Truth and Fiction in the Judicial Handling of Statutes

Jerry J. Phillips
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About the time I first met Pablo, he had made a sculpture of a bull's head out of the seat and handlebars of a bicycle. He used to say that this sculpture was reversible. "I find a bicycle seat and handlebars in the street, and I say, 'Well, there's a bull,'" he explained to me. "Everybody who looks at it after I assemble it says 'Well, there's a bull,' until a cyclist comes along and says, 'Well, there's a bicycle seat,' and he makes a seat and a pair of handlebars out of it again. And that can go on, back and forth, for an eternity, according to the needs of the mind and the body."

But this rough magic
I here abjure, and, when I have requir'd
Some heavenly music, which even now I do,
To work Mine end upon their senses that
This airy charm is for, I'll break my staff,
Bury it certain fathoms in the earth,
And deeper than did ever plummet sound
I'll drown my book.

THE CONSTITUTIONAL APPROACH

It is marvel enough that the Marshall Court in *Marbury v. Madison* found the power of constitutional review of state and federal statutes to lie with the courts. However, to read the courts' attempts to define what is a constitutional issue is truly astounding.

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*** W. Shakespeare, *The Tempest* act V, scene I.

1. 5 U.S. (1 Cranch) 137 (1803). Even the jurisdictional aspect of the case is bemusing. Why did the Court not simply hold that it lacked original jurisdiction because no ambassador, public minister, consul or state was a party to the lawsuit? See U.S. Const. art. III, § 2; *Ex parte Gruber*, 269 U.S. 302 (1925). Alternatively, using the well-accepted rule of statutory construction to avoid a constitutional issue when reasonably possible, the Marshall Court could easily have construed section 13 of the Judiciary Act of 1789 as conferring mandamus power on the Court only for appellate jurisdictional purposes. Indeed, why does the Court not have mandamus power in its original jurisdiction? Cf. *Ex parte Republic of Peru*, 318 U.S. 578 (1943). Having worked through this maze of issues, one can then get to the sixty-four dollar question of where in the Constitution, and why, is the power of constitutional review conferred on the courts.
On the one hand, there is the textually applicable provision, such as
the fifth amendment, where the justices often strongly differ regarding
the applicability of the provision to the facts at hand. These cases are
reg, and they exert a constant pressure on the courts to establish a
generalized rule that will facilitate disposition on something other than
an ad hoc basis. Thus, in the area of the fifth amendment one sees the
emergence of the fixed rule of *Miranda v. Arizona* to determine volun-
tariness of confession. Under the first amendment, the court attempted
to move away from the amorphous public-interest standard of *Rosenbloom
v. Metromedia, Inc.* in libel suits to the more fixed public-private person
categories of *Gertz v. Robert Welch, Inc.*

There is, however, substantial pressure to reconvert these fixed rules
into ad hoc determinations. So the issue under *Miranda* shifts from volun-
tariness of confession to voluntariness of waiver; under *Gertz*, the focus
shifts from determining public interest to determining the public versus
private status of the plaintiff and whether fault or constitutional malice
has been shown. These reconverted issues are factual and are determined
on a case-by-case, judgmental basis, and not by a broad, mechanically
applicable rule.

On the other hand are cases where the constitutional power authoriz-
ing or prohibiting state action is nowhere evident on the face of the con-
stitution. Thus, the Marshall Court found the power of Congress to
establish federal banks that are not subject to state taxation to be im-
plicit in the constitution—an early “penumbras” case. The Court in
*Griswold v. Connecticut* found the constitutional right of a married cou-
ples to obtain birth control information and devices to be implicit variously
in the penumbras of the first eight amendments to the constitution, in
the ninth amendment, and in the due process clause of the fourteenth
amendment. The dissenters, while conceding the Connecticut statute at
issue to be “an uncommonly silly law” and “unwise, or even asinine,”
nevertheless found it to be constitutional.

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2. See, e.g., *Watts v. Indiana*, 338 U.S. 49 (1949). Of course, the distinction between
law and fact is not always easy to make. See *Wainwright v. Goode*, 104 S. Ct. 378 (1983)
(the Florida Supreme Court’s resolution of the relevance of an aggravating factor in a capital
case viewed alternatively as a determination of fact and of law).
6. Indeed, the issue of public interest appears to have been retained as an additional
factor to be considered, instead of being discarded in exchange for other criteria. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).
8. 381 U.S. 479 (1965).
9. *Id.* at 527.
It always makes students of the law uncomfortable to see constitutional issues pulled out of penumbras, much like a rabbit being pulled out of a magician's hat. Conversely, it is equally discomfiting to see distinguished justices state with a straight face that while a law may be "unwise," "uncommonly silly" and "even asinine," it is nevertheless constitutional. The suggestion implicit in such a statement—that constitutional adjudication is not based on policy considerations—is disingenuous at best.

Astonishment does not end here, however. There are also the three levels of constitutional review—the rational basis, the substantial basis, and the compelling state interest. If reviewed under the first standard, a law is almost certain to pass constitutional muster; if reviewed under the third, it is almost certain to fail. Under the second standard, the outcome is anybody's guess. A determination of which standard applies in a given case is of paramount importance, but no clear criteria are apparent. To say that the third standard involves fundamental rights and suspect classifications, for example, provides little help, since presumably all constitutional rights are fundamental, and most laws that are doubtfully constitutional raise equal protection issues of suspect classifications.

A new brand of equal protection and due process adjudication that smacks of the allegedly discredited Lochnerism also exists. This adjudication is particularly evident at the state level; it often—and apparently permissibly—goes beyond the reach of federal constitutional strictures, making many constitutional scholars exceedingly uncomfortable. If guest passenger statutes are unconstitutional, as they have been held to be—although by no means uniformly—at the state level, then what

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10. The late Fleming James used to say that a plausible legal argument is any argument that a lawyer can make with a straight face. Professor James was an uncommonly honest man, however, and one would be understandably reluctant to use this standard for judging the plausibility of legal arguments made by poker-faced lawyers.

11. Professor Calabresi describes a court's common-law lawmaking function as that of determining consistent "policies," and constitutional adjudication as that of determining "principles." G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 165 (1982). "Principles are what is viewed as right; policies, what is useful." Id. at 292-93 n.1. This distinction, although nice in theory, is not very easy to make in practice with any significant degree of consistency, and it has a will-o'-the-wisp ring of fiction about it.


15. Id. at 251.


17. See Justice v. Gatchell, 325 A.2d 97 (Del. 1974), and cases discussed therein.

18. The United States Supreme Court upheld the Connecticut guest-passenger statute against federal constitutional attack in Silver v. Silver, 280 U.S. 117 (1929).
statutes are constitutional? Products liability and medical malpractice statutes of repose have likewise been struck down as unconstitutional, and again with sharply divided views as to the legitimacy of such holdings. Dollar limitations on the amount of tort recovery have met the same fate. Why have statutes of fraud not been similarly struck down? Is it not arbitrary that some contracts must be in writing, while others need not be? Why must a contract for the sale of goods of $500 or more be in writing to be enforceable, while a sale for $499 need not? Why must a contract to be performed in a year and a day be in writing, but not one to be performed within a year? Why is the hearsay rule constitutional, since some hearsay which is admitted as an exception to the rule is surely as unreliable as other hearsay which is excluded? The list of unconstitutional laws under this kind of analysis is potentially limitless.

The concept of inherent court power is yet another category of constitutional adjudication which, to date, has had a rather limited application, but which could well be expanded to gargantuan proportions. So far it has been used, apparently exclusively at the state level, to determine the constitutionality of statutes regulating the practice of law. The cases involve such matters as the qualifications for practicing law and grounds for lawyer discipline. But why is this power limited to attorney qualification cases? Why does not any law affect the qualification—or, by slight extension, the quality—of practice before the courts?

19. The decisions finding guest-passenger statutes unconstitutional under state constitutional provisions have been severely criticized. See W. Prosser, J. Wade & V. Schwantz, Cases and Materials on Torts 206 (7th ed. 1982). "The true antimajoritarian role that our tradition of judicial review does assign to courts is too crucial and too chaste to permit its promiscuous application in circumstances that are trivial, as in guest statutes." G. Calabresi, supra note 11, at 164.


24. The confrontation clause normally requires a showing of unavailability of the declarant and a showing that the declarant's statement "bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). Presumably the states, under their own constitutions, see Kirby, supra note 12, at 251, could go further and exclude all hearsay because of allegedly arbitrary classifications between "firmly rooted" and not so firmly rooted exceptions.

Sorrells v. United States is a very interesting Supreme Court case dealing with the entrapment defense. Some of the justices sought to apply the defense based on the inherent power of the Court, while others would have applied the defense based on the supposed intent of Congress in connection with the national prohibition statute at issue. A fascinating aspect of the case is that the "inherent power" justices based their decision to apply the defense on nonconstitutional grounds. They implicitly recognized, in other words, that if Congress were clear enough, the defense could constitutionally be made inapplicable to the statute at hand. This holding adumbrates the nonconstitutional, noninterpretational approach to the invalidity of statutes discussed in the latter part of this article as an alternative to the uncertain and highly potent constitutional analysis of laws.

Why is there much uncertainty about when an issue is properly raised regarding the constitutional validity of a statute? The explanation apparently is that there is no agreement on what a constitutional issue is. To say that a constitutional issue implicates fundamental values does no good because one person's fundamentalism is another person's trivia. Thus, school prayer has been held to be a fundamental issue, but the United States Supreme Court has held the issue of the opening of the Nebraska legislative sessions with prayer not to be of sufficient magnitude to rise to the level of constitutional importance. At one time, commercial speech was not protected by the first amendment because fundamental values were apparently not involved, but now such speech is at least partially protected. Whenever the interests of a lawyer's client are at stake, however, those interests are fundamental to that lawyer and that client.

It is more realistic to recognize that the importance or seriousness of an issue is not absolute, but varies with time and circumstances. The eighth amendment cruel and unusual punishment issue, for example, is heating up and becoming much more important than ever. This rising

27. Id. at 457 (Roberts, J., dissenting in part); G. CALABRESI, supra note 11, at 287 n.33.
28. See infra text accompanying notes 53-56.
29. See supra text accompanying notes 11-19.
31. Marsh v. Chambers, 103 S. Ct. 3330, 3349 (1983) ("Simply put, the Court seems to regard legislative prayer as at most a *de minimis* violation, somehow unworthy of our attention." (Brennan, J., dissenting)).
33. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). But see Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977) (refusing to apply the constitutional doctrine of overbreadth to commercial speech since "presumably" the advertiser of products or services "can determine more readily than others whether his speech is truthful and protected.").
controversy is due to the continued concern over the legitimacy of capital punishment and even of appropriate noncapital punishment.¹⁴

Moreover, questions of constitutionality run on a spectrum.¹³ A law is not necessarily either all constitutional or all unconstitutional; it may be slightly or substantially unconstitutional, or anywhere in between. A law providing separate public restrooms for men and women is probably completely constitutional; a law providing segregated restrooms based on race is probably completely unconstitutional. Gray areas fall in between. What about separate restrooms for faculty and students in a law school? Could separate restrooms for athletes and nonathletes be constitutionally justified? What of separate restrooms for homosexuals, heterosexuals, hermaphrodites, and transsexuals?¹⁶ Once again, the list of possibly unconstitutional categories seems potentially limitless. A major problem with constitutional adjudication is its all-or-nothing impact on laws. Except for the so-called “passive virtues,” discussed in the next section, courts typically do not say, “This statute is a little unconstitutional,” or, “This statute is almost completely unconstitutional.” Instead, they usually say it either is, or is not, constitutional.

In some instances a declaration of unconstitutionality is not fatal to a law's reenactment.¹⁷ Probably more often, however, a declaration of constitutional infirmity dooms a statute for reenactment purposes. A constitutional declaration against prayer in schools, unless overruled by the Supreme Court or by constitutional amendment, is inflexible. In those instances where laws are only partially unconstitutional, such inflexibility is very strong medicine indeed. Moreover, the difficulty of deciding when


³⁵. As Professor Calabresi puts it, some laws “might be moving toward unconstitutionality,” or might be “semiconstitutional,” and yet not be completely invalid. G. Calabresi, *supra* note 11, at 16, 21.

³⁶. In Diaz v. Oakland Tribune, Inc.; 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983), the defendant newspaper, following up “several confidential sources,” discovered that the plaintiff, Toni Ann Diaz—a controversial student class president of a California community college—was in fact a transsexual who had been born in Puerto Rico as Antonio Diaz, a male. A reporter for the newspaper published a short gossip item in the paper revealing this discovery, and concluded with the quip: “Now I realize, that in these times such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.” 139 Cal. App. 3d at 124, 188 Cal. Rptr. at 766. The California Court of Appeal held the plaintiff stated a cause of action against the defendant for invasion of privacy.

³⁷. See *infra* text accompanying note 38.
constitutional adjudication should be applied, and under what standard, further complicates the use of this method of review. These problems have led courts to seek less severe, and perhaps less complex, measures of adjudication when the issue of constitutionality vel non is uncertain. The measures involve the so-called passive virtues, and interpretation.

THE NONCONSTITUTIONAL APPROACH

Passive Virtues

Alexander Bickel coined the felicitous phrase "passive virtues" to describe those numerous maneuvers the courts use to skirt constitutional issues, thus giving the majoritarian processes a second chance to work out the problem short of constitutional adjudication. The plaintiff may lack standing; the issue may be moot, or not ripe for adjudication; there may be no case or controversy, or the lawsuit may involve a nonjusticiable political question; the case may be determinable on independent state grounds; or certiorari may have been improvidently granted. A law that is capable of more than one construction should be construed in a manner which will uphold its constitutionality. Anyone who has studied federal procedure in any depth is familiar with the numerous and often distracting devices which the courts, particularly the United States Supreme Court, use to avoid adjudication on the constitutional merits.

Even when the Court addresses the constitutional issue on the merits, it often does so in a way that does not spell the constitutional death knell for the law in issue. A statute found unconstitutionally vague, for example, can be legitimated by legislative tightening; an unconstitutional delegation of powers can be lawfully reasserted by its rightful owner; or an unconstitutional state infringement on interstate commerce can be validated by express Congressional approbation. All of these instances represent attempts by the courts to sidestep the constitutional issue because constitutional adjudication is such strong medicine. Perhaps in the process the court will drop a dictum or two indicating its concern with the hovering constitutional or quasi-constitutional problem. A word to the wise is well taken.

Interpretation

The major nonconstitutional method used by courts from time immemorial to invalidate or emasculate distasteful laws is that of interpretation. Interpretation may be used to "reconstruct" common law precedent or statutes. The end result in either case is the same: the old law takes on a new look so that one would hardly know the two are the same, while in theory, if not in fact, the old law remains intact.

Why do courts engage in such subterfuge? Initially, one should note

that the technique of interpretation is not always a subterfuge. Interpretation of statutes to determine the true legislative intent is a legitimate judicial function. In a civil law jurisdiction such as Louisiana, interpretation of legislative intent has been honed to a fine art. Even in common law jurisdictions, the deft civil law approach has been utilized.

Discerning judges and scholars have long recognized, however, that in some instances—how many is uncertain—the legislative intent is simply not apparent. What should the responsible judge do in this situation? Judge Albert Tate is one of the most eloquent advocates of the judicial duty to legislate in this context and of the judge's duty to candidly recognize that he or she is doing just that. The Hart and Sacks materials on legal process stand as one of the leading and most thorough explorations of the technique of judicial legislation in the face of statutory ambiguity.

As with most techniques, the exact boundaries of application are unclear and therefore subject to manipulation. It is a small step from actual intent, to implied intent, to constructive intent, to intentional disregard of the apparent intent of the legislature. An example can illustrate the problem. In 1978, in response to the so-called products liability insurance crisis, the General Assembly of the State of Tennessee enacted the "Tennessee Products Liability Act of 1978." Section 29-28-103 of that Act provides a complex statute of limitations and statute of repose for products liability suits. Putting aside questions of its constitutionality and scope of coverage, large questions of interpretation of this section

44. Several state courts have struck down their products liability statutes as unconstitutional. See Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983), and cases cited therein.
45. The Tennessee Act applies only to suits brought "on account of personal injury, death or property damage," and the product must either be "unreasonably dangerous"
remain. The sharpest bite of the section is its provision that all products actions "must be brought within ten years from the date on which the product was first purchased for use or consumption." A garbled exception is made for minor plaintiffs, and in 1979, the General Assembly enacted the following amendment to the section, adding another exception: "The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos."

What is the intent of the legislature with regard to other possible exceptions to the statute? Under the well-accepted rule of expressio unius, only minority and asbestos exceptions are intended. For every rule of statutory construction, however, an equal and opposite rule usually exists. Even the plain meaning of a statute may be disregarded when necessary to effect the legislative "intent." Surely the legislature did not intend to cut off claims for other slowly accumulating toxic torts, such as byssinosis, vinyl chloride poisoning and the like, which for all intents and purposes work very much the same way as asbestosis and mesothelioma. Moreover, no legislature could reasonably have intended to block an action based on fraudulent concealment, since to do so would shout inequity to the very heavens. And what of the continuing duty to warn, where the duty arises each instant, thus causing the statute to begin running anew as long as the warning is not given? Other entirely reasonable exceptions can be conjured up until the statute is eventually shot through with exceptions, raising the spectre of constitutional arbitrariness of classification for those cases remaining within the ten-year cutoff period of repose. Where, in all of this interpretation, does true legislative intent lie? Where does reality end and fiction begin?

or in a "defective condition," which is defined as "unsafe for normal or anticipatable handling or consumption." TENN. CODE ANN. § 29-28-102(1)-(8) (1980). Thus, an action for purely economic loss may not be covered by the Act. See Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982), and cases cited therein.

46. TENN. CODE ANN. § 29-28-103(a) (1980).
47. The statute provides that an action by a minor must be brought within either (1) the time periods enumerated therein, or (2) one year after attaining majority, "whichever occurs sooner." Id. Evidently, the legislature intended for the statute to run on the occurrence of the later, not the "sooner," of (1) or (2), as the federal District Court of Middle Tennessee held in Tate v. Eli Lilly & Co., 522 F. Supp. 1048 (M.D. Tenn. 1981).
48. TENN. CODE ANN. § 29-28-103(b) (1980).
49. Expressio unius est exclusio alterius—"expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (Rev. 5th ed. 1971).
51. Although the words of the statute may be clear and unambiguous, applying them to the facts of the present case may produce a result so unreasonable or so seemingly unfair as to suggest that the legislature never intended for the enactment in question to be applied to the present type of fact situation.
Tate, Techniques supra note 41, at 730.
Suppose, however, an astute legislature foresaw the problems of statutory construction posed in the preceding section, and sought to forestall them by a clear statement of legislative intent such as the following: "The foregoing exceptions for minority and asbestos actions are the only exceptions intended in this provision, and no other exception shall be made." The court is then traditionally squarely faced with the prospect of either obeying the clear legislative mandate or striking down the statute as unconstitutional. If the court takes a conservative attitude toward constitutional adjudication and is unwilling to strike down the statute on constitutional grounds, it is left no other choice but that of applying the statute as plainly written.

Professor Guido Calabresi, in his seminal work entitled *A Common Law for the Age of Statutes*, poses at this juncture the following provocative and profound hypothetical: "Let us suppose that common law courts have the power to treat statutes in precisely the same way that they treat the common law." His entire book is built around an exploration of the implications of this supposition.

The first objection of many to whom the supposition is one of first impression is that the exercise of such power is unconstitutional. Professor Calabresi makes short shrift of that objection. The courts have been doing it all along by sleight of hand, through statutory interpretations, so why not do it openly? The legislature could presumably confer this power on the courts openly, and if such conferral would be constitutional, unilateral judicial assumption of the same power would presumably be constitutional as well. Nothing in the doctrine of separation of powers prohibits the assumption of such power. Nothing in the constitution either expressly allows or prohibits the assumption of such a common law adjudicatory power any more than it expressly allows or prohibits the judicial assumption of the power to declare laws unconstitutional.

The practical ramifications of implementing such a doctrine are significant. According to Professor Calabresi, the doctrine will not necessarily result in any greater judicial activism than already exists and need not result in any adverse legislative backlash. The doctrine should greatly reduce the pressure to resort unwisely to constitutional adjudication in doubtful cases, and it should bring a large dose of honesty into the otherwise murky field of interpretational subterfuge. He strongly believes that honesty is the best policy.

53. G. CALABRESI, supra note 11.
54. Id. at 82.
55. Id. at 114-16.
56. Id. at 167-71.
Some Ruminations on the Calabresi Theory of Common Law Invalidation of Statutes

The Methodology

Professor Calabresi points out that a number of antecedents support his proposal. His mentor, Grant Gilmore, long recognized the problem of the glut of statutes in twentieth-century American law that threaten to choke the courts' operation in the performance of their function of common law adjudication. Gilmore predicted on the eve of his death that a "major problem of law reform over the next half century will be the reformulation of our theories about the allocation of power between court and legislature."

Professor Calabresi's book emphasizes that statutes become inappropriate through aging, that the problem is exacerbated by the constant passage of many new statutes, and that owing to the nature of the political process a large number of old statutes which should be removed nevertheless tend to remain on the books. He recognizes, however, that statutes do not become misfits simply because of age or desuetude. Statutes may be out of synchronization when enacted, but still not so bad as to be unconstitutional.

As previously noted, a major thrust of Professor Calabresi's thesis is to achieve honesty where the courts have traditionally engaged either in interpretational subterfuge or in unreasonable constitutional overreaction. Both traditional judicial approaches—strained interpretation and strained determinations of unconstitutionality—are dishonest, in Professor Calabresi's view, and therefore should be eschewed.

He recognizes the antimajoritarian thrust of his proposal, but correctly notes that it is no more so than the present function of the courts in constitutional and interpretational adjudication—and certainly less

58. G. CALABRESI, supra note 11, at 81-90.
61. G. CALABRESI, supra note 11, at 132.
drastic in long-range impact than when a determination of unconstitutionality is made with regard to a statute that is possibly, although not probably, unconstitutional. A question arises as to the basis of federal court jurisdiction over the review of state statutes not involving a federal question or diversity. Professor Calabresi ingeniously notes, however, that the question of legal propriety may raise a jurisdictional threshold constitutional issue of due process even though the law is ultimately upheld on constitutional grounds but struck down on common law grounds. Presumably, the same rationale would enable state courts to similarly review federal as well as state laws without running afoul of the supremacy clause.

How would this proposed new method of review work in practice? The Tennessee products liability statute of limitations, with the suggested proviso that no other exceptions (other than minority and asbestos suits) are to be read into this statute, provides an adequate example. The court might feel unable to honestly declare the statute unconstitutional, and only a transparent fabrication would enable it to read an additional exception into the statute in face of the clear proviso indicating a contrary legislative intent. At this juncture, the court may declare that to bar a claim that the plaintiff was unable to assert because of the defendant’s fraudulent concealment would be unreasonable and inequitable. The court could then add a fraudulent concealment exception, prospectively or retrospectively, subject to the legislature’s power of abrogating it later. However, the legislature might not abrogate the exception, in spite of the clear language of the proviso, because it simply may not have thought of the inequity involved. After all, the legislature did not contemplate the inequity of barring asbestos claims when it originally enacted the statute with only a minority exception.

For the court to strike down the ten-year limitation altogether on common law nonconstitutional grounds would, at first glance, seem much more difficult. But to do so differs only in degree from engrafting a fraudulent concealment exception onto the statute in the face of a clear legislative intent.

62. Id. at 91-119.
63. Id. at 201-02 n.43.
64. See supra p. 1318.
65. This is not unlike the nonconstitutional, reasonable-person approach to the invalidation of statutes long recognized at common law. See, e.g., Dr. Bonham’s Case, 77 Eng. Rep. 646, 652 (K.B. 1610) (“[F]or when an Act of Parliament is against common right and reason . . . the common law will control it, and adjudge such Act to be void.”); Bank of the State v. Cooper, 10 Tenn. 2 Yer. 529, 533 (1831) (“Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. The common law, says Lord Coke, (8 co. 118 a.) adjudgeth a statute so far void.”).
66. For a review of the various methods of prospective overruling, see G. Calabresi, supra note 11, at 279-82 n.2.
67. See supra note 48 and accompanying text.
intent to the contrary. The court could point to the inequity of barring any claim before it ever arises or could reasonably be discovered, and then point to the clear trend toward a discovery rule for statutes of limitation. It could point to the need to engraft so many exceptions onto the statute as to make it fairly arbitrary in application, and then suggest that if the statute is reenacted in its present form the court may need to carefully consider the possible overtones of unconstitutionality in such a statute. If in the face of such in terrorem tactics the legislature still reenacts the statute, the court must do some very careful soul-searching regarding questions of constitutionality and its role in a majoritarian society.

Another possible use of the Calabresi doctrine, although he does not propose it, is that of resolving factual disputes on appeal. An appellate court will seldom revise a lower court or jury finding of primary fact, unless the finding defies common sense, but it will reverse inferential findings, and will often do so on constitutional grounds. In such cases, a vigorously dissenting judge frequently becomes heated over the majority's usurpation of the jury function and contends that no question of constitutional fact has been presented. In order to avoid these needless disputes, why not simply say that the court is reviewing the facts for sufficiency in essentially the same way that common law courts regularly do?

Describing a fact review as a common law rather than a constitutional determination will not in most cases make the kind of difference that it does for common law versus constitutional abrogation of statutes, since fact determinations usually apply only to the immediate case and do not have the kind of binding effect that the statutory constitutional determination often has. Calling fact determinations common law determinations will have the salubrious effect of clearing the air, however, in many close cases in which the majority and dissent create such a smoke screen over the issue. Of course, there may be cases in which the fact determination should be designated as one of constitutional magnitude because of the gravity of the matter and the need to signal a strong and unequivocal response thereto. The law does not tolerate physical torture in exacting confessions, and a fact pattern indicating the use of torture should clearly be designated unconstitutional.

68. See McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975) (products liability); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974) (medical malpractice), and cases cited therein. Both of these decisions have been overruled by statute. Tenn. Code Ann. §§ 29-26-116, 29-28-103 (1980).

69. See supra note 52 and accompanying text.

70. The majority rule is that a jury must believe uncontradicted, disinterested testimony, Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 930-47 (1971), and cannot disregard established physical facts.

71. See supra note 2 and accompanying text.
Courts may be more or less revisionist in different areas of the law depending on a number of factors. For example, a jurisdiction such as Louisiana, with its civil law tradition, will very likely have a stronger bias than common law jurisdictions toward interpretation and retention rather than revision. A commercial code or a tax code, with its intricate interlocking provisions and presumed unity of effect, would normally be entitled to greater deference than isolated statutes enacted in response to dubious crises or powerful special interest pressures.

This writer's predilection is that tort law is peculiarly suited to common law development because of its strong fact orientation, its relatively imprecise legal standards, its tendency to accrete and absorb other areas of the law, and its remarkable capacity to respond to changing social needs. A statute regulating the law of torts, even one broadly drawn, tends to cast this process in amber and to inhibit its vital growth. If these observations are on the whole accurate, a substantial revisionist bias in the tort law area should be expected, and courts should not be required to overreact by using constitutional cannonade when all that is needed is a small-bore common law rifle.

**Truth and Fiction**

As noted earlier, a principal reason why Professor Calabresi wants the courts to legitimate their ability to revise and annul statutes on common law grounds, in the same way they typically treat common law precedent, is to promote honesty. Courts that pretend a constitutional issue is involved when one is not are deceiving themselves, the public, or both. Courts that pretend to interpret legislative intent when none exists, or actively disregard such intent as may exist, are engaging in subterfuge. Deception and subterfuge are bad, and honesty is always the best policy.

Lon Fuller, one of the foremost commentators on "legal fictions," wrote a series of brilliant law review articles by that name. Professor Fuller is convinced that legal fictions are bad, even dangerous; he states that they are like crutches which should be discarded as soon as courts

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72. See supra notes 39-41 and accompanying text.

73. In this connection, it is interesting to note that "the offenses and quasi offenses" of the Louisiana Civil Code "have been almost totally eclipsed by the common law of torts." Baudouin, The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 1, 5 (J. Dainow ed. 1974).

74. This is certainly the approach of Professor Keeton in R. Keeton, Venturing to Do Justice—Reforming Private Law (1969).


76. L. Fuller, supra note 75, at 10.

77. Id. at 2.

78. Id. at 23.
are able to walk on their own. And yet, in his central description of the judicial motives for the adoption of legal fictions, he uses a metaphor of an elderly woman choosing a dress for a ball. In another critical passage, he repeats the philosopher Vaihinger's description of human thinking as resembling "the process of opposing mistakes which are mutually compensatory" and the way in which "walking consists of a series of falls, each arresting and compensating the other just in time." Fuller concludes his series of articles by stating: "No theory or dogma can solve the problem of how far we ought to generalize or 'conceptualize' [read 'fictionalize'] the law. It is a question of balance and judgment . . . . Nothing will take the place . . . . of a sense of tact and balance . . . ." Fuller seems to be guilty of the same sin which he so roundly condemns. Surely metaphors of ballroom dresses and a person walking are not legal verities. And "tact" and "balance" have a strange nonlegal, or at best quasi-legal, ring to them.

The great Plato, the worshiper of pure reason, knowledge, and truth, couches his most famous statement about knowledge in the metaphor of the cave scene. Indeed, his central concept of ideals must be pure fiction, as opposed to reality. Who has ever touched or seen an ideal? Lon Fuller cautions against fictions because of their potential to mislead. "A small boy," he says, "on seeing a horse for the first time, called it a 'big dog.'" But unless the boy learns the difference he "may expect the horse to bark." Picasso saw no danger, however, in conceptualizing a bicycle as a bull, or vice versa, "according to the needs of the mind and the body." Prospero broke his staff, buried his book, and released Ariel not because art was bad, but because Shakespeare was simply ready to quit writing. Perhaps the only alternative to fiction is quitting.

Nor can any bright line be drawn between literature and law, either in method or in purpose. When the lawyer Abraham Lincoln at Gettysburg spoke of a nation "conceived in liberty and dedicated to the proposition that all men are created equal," he by main force gave birth to a new ideal that surely was fictional—in the best sense—then, as well as now. On a more mundane level, present lawyers daily engage in fictions with abandon, if not joy. Who is able to tell the difference, for example, between fact and law, or fact and opinion? Or who has ever seen the mythical reasonable person?

A major concern of Professor Calabresi—and one that has plagued
constitutional scholars since *Marbury v. Madison*\(^6\)—is how to justify the autocratic role of courts in a democratic society. To be honest and merely admit that courts in fact exercise such power does no good. One must also be able to say that courts should exercise that power, and why they should. On this pivotal issue, Professor Calabresi resorts to fiction in the grand style. He repeatedly refers to the ability of courts to discern the "legal topography," the "legal landscape," and the "legal fabric"\(^8\) of the law in a way that legislatures cannot do. He implies that the courts' ability to implement their insights in this regard will bring society more nearly in line with true democratic values than the unbridled, special-interest, and often nonresponsive legislatures could ever do. Calabresi's implication may be true, but it sounds more like a devout wish than a demonstrable reality.

The big fiction in much of the discussion about judicial decision-making is the assumption that judges make decisions based on some kind of objective standards—the "legal topography," if you will—and not on their own individual values and insights. Thus, one can perpetuate the fiction that the government is one of laws and not of men. Undoubtedly, a judge, just as a legislator, draws on numerous sources for his decisions,\(^8\) but ultimately, the quality of the judge himself will determine the quality of the decision.\(^9\) Otherwise, why is Marshall thought of as head and shoulders above most of the other Supreme Court justices?

This writer has never found politicians as a group particularly palatable, although there are occasional shining exceptions. On the other hand, neither the state nor the federal court system is especially noted for causing the wisest and the best to percolate to the top.\(^10\) If Professor Calabresi's proposal were implemented and resulted in a substantial shift of power in favor of the courts (as well it might), then a good deal more careful thought and implementation should be given to the process of judicial selection than is presently done.

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86. 5 U.S. (1 Cranch) 137 (1803); see, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); J. ELY, DEMOCRACY AND DISTRUST (1980).
88. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); see authorities cited supra note 41.
89. Justice Cardozo once said: "I think we are coming more and more to a knowledge of the truth which I have been emphasizing today that officialdom, however it displays itself, is the husk and that what is precious is the man within." Address by Chief Judge Cardozo, New York Court of Appeals, New York University Law School Alumni Association Luncheon (Dec. 20, 1927) 5 N.Y.U. L. REV. 1, 6 (1928), reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 428 (M. Hall ed. 1947).
Perhaps Professor Calabresi's proposal itself, if implemented, would make better judges of those who wear the robe. Shakespeare was fond of saying, "Assume a virtue, if you have it not,"91 but he also said just as often that the clothes do not make the man.92 Was he schizophrenic? One thing is certain: his game was fiction, and not reality. Undoubtedly, however, our society is much the richer for Shakespeare, for the Gettysburg Address, for Marbury v. Madison,93 and for countless similar expressions of insight. By analogy, if a judge is forced to "tell it like it is" and explain to the best of his ability just why he thinks a particular statute (as well as common law precedent) is good or bad, then such self-examination may indeed cause the judge to become a better person and thus improve the commonweal. All language is metaphor, and in that respect anything a court says is fiction; but, as Professor Calabresi so aptly puts it, speech does have meaning.94 Some words come much closer than others to mirroring personal experiences, to expressing personal feelings and insights, and to ordering society in the way society should be ordered.

Professor Calabresi states the issue concisely when he compares Frankfurter's balancing approach to the constitution to Hugo Black's absolutist position regarding the first amendment. "Both are actually misleading and inaccurate,"95 he states, in the sense that both are metaphorical ways of describing an attitude toward constitutional review. But if Justice Black's approach results in substantially greater protection of speech, it may come much closer to expressing society's feelings and insights about a well-ordered society than the balancing approach does. In that respect, Black's absolutist fiction more nearly reflects society's conception of reality regarding the role of free speech in society than does Frankfurter's fictional balancing scale. In the same way, a common law judge may more nearly express society's feelings and insights about what a court should normally be about in statutory construction by holding statutes up to the ideals of reasonableness and fairness rather than striking them down through the myths of interpretation and constitutional review.

91. W. Shakespeare, Hamlet act III, scene IV.
93. 5 U.S. (1 Cranch) 137 (1803).
94. G. Calabresi, supra note 11, at 175; cf. L. Carroll, Through the Looking Glass (1946). "'When I use a word,' " Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' "Id. at 94. But, of course, Humpty was a bit fragile and was unable to withstand the hard knocks of real life.
95. G. Calabresi, supra note 11, at 175.