CHRONIQUE BIBLIOGRAPHIQUE

Sales and Sales Financing in Canada [:] *Cases and Materials*. By Michael G. Bridge and Francis H. Buckley. Toronto: The Carswell Co., 1981. Pp. xlix, 694 [$72.50 hardcover]. *Commercial and Consumer Transactions*. By Jacob S. Ziegel and Benjamin Geva. Toronto: Emond-Montgomery Ltd, 1981. Pp. xlv, 1230 [$80.00 hardcover].

The major problem facing the authors of a casebook is one of selection. What material should be included in the work and what should be left out? This difficulty becomes particularly acute when the subject matter to be covered is one which embraces a wide range of diverse topics, such as commercial law. In this connection it is interesting to compare the approach adopted by the authors of two recent casebooks on Canadian commercial law which appeared at about the same time in 1981. They are "Sales and Sales Financing in Canada" by M. Bridge and F. Buckley, and "Commercial and Consumer Transactions" by J. Ziegel and B. Geva.

Bridge and Buckley's book, as the title indicates, deals with how goods are sold and how the sale is financed, and it includes sections on products liability and on the giving of a security interest in assets by manufacturers and retailers. The provisions of consumer protection statutes which impinge upon the private law relationship of buyer and seller are discussed, although the regulatory aspects of these statutes have been omitted. Also omitted is any detailed consideration of general principles of contract law, although certain aspects are covered where they have a particular impact on the contract of sale of goods. Thus, there are discussions on formalities and part performance; on unconscionability, including the control of exemption clauses, improvident bargains and the development of good faith and standards of fairness; on misrepresentation; on mistake; on conditions and warranties; and on frustration. There is also a good discussion of dependent and independent promises and the terms of the contract as well as the concept of "substantial breach".

The topics covered in Part I, entitled "The Contract of Sale of Goods",[1] follows a fairly standard pattern. They include the scope of the *Sale of Goods Act*;[2] statutory and common law provisions governing the entry into a contract, including consumer protection legislation permitting "cooling off" periods and cancellation of a contract; the terms of the contract and the buyer's right of rejection, acceptance and the cure of defective tender; implied conditions of description and quality; delivery and payment; seller's title and the passing of property; risk and frnstration; remedies; documentary transactions covering both domestic and international sales and including a discussion of bills of lading, trade terms and letters of credit; and finally, the transfer

[1] M. Bridge & F. Buckley, *Sales and Sales Financing in Canada* [:] *Cases and Materials* (1981) 1.

[2] R.S.O. 1980, c. 462.

of title to chattels including bulk sales which are dealt with from the point of view of legislation protecting the seller's creditors.

Part II covers sales financing.[3] There is an historical outline of chattels security legislation including the *Conditional Sales Act*[4] which is followed by a detailed consideration of the Ontario *Personal Property Security Act*.[5] Business financing, conflicting claims to the collateral, and consumer protection in relation to default and enforcement, including truth in lending, are also examined. The authors note in the preface that much of the structure of the book was inspired by the casebook on sales and sales financing by Professor Honnold[6] to whom they acknowledge their indebtedness.

The approach adopted in Part I goes beyond the time-honoured casebook method of collating edited extracts from leading cases and adding some brief notes and questions or problems for class discussion. There is an introduction to each topic, which is always interesting and which at times has a humorous touch to whet the appetite of the student. See for instance the note on the *Statute of Frauds*[7] or the comment that "man does not live by bread alone; on occasion he also needs strawberry jam",[8] or the reference to the fraudulent merchant who finds business bad and wonders whether life would be better in Costa Bananas.[9] In addition to the lively introductions, relevant cases are selected and edited with care and the extracts from the judgments are not excessively long. These extracts are followed by questions, some quite penetrating. There are also problems to test the student's analytical ability. Finally, a discussion on various points is undertaken and references are made to review articles or texts where a particular matter can be pursued further. A notable feature of the book is the frequent reference made to the Ontario Law Reform Commission [OLRC] *Report on Sale of Goods*[10] and the *Draft Sales Bill*[11] promulgated by it. In this connection, it is a pity that the text of the *Bill* is not included in the casebook, especially when many questions are directed to the terms of the *Bill*. Indeed, no statutory texts are included in the work and the authors acknowledge in the preface that where reference is made in the casebook to a statutory provision, students are expected to turn to a statutory supplement and read it. A list of 21 relevant statutes is then given.[12]

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[3] *Supra*, note 1, 433.
[4] R.S.O. 1970, c. 76.
[5] R.S.O. 1980, c. 375.
[6] J. Honnold, *Cases and Materials on the Law of Sales and Sales Financing* (1976).
[7] *Supra*, note 1, 27.
[8] *Ibid.*, 55.
[9] *Ibid.*, 424.
[10] Ontario Law Reform Commission, *Report on Sale of Goods* (1979).
[11] *Ibid.*, Appendix 1.
[12] *Supra*, note 1, iv.

There are numerous references to relevant decisions, including Australian and New Zealand cases, and, as one would expect, to American decisions and to the *Uniform Commercial Code*.[13] The selection of cases is always an issue on which opinions may differ; this reviewer would have liked to see, for instance, the decision in *Hammer and Barrow* v. *Coca-Cola*[14] extracted rather than referred to briefly at page 122, or more emphasis given to the *Ashington Piggeries* case[15] in relation to correspondence with description and its likely effect on such cases as *Re Moore and Co. and Landauer and Co.*[16] Nevertheless, the authors handle the difficult topic of correspondence with the description well, they bring in *Reardon Smith Line Ltd* v. *Yngvar Hansen-Tangen*[17], as to the two meanings of "identity" or "identification", and proceed to ask some penetrating questions on page 163. Reference could have been made on page 151 to the *Supply of Goods (Implied Terms) Act 1973*[18] in relation to the recommendation of the OLRC that the display of goods for sale should not by itself prevent the sale from being by description, while in the discussion on the meaning of merchantable quality, greater emphasis could have been placed on the fact that there is a statutory definition of the term contained in the same legislation, a definition which Lord Denning M.R. in the *Cehave* case[19] was prepared to apply to cases governed by the common law. Lord Denning did not advert to the fact that the statutory definition imposes a more stringent test than was the case at common law, but the matter is referred to in the casebook in the context of the OLRC recommendation.[20] It is interesting to note the authors' comment that the statutory definition has not proved particularly successful in the United Kingdom and that the whole area of implied terms has been referred once again to the English and Scottish Law Commissions.

The decision in *Lambert* v. *Lewis*[21] is not given the treatment it deserves although this is partly due, no doubt, to the reporting of the House of Lords judgments late in the day.[22] A future edition of the casebook should refer to the views of the Law Lords as to the period during which an implied term as to fitness remains extant. The case is concerned with remoteness of damage and,

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[13] Promulgated first in 1952 by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association.

[14] [1962] N.Z.L.R. 723.

[15] [1972] A.C. 441, [1971] 1 All E.R. 847 (H.L.).

[16] [1921] 2 K.B. 519.

[17] [1976] 3 All E.R. 570, [1976] 1 W.L.R. 989 (H.L.).

[18] 1973, c. 13 (U.K.).

[19] *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.* (*The Hansa Nord*) [1976] Q.B. 44, [1975] 3 All E.R. 739 (C.A).

[20] *Supra*, note 1, 198.

[21] [1981] 1 All E.R. 1185, [1980] 2 W.L.R. 299 (H.L.).

[22] See *supra*, note 1, 369, fn.

along with *Parsons (Livestock) Ltd* v. *Uttley Ingham & Co.*[23] it exemplifies the problems which can arise in this area in relation to sales of goods. It is suggested that both cases could with advantage have been included in the casebook.

These criticisms are minor and are not intended to detract from the overall high standard of the casebook. This is, after all, a book dealing with Canadian sales law and emphasis must be placed on Canadian decisions and on proposals to reform the law such as the *Draft Sales Bill*.[24] The authors clearly have put a great deal of time and effort into producing a first-class casebook with carefully edited extracts from relevant cases and with pertinent and well-researched introductions to, and comments on, the various topics. Questions asked are often penetrating and even difficult, which may pose problems for some students. The law of sale of goods is not easy, involving as it does difficult concepts and many complexities, and this casebook may tend at times to confuse the less gifted student. The task of the law teacher using the book is to see that any such problem is overcome.

Ziegel and Geva's *Commercial and Consumer Transactions*[25] is a massive book, of over 1200 pages. Over half of it is devoted to the law of sale of goods while the remaining pages are divided into two sections covering negotiable instruments and the financing of commercial and consumer transactions. The casebook is designed to meet the needs of a four-hour, single-semester course, but it covers substantially more ground, in greater detail, than the traditional materials on sales and sales financing and the authors admit that there is no practical possibility of covering the whole casebook in the allotted time. It is therefore up to the law teacher who uses the work to make his own selection from the three principal sections of the book according to his own preferences and predilections. As in the case of Bridge and Buckley, relevant statutes are not reproduced and the student is expected to acquire them for himself and thus be in a position to understand the materials and to answer the questions propounded. However, the appendix contains a number of forms of agreement and conditions of sale in use in Canada which will assist the student to understand current contractual and financing practices.

The section on the sale of goods is similar to that in Bridge and Buckley, containing extracts from cases, from review articles, and from the OLRC *Report on Sale of Goods*[26] as well as notes and a series of questions in relation to each topic. However, Ziegel and Geva take a much wider perspective and

[23] [1978] Q.B. 791, [1978] 1 All E.R. 525 (C.A.).
[24] *Supra*, note 10, Appendix 1.
[25] J. Ziegel & B. Geva, *Commercial and Consumer Transactions* (1981).
[26] *Supra*, note 10.

deal with such matters as the rights and wrongs of codification; the position of the law of sales in Québec, the United States and at the international level; the tax implications of the distinction between lease and sale; and the role of "plain English" legislation in the combating of standard form contracts (discussed in an excellent coverage of the doctrine of unconscionability). There is a much wider approach to the problems of consumerism and to the interplay between consumer protection legislation and traditional sales law in Canada.

Indeed, the overriding impression that is obtained from a perusal of Ziegel and Geva is one of breadth of coverage of the topics discussed, with, for example, references to studies commissioned by Government agencies, to Hansard, to articles concerned with model consumer protection legislation and to what the law ought to be, and even to Australian and New Zealand legislation on used motor vehicles warranties. General principles of contract law are included on a selective basis, the theory being that the student may not have as extensive a grasp on the law of contract as might be hoped. Consequently there is a discussion of *non est factum*, (the judgment of Lord Denning M.R. in the Court of Appeal in *Gallie* v. *Lee*[27] is preferred to those of the Law Lords on appeal)[28] and this is followed by a table showing variations on the *non est factum* theme in the context of consumer legislation. The problem of uncertainty of terms especially in relation to price is also examined although English cases are extracted in preference to Canadian authorities. Typical contracts cases like *Esso Petroleum Co.* v. *Mardon*,[29] *Leaf* v. *International Galleries*,[30] and *Koufos* v. *C. Czarnikow Ltd*[31] appear in a discussion on the scope of the contract and on the measure of damages. The section on the measure of damages is particularly excellent.

The authors clearly have tried to keep up with the latest developments in the commercial world and have for example referred to and discussed such innovations as price scanning, the "rust code" in relation to the merchantability of motor vehicles, and, in Part II, the transfer of funds by electronic means. Part II, dealing with payment mechanisms, is an excellent treatment of the topic of payment by negotiable instruments including letters of credit and their use in international trade.

To sum up, this is an excellent casebook, the preparation of which must have required many long and arduous hours of work. If there is a fault with

[27] [1969] 2 Ch. 17, [1969] 1 All E.R. 1062 (C.A.).
[28] [1971] A.C. 1004, [1970] 3 All E.R. 961 (H.L.).
[29] [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.).
[30] [1950] 2 K.B. 86, [1950] 1 All E.R. 693 (C.A.).
[31] [1969] 1 A.C. 350, [1967] 3 All E.R. 686 (H.L.).

this book, it is the surfeit of material through which the law teacher or the student will have to pick his way. The Canadian law teacher is now in the unenviable position of having to make a choice between two first rate casebooks dealing with commercial and consumer law, and his choice will be influenced by his method of teaching and by what he wishes to cover in his commercial law course. If he seeks to adopt a traditional and straightforward approach, he will no doubt be attracted by Bridge and Buckley; if he leans towards a wide-ranging, broad treatment of the subject, with materials from diverse sources and with attempted integration of consumer protection legislation at all levels, he will prescribe Ziegel and Geva for his class.

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Droit constitutionnel. Par François Chevrette et Herbert Marx. Montréal: Les Presses de l'Université de Montréal, 1982. Pp. xv, 1728 [68$].

Les professeurs François Chevrette et Herbert Marx ont publié en février 1982 aux Presses de l'Université de Montréal, un ouvrage très attendu: *Droit constitutionnel*. Les deux professeurs de la Faculté de droit de l'Université de Montréal ont ainsi comblé un vide important dans notre littérature constitutionnelle. Leur ouvrage est un outil de première importance pour tout travail sérieux en droit constitutionnel.

Composé de notes et de jurisprudence, le livre des professeurs Chevrette et Marx emprunte à bien des égards la forme et l'approche du *Case Book* américain. Basé fondamentalement sur la décision judiciaire, l'ouvrage donne une certaine place à la dimension historique, idéologique et institutionnelle des problèmes constitutionnels dans des notes que l'on retrouve en présentation de sujet et en situation et synthèse de chapitre. Ces notes sont pertinentes et fort bien faites. Elles seront une source de référence importante pour l'étudiant, l'avocat ou le juge qui doit solutionner un problème de droit constitutionnel.

Les premières pages de l'ouvrage sont consacrées aux sources historiques et formelles du droit constitutionnel, puis, dans une première partie, les auteurs abordent les principes fondamentaux du droit constitutionnel. Le principe de la légalité ou *rule of law*, la souveraineté du Parlement, la séparation des pouvoirs, le contrôle judiciaire de la constitutionnalité, le fédéralisme et la délégation intergouvernementale sont étudiés dans cette première partie. Ces principes ne sont pas toujours faciles à comprendre. Bien qu'ils se complètent à plusieurs occasions, il demeure que dans bien d'autres, ils se contredisent nettement. L'ouvrage a le mérite de les présenter d'une façon fort claire et par le fait même de contribuer à une meilleure compréhension du droit constitutionnel.

Dans une deuxième partie, les auteurs abordent les principaux sujets du partage des compétences législatives pour terminer dans une troisième partie par une étude de quelques libertés fondamentales comme l'égalité devant la loi, la liberté d'expression, la liberté de religion, la liberté et sûreté de la personne, l'immigration et la citoyenneté et les droits des minorités.

L'ouvrage des professeurs Chevrette et Marx sera particulièrement utile aux juristes aux prises avec un problème concernant les compétences législatives. Les notes et la jurisprudence utilisée font de cet ouvrage l'outil le plus à point en droit constitutionnel canadien pour l'étude de cet aspect majeur de notre droit constitutionnel qu'est le partage des compétences législatives. Les libertés publiques sont aussi traitées avec beaucoup de discernement et de pertinence quant au choix de la jurisprudence. Cependant, il faut dire que

cette partie importante de l'ouvrage se réfère très peu à la *Charte canadienne des droits et libertés*.[1]

Il semble que le rapatriement et la *Loi constitutionnelle de 1982*[2] ont causé quelques difficultés aux auteurs. Évidemment, c'est là un ouvrage qui ne se rédige pas en quelques mois. C'est probablement à la veille de donner leur texte aux éditeurs que les auteurs ont été confrontés avec la décision de la Cour suprême sur le rapatriement du 28 septembre 1981 qui en elle-même est un véritable traité de droit constitutionnel. Quant à la *Loi constitutionnelle de 1982*, elle a été promulguée deux ou trois mois après la parution du livre. Tant au niveau des principes fondamentaux qu'à celui des libertés publiques, cette situation a probablement mis les auteurs dans le dilemme de publier quand même leur ouvrage dans les délais prévus ou d'attendre quelques mois pour le compléter à la lumière de ces nouveaux textes constitutionnels. Ils ont décidé de publier dans les délais prévus au risque évidemment d'avoir à négliger certains aspects nouveaux. Ainsi, nous pouvons retrouver certaines phrases comme "[a]u Canada, le consensus est loin d'être réalisé en faveur de l'incorporation dans une Constitution révisée, d'une Déclaration des droits qui lierait tous les gouvernements, fédéral et provinciaux".[3]

Le livre des professeurs Chevrette et Marx est aussi un ouvrage pédagogique très bien fait. Non seulement les notes sont claires et abordables pour un étudiant de premier cycle, mais en plus, tout au long du livre, on trouve des jugements-problèmes qui, pour la plupart, émanent des tribunaux de première et de deuxième instance. Dans ces jugements-problèmes, les auteurs laissent le juge exposer le problème constitutionnel auquel il est confronté puis, ils l'interrompent pour demander à l'étudiant: "Quel a été le jugement rendu et pourquoi ce jugement a-t-il été rendu?" La méthode est très intéressante, elle permettra à l'étudiant d'élaborer sa réponse, puis de se rendre à la bibliothèque pour en vérifier l'exactitude.

Le *Droit constitutionnel* est donc un ouvrage de première importance et en tant que tel, il devrait se retrouver dans toute bibliothèque de droit digne de ce nom. Le principal reproche que nous pouvons faire au livre, en est un plus de forme que de fond. En effet, l'ouvrage est d'un volume considérable, puisqu'il fait mille sept cent vingt-cinq pages. Il aurait peut-être été préférable de le présenter en deux tomes. De plus, écrire en droit constitutionnel aujourd'hui est une tâche périlleuse, l'évolution jurisprudentielle y étant phénoménale. Depuis sa parution, plusieurs arrêts de la Cour suprême sont

[1] Voir la partie I de l'annexe B du *Canada Act 1982*, 1982, c. 11 (U.K.).
[2] Voir l'annexe B du *Canada Act 1982*, 1982, c. 11 (U.K.).
[3] Voir F. Chevrette et H. Marx, *Droit constitutionnel* (1982), à la p. 1202.

venus compléter certains points importants traités par les professeurs Chevrette et Marx. Dans la mesure où l'oúvrage est un *Case Book* basé sur la jurisprudence, il aurait été intéressant de le présenter sous forme de feuilles amovibles. Un système d'abonnement aurait ainsi pu être offert à ceux qui sont intéressés à compléter cet ouvrage qui est sans contredit une pièce maîtresse dans la doctrine constitutionnelle canadienne.

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A Common Law for the Age of Statutes. By G. Calabresi. Cambridge, MA.: Harvard University Press, 1982. Pp. 319 [$25.00 U.S.].

At first reading, this book appears to examine less than the title suggests. A reader will, within a few pages, find himself enmeshed in the institutional and procedural complexities of United States legal, political and administrative structures. For the person not specialized in American law and politics, this focus may prove frustrating, not to mention curiously parochial. Yet a touch of patience will be rewarded. Professor Calabresi raises serious questions concerning the traditional balance between the legislature and the judiciary. The discussion of these issues throughout the book does indeed underline the generality of the title and raises the possibility of a broad comparative view for this so-called "age of statutes".

The book describes the "statutorification"[1] of the law and the consequences for the judiciary of that development. Unlike the regime of laws that existed in the nineteenth century, which was predominantly casuistic and where the courts acted with ease to renovate the legal landscape, the twentieth century legal structure, particularly after the onset of the Great Depression, is founded on statute law. Under such a regime, courts are loath to interpret statutes in a manner which might implicitly alter the product of legislative enactment. This judicial "self restraint" has, according to the author, created a "multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date".[2] The question is raised: What institutional and procedural changes are required to allocate more effectively the burden of inertia, thus stimulating change so that laws reflect more closely the views of the shifting "majority"?

The author's solution to the problem of "petrification" is made clear early in the book. A new doctrine of judicial interventionism must be developed — with clear limits and techniques, as he writes toward the end of the book — to allow courts to mitigate the problems of obsolescence. Professor Calabresi prefers that judicial action be open and frank. He deplores the subterfuge that characterizes many court decisions today. For, as Calabresi describes, the judiciary has attempted to update laws, without admitting that intention, employing techniques not designed originally for that purpose. These techniques include the use of constitutional adjudication, particularly the invocation of the equal protection clause in the United States.[3] Additional-

[1] G. Calabresi, *A Common Law for the Age of Statutes* (1982) 1.

[2] *Ibid.*, 7.

[3] In part, says Calabresi, because the Court found the constitutional principle closely comparable to the common law principle "that like cases should be treated alike". *Ibid.*, 14.

ly, the courts have used what Alexander Bickel called the "passive virtues",[4] "delegation of powers", vagueness, desuetude and even the use of "lacks of jurisdiction", as a way to "actively force and at other times, through purposive inaction to induce legislative reconsideration of statutes". All, as the author describes, suffer from an ill-fitting adaptation to new tasks.

Having disposed of these current judicial responses, the author, in Chapter Five, commences a searching analysis of non-judicial techniques to avoid legal petrification. He examines the appropriateness of using the administrative agency to update laws. Then he looks at the legislative solution — sunset laws — and finally at structural reforms, the extremes of which are the creation of a more direct majoritarianism to overcome the "checked and balanced"[5] legislatures or a return to the nineteenth century legal topography — that is a predominantly common law environment. Each solution is discussed in turn, and weaknesses identified. The administrative agency suffers from its own expertise, says Professor Calabresi. Agencies are immediate problem solvers and cannot be trusted to fit a problem into "the historical context". And while in some ways politically accountable, independent or dependent agencies are likely to be subject to pressures of special interest groups, and may be unable to assess "the public interest". The legislative response of sunset laws would likely prove to be too mechanical, updating by nullification many statutes which still represent a consensus. As the author says, "[t]ime does not serve as a good indicator of age".[6]

As for the structural reforms, each extreme suffers from significant limitations. Direct majoritarianism would require the abolition of the checks and balances required for maintaining a balance between change and consistency, a balance necessary to any legal fabric. As for turning back the clock to a nineteenth century, common law landscape, Calabresi finds little comfort in that solution either. The rise of statutorification was not accidental, as the author describes in Chapter Seven. Its removal would necessitate the end of a "social-democratic" view of society which the author refuses to countenance.

Having put aside the non-judicial responses, Professor Calabresi returns to the courts to identify the antecedents, the doctrines, the limits, and the techniques of a court system of statutory reform. In a democracy, argues the author, a court, given its traditional role, methodology and authority, remains the preferred institution to assign the burden of inertia. The courts have always played a role in updating the legal fabric; that fabric and its underlying principles form "an aspect of the popular will". The judiciary can use its skills

[4] Bickel, *The Supreme Court, 1960 Term — Forward: The Passive Virtues* (1961) 75 Harv. L. Rev. 40. See also Calabresi, *supra*, note 1, 17.

[5] Calabresi, *ibid.*, 14.

[6] *Ibid.*, 62.

to adjust the law to "deep majoritarian" wishes. In the United States, judges are individuals who are elected, or appointed and ratified by elected officials, and they respond to election returns. Moreover, their decisions are subject to legislative or popular revision as a final check. The damage of a wrong decision can be rectified relatively easily. All this makes the courts the most appropriate means of meeting the unsatisfactory state of contemporary law.

Professor Calabresi argues his position most convincingly. Not only does he critique thoroughly present court methods and possible institutional solutions, he also tries to meet the range of criticisms that might arise given his support for the revision of the relationship between courts and statutes. Yet even his strong advocacy cannot erase serious doubts, in the mind of this reader at least, about the proposed solution.

The doubts, in fact, begin with the problem set out at the commencement of the book. We are presented with the view that judicial activism by the American courts is in part a "desperate response" to the problem of obsolescence. But one does not come away from the book convinced either of the extent of the problem or that the existence of this problem is an adequate explanation for current judicial activism.[7] Professor Calabresi is not very forthcoming in pointing out the breadth and seriousness of the problem of statutory obsolescence. Yes, he does provide specific examples, but it is not apparent that these cases represent the proverbial "tip of the iceberg". Furthermore, it may well be that obsolescence, if it is as serious and as wide-ranging as described, may comprehend various "types" of laws which may allow for distinguishable institutional and procedural solutions. The author alludes briefly to these themes, but most of this discussion, unfortunately, is assumed.

Ignoring this problem for the moment, greater questions revolve around the author's other assumptions, notably concerning the value of formalism — separation of powers, for instance — in the constitution, as well as the underlying motivation of the Founding Fathers in their construction of the second constitution of the United States. The Founding Fathers in the United States, as I read the constitutional debates and later writings, sought to structure a system to provide the widest ambit of freedom to the individual while still providing for necessary government authority to promote the public interest.[8] As much as possible, the structure was designed to prevent

[7] For a less sanguine view of the courts' role, see D. Horowitz, *The Courts and Social Policy* (1977) and P. McGuigan & R. Rader, eds, *A Blueprint for Judicial Reform* (1981).

[8] This view is accepted widely by pluralists and their critics alike. See R. Dahl, *A Preface to Democratic Theory* (1956) and *Democracy in the United States: Promise and Performance*, 4th ed. (1981); T. Lowi, *Incomplete Conquest: Governing America* (1976).

tyranny by permitting particular interests to use the government. To guarantee this result, the functions of government — legislative, adjudicative, administrative — were separated, though checked by other branches. This approach involved the widest representational mix, not necessarily majoritarian, to further protect individuals. While the author defends the checks and balances, at least regarding revisions for a more direct majoritarianism, he dismisses a little too quickly, "constitutionalism" — the separation and the limitation of power of the three branches of government.

In reaching his conclusion, it is hardly surprising that Professor Calabresi notes carefully the arguments of Dean Landis of Harvard.[9] James Landis was, of course, deeply involved in formulating solutions to the challenges presented by the Great Depression to the American economic and political systems. A large part of his institutional solution was to create and promote a relatively new institutional form — independent administrative agencies — which the Brownlow Committee would call the headless "fourth branch" of government.[10] And much like Professor Calabresi's proposals, this earlier solution was little concerned with the functional separation or overlapping representational checks on authority. Ironically, the independent regulatory agencies were called into being to right problems created by the courts' and the legislatures' unwillingness to act. Now, that solution has become part of the problem which courts are called upon to solve — statutory obsolescence. What new unforeseeable consequence will flow from the implementation of Professor Calabresi's functional and institutional revision? How many institutional alterations must be advanced and implemented before a more sensitive appraisal of the original structure and purposes of the system will be undertaken?

In fact, it is not clear that the pace of statutory change is not in keeping with the "representational" character of legislatures. For Professor Calabresi, the failure of revisions represents "checked and balanced" legislatures, antimajoritarian in their construction. Yet judicial activism may well distort the normal representational character of pluralist legislatures. As William Stanmeyer says: "[T]he refusal of a legislative body to do anything, when it is quite aware that it could do something, often demonstrates the process working. For it shows that the requisite popular consensus favouring change has not yet formed. And popular consensus should be the backbone of public policy in a representative republic."[11] The task of balancing consistency and change in the light of representational consensus might best remain with the

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[9] See J. Landis, *The Administrative Process* (1938).

[10] United States Government, President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (1937) 36.

[11] Stanmeyer, "Governing the Judiciary" in McGuigan & Rader, *supra*, note 7, 37.

legislature. At least, much more will have to be done to assess what constitutes the public interest in a representational democracy before Professor Calabresi's position could command significant authority.

I have argued that the American political system was constructed as a representative democracy, designed to limit majoritarianism. Changes have occurred which have reflected a desire to press toward a more directly majoritarian form of polity. To the extent that the system tries to integrate both elements — representational and majoritarian — the courts are likely to represent the least appropriate institution to legitimize the public interest. Notwithstanding the author's defences and his definition of the courts as "semi-representational",[12] the court remains the most problematic institution in a modern democracy if addressing the issues of political accountability and legitimacy.

If one is concerned about this legitimacy and accountability, then non-judicial solutions, institutions and procedures come readily to mind. If administrative agencies are employed, the use of directives from the executive or legislature can force non-elected agency officials to act within guidelines set by representative bodies. Executive or legislative veto might reinforce the political accountability of non-representative institutions. Professor Calabresi, on the other hand, would ask judges to alter the directives — the statutes — that are established as guidelines by other, more representative, institutions. It is a solution fraught with difficulty.

Various solutions to the problems of legitimacy and accountability are open, but it is not possible to work them out here. It is, however, my concern to question Professor Calabresi's benign view of the courts regarding these values. The courts, as recent politics in America has shown, have far less legitimacy in their quasi-legislative roles than Professor Calabresi tends to suggest.[13] The arrogation of authority to the courts, by the redefining of the legislative-judicial balance, might aid the cause of change and equity at the price of legitimacy. The danger to the public interest, and even to the courts, appears as great as the presumed benefits.

If the concern I raise about the courts' role in the United States has validity, then my concern is heightened if one addresses the Canadian situation. As in the United Sates, the division of function has blurred with the demands of a modern welfare society. Yet, in Canada, the representational quality of the courts has never been as serious a concern as in the United States. This fact seems odd because no judges in Canada are elected. Never-

[12] Calabresi, *supra*, note 1, 118.

[13] For a glaring example, note the negative effect upon the Court's legitimacy of the abortion decision *Roe* v. *Wade* 410 U.S. 113 (1973).

theless, here too, legitimacy and accountability are not values that can be ignored. The judiciary's historic role, and its relationship to Parliament, have defined a narrower role for the court in our society than in the United States. Some change in that role and relationship has occurred recently. The federal appointment of provincial judges and the current process of selection have circumscribed the courts' legitimacy in a broad policy or political role. So it is that Professor Calabresi's solution, in a Canadian context, at least as the courts are presently arranged, seems highly questionable. One need only reflect on the possibility of a Québec court, or perhaps the Supreme Court, asking the Québec National Assembly to re-evaluate a statute, to recognize the dubious character of the proposal in the Canadian context. Such a move certainly would raise a storm of protests from all nationalists, and might well prompt the same reaction amongst federalists. Few would countenance willingly a federally appointed judiciary vetoing the provincial legislative will. Even without authority to declare statutes obsolete, the judiciary remains on barely legitimate ground in Québec. This proposition may be true for other provinces as well.

I would conclude by urging other scholars to take up the issue of statutory obsolescence as identified by Professor Calabresi, both to examine the seriousness of the problem, and to evaluate the proposed solution. Professor Calabresi has done the legal and political community an important service. It is up to the community to further his contribution.

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