 (W. Va. 1981).

ture. See *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978); *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978).<sup>13</sup>

This passage, of course, was a set-up—a throw-away line for use in a subsequent case in which we will really need a second-look doctrine. Nonetheless, the throw-away line of *West Virginia, ex rel. S.M.B. v. D.A.P.*, is the type of authority that feeds on itself until no one notices that the rabbit came out of a hat empty of precedent but full of intelligent institutional analysis like Calabresi's.

For courts like the West Virginia Supreme Court of Appeals, which are struggling with the competing goals of separation of powers versus elimination of oppressive, obsolete statutes, Calabresi's argument is enormously valuable; it gives a theoretical, academic respectability to what might otherwise appear as a bare power-grab. Hardly any judge of a senior appellate court who has contorted, twisted, manipulated, or otherwise mutilated constitutional theory to save society from the maleficent effect of some dreadful dead statute has not yearned for a respectable theory that permits invalidation of the statute without creating the impediment to renewed legislative action that a bare holding of unconstitutionality creates.

Obviously, a power in courts to invalidate legislative acts is potentially a terrible threat to political government, of which legislative inertia is an integral part. Perceptive students of the current system, like Calabresi, understand perfectly well that courts will invalidate, interpret away, or otherwise manipulate statutes whenever they feel strongly about their obsolescence regardless of the flag under which this power flies. Calabresi's argument, therefore, proceeds on the assumption that courts will invalidate dreadful statutes anyway and that it is now important to consider the question of "how" rather than the question of "whether."

Calabresi's argument is, of course, enormously threatening to special interest lobbies. A court power effectively to veto selected pieces of legislation plays potential havoc with political expectations. In the real world of legislative politics individual bills do not usually pass; rather it is packages of bills reflecting social compromises that pass. One interest group gets a little piece of pie in return for letting another interest group eat its pie in peace. The leadership of any legislative body organizes an agenda that achieves these accommodations among otherwise hostile predators.

The executive, who has veto power, is privy to this negotiation

---

<sup>13</sup> *Id.* at 915.

process and is usually a recipient of a piece of the action. Everyone knows in advance what will be vetoed and what will not, and woe be it to the person who lies about his deal. Courts, however, because of the ethics and ceremony that surround their priest-like function, are not and should not be privy to these deals. And, even if judges could be privy to political deals, they would make pests of themselves because they have no constituency, and hence no legitimate political agenda other than their own salaries and overall support for the court system. Consequently, judges would be uncompromising about special interest legislation because, unlike the executive, they want nothing themselves. I tend to believe that compromise is good and that life is made livable by measured straining in opposite directions.<sup>14</sup> Thus I am fearful of judges who might oppose all special interest compromises on principle.

What happens to our predator friends who have finally gotten past the legislative bulwark if a court decides to strike down one piece of an overall legislative package on second look, structural due process grounds? Because that particular piece of rapacious legislation was part of a package—a quid pro for a quo, as it were—there is no hope of repassage of just that one individual bill (unless the predator wants to give something else up to get it repassed—unpleasant double payment). This spectre presents a significant obstacle to the enthusiastic endorsement of Calabresi's thesis, but it is not a new problem. Courts wanting to strike vicious special interest legislation can do it today under existing constitutional doctrines, and in fact, they do it all the time. Although federal courts are circumspect in this regard, state courts operating under the authority of state constitutions can be quite unpredictable.

Even activist state courts, however, do not usually intrude themselves into the current allocation of special interest goodies, except by the more respectable technique of statutory interpretation. It is social legislation—general, rather than special interest laws—that present the most urgent problems of obsolescence. Hard ball special interest statutes concerning everything from environmental regulation to labor-management relations and worker's compensation tend to be amended, or at least reviewed periodically.

Society in general breaks down into those who favor the status quo, those who oppose the status quo, and those who don't much care

---

<sup>14</sup> We urge our horse down hill and yet put the brake on the wheel—clearly a contradictory process to a logic too proud to learn from experience. But a genuinely scientific logic would see in this humble illustration a symbol of that measured straining in opposite directions which is the essence of that homely wisdom which makes life livable.

either way. Because any rule that permits courts to strike legislation for a second look strikes at the status quo, Calabresi's theory will never meet with approval from those who defend the status quo on general principle. People who favor the status quo are partisans of the inertia machine of the legislature. People who oppose the status quo are partisans of the courts because courts effect change while being relatively cheap and accessible. Courts are successful, however, largely for the same reasons that military juntas of banana republics are successful. In their constitutional adjudicatory role both the legislative and executive authority are in the hands of a small group of junta-like judges. The people who don't much care either way about the status quo do not oppose the courts actively for exactly the same reason that people throughout the world do not generally oppose authoritarian government actively.

The primary objection then to a "structural due process" review power is that the power will be used in an unprincipled way, by power-hungry judges, increasing in effect the junta-like component of American government. Calabresi anticipates this objection by arguing that while the courts may occasionally use a review power in an unprincipled way, the total legal structure will, nonetheless, be less unprincipled than it is under the current system in which inertia reigns supreme. He maintains that courts struggling to apply principles to the problems of "statutorification" are better than nobody applying any principles at all. On balance I tend to agree with professor Calabresi, and although my enthusiasm is reserved, Calabresi is correct that forthright confrontation of the problem is better than the current inartful subterfuge approach in which updating is accomplished through sloppy due process or equal protection analysis.

Most of *A Common Law for the Age of Statutes* is a superbly crafted presentation of an enormous body of legal theory. The last chapter, however, rises to heights of poetry that are almost unsurpassed in legal literature. The last chapter conceptualizes all of the issues addressed in the book as a choice between right versus right, rather than the traditional and pedestrian conception of conflict as right versus wrong.<sup>15</sup> It reflects either desperate hope or the hope of despair, and standing alone is a beautiful contribution to the legal literature.

Calabresi's book is a Herculean *tour de force* and a minor classic. It will have the precedential value of a well reasoned federal circuit court opinion and will ultimately have a major effect on the fabric of the law. It is a significant and original contribution to the science of

---

<sup>15</sup> See G. CALABRESI, *supra* note 6, at 178-81.

law of which both Professor Calabresi and the Yale Law School can be proud.