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Constitutional Flares: On Judges, Legislatures, and Dialogue

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

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> To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and the lowered quality of the product. . . . [T]he legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.[1]

INTRODUCTION

At the beginning of this century, then-professor—and soon-to-be Justice—Cardozo lamented the absence of regularized interactions between judges and legislatures. Writing at a time when judge-made common law played a decidedly more important role in establishing legal norms, Cardozo argued that reform-minded legislators often acted impetuously when legislating, producing poor results: they "marred" what they intended to "mend."[2] Cardozo's solution entailed the creation of a new government agency dedicated solely to considering issues related to law reform, a so-called "ministry of justice."[3] His idea makes a good deal of sense, as evidenced by the increasing importance of various ALI "restatement" projects[4] and by the

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† Assistant Professor of Law, Indiana University - Indianapolis. J.D., LL.M., Duke University; B.A., M.A. (Philosophy), Emory University. I wish to acknowledge the invaluable assistance of John C. Hueston, who initially brought *United States v. Then* to my attention and subsequently collaborated with me in developing this article. I also am grateful for the helpful comments and suggestions provided by Professors William Van Alstyne, Michael Heise, E. Gary Spitko, S. Elizabeth Wilborn, Garrett Epps, and David V. Snyder. Any errors or omissions are mine alone.

1. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921).

2. *Id.* at 114.

3. *Id.* at 123-26.

4. *See* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1; Herbert F. Good-

successful use of institutional law reform commissions in civil law jurisdictions such as Louisiana.[5]

However, another resolution of the problem is possible. Judges could endeavor to engage legislators more directly on matters of mutual institutional concern.[6] Indeed, judges could even assume substantial law reform duties under the rubric of their traditional common law powers.[7] Of course, placing greater reliance on judges to inform congressional debate (or perhaps even to supplant congressional debate) would fit rather uncomfortably into our existing constitutional cosmology.

A. SEPARATION OF POWERS PERSPECTIVES

Traditionally, most academics and judges have viewed the legislative role as quite separate and distinct from the judicial role: judges are not to exercise directly legislative powers and

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rich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449 (1936); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1993).

5. *See* La. Rev. Stat. Ann. § 24:201-208 (West 1989); *see also* William E. Crawford, *Forum Domesticum: The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985); J. Denson Smith, *The Role of the Louisiana State Law Institute in Law Improvement and Reform*, 16 LA. L. REV. 689 (1956); John H. Tucker, Jr., *The Louisiana State Law Institute*, 1 LA. L. REV. 139 (1938); Fred Zengel, *Civil Code Revision in Louisiana*, 54 TUL. L. REV. 942 (1980).

6. *See* Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1012-17 (1987) [hereinafter Ginsburg, *Legislative Review*]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) [hereinafter Ginsburg, *Judicial Voice*]; Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. UNIV. L. REV. 1537, 1540-45, 1550-55 (1995); *see also Proposal to Provide Rights to Victims of Crime: Hearings on H.J. Res. 71 and H.R. 1322 Before the House of Representatives Comm. on the Judiciary*, 105th Cong. 42-46 (1997) (statement of George P. Kazen, Chief Judge, United States District Court for the Southern District of Texas) (presenting the Judicial Conference's objection to the proposed "Victims' Rights" amendment to the federal Constitution); *Chief Justice's Annual Report Criticizes Senate's Slowness in Confirming Judges*, 66 U.S.L.W. 2408, 2408-09 (1998) (describing the Chief Justice's concerns about the shortage of judges in some parts of the nation); *Constitutional Victim?*, U.S. NEWS & WORLD REP., May 26, 1997, at 18 (describing a letter by Chief Justice Rehnquist and district court Judge George Kazen opposing passage of a "Victims' Rights" amendment to the federal Constitution). *See generally* Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962).

7. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

legislators are not to mandate the outcome of particular cases or controversies pending before the federal courts.[8] This view incorporates and reflects established principles of the separation of powers.[9] Given the Framers' concern with dividing power as an incident of protecting individual liberty,[10] most commentators have simply accepted this model for appropriate judicial and legislative behavior without serious question.

Of course, there is much disagreement over the precise scope of a judge's obligation to abjure policy-making roles. From a Borkian perspective, the divorce must be near total; judges cannot legitimately engage in devising public policies.[11]

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8. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-34 (1995). "Simply put, the legislature's responsibility in the United States' system of government is to enact statutes. The court's responsibility is to interpret and apply the statutes to resolve disputes." Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance?: Steps for Legislatures and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1092 (1991); *see also* Laurence C. Marshall, *Let Congress Do It: The Case for An Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 201 (1989) ("One of the central premises of the Constitution's division of powers, and the American system of government, is that the primary federal lawmaking authority belongs to Congress."); *cf.* Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REFORM 22-23 (1983) (arguing that a dialogue between the courts and Congress could improve interbranch relations and reduce direct interbranch conflicts).

9. *See, e.g.*, United States v. Butler, 297 U.S. 1, 62-63 (1936). As Justice Roberts explained, the Supreme Court "neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." *Id.* at 63.

10. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531-40 (1991); Ronald J. Krotoszynski, Jr., *On the Dangers of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 429-32, 468-84 (1997); John L. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313-14, 1396-1405 (1997); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 96, 94-114, 130-47 (M. Farrand ed., 1911) (discussing the necessity of establishing and maintaining a separation of executive, legislative, and judicial functions).

11. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 95-119 (1996); ROBERT H. BORK, THE TEMPTING OF AMERICA 4-9, 15-18, 261-65 (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-20 (1971); *cf.* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 34 (1995) ("However much we might prefer in this age of anxiety about 'legislating from the bench' and 'judicial activism' for only our elected representatives to make all the sensitive decisions, so long as human language remains imprecise and the human capacity to predict the future limited, the cascade of cases that call upon judges to fill the gaps—and to do so by reference to social justice—will unquestionably continue.").

As Senators Hatch and Thurmond like to put it, judges are to interpret the law, not "make it up."[12]

More moderate proponents of the separation of powers doctrine recognize, however, that judges cannot avoid making basic policy decisions.[13] Because of the broad and open-ended nature of many provisions of the federal Constitution—not to mention similarly broad statutory provisions—judges must occasionally pick and choose among competing plausible interpretations incident to deciding the cases and controversies that come before them.[14]

Even allowing for differences of application, the traditional view of separated functions has held sway without substantial challenge for many years. Given the Framers' embrace of Enlightenment political theory,[15] this is more than a historical accident.

B. A NEW PARADIGM

In a variety of contexts, legal scholars have begun calling on judges (and particularly federal judges) to inject themselves more directly into the legislative process.[16] These proposals do

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12. *See* Anthony Lewis, *Moving the Judges*, N.Y. TIMES, Apr. 27, 1998, at A15 ("I'm as strong a proponent of an independent judiciary as there is .... But where I get tough is where the judges want to make the law."); *Excerpts From Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A12 (providing Senator Thurmond's understanding of the proper relationship between the branches of the federal government, in which "the role of the judiciary is to interpret the laws"); Editorial, *Democracy Doesn't Need Bork's Protection*, N.Y. TIMES, Oct. 2, 1987, at A34 (describing Senator Hatch's aversion to judges who "make laws").

13. Philip P. Frickey, *The Constitutionality of Legislative Committee Supervision of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1254-55 (1986) ("Although the Minnesota Constitution appears to impose a rigid separation of powers, a realistic analysis must recognize that constitutional law, whether federal or state, is not the product of a mechanical formula. Judges long ago rejected the fiction that a court could avoid consideration of the policies in support of legislation...."); *see also* Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 573-75, 577-87 (describing and discussing various competing views on the proper judicial role).

14. *Cf.* Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (holding that when recourse to the traditional tools of statutory construction does not yield a single construction of an ambiguous statutory provision, federal agencies may select any reasonable interpretation of the text).

15. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26-30 (1967).

16. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH:

not merely argue in favor of greater judicial vigilance in enforcing particular constitutional guarantees. In some cases, the proponents of a revised relationship between judges and legislators call for an "open dialogue" between judges and legislators in an effort to create "good government."[17]

In more extreme iterations, judges would challenge the legitimacy of economic, social, and regulatory legislation that a particular judge, or group of judges, deems unwise or ill-considered.[18] Some federal judges have even proposed "constitutional remands" of statutes to state and federal legislatures.[19] The theory supporting such a course of judicial con-

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THE SUPREME COURT AT THE BAR OF POLITICS 161 (1962); CALABRESI, *supra* note 7, at 101-19, 146-62; Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 601-04; Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710-12, 1714-23, 1821-24 (1998); Anthony Taibi, Note, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913, 914, 954-55. *But cf.* Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1826-29 (1998) (arguing that "the judiciary lacks the kind of legitimacy that the legislative branch can claim when it makes policy decisions" and questioning "the notion that there is something in judges' status or stature that qualifies them to give . . . such advice to elected officials"); Patricia M. Wald, *The New Administrative Law—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 657-59 (questioning both the ability of judges to engage Congress in a dialogue regarding substantive issues of public policy and the legitimacy of such a course of action).

17. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1130 (1995); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1121 (1990). Professor Steinhardt explains that:

> [t]he metaphor typically comprehends a "conversation" between the legislature and the judiciary, in which the courts are empowered variously to remand statutes to the legislature for clarification, or to "develop" the statutory scheme envisioned by their legislative co-authors, or to "discuss" with the legislature the "state of legal principle" in the context of a particular statute, or to "give meaning to our public values" or "community consensus" in the process of interpretation.

Id. (footnotes omitted).

18. *See* Edley, *supra* note 16, at 603; Taibi, *supra* note 16, at 954, 963-66.

19. *See* Quill v. Vacco, 80 F.3d 716, 731-32, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 117 S. Ct. 2293 (1997); Abele v. Markle, 342 F. Supp. 800, 805, 810 n.18 (D. Conn. 1972) (Newman, J., concurring), *vacated*, 410 U.S. 951 (1973). Although the Supreme Court rejected Judge Calabresi's suggestion that the federal courts formally "remand" statutes banning assisting others in committing suicide, Chief Justice Rehnquist essentially endorsed Judge Calabresi's project: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." Washington v.

duct posits that the interchange of ideas between judges and legislators would lead to better laws; laws drafted with greater clarity and precision; laws that more precisely achieve their intended results.

The problem with such an approach, at least at the federal level, is rather obvious: on what basis can unelected members of the judiciary legitimately claim a right to review generally the wisdom of congressional enactments? Indeed, several eminent constitutional scholars already have concluded that a serious "countermajoritarian difficulty" exists under current judicial practices, in which judges merely "lay the Article of the Constitution which is involved beside the statute which is challenged and decide whether the latter squares with the former."[20] Accordingly, the constitutional difficulties associated with radical expansions of the judicial role seem insurmountable.

Moving beyond questions of constitutional authority, practical questions regarding the ability of federal judges to serve as roving experts on highly disparate and technical subjects remain to be addressed.[21] Even if the constitutional objections could be overcome, these basic competency issues would present a severe impediment to implementing an activist vision of federal judges serving as the roving Platonic guardians of "good governance."

Indeed, the idea may seem at first blush to be so ridiculous as to not merit serious consideration. After all, even if legal academics occasionally offer up wildly impractical proposals, what chance do such proposals have of being implemented by the federal courts? In light of Judge Guido Calabresi's concurring opinion in *United States v. Then*,[22] one should not dismiss

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Glucksburg, 117 S. Ct. 2258, 2275 (1997); *see also* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1146 (1997) (arguing that the Supreme Court should defer to legislative decisionmakers when questions of general morality, rather than constitutional principles, are at stake).

20. United States v. Butler, 297 U.S. 1, 62 (1936); *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10-16 (1991); BICKEL, *supra* note 16, at 16-17; CHARLES L. BLACK, THE PEOPLE AND THE COURT (1960); ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 9-11 (1984); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-06 (1980); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

21. *See* Mikva, *supra* note 16, at 1826-29; Wald, *supra* note 16, at 657-59; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 380-89, 397-98 (1989).

22. 56 F.3d 464 (2d Cir. 1995).

too lightly the idea of a redefined relationship between the federal judiciary and Congress.

In *Then*, Judge Calabresi fires a "constitutional flare" to Congress. Calabresi is essentially warning Congress that, if it fails to consider carefully a particular matter in light of evidence he deems constitutionally relevant, the federal courts are likely to enforce constitutionally-mandated constraints on congressional policy-making choices.[23] Simply put, Congress should do as the judiciary says now, or should be prepared to do as the judiciary says later. To borrow a phrase coined by Associate Justice Antonin Scalia, "the Imperial Judiciary lives."[24]

Notwithstanding our contrary constitutional tradition, perhaps Judge Calabresi has a point. Why should federal courts refrain from providing frank advice to legislative and executive branch policy-makers regarding close questions of constitutional law? If such advice better enables legislators and executive branch personnel to avoid unconstitutional actions, then one could plausibly argue that the dialogue enhances, rather than debases, the legislative process.[25] Perhaps an open dialogue between the federal judiciary, charged with determining the meaning and scope of the Constitution, and the Congress and/or executive branch, would lead to more enlightened public policy.

If one posits that legislative and executive branch personnel are constitutionally conscientious, then presumably more complete information about the constitutional aspect of a public policy problem would lead to better decision making, at least insofar as observance of constitutional limitations is concerned. If Congress has multiple means of achieving a particular end—some of which are constitutional and others which are not—obvious benefits flow from the federal judiciary letting Congress know which means the Constitution prohibits. Certain state constitutions adopt this point of view by permitting state supreme courts to render formal, binding advisory opinions to the state legislature and executive branch officers.[26]

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23. *See infra* notes 41-59 and accompanying text.

24. Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

25. *See* Schauer, *supra* note 8, at 22-23.

26. *See* Paul C. Clovis & Clarence M. Updegraff, *Advisory Opinions*, 13 IOWA L. REV. 188 (1928) (describing the advisory opinion process as it exists in about a dozen states); Oliver P. Field, *The Advisory Opinion—An Analysis*, 24

This approach also is reflected in the longstanding practice of including broad dicta—sometimes couched as an alternative holding—in published judicial opinions.

Thus, upon more careful consideration, Judge Calabresi's seemingly novel proposal for revising the relationship between judges and policy-makers should not be dismissed lightly. Relatedly, those in the academic community who have argued for a closer relationship between judges and lawmakers deserve a more formal response than hysterical laughter or ad hominem dismissals. In sum, the question is complex and requires more than superficial analysis.

This article will consider the desirability of having federal judges send Congress "constitutional flares;" that is, to provide clear warnings to Congress regarding the potential applicability of constitutional constraints on its policy choices. Part II takes up Judge Calabresi's concurring opinion in *United States v. Then*, an opinion that reflects remarkable candor and potentially points the way to a redefined relationship between the federal judiciary and Congress—a relationship that presupposes a more activist role for federal judges in legislative deliberations. Part III considers the history of "advisory" opinions in the federal and state courts.[27] This part gives particular attention to the historical reluctance of federal courts to render advisory opinions or even to decide constitutional issues when decision can be avoided. This part also considers the countervailing tradition reflected by the federal judiciary's use of dicta and alternative holdings as well as the issuance of formal advisory opinions at the state level. Finally, Part IV considers

IND. L.J. 203 (1949) (same); *see also* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70 (2d ed. 1973) (describing the history of advisory opinions in both the federal and state judicial systems); Felix Frankfurter, *A Note on Advisory Opinions*, 24 HARV. L. REV. 1002 (1924) (discussing the costs and benefits associated with advisory opinions).

27. It is difficult to state with certainty precisely what constitutes an "advisory opinion." Multiple meanings exist, and different players deploy shifting definitions without much consistency. Essentially, an advisory opinion consists of formal, binding advice from a court of law to other government officials or the general public in the absence of a live case or controversy pending before the court. This definition would not encompass other forms of judicial advice, including dicta, alternative holdings, and the like, which are admittedly in some sense precatory in nature. *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000-09 (1994) (describing the differences between holdings, dicta, and "asides").

whether Judge Calabresi's amended rules of appropriate judicial behavior can be squared with these historical antecedents.

As the inheritors of the New Deal's jurisprudential legacy, most contemporary judges and academics have accepted the necessity, if not the virtue, of a pragmatic, functionalist approach to interbranch relations.[28] Just as the growth of the modern administrative state required the reconceptualization of the delegation doctrine and separation of powers doctrine—largely in order to realize the benefits and efficiencies associated with agency expertise—the paradigm governing judicial interactions with the legislative branch should be reconsidered and perhaps revised. Ultimately, Judge Calabresi's concurring opinion in *Then* presents a plausible, though perhaps not preferable, model for judicial enforcement of constitutional limitations on legislative policy-making. The era of constitutional flares may have arrived.

II. CONSTITUTIONAL FLARES AND *UNITED STATES* v. *THEN*

A. CRACK COCAINE AND THE SENTENCING GUIDELINES

As if the federal Sentencing Guidelines are not controversial enough in their own right,[29] an uproar has arisen over the disparate sentences that the guidelines mandate for those convicted of crimes involving crack and powder cocaine.[30] As Professors Sisk, Heise, and Morriss have noted, "[c]ommentators have attacked the guidelines as perpetuating disparate treat-

28. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989); CFTC v. Schor, 478 U.S. 833 (1986); Paul Gewirtz, *Realism in the Separation of Powers*, 30 WM. & MARY L. REV. 343 (1989); Peter L. Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 496 (1987); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987). *But cf.* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (defending a flexible formalism in separation of powers theory as a necessary project related to enhancing individual liberty).

29. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Symposium, *Making Sense of the Federal Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 563 (1992); Symposium, *Punishment*, 101 YALE L.J. 1681 (1992).

30. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 364-86 (1997).

ment of racial and ethnic minority defendants."[31] Regardless of the merits of the more sweeping racial critiques of the guidelines,[32] the differential treatment of offenses involving powder and crack forms of cocaine presents a particularly thorny issue, especially given its pronounced disparate racial impact.[33]

The Sentencing Guidelines currently mandate a 100:1 sentencing ratio for crack versus powder forms of cocaine.[34] The net effect of this ratio is to increase dramatically sentences for persons convicted of offenses involving relatively modest amounts of crack cocaine. Incidentally, defendants convicted of crack offenses are disproportionately African American; hence, the ratio has resulted in African Americans receiving proportionately longer sentences than non-African Americans for crimes involving cocaine.[35]

Perhaps in response to the strong public criticism surrounding the arguably racial cast of this distinction,[36] the Sentencing Commission proposed revising downward the discrepancy.[37] Congress enacted legislation disapproving this

31. Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. (forthcoming Nov. 1998).

32. *See, e.g.*, Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to the Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Paula C. Johnson, *At the Intersection of Justice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995).

33. *See generally* United States v. Armstrong, 517 U.S. 456 (1996) (rejecting a discovery request in the context of a selective prosecution claim alleging racial bias in federal prosecutions involving crack cocaine).

34. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1997) (establishing "base offense levels" bearing a 100:1 ratio for powder and crack forms of cocaine). For example, someone attempting to sell 150 kilograms of powder cocaine commits a "Level 38" base offense, whereas a person selling only 1.5 kilograms of cocaine base (i.e., crack cocaine) also commits a "Level 38" base offense. As base offenses fall from Base Level 38 to Base Level 12, the 100:1 ratio remains constant. Hence, section 2D1.1(c) provides that anyone convicted of an offense involving 25 grams of powder cocaine faces the same base sentence as someone convicted of an offense involving only 25 milligrams of base cocaine. *See id.* § 2D1.1 (c)(14).

35. *See* KENNEDY, *supra* note 30, at 364-86.

36. *See, e.g.*, Ari Armstrong, *Crack Cocaine: Make the Sentencing Fair*, WASH. POST, Aug. 15, 1995, at A17; Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. TIMES, Oct. 28, 1995, at A1; Toni Loci, *Panel Plans to Amend Sentencing Disparity for Crack Dealers*, WASH. POST, Mar. 1, 1995, at D3.

37. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076 (1995).

revision, however, which President Clinton signed into law.[38] This course of action proved wildly unpopular in the federal prisons: "eight days of disturbances ensued at several federal prisons" following Congress's disapproval vote.[39] The end result of this congressional intervention was to leave the existing guidelines ratio in place, which means that the sentencing disparity between those convicted of offenses involving powder and crack cocaine will continue.

The matter has not, however, come to a complete rest. In July 1997, Attorney General Janet Reno and Drug Czar Barry McCaffrey endorsed a new proposal to reduce the sentencing ratio from 100:1 to 10:1.[40] At present, it is unclear whether the Sentencing Commission and Congress will accept this recalibration of federal sentencing policy.

B. JUDGE CALABRESI'S FRIENDLY ADVICE TO CONGRESS

In *United States v. Then*,[41] a panel of the United States Court of Appeals for the Second Circuit faced the vexing question of whether the sentencing disparity between persons convicted of crimes involving crack and powder cocaine constituted a violation of the Fifth Amendment's implied guarantee of equal protection of the laws.[42] Defendant Manuel Then pled guilty to four counts of trafficking in crack cocaine before a district judge in the Northern District of New York.[43] Consistent with the federal Sentencing Guidelines, the District Court sentenced Then to 210 months' imprisonment.

Then appealed his sentence to the Second Circuit, arguing that the District Court had misapplied certain mitigating and aggravating sentencing considerations. He also argued that the Sentencing Guidelines established an impermissible racial classification by treating offenses involving crack cocaine more

38. *See* Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995).

39. Roberto Suro, *Officials Draft Plan to Reduce Cocaine Sentencing Disparity*, WASH. POST, July 22, 1997, at A2.

40. *See id.*; *Drug Sentencing Disparities*, WASH. POST, July 30, 1997, at A22.

41. 56 F.3d 464 (2d Cir. 1995).

42. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954) (explaining the relationship between equal protection and due process).

43. *See Then*, 56 F.3d at 465.

harshly than offenses involving comparable amounts of powder cocaine.[44]

The Second Circuit first rejected Then's technical argument regarding the application of the guidelines by the district court.[45] The panel majority next turned its attention to Then's "equal protection" claim.[46] Citing an earlier Second Circuit precedent rejecting a similar claim, the panel majority declined to grant relief. On first blush, then, the case appears to be a routine—and meritless—appeal of a typical narcotics conviction.[47] This assumption would hold true but for a rather remarkable concurring opinion by Judge Guido Calabresi.

Judge Calabresi began his concurring opinion straightforwardly enough: he argued that the disparity between sentences for crimes involving powder and crack cocaine does not make out an equal protection violation on the facts presented because the appellant had failed to demonstrate intentional discrimination on the part of the Sentencing Commission or the Congress in first establishing the 100:1 ratio.[48] That said, Judge Calabresi went on to acknowledge that "[t]he unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling."[49] No present violation of the Fifth Amendment's equal protection principle existed, however, because "the link between foreseeable discriminatory impact and

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44. *See id.* at 466.

45. *See id.*

46. In something of a misdescription, Judge Altimari repeatedly refers to Then's constitutional claim as an alleged violation of the "Equal Protection Clause of the United States Constitution." *Id.* at 465, 466. Of course, the Equal Protection Clause applies only to the state governments and the agents of state governments. Strictly speaking, Then's claim is a substantive due process claim arising under the Due Process Clause of the Fifth Amendment. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-17 (1995); *Bolling*, 347 U.S. at 498-500.

47. The federal courts of appeals have been unanimous in rejecting equal protection challenges to the sentencing disparity between offenses involving crack and powder cocaine. *See* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2548-49 & 2548 n.4 (1995) (noting that no federal court of appeals has ever granted relief under the equal protection argument and citing numerous cases in various circuits); William Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 409 & n.19 (1992) (same); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1302-03 & n.93 (1995) (same).

48. *See Then*, 56 F.3d at 466-67 (Calabresi, J., concurring).

49. *Id.* at 467.

motive was insufficient to establish the kind of discriminatory intent on the part of Congress or the Commission that is needed to support this sort of equal protection claim."[50]

Judge Calabresi then turned the corner, noting that the present state of knowledge regarding the effects of the disparity is quite different. In consequence, he could foresee that "constitutional arguments that were unavailing in the past may not be foreclosed in the future."[51] Judge Calabresi described the Sentencing Commission's careful consideration of the racial impact of the sentencing disparity and the possibility that the Sentencing Commission might propose a recalibration of the ratio.[52] In light of the new evidence mustered by the Sentencing Commission, a failure on Congress's part to approve a downward departure or even simply inaction *might* satisfy the intent requirement set forth in *Washington v. Davis*[53] or support a claim that the disparity is wholly irrational.[54]

Judge Calabresi was very careful not to give a formal opinion as to how the court would resolve a later case involving his hypothetical facts.[55] He simply noted that the existence of compelling evidence demonstrating a racial linkage would give a reviewing court pause, should Congress maintain a stance of benign neglect or, worse yet, legislatively reaffirm the existing ratio notwithstanding a Sentencing Commission proposal to revise the disparity downward. Judge Calabresi rhetorically raised two questions: (1) "Precisely at what point does a court say that what once made sense no longer has any rational basis?" and (2) "What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached?"[56] Significantly, Judge Calabresi made no attempt to answer his

50. *Id.*

51. *Id.*

52. *See id.* at 467-68.

53. 426 U.S. 229, 240 (1976).

54. *See Then*, 56 F.3d at 468-69.

55. *See id.* As it happened, Congress rejected the Sentencing Commission's proposal to end the disparity and President Clinton concurred. *See generally* Mary Pat Flaherty & Pierre Thomas, *Crack Sentences Angered Inmates, Officials Warned*, WASH. POST, Oct. 27, 1995, at A1; Jones, *supra* note 36, at 1. To date, no court has used this subsequent course of events as a basis for reconsidering the constitutional status of the sentencing disparity.

56. *Then*, 56 F.3d at 468-69.

own questions. On the contrary, he admitted that their very existence "powerfully" counseled in favor of "restraint."[57]

Rather than simply ignore the mounting data that augur against the constitutionality of the disparity, Judge Calabresi was remarkably candid. In his view, the Sentencing Guidelines ratio *might* be "heading toward unconstitutionality" in light of "changed circumstances."[58] But he clearly and expressly reserved final judgment. At the end of the day, he confessed that future circumstances might, or might not, provide sufficient support for a claim similar to the claim pressed by Then.

The panel majority, unsurprisingly, took Judge Calabresi to task for offering Congress advice on its core policy-making functions. Characterizing Judge Calabresi's concurring opinion as a kind of advisory opinion, the majority emphasized that the court's "role is limited to interpreting and applying the laws that Congress passes, and striking down those that we find unconstitutional."[59] For the panel majority, the federal courts do not have any role to play in framing the constitutional dimension of public policy questions pending before the legislature. In the absence of an existing violation, silence is the appropriate stance for the federal courts.

There is much to recommend the panel majority's stance. Indeed, Judge Calabresi's proposal seems to constitute a kind of judicial intervention in an essentially legislative enterprise. Judge Calabresi's concurrence constitutes a kind of constitutional flare shot across the dome of the federal Capitol. As such, it presents an alternative and perhaps somewhat unconventional model for relations between the legislature and the judiciary.

It would be easy, like the panel majority, simply to reject Judge Calabresi's proposal reflexively as inconsistent with our constitutional practices and traditions. As will be explained more fully below, however, his proposal merits far more serious consideration than the panel majority was willing to afford it. After such consideration, one might nevertheless reach the conclusion that, at the end of the day, the objections to Judge Calabresi's vision possess greater weight than the anticipated benefits. Even so, the balance between the costs and benefits

57. *Id.* at 468.
58. *Id.* at 469.
59. *Id.* at 466.

associated with Judge Calabresi's model are much closer than the 100:1 ratio at issue in *Then*.

III. CONSIDERING JUDGE CALABRESI'S CASE FOR A NEW PARADIGM: THE LESSONS OF HISTORY RECONSIDERED

A careful analysis of Judge Calabresi's proposal consists of two separate inquiries. As a baseline matter, one must first determine whether the proposal is even arguably constitutional. If the proposal exceeds the constitutional authority of the federal courts, then the matter must be deemed at an end, for surely the federal courts cannot unilaterally alter the constitutional balance of powers.

Assuming that the proposal does not raise any insurmountable constitutional objections, one must then inquire into the prudential issues raised by Judge Calabresi's model of judicial/legislative dialogue. Even if the model is constitutional, it might nevertheless impose unacceptably high opportunity costs on the federal judiciary.

A. THE PROHIBITION AGAINST ADVISORY OPINIONS

The panel majority in *Then* accuses Judge Calabresi of violating the spirit, if not the letter, of the prohibition against federal courts issuing advisory opinions:

> [W]e decline to accept the invitation by the concurrence to notify Congress that if it does not adopt the recommendation of the Sentencing Commission, this Court in the future might invalidate the sentencing ratio as unconstitutional. Just as we ordinarily do not issue advisory opinions, we should not suggest to Congress that it ought to adopt proposed legislation. Our role is limited to interpreting and applying the laws that Congress passes, and striking down those that we conclude are unconstitutional.[60]

Although the majority does not argue that Judge Calabresi's concurrence *formally* constitutes an advisory opinion, it nevertheless asserts that Judge Calabresi's concurring opinion is just as imprudent as a formal advisory opinion and therefore represents a derogation from the proper judicial role.

Judge Calabresi responds by arguing that his concurring opinion does not violate the prohibition against advisory opinions because "[a]dvisory opinions decide situations which have

60. *Id.*

not yet occurred" and "[t]his opinion has no such intention."[61] Instead, Judge Calabresi describes his concurrence as "in the nature of a common sort of concurrence; that is, one that indicates what the majority opinion has not decided because it is not yet before the Court."[62] He goes even further, advocating a "dialogue" between courts and legislatures and asserting that "[t]he tradition of courts engaging in dialogue with legislatures is too well-established in this and other courts to disregard."[63]

Thus, the battle lines are clearly drawn: the majority accuses Judge Calabresi of disregarding the proper judicial role and he responds by challenging the majority's unduly narrow conception of the judicial role. An examination of the history of advisory opinions at the federal and state level will demonstrate that Judge Calabresi's concurrence in *Then* does not violate either the letter or the spirit of the prohibition against advisory opinions. Moreover, this exercise demonstrates that, insofar as advice to Congress on matters of constitutional import does not involve an exercise of "the judicial power," no constitutional bar prohibits judges from offering it.

1. A brief primer on advisory opinions

Since the earliest days of the Republic, the federal courts have declined to render formal advisory opinions.[64] Over time, most legal scholars have come to view the ban on advisory opinions as grounded in Article III's limitation of the federal judicial power to "cases and controversies."[65] As Professor Laurence Tribe explains, "[t]he federal courts created pursuant to article III are barred by the case-or-controversy requirement from deciding 'abstract, hypothetical, or contingent ques-

61. *Id.* at 466 n.1 (Calabresi, J., concurring).

62. *Id.*

63. *Id.* at 467 n.1.

64. *See* letter from Secretary of State Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793) and letters from Chief Justice Jay and Associate Justices to President Washington (July 20, 1793 and Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 486-89 (Henry P. Johnston ed., 1971); 10 THE WRITINGS OF GEORGE WASHINGTON 542-45 app. (Jared Sparks ed. 1847) (providing the questions set forth by President Washington to the Justices); *see also* Muskrat v. United States, 219 U.S. 346, 354 (1911). This *Correspondence of the Justices* also appears in BATOR ET AL., *supra* note 26, at 64-67.

65. U.S. CONST. art. III, § 1. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.1, at 5-6, § 2.1, at 42-46 (2d ed. 1994).

tions.'"[66] This prohibition generally has been read to preclude federal courts, as a matter of basic Article III jurisprudence, from offering up advice on legal questions in the absence of a lawsuit brought by litigants with standing to maintain the action.[67]

Certainly, both as a textual matter and as a matter of consistent historical practice, Article III limits the exercise of "the judicial power" to "cases or controversies." Thus, if an exercise of "the judicial power" is at issue, there must be a live case or controversy to justify the exercise of the power. The question remains, however, as to whether any and all forms of advice from judges to legislators constitute an exercise of "the judicial power" for purposes of Article III. For reasons that will be more fully developed below, the answer to this question must be a resounding "no."[68]

2. Misunderstandings regarding "advisory opinions" and Article III

As Professor Evan Lee has noted, "[o]ver the years, the [Supreme] Court has been extremely sloppy in its use of the phrase 'advisory opinions.'"[69] Indeed, the Supreme Court has used the term "advisory opinion" to denote a number of different judicial actions, including judgments subject to later review by other branches of the federal government,[70] formal advice on proposed courses of conduct,[71] decisions in moot or unripe

66. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-9, at 73 (2d ed. 1988) (quoting Alabama State Fed. of Labor v. McAdory, 325 U.S. 450, 461 (1945)); *see Muskrat*, 219 U.S. at 352-63; Flast v. Cohen, 392 U.S. 83, 94-101 (1968).

67. *See* TRIBE, *supra* note 66, at 73.

68. *See* U.S. CONST. art. II, § 2, cl. 2 (permitting judges to appoint inferior executive officers); Mistretta v. United States, 488 U.S. 361, 390-91 (1989) (permitting judges to serve as Sentencing Commissioners because the power exercised by the U.S. Sentencing Commission is not "judicial" power); *see also infra* notes 238-57 and accompanying text.

69. Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 644 (1992).

70. *See* Hayburn's Case, 2 U.S. (2 Dall.) 408, 409-10 (1792); Gordon v. United States, 117 U.S. 697, 698-99, 702-06 (1864) (report of undelivered opinion by Chief Justice Taney).

71. *See* Letter from Chief Justice John Jay to President George Washington (August 8, 1793), *supra* note 64; CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 108-11 (1937); *see also Muskrat*, 219 U.S. at 354 (declining to decide the validity of congressional legislation because of the absence of a genuine case or controversy between the litigants).

cases,[72] decisions in cases in which the plaintiff lacks or arguably lacks standing,[73] and any portion of an opinion not absolutely necessary to the resolution of the case (i.e., obiter dicta).[74] In light of these varying uses of the term "advisory opinion," there is much reason to concur with Professor Lee's view that "[t]he phrase 'advisory opinion' has . . . been reduced to a slogan comparable to the charge that a particular judge is a 'judicial activist.'"[75] The very incoherence of the term undermines its value as a tool for shaping or delimiting constitutional adjudication. Although "[n]o one knows exactly what the slogan [advisory opinion] means," its invocation "sets tongues clucking in disapproval."[76]

In order to label Judge Calabresi's concurrence as an "advisory opinion," thus vindicating the objections of the *Then* panel majority, one must (1) attempt to characterize Judge Calabresi's concurrence in *Then* as a kind of formal, perhaps binding, directive to Congress on a question of constitutional law, and (2) argue that this sort of strong judicial guidance transgresses the historical prohibitions against offering formal legal opinions to the political branches. Both propositions seem dubious.

Even giving a very generous benefit of the doubt to Judge Calabresi's critics, the first inquiry can be answered easily and quickly: Judge Calabresi's concurrence does not constitute an advisory opinion of the sort condemned in *The Correspondence of the Justices*.[77] Judge Calabresi was not offering formal advice to Congress based on an official inquiry from an Article I officer. Instead, Judge Calabresi could at worst be charged

72. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1019 (1994).

73. *See* Flast v. Cohen, 392 U.S. 83, 91-94, 101-06 (1968); Frothingham v. Mellon, 262 U.S. 447, 486-89 (1923).

74. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-402 (1821). Professor Lee also includes federal court review of state court decisions premised on an independent and adequate state law basis and decisions on the merits in the absence of proper standing. *See* Lee, *supra* note 69, at 644-45.

75. Lee, *supra* note 69, at 650.

76. *Id.*

77. Letter from Chief Justice John Jay to President George Washington (Aug. 8, 1793), *supra* note 64; WARREN, *supra* note 71, at 108-11. Chief Justice Jay's letter also appears in BATOR ET AL., *supra* note 26, at 65-66.

with writing broad obiter dicta that was unnecessary to the disposition of the case.[78]

By way of contrast, the prohibitions set forth in *The Correspondence of the Justices* relate to providing formal, binding advice to a coordinate branch of government in the absence of a live case or controversy. Secretary of State Jefferson, at the request of President Washington, sought a formal interpretation of a bilateral treaty between the United States and France.[79] After seeking additional time in order to poll his colleagues on the matter,[80] Chief Justice Jay declined to answer the questions posed in Jefferson's letter:

> We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the question alluded to, especially as the power given by the Constitution to the President, on calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly limited to the *executive* departments.[81]

In the absence of a concrete dispute, the Justices were disinclined to interpret formally the terms of the treaty. Had a live case or controversy regarding the application of the treaty been pending before the Supreme Court, the Justices would not have shirked from shouldering significant interpretive duties.[82] To read more than a prohibition against the issuance of formal, binding advisory opinions into *The Correspondence of the Justices* is to afford Chief Justice Jay's letter to President Wash-

78. *See generally* Dorf, *supra* note 27 (critiquing the federal courts' approach to distinguishing between holdings and dicta).

79. Letter from Chief Justice John Jay to President George Washington (Aug. 8, 1793), *supra* note 64; *see also* BATOR ET AL., *supra* note 26, at 64-65 (listing a representative sample of the questions submitted to the Supreme Court).

80. *See* Letter from Chief Justice Jay and Associate Justices to President Washington (July 20, 1793), *supra* note 64. Chief Justice Jay explained that because the question of whether the judges could render advice to the executive branch "appears to us to be of much difficulty as well as importance," the Justices felt "a reluctance to decide it without the advice and participation of our absent brethren." *Id.*

81. Letter from Chief Justice John Jay to President George Washington (Aug. 8, 1793), *supra* note 64.

82. *See, e.g.*, United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 590-97 (1841) (interpreting bilateral treaty between Spain and the United States in order to determine the legal status of the Amistad Africans).

ington more precedential authority than it commands by its own terms.

If there is a bar against individual jurists rendering advice to Congress or the President on an informal basis, it must rest solely on prudential grounds. With respect to the propriety of federal judges offering broad dicta in formal opinions issued incident to the resolution of a pending case or controversy, *The Correspondence of the Justices* is completely silent—the letter simply does not address limitations on the giving of constitutional advice in this context. Thus, Judge Calabresi's decision to render advice to Congress regarding the constitutional implications of maintaining the sentencing disparity might have been unwise, but it does not constitute a formal transgression of the separation of powers.

The vehicle Judge Calabresi used to deliver his advice to Congress constituted a live legal "case or controversy": Then's appeal of his sentence. As a formal matter, Judge Calabresi did not offer advice on the constitutional difficulties associated with retaining a sentencing disparity between powder and crack cocaine independent of the resolution of a live case. Indeed, it is rather difficult to see how Judge Calabresi's concurring opinion in *Then* satisfies *any* of the articulations of prohibited "advisory opinions." As Judge Calabresi himself notes, his observations do not purport to bind Congress, or even a future panel of the Second Circuit.[83] Judge Calabresi plainly states that he is not attempting to decide issues not presently before the court, but rather is hoping to pretermit the need for formal court review of a particular subset of issues. Nor, for that matter, is Judge Calabresi's concurrence subject to subsequent revision by either executive or legislative branch officials.[84] Finally, Then had standing to bring the appeal, which was neither moot nor unripe, before the court. Judge Calabresi did, however, assume the risk of speaking—albeit in very general terms—on a constitutional issue without the benefit of adversarial briefing and oral argument.

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83. *See* United States v. Then, 56 F.3d 464, 466 n.1 (2d Cir. 1995) (Calabresi, J., concurring).

84. *Cf.* Muskrat v. United States, 219 U.S. 346, 354 (1911) (holding that Congress could not waive the Article III case or controversy requirement by passing legislation conferring federal court jurisdiction over cases designed to test the constitutionality of certain federal statutes); Hayburn's Case, 2 U.S. (2 Dall.) 408, 409-10 (1792) (declaring the subsequent revision of judgments by non-judicial personnel fundamentally inconsistent with the independence of the federal judiciary).

3. Advisory opinions and dicta distinguished

The foregoing analysis acquits Judge Calabresi of the core charge of offering an advisory opinion, but still leaves him open to the charge of drafting unnecessary obiter dicta.[85] If one characterizes Judge Calabresi's concurrence as mere dicta, however, there is no constitutional bar to its existence: "whether to engage in dicta is a matter for the considered discretion of a court, and calling it an 'advisory opinion' changes that not one whit."[86] Numerous examples of federal judges engaging in this sort of behavior confirm the correctness of this view.[87] There is, nonetheless, a general prudential proscription against opining on questions of constitutional law in the absence of a clear need for doing so in order to dispose of the case at bar—a proscription that federal judges arguably honor more in the breach than in the observance.[88]

Judge Calabresi argues that judges often draft opinions that offer advice to legislators on a variety of topics and gives three such examples in his *Then* concurrence.[89] All three examples involve instances in which judges speak directly to Congress in formal judicial opinions about needed law reforms. Judge Calabresi fails, however, to mention a particularly apt example that issued from the Supreme Court itself.

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85. *Cf.* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Spectator Motor Serv., Inc. v. McLaughlin, 322 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

86. Lee, *supra* note 69, at 649.

87. *See infra* notes 154-97 and accompanying text.

88. *See* Feltner v. Columbia Pictures Television, Inc., 118 S.Ct. 1279, 1288-90 (1998) (Scalia, J., concurring); Rust v. Sullivan, 500 U.S. 173, 223, 223-25 (1991) (O'Connor, J., dissenting). *But see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 438, 438-42 (1982) (Blackmun, J., concurring).

89. *See* United States v. Then, 56 F.3d 464, 466-67 n.1 (2d Cir. 1995) (Calabresi, J., concurring) (citing Computer Assoc. Int'l. v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992)); Brock v. Peabody Coal Co., 822 F.2d 1134, 1152-53 (D.C. Cir. 1987) (Ginsburg, Ruth Bader J., concurring); Abele v. Markle, 342 F. Supp. 800, 810-11 n.18 (D.Conn. 1972) (Newman, J., concurring), *vacated*, 410 U.S. 951 (1973).

In *San Antonio School District v. Rodriguez*,[90] the Supreme Court rejected the assertion that the federal Constitution confers a right to a public school education generally, much less a public school education of a minimum quality.[91] The Court also rejected equal protection arguments related to the inequalities in funding resulting from the use of local property taxes to fund individual school districts.[92] With respect to the equal protection claim, Justice Powell observed in his opinion for the Court that the use of local property taxes to fund primary and secondary schools necessarily would result in wide funding disparities between school districts, but opined that such disparities did not transgress the requirements of the Equal Protection Clause.

Although Justice Powell already had rejected the equal protection claim on the merits, he went on to note that "[t]he need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax."[93] He suggested that "innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity."[94] Although Justice Powell was unwilling to impose financing reform in the funding of primary and secondary public school systems, he nevertheless believed that "[t]hese matters merit the continued attention of the scholars who already have contributed much by their challenges."[95] In the final analysis, however, Justice Powell explained that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[96]

In a similar vein, Justice Stewart, concurring in Justice Powell's majority opinion, began his opinion with an attack on the use of property taxes to finance public education: "The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that

90. 411 U.S. 1 (1973).

91. *See id.* at 29-39.

92. *See id.* at 17-29.

93. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

94. *Id.*

95. *Id.* at 58-59.

96. *Id.* at 59. On the other hand, Justice Powell never threatened Congress by implying that congressional inaction on the inadequacies of state school financing mechanisms might lead to a later judicial holding that such mechanisms are unconstitutional. *Cf.* United States v. Then, 56 F.3d 464, 466-68 (Calabresi, J., concurring).

can fairly be described as chaotic and unjust."[97] Thus, like Justice Powell, Justice Stewart offered concrete advice to the nation's state legislators as to the inadequacy of local property taxes as a means of providing for universal public education.

Admittedly, Judge Calabresi's concurring opinion in *Then* differs in scope from Justice Powell's and Justice Stewart's efforts to encourage school financing reform in *Rodriguez*. Rather than merely purporting to give public policy advice, Judge Calabresi's observations relate rather directly to issues sounding in equal protection.[98] But this would seem to be less of a usurpation of legislative prerogatives than the ad hoc advice offered up by Justices Powell and Stewart in *Rodriguez*.

Precisely because Judge Calabresi limited his observations to questions of constitutional law, he did not cross the line that separates the judge from the legislator. Moreover, Judge Calabresi did not purport to decide a case that had not yet been presented. He merely observed that, should the Sentencing Commission recommend a mitigation of the disparity in sentencing for crimes involving crack rather than powder cocaine, Congress's failure to accept such a recommendation might have some bearing on a subsequent reviewing court's equal protection analysis.[99] He did not speak to the ultimate result in such a case, but rather identified some of the considerations that might be relevant to a proper constitutional analysis. This sort of open constitutional rumination does not constitute a formal advisory opinion in any meaningful sense of the word.[100] To the extent that he did not promise a result, but instead merely identified considerations that might inform some future court's consideration of the issue in any subsequent litigation, one would be hard put to press the prudential case against him very effectively.[101]

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97. *Rodriguez*, 411 U.S. at 59 (Stewart, J., concurring).

98. *See Then*, 56 F.3d at 466-68.

99. *See id.* at 467-68.

100. *See supra* notes 77-84 and accompanying text; *see also* Katyal, *supra* note 16, at 1803-07 (distinguishing the use of broad dicta from formal advisory opinions).

101. *See infra* notes 122-29, 238-57 and accompanying text. One could, of course, reasonably inquire as to why Judge Calabresi thought it necessary to use a formal judicial opinion as the vehicle to deliver his advice to Congress. He could easily have employed some other means of conveying his message. A speech, a law review article, or a newspaper editorial could have served as an alternative forum. Judge Calabresi might even have sought to testify before the House or Senate Judiciary Committee should either committee hold

4. The counterexample established in the states

The existence and use of advisory opinions in various states undermines prudential arguments against a judicial/legislative dialogue. Several state constitutions permit and, in some instances, require, a particular state's supreme court to render advisory opinions to the executive or legislative branches of government.[102] A dozen state supreme courts currently have advisory functions of various sorts.[103]

The practice of rendering advisory opinions has roots in the practice of English courts,[104] and at least three states had adopted the practice as of 1787.[105] Notwithstanding state court experimentation with advisory opinions, the federal courts have historically decried undertaking any such duties. As Professor Frederick Schauer has noted, "[a]lthough some state courts issue advisory opinions, and although courts in other countries sometimes issue advisory opinions . . . federal courts

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hearings on a bill that would retain the existing sentencing disparity for offenders convicted of crimes involving crack cocaine. One possible explanation is that Judge Calabresi viewed a formal concurring opinion as the most effective means of delivering his views; Congress is far less likely to notice a speech or a law review article than direct advice contained in a formal judicial opinion. Several commentators have suggested that even direct advice often escapes Congress's notice. *See* Robert A. Katzman, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 662-65 (1992); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609-10 (1983). If Congress routinely ignores judicial advice contained in formal court opinions, it is rather doubtful that alternative, less formal channels of communication would prove more efficacious. Whatever the net effectiveness of judicial advice to Congress contained in formal opinions, the efficacy of such candid advice is likely to be inversely related to the frequency with which federal judges offer it. That is to say, the more often federal judges undertake offering Congress advice, the less likely Congress will be to listen.

102. *See* Field, *supra* note 26, at 203-05.

103. *See* Abrahamson & Hughes, *supra* note 8, at 1081 n.111; *see also* BATOR ET AL., *supra* note 26, at 69-70.

104. *See* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 10-50 (1997); Field, *supra* note 26, at 203; James B. Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153-54 (1893); CHARLES ALLAN WRIGHT ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3529.1 at 293-93 (2d ed. 1984).

105. The Massachusetts and New Hampshire state constitutions expressly authorized the issuance of advisory opinions, whereas the Pennsylvania Supreme Court offered advisory opinions without the benefit of a formal constitutional authorization. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 268 n.26 (1990); *see also* Jay, *supra* note 104, at 51-56 (discussing the role of state judges prior to 1787).

in the United States are different."[106] In the United States, "the advisory opinion is anathema, and for numerous well-managed reasons, American federal courts will not decide cases removed from the context of a real controversy between real parties."[107]

This approach certainly comports with the intentions of the Framers. At the Constitutional Convention of 1787 in Philadelphia, several delegates proposed vesting federal judges with advisory roles. The original "Virginia Plan" included a "Council of Revision" that would include "a convenient number of the National Judiciary."[108] This Council of Revision would have exercised a power of review over federal legislation.

Early on in the proceedings, some delegates objected to the proposal.[109] Elbridge Gerry of Massachusetts thought it unwise to make members of the federal judiciary "judges of the policy of public measures."[110] This view was seconded by Rufus King, also a member of the Massachusetts delegation, who ob-

106. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654 (1995).

107. *Id.* at 654-55; *see also* JAY, *supra* note 104, at 149-70 (explaining the historical and political factors that led Chief Justice Jay to decline President Washington's request for a formal advisory opinion). It is difficult to explain precisely why some state governments have concluded that formal advisory opinions are constitutionally acceptable. The relative independence of the federal judiciary might provide a partial answer. In many states, judges are elected or subject to retention votes. In this way, the citizenry is able to exercise some measure of control over the state judiciary. These political controls are absent in the federal system. The only way to remove a sitting federal judge is through impeachment proceedings. *See* U.S. CONST. art. I, § 3, cl. 6-7 & art. III, § 1. Limiting the advisory powers of the federal courts makes some sense if one is concerned with limiting the exercise of relatively unaccountable power. At some abstract level of analysis, Professor Jay suggests that the practice of refusing to render formal advisory opinions reflects the Supreme Court's interest in avoiding political controversy, a project related to institutional self-preservation. *See* JAY, *supra* note 104, at 161-70, 175-76. The reasons might, of course, be related: if the lack of political accountability reduces the legitimacy of the federal judiciary's actions, then the judiciary might logically seek to conserve its political capital. The logic of this approach would be especially strong in the context of federal advisory opinions, because of the coordinate branches' ability to disregard such opinions, and because the court's ability to deliver sound advice is handicapped by the absence of a lower court record, lower court opinions, and adversarial briefing.

108. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 21.

109. *See id.* at 97 (June 4, 1787) ("Mr. Gerry doubts whether the Judiciary ought to form a part of it [the Council of Revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.").

110. *Id.* at 97-98.

served that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."[111]

James Madison initially disagreed, arguing that giving federal judges a stake in the exercise of the President's veto would "increase the respectability" of the President's exercise of the veto.[112] Madison's proposal met immediate opposition and the delegates voted to table the motion to require judicial service on a "Council of Revision."[113] Ultimately, the delegates decided not to give members of the federal judiciary a role in exercising the President's veto power.[114]

The idea of creating an advisory council to the President retained currency with some delegates throughout the Federal Convention. On at least two subsequent occasions, the delegates referred proposals for a "Council of State" to the Committee of Detail, which was charged with preparing a working draft constitution for the delegates to consider.[115] In addition, Charles Pinkney, of South Carolina, successfully moved to instruct the Committee of Detail to consider whether "[e]ach branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions."[116]

Although an early report from the Committee of Detail included a "Privy Council" on which the Chief Justice of the Supreme Court served,[117] this proposal did not survive in subsequent committee drafts. By August 27, the delegates had

111. *Id.* at 98.

112. *Id.* at 108.

113. *Id.* at 111.

114. *See id.* at 138-40.

115. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 334-35 (referring a proposal for a "Council of State" to the Committee of Detail). On the role and influence of the Committee of Detail, see John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990).

116. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 341. This is a standard formulation of the requirement imposed by some state constitutions on state supreme courts to render advisory opinions. *See* Note, *Advisory Opinions*, 69 HARV. L. REV. 1302, 1302 n.1, 1307 (1956). The specific language proposed by Pinkney appears in the Massachusetts state constitution. *See* MASS. CONST. pt. II, cl. III, art. II.

117. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 366-69.

reached a general consensus that the federal judiciary would exercise authority only in matters of a "Judiciary nature."[118]

The Committee of Style's final draft vested a veto power with the President and limited the President's authority to request formal opinions to "the principal officer in each of the executive departments."[119] The final draft made no mention of either a "Council of Revision" or a "Privy Council." Although the Convention delegates had submitted proposals for both to the Committee of Detail, the committee declined to incorporate either proposal and the Committee of Style did not revisit this issue. Indeed, the absence of a "Constitutional Council" of some sort was among George Mason's principal objections to the final draft,[120] which he ultimately refused to sign.[121]

These historical materials make two important points. First, the Framers actively considered giving federal judges a formal policy-making role, as members of a "Council of Revision" or some similar entity and also considered requiring judges to offer legal advice to the executive and legislative branches. Second, and perhaps more importantly, the delegates to the Federal Convention failed to adopt *any* of these proposals, notwithstanding the ardor with which proponents advanced their desirability.

The logical conclusion one should take from these observations is that, at least as a matter of original intent, Chief Justice Jay was quite correct to reject President Washington's request for formal legal advice outside the context of a live case or controversy. The Framers plainly intended that the federal judiciary's policy-making role would be limited to the power of judicial review, a power that would be exercised only in cases or controversies of "a Judiciary nature"; the Framers were aware of various alternate arrangements in the states but expressly chose to reject such arrangements in favor of a more limited judicial role.

As explained above, however, Judge Calabresi's opinion does not constitute an advisory opinion in any constitutionally meaningful sense of the term.[122] Accordingly, even if one de-

118. *Id.* at 430.

119. *Id.* at 575, 599 (draft prepared by the Committee of Style).

120. *Id.* at 637-39 (September 15, 1787).

121. *See id.* at 664-65 (listing signatories).

122. *See supra* notes 69-84 and accompanying text; *see also* Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 442-44 (1996); Charles Gardner Geyh, *Paradise Lost,*

clined to give dispositive effect to the Framers' conscious and deliberate decision to deny the federal judiciary any formal advisory role, a detailed exploration of the states' experience with advisory opinions would still not be materially useful to an analysis of whether Judge Calabresi transgressed appropriate constitutional limitations in his *Then* concurrence. On the other hand, to the extent that advisory opinions at the state level provoke interbranch dialogue, they do shed light on the possible consequences of the more widespread use of dicta, concurring opinions, and similar devices as a means of provoking a dialogue about constitutional values with or, better still, within Congress.

A popular misconception about the state court advisory opinions is that they constitute the formal work product of the court. Almost uniformly, state supreme courts deem advisory opinions to be the work product of the individual members of the court, rather than the court itself. "In giving such opinions, the Justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity."[123] As Professor William Fletcher has observed, the necessary consequence of this is that "[w]hile [advisory opinions] may have been useful in predicting what the state courts might later do, they had neither the force of precedent nor of res judicata."[124]

This distinction is significant for purposes of analyzing the prohibition on advisory opinions at the federal level. If one can plausibly argue that an advisory opinion is not a binding judicial precedent and that its creation is not an exercise of formal

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Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress, 71 N.Y.U. L. REV. 1165, 1192-94 (1996).

123. Opinion of the Justices to the Senate and House of Representatives, 126 Mass. 557, 566 (1880). *See generally* Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269 (1989) (noting that early federal judges justified their political activities and executive branch service on the theory that they undertook such activities extrajudicially and only in their individual capacities).

124. Fletcher, *supra* note 105, at 268; *see also* Thayer, *supra* note 104, at 153-54 (arguing that advisory opinions are not binding expressions of the law); Note, *Advisory Opinions*, *supra* note 116, at 1303-05 (noting that some state supreme courts hold the view that rendering advisory opinions is an extrajudicial function). Professor Maeva Marcus has described a similar justification for the advisory roles undertaken by Supreme Court Justices in the early years of the Republic. *See* Marcus, *supra* note 123, at 271-77.

judicial authority, it is difficult to discern how the Constitution prohibits the issuance of "advisory" opinions by individual judges not acting in any official Article III capacity. Article III limits the exercise of the "judicial power" to "cases or controversies," but it does not prohibit individual judges from offering extra-judicial advice to the President or to Congress. Indeed, the practice of the Justices has been to offer advice to Presidents in a variety of contexts regarding a variety of matters.[125] A formal prohibition on the offering of advice regarding pending legislation also would appear to doom various proposals for increased dialogue between Congress and the federal courts regarding matters related to the operation of the courts.[126] The better view, ably expressed by Professor Charles Geyh, is that "the Constitution poses no impediment to the heightened legislative-judicial cooperation contemplated by a new, more interactive paradigm."[127]

In fact, federal judges historically have separated their "personal" activities from their "judicial" activities and, having done so, gone on to undertake a variety of extrajudicial tasks.[128] There are sound *prudential* objections associated with judges undertaking extrajudicial duties, particularly when these duties jeopardize the discharge of their Article III responsibilities.[129] But, until the extrajudicial duties impede the exercise of Article III powers, the prohibition is only prudential.

The practice of the states demonstrates that advisory opinions are not inherently inconsistent with maintaining a proper separation of powers. Nevertheless, this observation alone cannot resolve the propriety of Judge Calabresi's concurrence because his concurrence is not an advisory opinion. To the extent that the state supreme courts consistently have maintained significant efforts to separate advisory duties from traditional adjudicatory functions, their experience supports

125. *See* Krotoszynski, *supra* note 10, at 462-66; Marcus, *supra* note 123, at 270-77.

126. *See* Abrahamson & Hughes, *supra* note 8, at 1081-93; Ginsburg, *Legislative Review*, *supra* note 6, at 997-1002, 1017; Tacha, *supra* note 6, at 1550-55.

127. Geyh, *supra* note 122, at 1192; *see also* Jay, *supra* note 104, at 149-55, 171-77 (noting that there is no absolute constitutional prohibition against federal judges issuing formal advisory opinions).

128. *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122-41 (1994).

129. *See* Krotoszynski, *supra* note 10, at 468-84.

an argument against the application of an Article III impediment to Judge Calabresi's attempt to inform federal legislators about potentially relevant constitutional constraints that delimit their policy-making functions.

In sum, there is a world of difference between a formal limitation, expressed in official and binding constitutional terms, and "friendly advice" from the Article III courts. Article III prohibits the exercise of the judicial power of the United States in the absence of a case or controversy. Because Judge Calabresi's concurrence was part and parcel of the decision of a live "case or controversy," it is not an advisory opinion and accordingly does not constitute an impermissible exercise of the judicial power of the United States. It remains to be seen whether it transgress any serious *prudential* limitations on the judicial role.

B. THE PRUDENTIAL BAR AGAINST DECIDING CONSTITUTIONAL ISSUES UNNECESSARILY

There are sound and well established prudential objections to judges offering constitutional advice in formal opinions when such advice is not absolutely necessary to the disposition of the case pending before the court. The overall strength and vibrancy of these doctrines—as well as the consistency with which courts apply them—is, however, open to question. In the final analysis, a critical observer should not ask whether prudential objections to Judge Calabresi's model exist (they do), but rather, whether such objections outweigh the potential benefit of such a course of conduct (they might).

1. Decision avoidance techniques and the "passive virtues"

It is well established that federal courts should not gratuitously exercise the power of judicial review.[130] Expressed most eloquently (and comprehensively) by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, the Supreme Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional

130. *See* CHEMERINSKY, *supra* note 65, §§ 2.1-2.2, at 42-53; WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 144-46 (1987); JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1920); TRIBE, *supra* note 66, §§ 3-7 to 3-9, at 67-77; Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 302-06 (1979).

questions pressed upon it for decision."[131] Because federal judges are not democratically accountable, they should avoid using the power of judicial review gratuitously to thwart executive or legislative branch actions. Moreover, lacking both the power of the purse and the sword, federal courts should not seek out confrontations with the coordinate branches of the federal government.

Legal academics have argued that the countermajoritarian nature of the federal courts mitigates strongly in favor of judicial restraint. Professor Alexander Bickel, for example, extolled the "passive virtues" of judicial self-restraint. These passive virtues consist of a number of clever decision avoidance techniques that permit judges to refrain from deciding cases rife with the potential to generate serious interbranch conflict.[132]

It is certainly true that the federal courts deploy a number of decision avoidance techniques that allow them to eschew making hard policy choices. For example, as a baseline matter, standing doctrine presents a substantial barrier to the exercise of the power of judicial review.[133] Standing doctrine requires that a would-be plaintiff establish a cognizable personal interest in the litigation, including an actual injury that the federal courts have the power to redress through an appropriate remedy. Ancillary standing doctrines include ripeness and mootness: a case must be ready for decision (i.e., "ripe") and it must present a live, ongoing dispute for resolution (i.e., it must not be "moot"). For many years, jurists and academics debated whether standing doctrine constituted a limitation on the Arti-

131. 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *cf.* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 110-15 (1984) (arguing that the federal courts cannot legitimately refuse to decide cases over which Congress has conferred subject matter jurisdiction, even if artfully dodging the controversy via application of an abstention doctrine presents the most attractive course of action). For a comprehensive treatment of the Supreme Court's decision avoidance techniques, see CHEMERINSKY, *supra* note 65, §§ 2.3.5-2.6, at 88-166; Kloppenberg, *supra* note 72, at 1006-66.

132. *See* BICKEL, *supra* note 16, at 116-21, 127-33, 171-72, 200-07; Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47-58, 79 (1961) [hereinafter Bickel, *The Passive Virtues*]; Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 8-9, 31-35 (1957).

133. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 575-78 (1992).

cle III powers of the federal courts or rather represented a kind of prudential doctrine.[134] Justice Scalia's opinion in *Lujan* seems to anchor standing doctrine as a core constitutional requirement rather than a mere prudential doctrine.[135]

If a federal court renders a judgment in a case in which the plaintiff lacks standing, then it has authored an advisory opinion. Indeed, such an opinion would fall squarely within the prohibition of *The Correspondence of the Justices*. Article III's core "case or controversy" requirement mandates that the parties to the suit have more than an academic interest in the outcome of the dispute.[136] This approach incorporates a plausible parsing of Article III's text and as such is unobjectionable. It is not particularly helpful, however, to evaluating the propriety of Judge Calabresi's concurring opinion in *Then*. Manuel Then's appeal satisfied all aspects of the standing doctrine. If there is a problem with Judge Calabresi's opinion, it does not relate to a lack of standing on Then's part.

The federal courts also deploy several other decision avoidance techniques, including the political question doctrine[137] and the rule against unnecessarily addressing constitu-

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134. *See* Craig R. Gottlieb, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066-1143 (1994); *see also* Pushaw, *supra* note 122, at 481-85.

135. *See Lujan*, 504 U.S. at 560-62; *see also* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927, 933-38 (1998) (discussing and applying the requirements for establishing standing).

136. *See* Muskrat v. United States, 219 U.S. 346, 356-63 (1911) (refusing to reach the merits in manufactured test case brought between the plaintiff and the United States government because the parties to the suit did not really stand in an adversarial relationship and were simply attempting to discern the Supreme Court's views regarding the constitutionality of an act of Congress).

137. *See* Colegrove v. Green, 328 U.S. 549, 552-56 (1946); Oetjen v. Central Leather Co., 246 U.S. 297, 302-04 (1918); Shaw v. Reno, 509 U.S. 630, 661-64 (1993) (White, J., dissenting); Baker v. Carr, 369 U.S. 186, 280-97 (1962) (Frankfurter, J., dissenting); *cf. id.* at 208-11 (holding that the political question doctrine did not prevent a federal court from adjudicating a complaint alleging malapportionment of the state legislature). The political question doctrine prohibits courts from adjudicating claims which are essentially political in nature, which lack clear legal rules for the federal courts to enforce, or claims which are demonstrably committed to another branch of the federal government. *See* Nixon v. United States, 506 U.S. 224, 228-29 (1993); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803); Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 597-601 (1976); Wechsler, *supra* note 20, at 7-9; *see also* Bickel, *The Passive Virtues*, *supra* note 132, at 183-89; Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1033, 1039-55 (1985).

tional issues.[138] Similarly, the federal courts avoid becoming entangled in matters expressly committed by the Constitution to a particular branch of the government: for example, foreign affairs, the war power, and the seating of members of Congress.[139] These doctrines, unlike the standing doctrine, are entirely prudential in nature. That is to say, they are solely the creation of the federal judiciary and are not mandated by Article III. Accordingly, the federal judiciary remains free to disregard these doctrines when it finds it either necessary or convenient to do so.[140]

Obviously Judge Calabresi's concurring opinion transgresses these prudential rules. Having determined that Then's claim lacked merit on the facts presented, Judge Calabresi had no reason to provide any additional observations regarding the constitutionality of the sentencing disparity. Consistent with the *Ashwander* doctrine, Judge Calabresi should not have fired a constitutional flare in the general direction of Congress.[141]

Conversely, given that the proscriptions at issue are merely *prudential* in nature, rather than core Article III requirements, one should at least consider the possibility that Judge Calabresi's derogation from these self-imposed restraints might be justified. Moreover, the overall strength of

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138. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

139. *See* Dames & Moore v. Regan, 453 U.S. 654, 668-69, 679-88 (1981); Powell v. McCormack, 395 U.S. 486, 516-22, 548-50 (1969); *Baker*, 369 U.S. at 211-18; Coleman v. Miller, 307 U.S. 433, 454-55 (1939); *Marbury*, 5 U.S. (1 Cranch) at 137, 169-71.

140. *See, e.g.*, *Baker*, 369 U.S. at 204, 208-37; *Shaw*, 509 U.S. at 641-42, 647-49. Indeed, one might reasonably question whether the modern Supreme Court's districting decisions represent a waiver of basic standing requirements. *See Shaw*, 509 U.S. at 658-74 (White, J., dissenting). Given that every citizen has a vote and that each vote is roughly equal in strength, it is difficult to piece together how one is injured by being districted in a "minority opportunity" district. *Cf.* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 576-85, 594-95 (1997) (arguing that standing exists for challenges to minority opportunity districts based on the racial segregation of voters for purposes of conducting federal elections).

141. Although the sentencing disparity certainly presents a politically charged question, it does not constitute a "political question" for purposes of applying the political question doctrine. Political questions are questions that lack discernable legal standards and which threaten to place the judiciary in the midst of a partisan political dispute precisely because no clear legal guidelines exist to cabin the judiciary's discretion when considering how to resolve the problem presented for review. *See* United States v. Nixon, 418 U.S. 683, 692-97 (1974); *Baker*, 369 U.S. at 208-11, 228-37; *Marbury*, 5 U.S. (1 Cranch) at 137, 169-71.

these prudential decision avoidance techniques should have some bearing on the outcome of the inquiry. If federal judges routinely flout these prudential doctrines, it would be unjust to fault Judge Calabresi for simply following the herd. As Justice Holmes admonished, the life of the law is not logic, but experience.[142] As explained more fully below, experience demonstrates that these prudential doctrines have relatively weak moorings.

2. The counterexample in the federal courts: dicta, alternative holdings, and concurrences

The most obvious defense of Judge Calabresi's concurring opinion is that judges routinely offer opinions on matters of constitutional law in various ways, including dicta, alternative holdings, and concurrences. Unlike judges in certain civil law jurisdictions,[143] federal judges at all levels draft and publish lengthy explanations for their decisions. The custom began in the time of Chief Justice Marshall and has not been seriously questioned ever since.

Given that federal judges must write opinions that attempt to justify their rulings, the question of how much to write cannot be avoided.[144] Some judges will write more, some will write less. It would be quite impossible to establish and enforce firm rules regarding the length of judicial opinions or the level of detail that must be provided. If a judge must justify her holding, then one must be prepared to face the inevitability of dicta. Reasonable minds can and will disagree about

142. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

143. *See* INTERPRETING STATUTES: A COMPARATIVE STUDY 171-211 (D. Neil MacCormick & Robert S. Summers eds., 1991); Antonio Baldassarre, *Structure and Organization of the Constitutional Court of Italy*, 40 ST. LOUIS U. L.J. 649 (1996); John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1248-53 (1997) (reviewing INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997)); Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 513-14 (1996) (reviewing INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991)); Giuseppe Frederico Mancini, *Crosscurrents and the Tide at the European Court of Justice*, 4 IRISH J. EUR. L. 120, 120-21 (1995); Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact"*, 33 COLUM. J. TRANSNAT'L L. 259, 274-76 & n.56 (1995).

144. *See generally* Dorf, *supra* note 27, at 2029-30 (noting that the federal judiciary's obligation to give reasons in support of particular results creates the unavoidable problem of disentangling "holdings" from "dicta").

what is required to justify a particular result. To paraphrase the second Justice Harlan, one person's dicta is another person's *ratio decidendi*.[145]

Professors P.S. Atiyah and Robert Summers have noted that courts in the United States tend to paint with much bolder and wider strokes than their counterparts in the United Kingdom.[146] English judges tend to be quite cautious and usually attempt to write narrow, technical opinions justifying their decisions.[147] From an English point of view, judicial opinions in the United States are grossly overwritten—literally brimming with dicta.

In sum, contemporary judicial drafting techniques are in need of serious revision if the federal courts are at all serious about consistently and reliably enforcing the prudential bars against addressing constitutional questions absent an unavoidable need for doing so. Currently, the doctrines serve—at best—as a sort of weak brake on the grossest forms of judicial overreaching.

Federal courts, including the Supreme Court, routinely "overwrite" decisions and opine about myriad matters not strictly necessary to the disposition of the case before them.[148] Judges frequently offer informal advice to legislators in the context of resolving pending cases and controversies. Jurists who speak to legal issues unnecessary to the disposition of the case before them without expressly directing their remarks to Congress should be no less open to criticism than Judge Calabresi. If anything, Judge Calabresi's candor makes it more likely that the advice will be heard and incorporated into the relevant policy debates.[149]

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145. *Cf.* Cohen v. California, 403 U.S. 15, 25 (1971) (noting that "one man's vulgarity is another's lyric").

146. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 21-41, 88-95, 118-50, 267-97 (1987).

147. *See id.* at 118-50, 283-97, 408-28. English judges also lack access to the secretaries, law clerks, law libraries, and other administrative resources that permit state and federal judges in the United States to produce and publish a blizzard of opinions annually. *See id.* at 277-83.

148. *See supra* notes 164-97 and accompanying text; *see also* Lee, *supra* note 69, at 648-49.

149. *Cf.* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (explaining that "legislatures are frequently too busy, over-extended, or inert to respond to an objectionable judicial interpretation" and, moreover, "there is little reason to believe that legislators systematically monitor judicial inter-

Indeed, candid advice offered in the form of dicta arguably presents less of a challenge to legislative prerogatives than invoking the power of judicial review without forewarning to overturn the legislative branch's work product.[150] Because, strictly speaking, the federal court has not directly commanded Congress to do or refrain from doing *anything*, Congress remains completely free to ignore the court's advice without expending any additional energies and without additional explanation.[151]

Moreover, there is no formal constitutional prohibition on federal judges giving advice pertaining to legal matters, whether in theoretical law review writings or in formal testimony before the committees of Congress.[152] The Article III prohibition applies only if a judge purports to exercise the judicial power in the absence of a case or controversy. Musing about the desirability of federalizing crimes against women or pointing out the need for more district judges are not exercises of the federal judicial power.[153]

In fact, individual Justices over time have offered the political branches advice on a wide variety of constitutional ques-

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pretations" of statutory and constitutional text).

150. *See* Schauer, *supra* note 8, at 22-23.

151. *See* Abrahamson & Hughes, *supra* note 8, at 1055-59; Schacter, *supra* note 149, at 605-06.

152. *See* Geyh, *supra* note 122, at 1194 (arguing that Article III limitations have "no bearing upon judges acting as individuals or representatives of the Judicial Conference who render advice and assistance to Congress without exercising Article III powers"); *see also* Fletcher, *supra* note 105, at 284-86; Pushaw, *supra* note 122, at 455-72.

153. *See Federal Judges Prefer Law for Victims*, N.Y. L.J., June 26, 1997, at 6 (reporting on the United States Judicial Confrence's opposition to a new "victims' rights" amendment to the United States Constitution); Jan Crawford Greenberg, *Judges Back on Political Hot Seat*, CHI. TRIB., Apr. 3, 1996, §1, at 1 (reporting on the United States Judicial Conference's opposition to the Line Item Veto Act because it could threaten judicial independence by giving the President control of judicial budgets); Neil A. Lewis, *Congress, but Not Judiciary, Receives an Increase in Pay*, N.Y. TIMES, Oct. 21, 1997 at A23 (describing a letter sent to certain members of Congress by Chief Justice Rehnquist regarding the need to increase judicial salaries); Rhonda McMillion, *Two Routes to Victims' Rights*, A.B.A. J., Nov. 1997, at 98 (reporting that the United States Judicial Conference prefers adoption of a "victims' rights" constitutional amendment); William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Admin. Off. of the U.S. Cts., Washington, D.C.) Jan. 1998, at 1 (reporting the Chief Justice's opposition to the expansion of the jurisdiction of the federal courts and decrying the slow pace of the confirmation process for new federal judges).

tions.[154] Dicta and alternative holdings may constitute a more questionable practice than the offering of completely extrajudicial advice about the meaning of the Constitution.[155] If one takes at all seriously Justice Brandeis' concerns about avoiding unnecessary constitutional analysis,[156] dicta represents an overextension of the judicial role.[157]

Direct advice to Congress labeled as such might also create two practical difficulties. First, Congress may not feel entirely free to ignore friendly judicial advice based on an altogether reasonable assumption that the court offering it really means what it says. Judicial advice could in practice prove to be outcome determinative. Second, even if Congress ultimately musters the institutional will to ignore particular judicial advice, this course of action would openly and squarely present an interbranch crossing of the swords. These potential objections are far from compelling.

The first objection significantly underestimates congressional independence and the willingness of members of Congress to assert their Article I institutional prerogatives. If a problem in federal judicial/legislative relations presently exists, it is a willingness on the part of Congress to ignore constitutional limitations incident to legislating rather than a slavish deference to the opinions of the federal courts.[158] To the

154. See BATOR ET AL., *supra* note 26, at 68-69 (describing instances of members of the Supreme Court providing advice to executive branch and legislative branch officials); BRUCE ALLAN MURPHY, FORTAS: THE RISE AND FALL OF A SUPREME COURT JUSTICE 186-211 (1988) (describing Associate Justice Fortas's extensive advisory role within the Johnson White House); Pushaw, *supra* note 122, at 442-44 (noting that the Supreme Court's refusal to provide nonbinding advice in *The Correspondence of the Justices* lacks firm Article III roots); WARREN, *supra* note 71, at 595-97 (describing an informal advisory opinion, rendered in letter format, from Associate Justice Johnson and his colleagues regarding the federal government's powers to fund and construct internal improvements, such as roads and canals).

155. *Cf.* Schauer, *supra* note 106, at 655 n.69 (arguing that dicta merely represents one category of reasons that judges offer to legitimate their exercise of Article III power).

156. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

157. *See* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 37 (1992); *see also* Kloppenberg, *supra* note 72, at 1027-28, 1036-55; *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-73 (1803) (providing a tour de force example of extensive dicta wholly unnecessary to the disposition of the case at bar); Dorf, *supra* note 27, at 2009-24 (noting that Chief Justice Marshall grossly overwrote his opinion in *Marbury* and describing subsequent Supreme Court efforts to prune back the decision).

158. Abortion and flag burning provide good examples of the willingness of

extent that judicial statements directed at Congress encourage Congress to consider the constitutional implications of various legislative choices, so much the better. The federal courts should not have to shoulder alone the duty of observing constitutional limitations—even if it is the special duty of the federal courts to "say what the law is."[159] The citizenry should both expect and demand that federal legislators will prove to be constitutionally conscientious.[160] That Congress might elect to disregard judicial advice is not a good reason for an individual judge to refrain from offering it to Congress, particularly when constitutional values are at stake.[161]

The second objection fares no better than the first: interbranch conflict is a natural corollary of the Framers' system of checks and balances.[162] Divided power necessarily means that the executive, legislative and judicial branches will become embroiled in interbranch disputes.[163] Moreover, if the mem-

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Congress to disregard binding Supreme Court authority incident to the exercise of its legislative powers. *See infra* notes 231-36 and accompanying text.

159. *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3-13, 123-50, 232-70 (1994) (arguing that, notwithstanding the strong tradition of judicial primacy in interpreting and enforcing the Constitution, coordinate branches of the federal government might possess attributes that make them better suited for taking the laboring oar in performing certain constitutional duties).

160. *See* Thayer, *supra* note 104, at 129, 144-48, 151-56; *see also* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

161. For example, Congress obviously ignored the mandate of *Texas v. Johnson*, 491 U.S. 397 (1989), when it revised the federal flag desecration statute. *See* 18 U.S.C. § 700 (1989) (prohibiting and criminalizing flag desecration). As is usual in such circumstances, Congress's effort to evade legislatively a constitutional mandate failed rather miserably. *See* United States v. Eichman, 496 U.S. 310, 313-319 (1990) (holding the Flag Protection Act of 1989 unconstitutional on First Amendment grounds).

162. *See* THE FEDERALIST NOS. 47, 51 (James Madison), 78 (Alexander Hamilton); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 10, at 86-87, 144-47.

163. Legislative reaction to court pronouncements on desegregation, school prayer, and abortion were similarly political in nature—and similarly unconstitutional. *Compare* Robert H. Bork, *Constitutionality of the President's Busing Proposals*, 24 AM. ENTERPRISE INST. SPECIAL ANALYSIS 1 (1972) (arguing that Congress probably has the constitutional power to enact proposed busing bills and that the federal courts should defer to such legislative limitations on busing as a remedy for school segregation) *and* 20 U.S.C. §§ 1652, 1714 (1992) *with* United States v. Texas Educ. Agency, 532 F.2d 380, 394 n.18 (5th Cir. 1976) (holding that federal statutes do not bar or limit court-ordered busing),

bers of the federal judiciary felt that they could offer advice to the legislative branch, individual judges might prove less likely to legislate from the bench. This would be yet another potential benefit associated with Judge Calabresi's model.

IV. LET'S DO AND SAY WE DIDN'T: RECONCILING THEORY AND PRACTICE

A. DISENTANGLING FORM AND SUBSTANCE

As demonstrated previously, Judge Calabresi's free advice to Congress does not seem to violate the formal proscription against the rendering of advisory opinions. Courts and commentators, however, still seem to confuse the extrajudicial formal interpretation of the Constitution with mere dicta.

For example, consider *State of New Jersey v. Heldor Industries*.[164] In this case, a panel of the United States Court of Appeals for the Third Circuit rebuked a New Jersey bankruptcy judge for issuing an opinion regarding the legality of the New Jersey Environmental Clean-Up Responsibility Act ("ECRA"), which required a debtor or its estate to pay the state for the costs associated with remedying environmental damage to real property before honoring other creditors' claims.[165] The debtor, Heldor Industries, initially submitted a liquidation plan to the bankruptcy court that did not include monies to compensate the state for the cost of cleaning up environmental damage caused by Heldor's operations. Although Heldor's assets would be sold to satisfy creditors, neither Heldor's principals nor the purchasers of Heldor's assets would undertake responsibility for a cleanup of Heldor's New Jersey manufacturing sites.[166]

The New Jersey Department of Environmental Protection ("Department") objected to the proposed sale, noting that "no funds were set aside from the sale proceeds for ECRA compliance."[167] Subsequent negotiations between the debtors, the

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vacated on other grounds sub nom. Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); *see also* H.R.J. Res. 56, 97th Cong. (1982); The Human Rights Statute, S. 158, 97th Cong. (1981); 127 CONG. REC. 496 (Jan. 19, 1981).

164. 989 F.2d 702 (3d Cir. 1993).

165. *See id.* at 703-04, 708-09; *see also* N.J. Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 to 13:1K-14 (West 1992) ("ECRA") (now known as the Industrial Site Recovery Act).

166. *See Heldor Indus.*, 989 F.2d at 703-04, 708-09.

167. *Id.* at 704.

creditors, and the agency resulted in a mutually satisfactory arrangement pursuant to which the ECRA obligations would be discharged. Accordingly, the Department withdrew its objection to the plan.

Although the Department had withdrawn its objection, the bankruptcy court nevertheless issued an order approving the plan accompanied by an opinion that attempted to rule on the merits of the Department's objection.[168] The bankruptcy judge opined that federal law, the Supremacy Clause, and the Takings Clause preempted the New Jersey statute. Subsequent to the bankruptcy judge's release of his memorandum opinion, the Department moved that the judge vacate his opinion and withdraw the memorandum opinion. When the judge refused to grant the motion, the Department appealed his decision to the federal district court.[169]

The district court held that the dispute was not moot at the time the bankruptcy judge issued his memorandum opinion and therefore declined to reverse the bankruptcy judge's decision. The Department then took an appeal to the Third Circuit, which reversed.

The Third Circuit panel began its consideration of the matter by revisiting some "first principles of Article III jurisprudence."[170] According to the two judges in the majority, the Framers did not intend for judges to offer constitutional opinions in matters that were not of a "judiciary nature."[171] Given the prohibition against advisory opinions, the majority held that the bankruptcy judge erred in refusing to vacate his opinion. In the majority's view, no live "case or controversy" remained in existence between the debtor and the Department.[172] Quoting the Supreme Court's admonition that "[s]hould the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories" and "would properly meet rebuke and restriction from other branches," the Third Circuit reversed.[173]

168. *See id.*
169. *See id.* at 705.
170. *Id.*
171. *Id.* at 706.
172. *See id.* at 706-09.
173. *Id.* at 709 (quoting United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947)) (internal quotation marks omitted).

There is, however, a fundamental flaw in the majority's reasoning. The bankruptcy judge was faced with a live case or controversy: whether or not to approve the liquidation of the debtor's assets pursuant to the proposed plan. To be sure, the Department's specific objection no longer needed to be addressed. Because the Department had withdrawn its objection, it would have been possible to decide the case without reference to the constitutionality of the ECRA. Moreover, under *Ashwander* and similar prudential doctrines, the bankruptcy judge should seriously have considered the wisdom of offering advice on the constitutionality of the state law.[174] Even with these concessions, however, it is clear that the bankruptcy judge did not offer up an advisory opinion.

In dissent, Judge Nygaard observed that in his view, "contrary to the majority, . . . there is indeed a 'case' here: the whole bankruptcy matter given to the bankruptcy court to decide."[175] Because the underlying order was proper, Judge Nygaard would not have ordered the withdrawal of the bankruptcy judge's expansively drafted opinion.[176] Judge Nygaard has the better argument.

The bankruptcy judge authored very broad dicta, but the memorandum opinion's treatment of the ECRA does not enjoy binding precedential authority as a holding. Precisely because it was not necessary to the decision of the case, the bankruptcy judge's opinion as to the constitutionality of the ECRA does not constitute binding precedential authority, even before the bench of the very judge who issued the opinion.[177] The *Heldor Industries* majority acknowledged that the bankruptcy judge's opinion about the constitutionality of the ECRA constituted dicta, but reasoned that lawyers and courts often treat published—and sometimes even *unpublished*—opinions as having precedential force even on points that constitute mere dicta.[178]

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174. *See supra* note 131.

175. *Heldor Indus.*, 989 F.2d at 709 (Nygaard, J., dissenting).

176. *See id.* at 710-11.

177. Realistically, of course, a judge might be quite reticent to depart from a prior position that she has expressed publicly, regardless of its formal precedential force. This concern undoubtedly undergirds (at least in part) the prudential rule against deciding constitutional issues unnecessarily. *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, in THE SUPREME COURT REVIEW 123, 152-54 (Philip B. Kurland ed., 1973). *See generally* Dorf, *supra* note 27, at 2005-09 (discussing the rule against overwriting judicial opinions and the concerns that support this rule).

178. *See Heldor Indus.*, 989 F.2d at 709 n.10 (noting with alarm that four

As an empirical matter, the majority is no doubt correct. The question, however, is not whether the bench and bar will give dicta more precedential weight than it deserves, but rather whether the bankruptcy judge transgressed his statutory authority.

Opinions often have more formal effect than they deserve. Consider, for example, Judge Stanley Birch's opinion in *CNN v. Video Monitoring Services*.[179] Judge Birch, writing for a panel of the United States Court of Appeals for the Eleventh Circuit, issued an opinion that squarely overruled a prior panel decision of the court.[180] This exceeded his power. Another member of the court stayed the mandate and the whole court voted to rehear the case en banc. The en banc court ultimately voted to vacate the panel opinion[181] and dismissed the appeal as procedurally improper.[182] Nevertheless, Judge Birch's opinion has gone on to serve as persuasive authority with respect to the point of copyright law at issue.[183] Strictly speak-

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courts already had cited the bankruptcy judge's opinion as authority on the constitutionality of the ECRA).

179. 940 F.2d 1471 (11th Cir. 1991), *vacated and reh'g en banc granted*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed per curiam*, 959 F.2d 188 (11th Cir. 1992).

180. *See Video Monitoring Serv.*, 940 F.2d at 1476-80; *cf.* Pacific & Southern Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984) (holding that broadcast television newscasts are protected under federal copyright laws and that a broadcaster may obtain an injunction prohibiting the prospective copying of its newscasts against a party found guilty of violating the broadcaster's copyrights).

181. *See Video Monitoring Serv.*, 949 F.2d at 378.

182. *See Video Monitoring Serv.*, 959 F.2d at 188. Evidently, Video Monitoring Services had attempted to appeal a preliminary injunction. *See id.* Under the well-established case law of the Eleventh Circuit, Video Monitoring Services' appeal on the merits would not be ripe until after the district court conducted a trial and, if CNN were to prevail on the merits, issued a permanent injunction against Video Monitoring Services' taping of CNN's programming. Judge Birch and his fellow panel members seriously jumped the gun by reaching the merits in an appeal of a preliminary injunction—an error the en banc court corrected after hearing oral arguments in the case. Accordingly, the incident not only reflects a kind of gross judicial overreaching as to the merits (i.e., the panel's attempt to overrule a prior panel's decision about the scope of relief available to broadcasters or cablecasters), but also overreaching by using an inappropriate vehicle to reach this result.

183. *See, e.g.*, Kodadek v. MTV Networks, Inc., No. CV 96-1429 DT(SHX), 1996 U.S. Dist. LEXIS 20776, at *6 (C.D. Ca. Dec. 9, 1996); National Basketball Ass'n v. Sports Team Analysis and Tracking Sys., Inc., 939 F. Supp. 1071, 1089-90 (S.D.N.Y. 1996), *aff'd in part and vacated in part sub nom.* National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); Trenton v. Infinity Broad. Corp., 865 F. Supp. 1416, 1424 (C.D. Ca. 1994); Gates Rubber Co.

ing, the published opinion has absolutely no precedential authority. As a practical matter, lawyers and judges have accorded it formal precedential weight.[184]

In fact, one need not even bother to comb the pages of the Federal Reporter for such instances of dicta masquerading as holding. *Marbury* arguably represents the crowning triumph of dicta over the strict rule of according only the *ratio decidendi* formal precedential force. As Professor David Currie observed, "[s]ome might call the Court's comments on this issue [of whether Marbury's commission was effective without delivery] an advisory opinion, which the Justices eight years earlier had implied they had no power to give."[185] Professor Currie further notes that "[o]ne must be cautious in evaluating the early materials by modern standards; *Marbury* and other Marshall opinions suggest the important question whether attitudes about the propriety of judicial pronouncements going beyond the necessities of the case have remained constant over nearly two centuries."[186] The more things change, the more things stay the same.

Professor Currie's implicit argument for an evolving standard of judicial modesty seems misplaced. As recently as 1982, Justice Blackmun authored dual opinions on entirely different

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v. Bando Am. Inc., 798 F. Supp. 1499, 1503 (D. Colo. 1992), *aff'd in part and rev'd in part*, 9 F.3d 823 (10th Cir. 1993); *cf.* Los Angeles News Serv. v. Tullo, 973 F.2d 791, 794-95 (9th Cir. 1992) (criticizing and rejecting in part Judge Birch's reasoning in *Video Monitoring Services*, notwithstanding the opinion's utter lack of precedential value).

184. Some commentators and legal academics have hailed the panel's holding that unregistered newscasts are not protected under the copyright laws as a bold new direction in copyright law. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 905 n.104 (1996); Mythili Tharmaratnam, Note, *Copyrighting Raw Videotapes: A Restriction of the Free Press?*, 1993 U. CHI. LEGAL F. 417, 422 n.29; Amy Adelyn Davis, Comment, *Caught in the Crossfire: Cable News Network v. Video Monitoring Services and the Nature of Copyright*, 53 OHIO ST. L.J. 1155 (1992). Professor L. Ray Patterson has even urged courts in other jurisdictions to afford the panel decision some measure of decisional value, notwithstanding the fact that the Eleventh Circuit vacated it. *See* L. Ray Patterson et al., *Brief* Amicus Curiae *of Eleven Copyright Law Professors in* Princeton University Press v. Michigan Document Services, Inc.—*Editor's Foreword*, 2 J. INTELL. PROP. L. 183, 195 n.14 (1994); *see also* Tracy Lea Meade, Note, *Ex-Post* Feist: *Applications of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L. 245, 267 n.163 (1994) (noting that the analysis of *Video Monitoring Services* has not been contradicted).

185. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE POWERS OF THE FEDERAL COURTS, 1801-1835, at 651 n.41 (1982).

186. *Id.*

substantive constitutional grounds.[187] Writing for a majority of six justices, Justice Blackmun sustained a procedural due process objection to a state law statute of limitations.[188] Writing for himself and three additional justices, Justice Blackmun also authored a concurring opinion purporting to decide an independent equal protection claim, even though a majority of the Court had decided the petitioner's procedural due process claim in his favor, which, by itself, disposed of the entire case.[189] Justice Blackmun's alternate holding was completely unnecessary to the resolution of the case.

Justice Blackmun explained his course of action by noting that his authorship of the opinion for the entire court did not require him to "forego expression of his own convictions."[190] This does not, however, explain his willingness to offer advice on an independent claim that was wholly unnecessary to the disposition of the case.[191] For his part, Justice Blackmun noted that:

> [a]lthough the Court considered that it was unnecessary to discuss and dispose of the equal protection claim when the due process issue was being decided in Logan's favor, I regard the equal protection claim as sufficiently important to require comment on my part, particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim, although, to be sure, that majority is not the one that constitutes the Court for the controlling opinion.[192]

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187. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

188. *See id.* at 422-38.

189. *See id.* at 438-42 (Blackmun, J., concurring); *cf.* Marcus v. Search Warrants, 367 U.S. 717, 723 n.9 (1961) (declining to address potentially meritorious First Amendment arguments having already disposed of the case on independent and adequate procedural due process grounds).

190. *Zimmerman Brush Co.*, 455 U.S. at 438 n.1 (internal quotations and citations omitted).

191. *Cf.* Stevens, *supra* note 157, at 37 ("The doctrine of judicial restraint, which counsels against the use of unnecessary dicta, also imposes on federal judges the obligation to avoid unnecessary or unduly expansive constitutional adjudication."); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (declining to address whether the musical "Hair" constituted obscenity because ruling on the question of prior restraint disposed of the case completely). *But see Zimmerman Brush Co.*, 455 U.S. at 438-42 (1982) (Blackmun, J., concurring) (offering a gratuitous and detailed examination of equal protection concerns after having already resolved the case on the basis of procedural due process).

192. *Zimmerman Brush Co.*, 455 U.S. at 438. Justice Blackmun's efforts have not gone unnoticed. Indeed, his concurring opinion receives prominent treatment in one of the principal constitutional law casebooks. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 633-34 (12th ed. 1997).

This behavior is utterly at odds with the prudential limitations on judicial exposition of constitutional text set forth by Justice Brandeis in *Ashwander*.[193] Even more remarkably, Justice Blackmun characterizes his comments as representing the views of a majority of the Court, even though only three additional justices formally joined his concurring opinion. Not only is Justice Blackmun providing advice which is not needed to dispose of the claim, but he also is purporting to predict the voting behavior of a majority of his colleagues in a future case that squarely presents the equal protection claim to the Court for decision.

Nor is Justice Blackmun's behavior particularly atypical of the Justices. In *Loving v. Virginia*,[194] eight justices joined an opinion by Chief Justice Earl Warren that provided alternative equal protection and substantive due process holdings.[195] Either holding adequately and completely resolved the matter before the Court. Why then did the majority find it necessary to dispose of both questions? Even more remarkably, not a single Justice dissented on the ground that the Chief Justice's opinion gratuitously addressed and decided a constitutional question.

My goal in presenting these cases is not to demonstrate that the federal courts never exercise restraint when presented with constitutional questions. Of course, from time to time, the concerns set forth by Justice Brandeis in *Ashwander* carry the day; the federal courts decline to decide some issues if the resolution of other issues adequately disposes of the case.[196] My point is much narrower: the federal courts routinely offer up essentially gratuitous constitutional advice incident to deciding the cases pending before them. In light of this objective reality, Judge Calabresi's proposal in *Then* becomes much more a question of scope or degree rather than a basic question of constitutional authority or legitimacy.[197]

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193. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (outlining seven rules the Court has developed to ensure that only ripe and necessary constitutional issues are decided).

194. 388 U.S. 1 (1967).

195. *See id.* at 7-12 (providing the equal protection analysis and holding); *id.* at 12-13 (providing a substantive due process analysis and holding, notwithstanding the fact that the equal protection analysis and holding completely disposed of the case).

196. *See, e.g.*, Marcus v. Search Warrants, 367 U.S. 717, 723 n.9 (1961).

197. *See* Jay L. Koh, Book Note, *More Humble Servants: A Second Look at the Advisory Role of Judges*, 107 YALE L.J. 1151, 1155-56 (1998).

B. CANDOR AS A PASSIVE VIRTUE

In their seminal work on the "passive virtues," Professors Alexander Bickel and Harry Wellington invoke the metaphor of a dialogue to describe a process through which courts and legislatures work to achieve meaningful legal reforms.[198] Judge Calabresi, an intellectual heir to Bickel and Wellington, both embraces and rejects their basic premise that the creative use of judicial decision avoidance techniques will lead to substantively better policy results.[199] Judge Calabresi agrees that sometimes the best decision may be no decision, but disagrees to the extent that Bickel and Wellington assumed that the reviewing courts would be less than forthcoming about the precise reasons for their decision to avoid reaching the merits.

1. The active vices of the passive virtues

The passive virtues suffer from a number of shortcomings, most notably a naive hope that Congress will pay careful attention to acts of judicial abstention. Judge Calabresi's proposal corrects for this problem by permitting judges to address the legislature directly. He would not rely on blind luck to ensure that Congress receives the message that the judiciary is attempting to send regarding the need for legislative reconsideration of a particular problem.[200]

Judge Calabresi is right to be skeptical about the ability of legislators to read the minds of federal judges; a recent study shows that Congress really does not keep up with the various winks, nudges, and other forms of judicial fidgeting that epitomize Bickel's virtuous—but passive—jurist.[201] Indeed, Robert Katzman reports that even direct judicial pleas for legislative intervention more often than not fall upon deaf legislative ears.[202] As Katzman explains, "while it may be in the in-

198. *See* Bickel & Wellington, *supra* note 132, at 19-20; *see also* BICKEL, *supra* note 16, at 113-127; Bickel, *The Passive Virtues*, *supra* note 132, at 50.

199. *See, e.g.*, Quill v. Vacco, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring) (proposing a constitutional remand of New York's statutory ban against physician-assisted suicide in order to permit the New York State Legislature to reconsider the problem), *rev'd*, 117 S.Ct. 2293 (1997); *see also* Koh, *supra* note 197, at 1154-55.

200. *See supra* notes 41-59 and accompanying text; *infra* notes 238-50 and accompanying text.

201. *See* Katzman, *supra* note 101, at 662-65 (reporting that relevant congressional staffers had little familiarity with judicial decisions noting gaps in various statutory schemes).

202. *See id.*

terest of legislators to track what courts do in the appellate statutory cases, they tend not to do so; they tend not to concern themselves very much with how courts will interpret their legislation when writing statutes."[203] Former Chief Judge of the District of Columbia Circuit Abner Mikva has echoed this observation, noting that "most Supreme Court decisions have never come to the attention of Congress."[204] Judge Mikva's observations are particularly relevant, given his prior years of service in the House of Representatives.

One could also question the first premise of the "passive virtues" in terms of the Supreme Court's institutional responsibilities: does clever decision avoidance adequately discharge the federal courts' institutional obligations? If one takes the Court's lawmaking function seriously, this question must be answered negatively. As Professor Schauer notes, "when the Court fails to decide an issue at all, it may, in many cases, be failing to perform adequately or may simply be abdicating its guidance function."[205] Thus, the "passive virtues," to the extent that they require the federal courts to shirk their lawmaking (or, more perhaps more accurately, their interpretative) responsibilities, require an institutional breach of duty.[206]

Defenders of the passive virtues would assert that the federal courts' responsibilities entail not just deciding a particular legal question, but also include deciding the question correctly.[207] Obviously, a balance must be struck. Poorly reasoned decisions can have long half-lives.[208] On the other hand, "[w]e

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203. *See id.* at 654-55.

204. Mikva, *supra* note 101, at 609.

205. Schauer, *supra* note 8, at 9; *see also* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16-25 (1964).

206. *See* Redish, *supra* note 131, at 72-75 (arguing that abstention, whether partial or total, can represent an unacceptable form of judicial activism, particularly when Congress has conferred jurisdiction over the class of cases at issue).

207. *See* Schauer, *supra* note 8, at 8-9; *see also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.").

208. *See, e.g.*, The Slaughter House Cases, 83 U.S. 36, 78-80 (1872) (holding that the Privileges and Immunities Clause does not incorporate the Bill of Rights against the states); *cf.* Washington v. Glucksburg, 117 S. Ct. 2258, 2277-81 & n.6 (1997) (Souter, J., concurring) (noting persistent and lingering doubts about the wisdom of the *Slaughter House Cases'* interpretation

do not wish the legislatures to have to wonder constantly about whether their legislation is going to be struck down by the courts."[209] Accordingly, there can be "important advantages to bypassing [the development of an issue within] the lower courts and talking directly to the concerned party, the legislature."[210] This highlights a second difficulty with the passive virtues: strict observance of the passive virtues is as likely to provoke interbranch strife as to prevent it.

Given Congress's apparent obliviousness to the federal courts' work product, the "passive virtues," to the extent that they presume Congress will notice judicial reticence and take corrective action, are largely if not completely ineffective.[211] Simply put, these decision avoidance techniques are very unlikely to secure meaningful reform.[212] Accordingly, decisions using "passive" techniques to avoid interbranch conflicts can rightly be viewed as failures: "The court's decisions should be evaluated not only in terms of whether they are correct or incorrect, legitimate or illegitimate, but also in terms of whether they are usable by others."[213] The larger question, however, still remains: could the federal courts successfully engage Congress in meaningful dialogue about questions of law reform?[214]

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of the Privileges and Immunities Clause).

209. Schauer, *supra* note 8, at 22.

210. *Id.*

211. In this respect, perhaps a better coin of phrase to describe the passive virtues would be the "disregarded" or "irrelevant" virtues.

212. Of course, if the issue is otherwise brought to the attention of the legislature, legislative relief might be forthcoming. Such relief would not, however, have any causal relationship to a federal judge's failure to reach the merits in a particular lawsuit. At most, the judge's self-imposed reticence might permit continued legislative consideration of the issue, if the legislature is otherwise inclined to revisit the matter. *See* CALABRESI, *supra* note 7, at 16-30, 136-38; *see also* Ginsburg, *Judicial Voice*, *supra* note 6, at 1198-1209.

213. Schauer, *supra* note 8, at 24.

214. For a variety of reasons, the situation with respect to state supreme courts and state legislatures appears to differ significantly with regard to the possibility of "dialogue." On numerous occasions, state supreme courts have indicated a need for law reform and legislatures have responded. *See* Abrahamson & Hughes, *supra* note 8, at 1054-55; Kaye, *supra* note 11, at 23-26. Justice Abrahamson describes a number of reasons why this is the case, notably including professional legislative staff actively monitoring the work product of a state's appellate courts. *See* Abrahamson & Hughes, *supra* note 8, at 1060-70. Nevertheless, "prompt legislative reaction to judicial interpretation is probably the exception, however, not the rule." *Id.* at 1055. Effective dialogue between a state supreme court and a state legislature is, at least arguably, much easier to accomplish for a variety of reasons. First and foremost, state legislative staff need only monitor the work product of a court or two.

2. Interbranch dialogue as an alternative to the passive virtues

Interbranch dialogue between the federal courts and Congress provides one potential alternative to the passive virtues, an alternative that, like the passive virtues, secures the legislature's primacy in matters of law reform and policy-making. Rather than using artful dodges to avoid hard questions, a model based on dialogue would require federal judges to share openly concerns regarding the potential constitutional difficulties associated with particular policy choices. Rather than intervening to block a constitutionally dubious first step by Congress, the judiciary would offer a candid warning which, if heeded, would avoid the constitutional difficulty.

Judge Calabresi, at least while still a law professor, fully embraced candor as a necessary incident of judging.[215] He went beyond the dialogue model, however, by proposing that judges take unilateral action to update obsolete legal rules.[216] Because the exercise of the passive virtues fails reliably to achieve meaningful reform, judges, exercising their traditional common law role, must be free to revise obsolete statutes without first winking and nodding toward the state house or Capitol dome.[217] There are obvious difficulties with determining when a statute has become obsolete,[218] but, for the most part,

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At the federal level, the Supreme Court and thirteen separate appellate courts churn out a tsunami of work product. Even the most conscientious congressional staffer could not hope to keep up with the blizzard of opinions emanating from the federal courts. Second, state courts are often less distant than most of the federal courts to Congress. State judges, legislators, and executive branch personnel often move in the same circles, particularly in states with relatively small populations. Dialogue can therefore exist at two levels (at least): an overt dialogue that takes place in formal communications between the branches and a covert dialogue that takes place at professional and social gatherings. Simply put, there is a higher level of mutual cognizance between the branches as to what each branch is doing. Finally, the strong form of separation of powers practiced at the federal level does not necessarily exist at the state level. Perhaps the best example of this is the practice of state supreme courts issuing advisory opinions to the executive and legislative branches of state government. At the federal level, prudential considerations historically have precluded federal judges from rendering similar service. *See supra* notes 102-29 and accompanying text. It is likely, moreover, that formal interactions through devices like advisory opinions give rise to easier informal relationships outside the regular channels of communication.

215. *See* CALABRESI, *supra* note 7, at 141-45, 172-77.

216. *See* Gunther, *supra* note 205, at 16-24.

217. *See id.* at 24-25.

218. For example, the fact that a particular statute is old does not neces-

Judge Calabresi recognized and attempted to address these problems of application.[219]

In the fifteen years since Judge Calabresi first issued his proposal that judges should undertake general law reform duties, his ideas have drawn a largely negative response.[220] At the same time, a growing chorus of federal and state judges has argued in favor of stronger and more regular communication between legislative and judicial personnel over matters of mutual professional concern.[221] The question thus remains: does the metaphor of a "dialogue" between judges and legislators have any practical significance? Can judges effectively engage legislators in a colloquy about the importance of particular constitutional values? These questions can and should be answered affirmatively.

3. Limitations on interbranch dialogue as a model for judicial/legislative branch interaction

A model of judicial/legislative—or even judicial/executive—interaction based on interbranch dialogue *is* feasible. It should be noted at the outset, however, that everything is a matter of degree. I certainly do not endorse the broad based judicial interventionism sketched in Judge Calabresi's book, *A Common Law For the Age of Statutes*.[222] For reasons ably articulated by a number of critics, notably Professors Robert Weisberg and Nicholas Zeppos,[223] the Calabresian "superjudge" should remain solely a fictional being.

Judges lack the competence to determine whether particular statutes, especially technical administrative law statutes (such as OSHA and the Clean Air Act), have become

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sarily indicate that it is obsolete. *See* CALABRESI, *supra* note 7, at 105-14, 123-35.

219. *See id.* at 120-62.

220. *See, e.g.*, Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 249-54 (1983); Zeppos, *supra* note 21, at 353, 380-406.

221. *See* Ginsburg, *Judicial Voice*, *supra* note 6, at 1204-09; Ginsburg, *Legislative Review*, *supra* note 6, at 1015-17; Tacha, *supra* note 6, at 1540-55; Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991). State court judges have made similar arguments. *See* Abrahamson & Hughes, *supra* note 8, at 1048, 1057-81; Kaye, *supra* note 11, at 21-35.

222. *See* CALABRESI, *supra* note 7, at 81-90, 101-14, 163-71.

223. *See* Weisberg, *supra* note 220, at 243-54; Zeppos, *supra* note 21, at 380-85, 406-12.

"obsolete." Put concretely, few judges have the technical expertise to determine whether the Clean Air Act adequately protects citizens' health, or whether the legislation governing the operation of nuclear power plants is in need of updating. Because statutes increasingly regulate with greater specificity in technically complex areas of commerce, generalized, policy-based law reform is simply beyond most judges' ken.[224]

Even if some judges possessed the technical competence to make value judgments about the efficacy of a particular statutory regime, questions of judicial legitimacy would remain.[225] Traditional separation of powers theory holds that the federal judiciary is to interpret, not make, the law; a necessary corollary is that judges should not supplant legislators as the principal architects of public policies.[226] The Calabresian judge suffers from a rather extreme form of hubris: the belief that she knows better than the elected representatives of the people what best serves the public interest. This sort of unfettered and subjective judicial activism would not be tolerated by a democratic people.

In sum, Professors Weisberg and Zeppos have offered convincing reasons for rejecting Judge Calabresi's judicial model,

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224. *See* Zeppos, *supra* note 21, at 380-81; *cf.* CALABRESI, *supra* note 7, at 44-58, 148 (noting the relative expertise benefits associated with administrative agencies but arguing that institutional constraints better suit judges for the task of law reform). The District Court for the District of Columbia demonstrated the scope of this problem—and one potential solution—in a recent antitrust case involving Microsoft. *See* United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997). Rather than attempting to master the inner workings of the software industry, the district court judge instead appointed Professor Lawrence Lessig to serve as a special master. Professor Lessig is responsible for advising the court on technical matters. *See id.* at 545-46; *see also* Rajiv Chandrasekaran, *Microsoft, Justice Argue Software Issue in Court*, WASH. POST, Apr. 22, 1998, at C11; Amy Harmon, *Microsoft Pushes to Oust Judge's Adviser*, N.Y. TIMES, Jan. 13, 1998, at D2; Amy Harmon, *Theorist's Task: Make Old Laws Fit in Digital World of Microsoft*, N.Y. TIMES, Dec. 15, 1997, at D1; Steve Lohr, *Unbundling Microsoft*, N.Y. TIMES, Dec. 13, 1997, at A1. Relying on outside court experts presents one method of reducing the difficulties associated with having generalist judges hearing and deciding cases involving complex technological or scientific materials. To Judge Jackson's credit, he recognized his need for special technical assistance and used his ability to appoint a special master as a convenient device for augmenting his technical competence. The United States Court of Appeals has subsequently put Professor Lessig's efforts to assist Judge Jackson on hold. *See* Rajiv Chandrasekaran, *Ruling Halts 'Master' In Microsoft Case*, WASH. POST, Feb. 3, 1998, at D1.

225. *See* Zeppos, *supra* note 21, at 380-81, 386, 398.

226. *See supra* notes 8-15 and accompanying text.

at least insofar as general matters of statutory interpretation are at issue. Judges lack both the ability and the power to serve as roving law reform commissioners.

That said, must judges be relegated to wielding the passive virtues in seeking law reform? Are judges to resort to subterfuges in order to protect constitutional values from legislative attack? In this regard, it seems clear that Judge Calabresi's approach in *Then* is not only distinguishable from his more ambitious proposal for "superjudges" in *A Common Law for the Age of Statutes*, but also has much to recommend it. The *Then* concurrence does not purport to "update" the obsolete sentencing guideline, or anything else for that matter. Instead, it represents a form of candid advice to Congress about the parameters of congressional discretion in light of potentially applicable constitutional constraints. Rather than simply rejecting the challenge before him while privately harboring doubts about the probable outcome of a case presenting slightly different facts, he chose to share his concerns in the hope of avoiding a direct interbranch conflict. He said what was on his mind; he practiced the virtue of candor.

4. Potential objections to constitutional flares

As noted above, Judge Calabresi's model for interbranch relations between the federal judiciary and Congress is premised on candor and dialogue. Some commentators, however, have questioned whether judicial candor actually furthers good governance.[227] Professor Zeppos suggests that "for the judiciary, other values—such as preserving the court's checking function—may outweigh the value of candor."[228] Candor for its own sake may result in injury to other important values. Accordingly, a more "utilitarian" approach might be in order in some circumstances: society should accept "less than full candor" from judges "when necessary to achieve a desirable policy goal."[229]

These criticisms are wide of the mark. Just as judges should not undertake responsibilities that exceed their individual and institutional competence, they should not shrink

227. As Professor Zeppos puts it, "[b]y jeopardizing the legitimacy of the judicial function, candor raises particularly troublesome implications for the judicial role in the administrative state." Zeppos, *supra* note 21, at 412-13.

228. *Id.* at 405.

229. *Id.*

from discharging their obligation to undertake duties for which they bear principal constitutional responsibility.[230] In this regard, enunciating and protecting constitutional values constitutes a duty peculiarly within the judiciary's domain. In the American constitutional system, it is the judges who serve as the guardians of our constitutional rights and prerogatives. Recent history demonstrates the necessity of this role.

Even after the Supreme Court declared flag burning to be protected expressive activity under the First and Fourteenth Amendments,[231] Congress attempted to protect the sacred icon from "desecration."[232] Once again, the Court vindicated the constitutional value of free speech from legislative encroachment.[233] This episode is not particularly unique.[234] Whenever

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230. In the words of Chief Justice Marshall:

> It is most true that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* Redish, *supra* note 131, at 114-15; Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 579-87.

231. *See* Texas v. Johnson, 491 U.S. 397 (1989).

232. *See* 18 U.S.C. § 700 (1990).

233. *See* United States v. Eichman, 496 U.S. 310 (1990); *see also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (prohibiting states from imposing tort liability for good faith criticism of government officials, even when such criticism rests on erroneous factual predicates); Harry Kalven Jr., *The New York Times Case: A Note On the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191 (noting that the ability to criticize government officials freely is an indispensable element of a functional democracy).

234. *See* EDWARD KEYNES WITH RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 145-73, 187-205, 219-44, 279-300 (1989); Alphonso Bell, *Congressional Response to Busing*, 61 GEO. L.J. 963 (1973); Arthur J. Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 NW. U. L. REV. 319 (1972). *But see* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1981-82) (arguing that few internal limits exist on Congress's authority to use jurisdiction-stripping legislation as a means of registering disapproval of Supreme Court decisions and noting that the potential efficacy of external, perhaps constitutionally-imposed, limits is uncertain). The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994),

the federal courts enforce a constitutional value that runs counter to the supposed popular will, legislators often respond with intransigence rather than obedience.[235] Because the courts must ultimately undertake the hard duty of "saying what the law is," legislators remain free to put on dog and pony shows for the amusement and delight of select constituencies.[236]

The question that Judge Calabresi raises in his *Then* concurrence is whether the judiciary must content itself with a largely passive or reactive role.[237] Many federal judges are content to relegate themselves to a completely reactive role. Unlike Bickel's virtuous, but passive, jurist, the Calabresian judicial artist, Clark Kent-like, dons her judicial robes and flies to the rescue of the Constitution *before* the villain (viz., Congress) works its mischief.

5. Defining the promise and the limits of constitutional flares

Judge Calabresi challenges us to consider whether the judiciary must remain entirely passive until constitutional lines are transgressed.[238] Why should the federal judiciary refrain from attempting to inform the legislative and executive branches when particular courses of action are fraught with constitutional danger? A direct warning, a kind of constitutional flare across the bow, would be far less injurious to interbranch relations than the formal exercise of judicial authority to strike down legislative work product or an executive act.

Moreover, limiting the project of the Calabresian judge to matters of constitutional importance resolves the principal ob-

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provides perhaps the most recent example of Congress attempting to use its legislative powers to have the last word in a dispute with the Supreme Court over the Court's interpretation of a particular constitutional provision. *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292-303 (1996). For the Supreme Court's reaction to Congress's challenge to the Court's primacy over interpretation of constitutional text, see City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

235. *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-18 (1996) (arguing that courts seldom, if ever, truly engage in grossly countermajoritarian social policy-making).

236. *See* Frank M. Johnson Jr., *The Alabama Punting Syndrome*, JUDGES J., Spring, 1997, at 4-17, 53-54; Frank M. Johnson Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979).

237. *See* United States v. Then, 56 F.3d 464 (2d Cir. 1995) (Calabresi, J., concurring).

238. *See id.* at 466-68; *see also* CALABRESI, *supra* note 7, at 163-66, 178-81.

jections to the model. Rather than vesting judges with "a broad judicial warrant for the re-imagination of obsolete statutes,"[239] a Calabresian judge instead readily and willingly shoulders her proper duties in the constitutional scheme of separated and divided powers.[240] Reconceived in this light, the Calabresian judicial artist is not a Platonic guardian, but a constitutional sentinel. In constitutional adjudication, candor about the limits of legislative and executive discretion directly furthers the ability of the political branches to discharge their duties in a fashion consistent with constitutional limitations.[241] Such a paradigm is fundamentally consistent with the Framers' conception of the judiciary's proper role within the federal government.[242]

In addition, federal judges plainly are competent to opine about the meaning of the Constitution. Unlike generalized efforts to "update" statutory law, comments directed to the political branches regarding constitutional meaning should not lack credibility. Since *Marbury*, federal judges have established a strong professional reputation for giving meaning to constitutional text.

Turning to issues of legitimacy, one would be hard pressed to argue that judges lack the institutional responsibility for explicating constitutional text. Moreover, the Framers expressly sanctioned such a role for the federal judiciary.[243] Unlike attempts to micromanage the Nuclear Regulatory Commission or the Bureau of Alcohol, Tobacco, and Firearms,[244] federal judges have a legitimate claim to principal responsibility for establishing constitutional meaning. In Calabresian terms, absent the successful invocation of the Article V amendment process, federal judges have a "common law" role to play in the devel-

239. Steinhardt, *supra* note 17, at 1118.

240. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2162-64, 2168 (1997); *see also* Brown, *supra* note 10, at 1557-66.

241. *See generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-38 (1987) (arguing for a strong presumption in favor of candor as a rule of judicial behavior).

242. *See* THE FEDERALIST NO. 79 (Alexander Hamilton).

243. *See* THE FEDERALIST NO. 78, at 484-89 (Alexander Hamilton) (J. Hamilton ed., 1888).

244. *See* Wald, *supra* note 16, at 650-59; Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, 545-46 (1992); Patricia M. Wald, *Some Thoughts On Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 WASH U. L.Q., 661, 665 (1989).

opment of federal constitutional law. Just as state judges police the contours of property, contract, and tort law, subject to legislative revision, federal judges police the meaning of the Constitution, subject to correction through the Article V amendment process.[245]

New York Court of Appeals Chief Judge Judith Kaye has described a number of instances in which judicial/legislative dialogue about the common law resulted in successful law reform.[246] Similarly, Judge Calabresi cites a number of successful judicial/legislative interactions in his book.[247] Thus, at the state level at least, the metaphor of a dialogue between judges and legislators has been grounded in reality, with some good results.

Judge Calabresi's opinion in *Then* represents the same sort of judicial conduct. He gives meaning to the broad mandate of "equal protection of the laws," suggesting that Congress cannot invoke willful blindness to escape responsibility for a discriminatory result. He does not purport to decide any future case, but merely cautions that the disparity between sentences for rock and powder cocaine has an obvious racial cast which the federal courts cannot ignore. One does not yet know whether the racial cast will give rise to a finding of intentional or purposeful discrimination sufficient to satisfy *Washington v. Davis*.[248] This determination must await the development of a concrete record. Should Congress reject a recommendation from the Sentencing Commission to reduce the disparity, federal judges will take a fresh look at the reasons Congress proffers in support of its determination. These reasons will be weighed against the Sentencing Commission's observation that the existing dichotomy created by the guidelines leads to an unacceptable racial disparity in sentences. Judge Calabresi simply tells Congress that the fact of the known disparity will be relevant to subsequent judicial review of Congress's exercise of legislative power to maintain the disparity.[249]

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245. *See generally* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) (discussing the operation of the Article V amendment process, the respective roles of Congress and the federal judiciary in the amendment process, and proposing a more active role for the federal judiciary in policing the amendment process).

246. *See* Kaye, *supra* note 11, at 23-24.

247. *See* CALABRESI, *supra* note 7, at 149-58.

248. 426 U.S. 229 (1976).

249. *See supra* notes 112-14 and accompanying text.

As noted above, this sort of informal judicial advice does not constitute an advisory opinion in any meaningful sense,[250] nor does it preempt de novo review of the problem in a subsequent case. In effect, Judge Calabresi's concurring opinion constitutes a kind of highly targeted dicta, aimed at better informing legislators of the applicable constitutional parameters that delimit their policy-making authority.

6. The superiority of dialogue to the passive virtues

Judge Calabresi's model for judicial behavior ultimately makes candor a kind of passive virtue: by informing the political branches about potentially applicable constitutional constraints, elected policy-makers can better focus their attention on those policy options that pass constitutional muster. Constitutionally conscientious legislators can better legislate, for there will be substantially less need for constitutional guesswork. To the extent that Congress considers the constitutional dimension of the problem prior to legislating, the probability of judicial review resulting in the invalidation of Congress's work product is correspondingly reduced. This model of judicial/legislative relations better serves the value of interbranch comity than judicial silence followed by invalidation of legislative work product without prior warning.

In this way, Bickel's passive virtues ill-serve the Republic because they invite direct interbranch conflict. Much like the spouse who exclaims, "if you really loved me you would know how I feel," without ever bothering to explain to his beloved how he feels, the federal courts will repeatedly find themselves forced to choose between deference to Congress and fealty to constitutional text and precedent. By failing to apprise Congress of its constitutional concerns, the judiciary is faced with the hard choice of resolving a direct conflict. As in many relationships, failing to come to terms with the issues that frame a potential conflict make the resolution of the dispute infinitely more difficult. The passive virtues, if consistently practiced, inexorably will lead the federal courts into repeated interbranch conflicts.

Although the conclusion may at first seem counterintuitive, to the extent that judicial candor encourages legislative consideration of and respect for constitutional constraints, the need for the aggressive use of judicial review recedes. Thus, a

250. *See supra* notes 115-52 and accompanying text.

course of action seemingly less deferential to congressional prerogatives is in reality more conducive to judicial deference to legislative work product. Of course, this presupposes that Congress will actually consider the import of a constitutional flare. For a variety of reasons, there is good reason to doubt that this will happen.[251] Nevertheless, the judiciary should not proceed on a "bad man" theory of the legislature. Instead, judges should assume that legislators will attempt to act in ways consistent with the Constitution.

Moreover, should Congress ignore a constitutional flare with the result that legislation fails to survive judicial review, the fault lies with Congress and not the courts. As the saying goes, "forewarned is forearmed." If legislators willfully violate known constitutional principles, then the federal courts should reject the results of their legislative labors. The fact that Congress knew of a potentially relevant constitutional objection to a particular course of action but willfully ignored it provides added legitimacy to the judiciary's use of the power of judicial review to strike down the offending legislation.

At the same time, federal judges should exercise great restraint in offering advice to Congress. If judges frequently attempt to offer advice to Congress, it is doubtful that the advice will be effective. Not unlike the villagers in the children's tale "Peter and the Wolf," members of Congress are likely to become deaf to judicial warnings of constitutional peril if the judiciary is unduly promiscuous in offering them. The efficacy of the practice is likely to be inversely related to the frequency of its use.

Practical considerations also counsel in favor of restraint. The absence of a concrete factual dispute—not to mention briefing and oral argument on a particular issue—make it very difficult for federal judges to offer useful advice. Of necessity, advice in the absence of specific facts must be relatively open-ended, perhaps even bordering on vagueness. The utility of such advice is open to question. To the extent that the advice is vague, it is not likely to be particularly helpful to legislators; to the extent that judges attempt to offer highly targeted advice in the absence of a formal record, the advice is likely to be poor.

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251. *See* Abrahamson & Hughes, *supra* note 8, at 1055; Katzman, *supra* note 101, at 654-55, 662-63; Kaye, *supra* note 11, at 24-25; Schacter, *supra* note 149, at 605-06.

These objections are not fatal to the use of candid judicial advice, if such advice is strictly limited to constitutional questions. To be sure, the objections strongly counsel in favor of restraint in sending constitutional flares. This is not to say, however, that federal judges should never offer candid advice to Congress regarding potentially applicable constitutional limitations that might, in a particular instance, cabin its policy-making abilities.

When the potential benefit of candid advice to Congress outweighs the probable risks associated with giving such advice, federal judges should enjoy the discretion to offer the advice. Properly deployed, a constitutional flare facilitates less confrontational judicial interactions with the political branches and reduces the countermajoritarian bite of judicial review. Dialogue between courts and members of the executive and legislative branch should help to facilitate compliance with constitutional norms, thereby avoiding interbranch strife. This is a prize that makes the game worth playing.

There remains, of course, the question of how best to facilitate this dialogue. In *The Correspondence of the Justices*, the members of the Supreme Court declined to issue advisory opinions outside the context of the formal exercise of the judicial power. Nevertheless, the federal judiciary's consistent use of dicta, concurring opinions, dissenting opinions, and dissents from denials of certiorari conclusively demonstrates that federal judges will provide advice to executive and legislative personnel incident to the disposition of the "cases or controversies" appearing at bar. For prudential reasons, informal contact between judges and policy-makers should probably remain minimal.[252]

In order for the Article III courts to discharge their core function, they must be viewed as independent and impartial decision makers.[253] Systematic informal contacts with political policy-makers will surely undermine the public's confidence in both the independence and impartiality of judicial personnel. Accordingly, judicial advice to the coordinate branches should be sent through formal channels and organizations. For exam-

252. *See* Krotoszynski, *supra* note 10, at 468-85; *cf.* Geyh, *supra* note 122, at 1192-94 (arguing in favor of federal judges playing a more active role in Congress's policy deliberations); Tacha, *supra* note 6, at 1550-55 (arguing in favor of the federal judiciary maintaining a more regularized institutional voice in Congress).

253. *See* Krotoszynski, *supra* note 10, at 468, 472-75, 477-78.

ple, there is nothing improper about the Judicial Conference providing its views on proposed legislation.[254] Conversely, were the Chief Justice to meet privately with the Chairman of the Senate Judiciary Committee to discuss pending legislation, public confidence in the ability of the Chief Justice to oversee the implementation of legislation adopted following the conversation, and perhaps incorporating the Chief Justice's views, would undoubtedly be compromised.[255]

For the judiciary to maintain its credibility with the public, its advisory roles must be implemented in public ways: for example, through official judicial organs (like the Judicial Conference) and through official judicial work product (like concurring and dissenting opinions). The use of informal channels to impart advice—even advice regarding potential constitutional hurdles to a particular course of action—would necessarily raise serious questions about judicial independence from the political branches.[256]

Assuming that the advisory function is limited to official channels of communication and involves only questions of constitutional significance (as opposed to general questions of sound public policy), Judge Calabresi is right to maintain that the judiciary may properly attempt to provide Congress with advice on the constitutional constraints associated with deciding particular policy matters. Constitutional flares, properly deployed, would facilitate better democratic self-government by empowering the political branches to avoid foundering on constitutional shoals. Significantly, nothing in the text of the Constitution nor in our constitutional tradition would preclude the judiciary from undertaking such a role.[257]

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254. *See* Tacha, *supra* note 6, at 1540, 1542-45; Tacha, *supra* note 221, at 295-97.

255. *See* Krotoszynski, *supra* note 10, at 447-56 (describing some of the problems associated with back-channel communications between members of Congress and federal judges); Wheeler, *supra* note 177, at 144-58 (same).

256. In this regard, Justice Fortas's disastrous involvement in the Johnson Administration is instructive. *See* MURPHY, *supra* note 154, at 188-211; *cf.* Marcus, *supra* note 123, at 270-77 (describing the overtly political activities of some federal judges in the early years of the Republic).

257. *See* Geyh, *supra* note 122, at 1192-94; Ginsburg, *Legislative Review*, *supra* note 6, at 1011-17; Tacha, *supra* note 221, at 290-92.

CONCLUSION

Judge Calabresi has offered an intriguing new paradigm for the institutional relationship between judges and legislators; a paradigm in which judges and legislators would become mutually engaged in a dialogue regarding constitutional values. If one presupposes that legislators are constitutionally conscientious, the proposal makes a great deal of sense. The dynamic, interactive relationship proposed by Judge Calabresi would lead to more careful consideration of constitutional values incident to the legislative process and should, at least in theory, better serve our constitutional values.

This first premise is, however, open to doubt. A member of Congress is almost certain to value her own reelection more highly than respecting constitutional constraints. Simply put, most federal legislators are probably *not* constitutionally conscientious most of the time. Given this state of affairs, it is difficult to see how a new interactive relationship would improve legislative behavior. If legislators are largely indifferent to constitutional values with imperfect information, why should we expect them to behave differently if they enjoyed access to better information about the constitutional implications of their policy-making choices?

Admittedly, it would be nice to imagine a Congress that would benefit from constitutional flares—a Congress comprised of men and women more dedicated to preserving our constitutional values than their own political careers. Judge Calabresi's proposal plainly incorporates an optimistic view of the capacity of our elected officials to honor the Constitution in deed as well as word. Perhaps his optimism is justified. The citizenry can and should demand that our elected officials take constitutional values seriously—we should expect our elected officials to behave in a constitutionally conscientious manner. Because Judge Calabresi's approach would help to facilitate constitutionally conscientious policy-making by Congress and the executive branch, it should not be dismissed casually.

Moreover, there are potential benefits associated with Judge Calabresi's proposal even if we conclude that Congress is populated by unprincipled scoundrels. At a minimum, Judge Calabresi's proposal would make it far more difficult, if not impossible, for federal legislators to plead ignorance when called to account for transgressing constitutional limitations. Assuming that voters consider fealty to the Constitution to be an essential job requirement for members of Congress, Judge

Calabresi's proposal potentially would serve an important informational—if not checking—function for the electorate. Moreover, should Congress ignore a clear warning about the potential constitutional implications of a particular course of action, judicial negation of the legislative work product is more legitimate.

At the end of the day, one might conclude that the benefits associated with Judge Calabresi's revised model for judicial/legislative interaction do not offset the institutional costs. Nevertheless, his proposal deserves serious consideration within the federal judiciary and the practicing bar, within the Congress, and within the legal academy. It is high time for a dialogue about dialogue.