BYU Law Review

Volume 1991 | Issue 2 Article 11

5-1-1991

Pragmatism Without Politics-A Half Measure of Authority for Jurisdictional Common Law

Gene R. Shreve

Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law

*Gene R. Shreve**

I. INTRODUCTION

My paper for the symposium considers the propriety of independent lawmaking by federal courts about their own power.[1] There has been much debate. Figuratively, most participants are in one of two camps. The first is led by Professor Martin Redish. Commentators in this group argue that the separation of powers constraint imposed by article III of the Constitution permits federal courts to affect subject matter jurisdiction only by interpreting the text of the Constitution or statutes. The opposing camp, led by Professor David Shapiro, rejects the idea that federal courts labor under an added handicap when addressing matters of federal jurisdiction. These commentators maintain that federal courts have authority to administer their own rules about subject matter jurisdiction unless or until Congress has displaced those rules with valid legislation.

I consider whether, for all their differences, these opposing camps might not share an important misconception: that all of the federal courts' own rules in this area (which I explain as jurisdictional common law) carry the same claim to legitimacy. I suggest why these rules may not stand on the same ground, and how it might be possible to sort at least some of them into categories of licit and illicit jurisdictional common law.

The paper entertains this premise. In broad terms, Congress regulates federal subject matter jurisdiction (1) to strike bal-

---

* Professor of Law, Indiana University School of Law at Bloomington. I wish to thank my friends at New York Law School for permitting me to test at a faculty workshop there some of the ideas presented in this paper. I also wish to thank those who made helpful comments on the manuscript: Jack Beerman, George Brown, Dan Conkle, Doug Laycock, Bill Marshall, Doug Rendleman, Lauren Robel, and Mark Tushnet. I take sole credit of course for any aspect of the paper that troubles the reader.

1. It seems most accurate to speak of this authority as belonging to federal courts as a whole, although it is largely the work of the United States Supreme Court that will concern us.

ances between affirmative policies of federal jurisdiction and those of federalism, and (2) to attend to significant details of federal court administration. While policies supporting either objective may inspire jurisdictional statutes, we should read the separation of powers doctrine to permit federal courts to make jurisdictional common law only to advance policies of judicial administration.

Policies in the first sphere should be understood as accessible only to Congress because those policies guide jurisdiction as a means for making substantive, political choices. I explain how historic and continuing political antagonisms account for the language in article III that constrains jurisdictional common law, and how different that environment is from the one in which policies of federal judicial administration operate. I discuss why, when federal courts chart an independent course to advance policies of judicial administration, they intrude less upon Congress and contribute more to the content of jurisdictional law. To clarify policies of judicial administration and to delineate them from those in the political sphere, I picture the former in a larger, transsubstantive tradition of procedural law. I offer pragmatic instrumentalism as a jurisprudence uniting this tradition. The paper's conclusion, that policies of federal judicial administration should have a second life as bona fide inspiration for jurisdictional common law, rests upon a demonstration of the strongly pragmatic character of those policies. As the title suggests, readers are invited to consider how pragmatism (but not politics) might offer authority for jurisdictional common law.

Of course, one does not question lightly the judgment of such distinguished federal courts scholars as Professors Shapiro and Redish[2] that there is no middle ground. A strength in approaching matters as they have is that it makes unnecessary a difficult task confronting this paper: descent from general theory into the actual process of separating licit from illicit jurisdictional common law. Yet, with the aid of a series of examples,[3] I urge that such an undertaking might work.

---

2. I have joined many others in expressing my admiration for the work of both writers. *E.g.*, Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U.L. REV. 894, 926-27 (1980) (on Professor Shapiro's proposal for intervention reform) [hereinafter Shreve, *Intervention*]; Shreve, *Federal Jurisdiction: The Perils and Rewards of Pulling Things Together* (Book Review), 80 MICH. L. REV. 688 (1982) (reviewing M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980)).

3. I will discuss what the approach of this paper suggests concerning the legitimacy

II. The Current Landscape

A. *Warring Absolutes*

Some time ago I questioned the Supreme Court's withdrawal of federal civil rights jurisdiction in a line of cases beginning with *Younger v. Harris*.[4] I maintained that the *Younger* doctrine was both unwise and illegitimate, the latter because it usurped Congress' authority to allocate jurisdiction between state and federal courts.[5] Thereafter and at greater length, Professor Martin Redish also argued that *Younger*-based withdrawals of federal jurisdiction were unauthorized.[6] Professor David Shapiro later took us both to task,[7] as he defended the legitimacy (if not the wisdom) of *Younger*.[8]

Professor Shapiro's article broadened the discussion. Professor Redish and I had leveled our criticisms at abstention cases.[9] Professor Shapiro also considered federal court refusals to exer-

---

of four types of jurisdictional common law: refusals to exercise jurisdiction because of concurrent state litigation; common law state sovereign immunity; federal forum non conveniens doctrine; and the *Younger* doctrine. *See infra* Part VII.

4. 401 U.S. 37 (1971). For discussion of the *Younger* doctrine, see *infra* notes 32-37, 167-84, and accompanying text.

5. Shreve, *Federal Injunctions and the Public Interest*, 51 Geo. Wash. L. Rev. 382, 415-19 (1983). In short, my position was that "[i]ssues of federalism are of such transcendent importance that the Constitution mandates that inquiry over proportionate allocation of power between state and federal courts be perennial. But the power to conduct the inquiry and the processes suitable to its undertaking belong to Congress, not the federal judiciary." *Id.* at 415-16 (citations omitted). I recently discovered statements in a similar vein in Tushnet, *Constitutional and Statutory Analysis in the Law of Federal Jurisdiction*, 25 UCLA L. Rev. 1301 (1978). Thus Professor Tushnet observed that concerns raised by the *Younger* doctrine were "committed by the Constitution to Congress and not to the courts." *Id.* at 1356.

6. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).

7. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 552 n.55 (1985). This is a splendid article, and I have been greatly influenced by it. I still have doubts about the legitimacy of the *Younger* doctrine, *see infra* Part VII D; however, this paper will eliminate the basis for the assumption made by Professor Shapiro and repeated in Note, *The Preemption Dimension of Abstention*, 89 Colum. L. Rev. 310, 313 (1989), that Professor Redish and I share the same position.

8. Shapiro, *Jurisdiction*, *supra* note 7, at 580-81. Professor Shapiro clearly separated the issues of lawmaking authority and the wisdom of law made. He noted concerning the latter that "the *Younger* doctrine itself has been resoundingly criticized by estimable scholars." *Id.* at 550. Professor Redish recognized the same important distinction. *See* Redish, *supra* note 6, at 71-72 & n.5.

9. I focused on the *Younger*-line of cases, *see* Shreve, *supra* note 5, at 405-19. Professor Redish criticized all of the Supreme Court's abstention doctrines. *See* Redish, *supra* note 6.

cise jurisdiction on forum non conveniens and other non abstention grounds, as well as enlargement of federal judicial power through doctrines of supplementary jurisdiction. Across the board, Professor Shapiro argued the desirability of judicial independence in exercising federal jurisdiction. Just as categorically, Professor Redish countered that the separation of powers doctrine required statutory authority for decisions either to exercise or to refuse federal jurisdiction.[10] The manner in which commentators have since rallied around the Redish[11] and Shapiro[12] positions attests to the importance of the legitimacy debate. So do continuing federal courts developments noted in the first symposium here[13] and elsewhere.[14]

---

10. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 351 (1988) [hereinafter Redish, *Judicial Parity*]. This still appears to be Professor Redish's position. *See* Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 CASE W. RES. L. REV. 1023, 1026 n.16, 1034 (1989-90) [hereinafter Redish, *Judge-Made Abstention*].

11. *See, e.g.*, Doernberg, *"You Can Lead a Horse to Water. . .": The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1007 (1989-90); Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 291 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*] (both endorsing Redish's separation-of-powers position). In a coda, Professor Chemerinsky questioned whether Professor Redish's legitimacy analysis "can be used to solve all jurisdictional issues." Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 380 (1988).

12. *See, e.g.*, Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 n.56 (1989-90); Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1249 (1988); Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1339 n.240 (1986) (each endorsing Professor Shapiro's court-autonomy position). *Cf.* Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985) (adopting a similar position); Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1, 8 (1990) (arguing an even stronger version of court autonomy by questioning the "assumption . . . that the Constitution allocates to Congress primary authority for defining the jurisdiction of the federal courts . . . .").

13. Commentators noted, for example, the continued vitality of the *Younger* doctrine, *see* Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 366-71, and recent separation-of-powers scrutiny of judge-made pendent and ancillary jurisdiction, Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247. On the manner in which the *Younger* doctrine figures in the legitimacy debate, see *infra* Part VII D. On the same concerning pendent and ancillary jurisdiction, see *infra* notes 31 & 187.

14. *E.g.*, FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS (July 1, 1990), vol. 1, pp. 546-68 (supplemental jurisdiction), pp. 628-45 (*Younger* doctrine).

B. *Why the Debate Has Failed to Nurture a Common Law Perspective*

The focus of the legitimacy debate typically has not been on the common law character of events.[15] Closer examination of the debate reveals why.

Professor Redish's approach invites little need for extended consideration of jurisdictional developments as common law, since he views federal courts to be entirely without common law authority in this area. Taking what might be called an illicit-per-se position, he has argued that federal courts can only affect federal jurisdiction through statutory and constitutional interpretation. Professor Redish appeared to suggest that any such law that cannot be found on close examination to be a product of interpretation should be struck down.[16] Thus under Professor Redish's approach, no category of jurisdictional common law appears to have a stronger claim to legitimacy than any other.

Opposed as Professor Shapiro's approach is, it has not placed the common law aspect of developments in much sharper relief. Professor Shapiro saw independent readings of the federal judicial power (he termed them acts of "principled discretion"[17]) open to federal courts whenever questions arise outside enclaves of statutory control.[18] Under his licit-per-se approach, Professor Shapiro identified a variety of situations where federal courts exercised more or less jurisdiction than Congress conferred and suggested that all were legitimate. Therefore, no category of jurisdictional common law appears under Professor Shapiro's approach to have a weaker claim to legitimacy than any other.

Thus the all-or-nothing approach Professors Redish and Shapiro share does not really call for a strong common law perspective.[19] In contrast, because it asks readers to consider the

---

15. Matasar & Bruch, *supra* note 12, provide a valuable exception.

16. Redish, *Judicial Parity*, *supra* note 10, at 351. Professor Redish made clear that he was directing his legitimacy attack at federal court lawmaking rather than interpretation. *Id.* at 348.

17. Shapiro, *Jurisdiction*, *supra* note 7, at 545.

18. The separation of powers constraint he recognized within those enclaves is merely that on all federal common law—an obligation to accede to direct congressional commands. *Id.* at 580 ("Of course, the range of judicial discretion . . . may be affected by the governing statute."). On the nature of this general obligation, see *infra* notes 40-46 and accompanying text.

19. Yet there may be general agreement that many of the developments in this area (whether or not one believes them to be legitimate) fit the generic model of federal common law. Compare my elaboration of that view, *infra* note 22 and accompanying text,

possibility that some but not all judicial innovations concerning jurisdiction may be legitimate, this paper pays closer attention to developments at common law.

III. An Image of Jurisdictional Common Law

A. *Defining Jurisdictional Common Law*

This paper seeks to describe jurisdictional common law as a subdivision of federal common law.[20] The term treats subject matter rather than personal jurisdiction.[21] I mean by jurisdictional common law doctrine federal courts use either to explain why they adjudicate claims for which Congress has not conferred jurisdiction or to explain why they refuse to adjudicate claims that Congress has constitutionally authorized them to hear.[22] This definition reflects the general features of federal common law.[23] While protagonists in the legitimacy debate have not al-

---

with Redish, *Judicial Parity*, *supra* note 10, at 352 (describing refusals to exercise jurisdiction as situations where "the court, for nonconstitutionally based reasons, declines to exercise jurisdiction Congress intended it to have") and Shapiro, *Jurisdiction*, *supra* note 7, at 547 (observing that usually "the court is making a determination that despite the existence of statutory authority to adjudicate, the case has been presented in the wrong court or at the wrong time").

20. On federal common law generally, see Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986); Jay, *Origins of Federal Common Law*, 133 U. Pa. L. Rev. 1003, 1231, pts. 1 & 2 (1985); Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985); Weinberg, *Federal Common Law*, 83 Nw. U.L. Rev. 805 (1989).

21. On personal jurisdiction as a form of common law, see Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo. Wash. L. Rev. 849 (1989).

22. That is, cases for which subject matter jurisdiction exists by statute *and* for which no other statute or rule approved by Congress is an obstacle. For example, a court's refusal to adjudicate a claim brought within the language of the general diversity statute (28 U.S.C. § 1332 (1988)) does not come within this category if prompted by plaintiff's failure to satisfy the general venue statute (28 U.S.C. § 1391 (1988)), or by the absence of an indispensable party (Fed. R. Civ. P. 19(b)).

23. *E.g.*, C. Wright, Law of the Federal Courts 389 (4th ed. 1983) ("Whenever the federal court is free to decide for itself the rule to be applied . . . it is applying, or making, 'federal common law.' "); Field, *supra* note 20, at 890 (". . .any rule of federal law created by a court. . .*when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional") (emphasis in original); Matasar & Bruch, *supra* note 12, at 1326 ("The texts of the Constitution and congressional statutes are the enacted law of the federal system. Federal common law rules . . . do not purport to be required by any textual command; they are predicated upon court-made policy judgments.").

For a historical survey of different understandings of common law generally and of federal common law, see Jay, *Origins* (pt. 2), *supra* note 20, at 1234-41.

ways noted the character of events as jurisdictional common law,[24] the concept fits well.[25]

B. Setting Jurisdictional Common Law Apart from Constitutional Doctrine and Statutory Interpretation

All forms of law making up federal jurisdiction aspire to reasoned bases for determining whether to exercise the federal judicial power. There are rich traditions of constitutional[26] and statutory[27] interpretation. The process of isolating certain juris-

---

24. *See supra* Part IA.

25. *Cf.* Jay, *Origins*, pt. 1, *supra* note 20 (including federal jurisdiction within a broader conception of federal common law); Matasar & Bruch, *supra* note 12, at 1355 (describing the same as "procedural common law"); Wells, *supra* note 12, at 1098 (describing as "common law rules" those by which the Supreme Court has expanded or restricted jurisdiction).

Commentators have occasionally described particular developments as common law. *E.g.*, Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1939 (1982) [hereinafter Note, *Incidental Jurisidiction*](describing pendent and ancillary jurisdiction as "common law rules surrounding the relevant jurisdictional statute"); Note, *Flexible Application of Common Law Forum Non Conveniens and the Alternative Forum Rule*, 46 BROOKLYN L. REV. 939, 954 (1980) (describing situations outside 28 U.S.C. § 1404(a) where "the common law doctrine of forum non conveniens remains in control").

26. Most Constitution-based refusals to exercise federal jurisdiction rest on interpretations of article III and the eleventh amendment. Concerning article III, see Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy Requirement,"* 93 HARV. L. REV. 297 (1979); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647 (1990); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985). For interpretations of the eleventh amendment, see the authorities appearing *infra*, notes 139 & 141.

27. Federal judges contribute to the content of federal jurisdiction by the manner in which they interpret statutes. *See* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1486 (1987) ("Although Congress initially prescribes the jurisdiction of the federal courts, the courts themselves find extensive room for interpretation of these grants of jurisdiction.") (citation omitted); Chemerinsky, *Parity Reconsidered*, *supra* note 11, at 292-93 (noting judicial "discretion in determining federal court jurisdiction because of ambiguity in Congress's intent as expressed in the legislative history of the jurisdictional statutes"). For illustrative cases, see Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (supplying a category "of decisions that are appealable under [28 U.S.C.] § 1291 even though they do not terminate the underlying litigation"); Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 810 (1986) ("exploring the outer reaches of [28 U.S.C.] § 1331").

Judges have been known to displace statutes while purporting to interpret them. *See* G. CALEBRESI, A COMMON LAW FOR THE AGE OF STATUTES 36-43 (1982). Nonetheless, they are more restrained overall when deciding the manner in which a statute applies than when devising (in a common law setting) their own best solution for the problem at hand. The relative restraint imposed by statutory interpretation has been described the following way:

dictional decisions and labeling them as common law[28] can be difficult.[29] However, the fact of a grey area does not disprove the existence of clear cases on either side.[30] Common law designations seem possible for a number of developments concerning federal jurisdiction.[31]

> In all ordinary cases the statute is, and is intended to be, a formal source of law in the sense that it is intended to exclude from consideration countervailing arguments against the result which the statute dictates. The statute is not just one additional reason to be taken account of by the judge, a reason which may tip the scales in one direction or be overridden by contrary substantive arguments. The statute shuts out contrary arguments.

P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 8 (1987). *Accord*, J. ELY, DEMOCRACY AND DISTRUST 3 (1980).

28. *See supra* text accompanying note 22.

29. Periodic difficulties will be encountered in separating issues of federal common law from those arising under the Constitution. *See* R. BIRDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 3-4 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 6 (2nd. ed. 1988) Burnham, *Separating Constitutional and Common-Law Torts: A Critique and Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515 (1989); or from those involving statutory interpretation, *see* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 17-22 (1957); Merrill, *supra* note 20, at 3-7; Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554 (1982). At the same time, there is little to suggest that difficulties in ascertaining jurisdictional common law would be greater than for federal common law generally (*see supra* sources appearing in note 20) or, for that matter, greater that those in any contemporary search for the meaning of common law. *See* M. EISENBERG, THE NATURE OF THE COMMON LAW 157-59 (1988).

30. Thus it may go too far to suggest, as Professor Althouse has, that the law of federal jurisdiction "lacks clear divisions between the truly constitutional, the completely statutory, and the decidedly judge-made." Althouse, *supra* note 12, at 1037. Up to a point at least, distinctions setting jurisdictional common law apart seem intelligible in both theory and application. For example, see the discussion in Shreve, *supra* note 5, at 416-17, and Redish, *supra* note 6, at 86-87, of the difference in legitimacy between the Supreme Court interpreting 28 U.S.C. § 2283 (1988) to deny jurisdiction to lower federal courts and invoking the *Younger* doctrine to do the same. *Cf.* J. CHOPPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 406 (1980) (noting a similar difference between the Supreme Court refusing appellate jurisdiction through statutory interpretation and refusing the same independently).

31. Examples include those discussed in this paper: refusals to exercise jurisdiction because of concurrent state litigation (*see infra* Part VII A); common law state sovereign immunity (*see infra* Part VII B); forum non conveniens doctrine (*see infra* Part VII C), and the *Younger* doctrine (*see infra* Part VII D). Surveys have noted these areas and a number of others which seem to fit the jurisdictional common-law mold. *See* Matasar & Bruch, *supra* note 12, at 1332-58; Shapiro, *Jurisdiction*, *supra* note 7; Wells, *supra* note 12, at 1122 n.128; Note, *Power to Decline the Exercise of Federal Jurisdiction*, 37 MINN. L. REV. 46 (1952).

While the examples I discuss later involve withdrawals of jurisdiction, the concept of common law jurisdiction also covers situations where federal courts add to statutory jurisdiction. It is possible to question authority for the latter, *see* Redish, *Judicial Parity*, *supra* note 10, at 355-56), but it seems no more vulnerable than doctrine withdrawing federal jurisdiction, *see* Matasar & Bruch, *supra* note 12, at 1357. Leading examples of

The *Younger* doctrine offers an example. It has come to mean that a federal court cannot entertain cases seeking injunctive or declaratory relief against a pending state judicial proceeding, unless the state proceeding has been brought in bad faith, or unless a state statute challenged is unconstitutional in every conceivable application.[32] It is true that constitutional reasons for refusing federal jurisdiction can arise in close proximity to the *Younger* doctrine,[33] as can questions of statutory interpre-

---

jurisdiction unprovided for by statute are pendent and ancillary jurisdiction, used to supplement statutory jurisdiction by adding claims or parties under the right circumstances. *See generally* C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1444 (1990); McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863 (1989); Note, *Incidental Jurisdiction*, *supra* note 25.

Law in this area is in flux. In Finley v. United States, 490 U.S. 545 (1989), the Supreme Court seemed to suggest that many points of previously settled doctrine were vulnerable because they did not rest on statutory authority. The case generated uncertainty in federal courts and consternation among commentators. *See, e.g.*, Mengler, *supra* note 13; Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*; 76 VA. L. REV. 539 (1990); Note, *Pendent Party Jurisdiction After Finley v. United States: A Trend Toward its Abolition*, 24 GA. L. REV. 447 (1990); Note, *Pendent-Party Jurisdiction Under the FTCA: Finley v. United States*, 5 J. LEGAL COMMENTARY 77 (1989). Congressional response was swift. Part of the Federal Courts Study Committee Implementation Act of 1990 (appearing now in 28 U.S.C. § 1367) largely "codifies supplemental jurisdiction as it existed before the *Finley* decision." Mengler, Burbank & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 214 (1991). There is probably some room left for pendent and ancillary jurisdiction as jurisdictional common law, but it is too soon to tell how much.

32. A relatively recent and well-publicized use of the doctrine to refuse jurisdiction came in Pennzoil Oil Co. v. Texaco, 481 U.S. 1 (1987). For discussions of the case, see Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051 (1988); Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336-340 (1989) Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co. v Texaco Inc.*, 57 FORD. L. REV. 997 (1989); *Symposium on the Pennzoil v. Texaco Litigation*, 9 REV. OF LIT. 297 (1990). The Supreme Court's most recent discussion of the *Younger* doctrine came when it refused to apply it in New Orleans Public Service, Inc. v. City Council, 491 U.S. 350 (1989). For assessments of this case see Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114, 148-52 (1990) [hereinafter Brown, *Federalism*]; Federal Courts Study Committee, *Working Papers*, *supra* note 14, at vol. 1, pp. 633-34. General descriptions of the *Younger* doctrine appear in E. CHEMERINSKY, FEDERAL JURISDICTION §§ 13.1-13.4 (1989); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, Ch. 11 (2d ed. 1990); Brown, *Dealing with* Younger *Abstention as Part of Federal Courts Reform—The Role of the Vanishing Proposal*, 1991 B.Y.U. L. REV. ; Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989). For discussion of the possibility that *Younger* might in the future extend to damage cases, see D. LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 135 (1991).

33. For instance, the *Younger* doctrine is grounded in part on principles of forbearance in granting injunctive relief. One such principle is that injunctions should not be issued unless harm to be averted is imminent. Failure to make such a showing also cre-

tation.[34] Moreover, the doctrine itself functions much like a statute in its breadth and rigidity.[35] Nevertheless, many invocations of the *Younger* doctrine occurred when jurisdiction would not have been problematic under the Constitution, and virtually none were exercises in statutory construction.[36] First and last then, the substantial barrier to civil rights litigation posed by *Younger* and succeeding cases is a judicial invention.[37]

Of course, federal courts contribute significantly to the content of jurisdictional law through constitutional and statutory interpretation. Questions whether they use their interpretive powers well command considerable attention.[38] My interest, however, is in the legitimacy of federal court inquiries about jurisdiction, and that is scarcely a concern outside the area of common law. *Marbury v. Madison*[39] established judicial compe-

---

ates for federal plaintiffs difficulties under the ripeness doctrine of article III of the Constitution. For elaboration of these points, see Shreve, *supra* note 5, at 391-92, 405-06.

34. *Younger*'s ultimate importance in fact turned on a question of statutory interpretation. The immediate effect of invoking the *Younger* doctrine was to remit the federal claimant to a state trial. The question remained, however, whether the state adjudication would merely delay subsequent retrial in federal court or block it altogether. Opting for the latter result, the Supreme Court read the full faith and credit statute (28 U.S.C. § 1738 (1966)) to bind a federal trial judge to the claim- and issue-preclusion doctrines of the state court conducting the initial trial. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980). The Supreme Court refused in these cases to find that 42 U.S.C. § 1983 suspended § 1738. For more on these developments, see Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1245-49 (1986).

35. Shreve, *supra* note 5, at 413-14; Note, *supra* note 7, at 312.

36. In Mitchum v. Foster, 407 U.S. 225 (1972), the Court rejected an opportunity to cover the same ground through statutory interpretation. *Mitchum* shielded cases brought under 42 U.S.C. § 1983 from the prohibition of the Anti-Injunction Act (28 U.S.C. § 2283) by reading the former to be a statutory exception to the latter. Thereafter, federal injunctive and declaratory cases under § 1983 seeking relief against pending state court actions became the province of the *Younger* doctrine.

37. The Court's refusal to exercise jurisdiction in *Younger* was to Professor Redish "purely . . . a matter of judge-made principles." Redish, *supra* note 6, at 86. Professor Shapiro described the *Younger* doctrine as "a leading example of the willingness of the federal courts to decline to exercise authority they admittedly possess." Shapiro, *Jurisdiction*, *supra* note 7, at 550. *Cf.* Althouse, *supra* note 12, at 1041 (describing *Younger* as "nonstatutory, freestanding doctrine").

38. For commentary on constitutional interpretation, *see supra* note 26. One topic of continuing interest in the realm of statutory interpretation is the Supreme Court's reading of the "arising under" language of 28 U.S.C. § 1331. *E.g.*, P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 995-1007, 1020-22 (3rd ed. 1988); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

39. 5 U.S. (1 Cranch) 137 (1803).

tence to affect federal jurisdiction through statutory and constitutional interpretation. Less clear is the authority of federal courts to do the same without the pretext of interpretation.

IV. THE UNCERTAIN AUTHORITY OF JURISDICTIONAL COMMON LAW

A. *Basic Separation of Powers Constraints on Federal Common Law*

At the very least, the authority of jurisdictional common law is subject to separation of powers[40] limitations generally applicable to federal common law. Since *Erie Railroad Co. v. Tompkins*,[41] the conventional understanding of federal courts' common-law power has been that, whenever inspired by a federal interest, federal courts may create common law[42] in areas

---

40. On the doctrine generally, see, e.g., R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 3.12 (1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 2 (2nd ed. 1988); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989); Chemerinsky, *A Paradox Without Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987); Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL. L. REV. 488 (1987). *Cf.* M. VILE CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967) (comparing separation of powers doctrine in England, America and France).

41. 304 U.S. 64 (1938). *Erie* abolished common law and common law-making authority previously thought to grow out of federal diversity jurisdiction. Justice Brandeis wrote for the Court: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law." *Id.* at 78. *Erie* introduced uncertainties of its own. *See, e.g.*, the cases and commentary noted in G. SHREVE & P. RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE §§ 38-40 (1989). However, "[t]he case put a period, with an exclamation point, to the notion that the decisional rules of the state courts had a status inferior to state statutes in the spheres, whatever they were, in which state law governed." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 506 (1954).

42. That federal courts retained this kind of common-law authority after *Erie* has often been stated. Justice Jackson observed:

> The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring) (em-

unoccupied by federal statutes.[43] The common law that federal courts make survives only as long as Congress does not displace it with constitutionally valid legislation.[44] The law-making supremacy of Congress appears secure[45] despite recent tremors.[46]

---

phasis in original). For an illuminating application of this principle in one field, see Trautman, *The Relation Between American Choice of Law and Federal Common Law*, LAW & CONTEMP. PROBS. 105 (Spring 1977). None of this means, of course, that federal courts are *bound* to make federal common law. They often decline opportunities to do so. *See, e.g.*, Miree v. Dekalb County, 433 U.S. 25, 31-32 (1977).

43. As Holmes stated, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . . ." Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). For examples of how federal common law has filled interstices left by federal legislation, see Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 413-21 (1964).

The Supreme Court has often reaffirmed the authority of federal courts to make common law, a position enjoying wide but not unanimous support among commentators. In Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U.L. REV. 761, 786-90 (1989), Professor Redish argued that the Court and others have misunderstood the Rules of Decision Act (28 U.S.C. § 1652 (1966)), and that the Act should be read to preempt federal common-lawmaking power. For one response to the Redish attack, see Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L. REV. 860 (1989). The exchange continues in Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U.L. REV. 853 (1989).

44. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)), which recognized the "paramount authority of Congress" to nullify federal common law announced only a year earlier.

45. Widely accepted, the idea that the federal judiciary's legislative preferences are subordinate to those of Congress is grounded in history and tradition. *See, e.g.*, P. ATIYAH & R. SUMMERS, *supra* note 27, at 8-9; R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7 (1975); J. ELY, *supra* note 27, at 3; M. VILE, *supra* note 40; Casper, *An Essay on Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 214 (1989); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says?*, 34 A.B.A. J. 535, 536 (1948); Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1 (1954); Sharp, *supra* note 40.

46. There has been renewed interest recently in the idea that frailties in the legislative process (especially its susceptibility to manipulation by special interests) justify greater latitude for courts in dealing with statutes. For some of the different interpretations of this "public choice" movement, see Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

Since public-choice critics question the integrity of the legislative process, they might be seen to undercut the deference to Congress bound up in Professor Redish's illicit-per-se reading of jurisdictional common law. *See supra* notes 15 & 16 and accompanying text. Redish has perceived such a challenge and responded. Redish, *Judicial Parity*, *supra* note 10, at 360-67; Redish, *Judge-Made Abstention*, *supra* note 10. My misgivings about Professor Redish's position are of a different sort. *See infra* Part V A.

Federal common law may neither defy nor outlive the will of Congress.

B. The Possibility of Further Limits on the Authority of Federal Courts to Make Jurisdictional Common Law

It has often seemed that the separation of powers doctrine imposes a distinctly greater disability on the authority of federal courts to make law about their own jurisdiction. Since the Constitution appears to commit exclusively to Congress the question whether lower federal courts will exist,[47] the argument has been that it is for Congress to determine the scope of their judicial power. Chief Justice Marshall's opinion in *Cohens v. Virginia*[48] has often been quoted, if somewhat out of context, for this principle.[49] In many cases, the Supreme Court has exhibited special deference to Congress concerning lower federal court jurisdiction.[50] There is a good deal of distinguished commentary in the

---

47. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

48. 19 U.S. (6 Wheat.) 264 (1821). *Cohens* dealt with the Supreme Court's own jurisdiction to review a state decision of a federal constitutional question.

> 49. 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. . . . 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.

Id. at 404.

50. Illustrative of the Court's application of the *Cohens* principle to the jurisdiction of lower federal courts is Willcox v. Consolidated Gas Co., 212 U.S. 19, 39-40 (1909):

> At the outset it seems to us proper to notice the views regarding the action of the court below, which have ben [sic] stated by counsel for the appellants. . . . They assume to criticize that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction [citing *Cohens*]. . . . That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

Other examples include Patsy v. Bd. of Regents, 457 U.S. 496, 501-02 (1982) ("a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [congressional] intent"); Zwickler v. Koota, 389 U.S. 241, 248 (1967) (through statutory civil rights jurisdiction, "Congress imposed the duty upon all levels of the federal

same vein.[51]

Under the most forceful statements of this view, not only must federal courts accede to congressional will in the usual way,[52] but they have little power (if any) to fill interstices in the statutory scheme with common law. In short, refusals to exercise federal jurisdiction would have to turn on constitutional or statutory interpretation and exercises of jurisdiction would have to be statute-based.[53]

V. IMPOVERISHED CHOICES

A. The Failure of an Illicit-Per-Se Conception of Jurisdictional Common Law

I cannot agree with Professor Redish[54] that Professor Shapiro's points failed to hit home. Rather, there is not much left to add to the case against Professor Redish's illicit-per-se position. Professor Shapiro demonstrated, as have others since, that the rule against judicial improvisation is shot full of exceptions. Federal courts can and do vary their judicial power without pretext of statutory or constitutional interpretation.[55] Applications of the separation of powers doctrine to limit jurisdictional common

---

judiciary to give due respect to a suitor's choice of a federal forum"); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) (When a party brings his case within a jurisdictional statute, federal courts have a "duty to take such jurisdiction") (quoting *Wilcox*, 212 U.S. at 40); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1858) ("[T]he courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

51. Lee & Wilkins, *supra* note 13, at 367; Tushnet, *supra* note 5. *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 173 (1962); Chemerinsky, *Parity Reconsidered*, *supra* note 11, at 290-91; Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term*, 1976 SUP. CT. REV. 183, 214-15; Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500-01, 514 (1928); Redish, *supra* note 6; Redish, *Judicial Parity*, *supra* note 10, at 342-67; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

52. *See supra* notes 27, 44, 45 and accompanying text. For example, federal courts had no choice but to accept the increase in the jurisdictional minimum for diversity cases (from $10,000 to $50,000) that resulted from the last amendment of 28 U.S.C. § 1332 (1988).

53. Doernberg, *supra* note 11, at 1017; Redish, *Judicial Parity*, *supra* note 10, at 351.

54. Redish, *Judicial Parity*, *supra* note 10, at 350-51.

55. *See supra* note 31 and accompanying text.

law have been at best quixotic. This should not be surprising, given the indeterminacy of separation of powers theory overall.[56]

Moreover, Professor Shapiro and others have suggested a benefit that justifies at least some play in the separation of powers doctrine: opportunities for the federal judiciary to make jurisdictional law more sensitive to concerns of judicial administration.[57] The arrangement may not be ideal, since federal appellate judges, who shape the outlines of jurisdictional common law, may not be as keen observers of the litigation process as federal trial judges.[58] Nonetheless, if the federal judiciary

---

56. Much of the Supreme Court's recent work with the separation of powers doctrine is summarized in U.S. DEP'T OF JUSTICE, REPORT TO THE ATT'NY GEN.—THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 169-83 (1988) and in the sources which follow in this note. None of the recent decisions bears directly on the question whether federal courts may validly create jurisdictional common law, Friedman, *supra* note 12, at 8; Brown, *Federalism*, *supra* note 32, at 132, but there is no clear suggestion from the cases that such power is lacking.

In fact, the innate haziness of the constitutional doctrine of separation of powers significantly undermines an illicit-per-se position. There is no separation of powers clause in the Constitution, Elliott, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506, 529 (1989), nor is it clear that the Framers shared an understanding of what the scope of such a doctrine should be. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989). On top of that, many feel that the Court's recent decisions have only made matters worse. Professor Elliott observed: "Separation of powers jurisprudence in the United States is in an abysmal state." *Id.* at 506. Other criticisms are numerous. *See, e.g.*, Chemerinsky, *supra* note 40, at 1084 (noting the Court's "inconsistency in approach"); *Strauss*, *supra* note 40, at 526 (stating that "the Court appears to be at sixes and sevens about the appropriate analytic technology for resolving separation-of-powers issues"); Note, *Separation of Powers: A New Look at the Functionalist Approach*, 40 CASE W. RES. L. REV. 331, 331 (1989-90) (noting the Supreme Court's "inconsistent methods of analysis to resolve constitutional separation-of-powers issues"); Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 173 (1990) ("the Supreme Court has yet to formulate a consistent theory for resolving separation of powers problems").

57. Professor Shapiro stressed the need for "sufficient room for the federal courts to make a range of choices based on considerations of judicial administration . . . ." Shapiro, *Jurisdiction*, *supra* note 7, at 568. Shapiro would "include such questions as the interests of the parties and of the court in avoiding redundant or vexatious litigation, and the determination of the more appropriate forum for resolving the dispute . . . ." *Id.* at 587. For similar comments, see Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053, 1065 (1989-90); Matasar & Bruch, *supra* note 12, at 1355 n.339.

58. This possibility has been explored from many angles. *See, e.g.*, Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971); Saks, *Enhancing and Restraining Accuracy in Adjudication*, 1 LAW & CONTEMP. PROBS. 243 (Autumn 1988); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

shares with Congress law-making authority to advance goals of judicial administration, that enhances both the content of jurisdictional law and the speed of needed changes.[59]

B. *Does a Licit-Per-Se Conception of Jurisdictional Common Law Go Too Far?*

To those in the Shapiro camp, federal judges are as free to make jurisdictional common law as they are to make common law of any other form. That is, the federal judiciary can fill any interstices it finds between statutes governing federal jurisdiction.[60]

I agree with the group's initial assumption: that, without more, statutory grants of jurisdiction do not connote a congressional command that federal courts must use them in every case to which they apply.[61]

We disagree thereafter because the licit-per-se group does not regard authority to make jurisdictional common law to be limited in any significant sense.[62] That is, the group holds that

---

59. *Cf.* Pound, *Reforming Procedure by Rules of Court*, 76 CENT. L.J. 211, 212 (1913) ("Experience has shown that small details of procedure, which sometimes are very irritating in their effects, do not interest the legislature so that it is almost impossible to correct them by enactment."). A recent statement in the same vein appeared in the testimony of the Honorable Robert Peckham on behalf of the Federal Judicial Conference. "[W]e wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense." *The Civil Justice Reform Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Committee of the Judiciary*, 101st Cong. 2d Sess. 334. For more on why federal courts should have power to advance goals of judicial administration through jurisdictional common law, see *infra* Part VI.

60. *See supra* Part II.

61. Using the *Younger* doctrine (explained *supra* notes 32-37 and accompanying text), Professor Althouse nicely illustrated the difference between a passive grant of jurisdiction and a stronger message from Congress.

> [I]f Congress wanted to eliminate the *Younger* doctrine, it could simply amend section 1983 to add genuinely clear language, such as: "The federal courts may enjoin ongoing state court proceedings, notwithstanding 28 U.S.C. § 2283, and they shall not abstain in deference to such proceedings, despite the capacity of the state court to enforce the federal claim asserted under this section."

Althouse, *supra* note 12, at 1048.

62. Consistent with its view that federal court power over jurisdiction should be largely unrestrained, the group seems to acknowledge only two limitations—neither of great practical importance. The first limitation is a duty of compliance when Congress uses its "power to end the Court's jurisdiction-shaping role with unambiguous and express language," *Id.* The second is a duty upon the federal judiciary not to use its independence arbitrarily. Professor Shapiro wrote concerning the latter that the power he urged for federal courts "carries with it an obligation of reasoned and articulated deci-

federal courts have legitimate access to the entire range of policies Congress consults in enacting jurisdictional statutes. In this way, they argue, the federal judiciary compliments the work of Congress and fine tunes federal jurisdiction.[63]

The problem with so broad and undifferentiated an approach to jurisdictional common law is that it fails to address challenges based on the special lawmaking franchise ceded to Congress by the text of article III, section one,[64] and based on the considerable (if episodic) Supreme Court declarations that article III diminishes the power federal courts have over their own jurisdiction.[65] These challenges cannot support the entire weight of an illicit-per-se argument. But, in failing to answer them, the licit-per-se group permits the opposite position to appear a good deal more attractive than it really is.

I suggest that it should be possible to answer—more than that, to accommodate—these challenges under a theory that still permits federal courts to make a good deal of jurisdictional common law. The point is that the article III language and the Supreme Court's admonitions need not cast a shadow over *all* jurisdictional common law. Those concerns may be properly aroused only when federal courts use jurisdictional common law to express political policies. I will explain here what I mean by "political,"[66] what sets political policies apart from jurisdictional

---

sion . . . ." Shapiro, *supra* note 7, at 579. Later he offered an illustration.

> Thus a wholesale refusal by the federal courts to adjudicate diversity cases on the grounds that these courts have more important things to do, and that the state courts are more appropriate tribunals, simply cannot be reconciled with the congressional grant of authority, no matter how much appeal this approach may have for particular judges.

Id. at 587.

Never popular with Congress, the kind of "unambiguous and express language" for jurisdictional statutes posed by Professor Althouse as a theoretical limitation on court autonomy is unlikely to become much of one in fact. Professor Shapiro's concept of "reasoned and articulated decision" seems less a particular check on the federal judiciary's control of jurisdiction than a general goal for all judicial decisions. The concept seems unlikely to figure in any but the most extreme case.

63. Several in the group have stated this view and have chosen the "fine tuning" metaphor to explain it. *See, e.g.*, Althouse, *supra* note 12, at 1049; Matasar & Bruch, *supra* note 12, at 1356 n.341; Shapiro, *supra* note 7, at 574.

64. *See supra* note 47.

65. *See supra* note 50.

66. An interesting and somewhat different conception of the politics of federal jurisdiction can be found in the writing of Professor Mark Tushnet. *See, e.g.*, Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 NW. U.L. REV. 454 (1991); Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 CONN. L. REV. 621 (1990) [hereinafter Tushnet, *General Principles*].

policies concerned with judicial administration, and why article III should be understood to prevent political policies (but not administrative policies) from becoming bona fide inspirations for jurisdictional common law.

Political policies often determine the shape of federal jurisdiction because all federal jurisdiction connotes an element of distrust in state courts and because groups will gain or lose substantively by the way cases are allocated between federal and state court systems. To illustrate this, I will refer to three important heads of federal trial jurisdiction contemplated in article III: federal question, diversity and admiralty jurisdiction.[67] It may be easiest to begin with federal question jurisdiction.

First, the assumptions upon which federal question trial jurisdiction[68] rests are these. If all issues concerning the meaning and application of federal law were committed to *state* trial courts, (1) the content of federal law would be less certain,[69] and (2), whatever its content, federal law would give way to state law more often.[70] Empirically, it has not been possible to measure or

---

67. It has always been difficult to sort federal lower court jurisdiction into a few neat categories, and I do not maintain that this tripartite designation does that. For more extensive surveys, see H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948). I have set apart, as Frankfurter did, federal question and diversity jurisdiction. Frankfurter, *supra* note 51, at 507. And I have added admiralty jurisdiction, which appears on Frankfurter's supplementary list of " 'federal specialties,' " *id.* at 507 n.37, as a third category.

On federal question jurisdiction, see generally AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 477-88 (1969); Mishkin, *The Federal "Question" in the District Courts* 53 COLUM. L. REV. 157 (1953). On diversity jurisdiction, see generally Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97. On admiralty jurisdiction, see generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 1-52 (2nd ed. 1975); D. ROBERTSON, ADMIRALTY AND FEDERALISM 6-135 (1970).

68. This paper does not address policies behind the Supreme Court's appellate jurisdiction over state courts, but they appear to be similar. *See* Matasar & Bruch, *supra* note 12, at 1358-90.

69. To the extent that, whether tried in state or federal court, federal question cases are not heard by the United States Supreme Court, some lack of uniformity as to the meaning and application of federal law is inevitable. There is reason, however, to believe that greater uniformity results from hearing these cases in a federal court. AMERICAN LAW INSTITUTE, *supra* note 67, at 165-66.

70. "Where the difficulty is not misunderstanding of federal law, but lack of sympathy—or even hostility—toward it, there is a marked advantage in providing an initial federal forum." *Id.* at 167. This federal law enforcement concern most obviously accounts for exclusive federal jurisdiction, *see* Shreve, *supra* note 34, at 1240; Note, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation*, 67 CORNELL L. REV. 219, 232 (1981); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281, 1282 (1978),

perhaps even to prove these assumptions.[71] Yet it takes considerable force of will to doubt them, to believe instead that state judges—under no obligation to read federal law as broadly as federal judges might[72]—would do so anyway.[73] Moreover, even if these assumptions do not reflect reality, they do underpin federal question jurisdiction.[74]

Second, instead of operating in a vacuum, the law enforcement concerns driving federal question jurisdiction collide with

---

and for concurrent jurisdiction regarding claims under the Constitution, see AMERICAN LAW INSTITUTE, *supra* note 67, at 168. *Cf.* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (original federal jurisdiction for actions brought under 42 U.S.C. § 1983 important in part since Congress "realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts").

71. "The problem is that without empirical measurement, each side of the parity debate simply has an intuitive judgment about whether the institutional differences between federal and state courts matter in constitutional cases." Chemerinsky, *Parity Reconsidered*, *supra* note 11, at 278-79. For surveys of the parity debate, see *id.*; Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

72. If state judges read federal law less broadly than federal judges, they are not *a priori* in violation of the supremacy clause. [U.S. CONST. art. VI] The duty imposed by the supremacy clause to enforce federal law is not the duty to give it the broadest possible reading, only a duty to give it a reasonable reading and one in keeping with controlling precedent. The only federal decisions on the meaning of federal law which bind state courts are those of the United States Supreme Court.

Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 605 n.20 (1989) (citations omitted). *Cf.* Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U.L. REV. 465, 476 (1991) ("The forum issue makes a difference only in hard cases where a conscientious judge could rule either way and remain faithful to the precedents and other legal materials").

73. [O]ne need not question the good faith or diligence of state judges to conclude that they are unlikely overall to read as much into federal substantive law. Since they work with their state law more than federal judges do, it would be natural for them to give it more life and federal law correspondingly less.

Shreve, *supra* note 72, at 605.

[M]uch may depend on the judge's orientation when the inquiry begins. The state judge will wonder why state law, which he constantly lives with and enforces in other cases, should be disregarded in this case. The federal judge, though accustomed to enforcing state law in diversity cases, will not regard himself as a living extension of state law, as may his state court counterpart.

Shreve, *supra* note 5, at 418 n.229. *Cf.* Shreve, *In Search of a Choice-of-Law-Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 345 (1982) [hereinafter Shreve, *Choice-of-Law Reviewing Standard*] ("A state judge's initial presumption of the applicability of forum law in every case may be less an act of chauvinism than an understandable and perhaps inevitable institutional reflex.").

74. *See* Mishkin, *supra* note 67, at 158-59; Wechsler, *supra* note 67, at 225-26; Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 512-13 (1989). *Cf.* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328 (1978) ("All grants of federal jurisdiction are based upon some perceived inadequacy of state courts.").

opposing concerns of federalism.[75] Federal question jurisdiction takes cases away from state trial and appellate judges and reflects a certain distrust.[76]

Third, the political choice between federal law enforcement and federalism is made less abstract but more perplexing by contending litigant factions formed around the two positions. There are always some groups that enjoy advantages over others through federal substantive law. The pendulum swings over time.[77] Currently, federal substantive law still "seems generally to favor interests supported by the liberal left."[78]

The remaining heads of federal jurisdiction to be discussed here conform to the pattern, if less vividly. In theory, diversity jurisdiction diminishes the influence of citizenship on the outcome of cases,[79] and admiralty jurisdiction promotes the na-

---

75. *See* Tushnet, *General Principles*, *supra* note 66, at 623-24. *Cf.* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (noting "the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception.").

76. *See supra* notes 70 & 74.

77. For example, federal law was politically conservative in the late nineteenth century, favoring monied, corporate interests to a greater extent than state law. This was true of both the general federal common law created under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *see* J. W. HURST, THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 190 (1950), and federal constitutional law. *Ex parte* Young, 209 U.S. 113 (1908), offers an illustration of the latter. Concluding that the eleventh amendment did not bar suit, the Court held that Minnesota's statute attempting to set maximum railroad rates violated the due process clause.

Shreve, *supra* note 72, at 605-06 n.22.

78. *Shreve*, *supra* note 72, at 605-06.

In particular, federal civil rights law, usually vindicated through 28 U.S.C. section 1983, has offered special advantages to minorities, to the disadvantaged, and to individuals who feel intruded upon by government. Typical section 1983 litigation finds persons so aggrieved suing state or local officials. The left is likely to be solicitous of the interests of such plaintiffs.

On the other side, conservatives are likely to sympathize with government defendants either because they see the benefit to which the plaintiff claims a right as one which government should have the discretion to withhold, or because they see the plaintiff's suit as interference with government's realization of some moral agenda. Moreover, conservatives favor local autonomy in making and enforcing moral judgments and find interruptions from without, *i.e.*, from the federal government through its judicial branch, particularly irritating.

Id. at 606 (citations omitted). *Accord*, A. COX, THE COURT AND THE CONSTITUTION 348 (1987).

79. *See* Friendly, *supra* note 67; Shapiro, *Federal Diversity Jurisdiction: A Survey and a proposal*, 91 HARV. L. REV. 317 (1977).

tional maritime interest.[80] These purposes are political because they deliberately sacrifice state trial jurisdiction,[81] and because they are often thought to produce substantive advantages.[82]

When returning to the language and history of article III, section 1, we see that these dual political concerns seem to account for the decision of the Framers of the Constitution to assign the future of lower federal courts to Congress. Not only were there charged political questions in the abstract concerning the relative powers of state and federal court systems,[83] but there was public consciousness even before ratification of the Constitution that different courts could mean different sets of winners.[84] Those at the Constitutional Convention who champi-

---

80. "[I]f there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the shipping industry—with all of them . . . ." G. GILMORE & C. BLACK, *supra* note 67, at 29.

81. Regarding diversity jurisdiction, see JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 41 (1990) ("Diversity is a source of friction between state and federal courts, particularly when a party commences an action based on diversity that is identical to an action pending in state court."). Regarding admiralty jurisdiction, see G. GILMORE & C. BLACK, *supra* note 67, at 47 (noting the "conflict between the state and federal courts over judicial jurisdiction in certain maritime cases").

82. Maritime shippers and their creditors are able to avail themselves of federal procedure and the expertise of federal trial judges concerning maritime law. Presumably, this permits them to do better on the merits of their cases as a group. Substantive advantages actually conferred by diversity jurisdiction have been more obscure since the inception of the *Erie* doctrine. *See supra* note 41, and *infra* note 84.

83. *See* G. ANASTAPLO, THE CONSTITUTION OF 1787 127 (1989); M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79-80 (1913); E. SURRENCY, HISTORY OF THE FEDERAL COURTS 13 (1987).

84. For example: "The function of colonial juries was to acquit smugglers and other violators of the Trade and Navigation Acts. The strategy of the English government was to remove litigation to the juryless forum of the vice-admiralty courts, whose judges were appointed by the Crown." G. GILMORE, THE AGES OF AMERICAN LAW 8-9 (1977). *Cf.* Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of Federal Courts*, 1989 DUKE L.J. 1421, 1458 (describing the pro-creditor bias of state courts during the 1780s).

The existence of federal diversity jurisdiction in the Constitution was to an extent attributable to the "desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation." Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 28 (1948). *Accord* Holt, *supra* at 1459-66. During the nineteenth century commercial litigants in fact became a much greater force in the economy and in law courts, and they often achieved substantive advantages by invoking federal diversity jurisdiction. T. FREYER, HARMONY & DISSONANCE: THE *Swift* & *Erie* CASES IN AMERICAN FEDERALISM 56, 110 (1981); J. W. HURST, *supra* note 77, at 190. These advantages were diminished by the *Erie* doctrine, *see supra* note 41, and by the amendment in 1958 of the general diversity statute to extend the citizenship of a corporation to the additional state, if any, "where it

oned the interests of state courts almost succeeded in purging from the Constitution any mention of lower federal courts. The "Madisonian Compromise," which became part of section 1, was expressly offered to mollify states-rights antagonists with an assurance that Congress would decide whether or to what extent lower federal courts would partake of the judicial power.[85]

Aspects of the internal operation of lower federal courts immediately caught the attention of Congress,[86] and it has never been doubted that it is proper and desirable for that body to consult policies of federal judicial administration in regulating federal jurisdiction.[87] It is important to stress, however, that policies of judicial administration accounted scarcely if at all[88] for

---

has its principal place of business." 28 U.S.C. § 1332(c) (1988).

85. Article III, section 1, appears in pertinent part *supra*, at note 47. For longer narratives of the events leading to its adoption see Shreve, *supra* note 5, at 416 & n.224; M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 21-22, 118, 125 (1937); Frank, *supra* note 84, at 10. It is true that the assorted materials making up the record of the Convention are not in all respects reliable, and that the Supreme Court worked for an initial period of thirty years without benefit of any published record. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986).

86. For discussions of court organization under the First Judiciary Act, see P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *supra* note 38, at 31; W. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 63-70 (W Holt & L. H. LaRue eds. 1990). For the text of the Act see G. SHULZ, CREATION OF THE FEDERAL JUDICIARY, S. Doc. No. 75-91, 75th Cong., 1st Sess. 125-48 (1937), *reprinted in* 1 B. REAMS & C. HAWORTH, CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY 1787-1977 at 129-52 (1978).

87. *Cf.* Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 522 (1990) ("Congress' Article III power to create the lower federal courts enables it to organize their operations as it sees fit.").

It is proper for Congress to be concerned with federal judicial administration because it appropriates funds supporting the federal judiciary; because it is charged with making changes in the infrastructure of the federal court system (for example, of redesign of middle-tier federal appeals in the Evarts Act, discussed in E. SURRENCY, *supra* note 83, at 246); and because it must have access to the full range of policy concerns (administrative and political) in deliberating legislative changes. For example, the full case for reducing the statutory breadth of present diversity jurisdiction rests on both a perception of the federal judiciary as overworked and concern over friction between state and federal courts. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 81, at 40-42.

The position of this paper is that administrative and political policies function differently concerning jurisdictional common law. While federal courts should not ignore the politics of federal jurisdiction in considering whether or how to make jurisdictional common law, politics should not be an end in itself. *See infra* notes 187-88 and accompanying text.

88. At least one delegate at the Constitutional Convention added to his state-rights opposition to lower federal courts the argument that "duplicate federal courts were too expensive." Frank, *supra* note 84, at 10. It is unclear, however, whether this was more than an afterthought.

the language in article III, section 1, reposing in Congress special authority over the federal judicial power.

Separation of powers concerns emanating from that provision are therefore less likely to be aroused when jurisdictional common law advances policies of judicial administration than when federal courts make such law to achieve political ends.[89] That is an important reason for concluding that authority for the former rests on firmer ground.

There is a second reason as well, one found in the special role federal courts play when the jurisdictional common law they make advances goals of judicial administration. Judicial administration is an accepted subcategory of jurisdictional policy[90] that is recognized in the arguments of the licit-per-se group.[91] Intuitively, the "fine tuning" imagery[92] these commentators use to argue for jurisdictional common law is more persuasive here than when used by the group to support jurisdictional common law advancing political goals.[93] Federal courts would obviously miss the power to initiate political preferences less than they would the power to respond to issues of judicial administration that materialize in their daily work. However, this paper seeks to go beyond intuitive argument in pressing the point. As we shall see in the next section, jurisdictional common law based on concerns of judicial administration is but part of a larger tradition of procedural lawmaking that calls for active judicial participation.

VI. Toward a Theory of Limited Authority for Jurisdictional Common Law

A. *Judicial Administration as Transsubstantive Procedure (and Why Both Should Be Taken Seriously)*

It may not always be possible to attribute particular developments in federal jurisdiction solely to political policies or

89. This pinpoints my disagreement with the licit-per-se group, since they include realization of this latter objective as a purpose for jurisdictional common law. *See, e.g.*, Althouse, *supra* note 12, at 1050-51; Friedman, *supra* note 12, at 60; Matasar & Bruch, *supra* note 12, at 1356 & n.341; Shapiro, *supra* note 7, at 574; Wells, *supra* note 12, at 1132.

90. *E.g.*, Wells, *supra* note 74, at 512.

91. *See supra* note 57 and accompanying text.

92. *See supra* note 63 and accompanying text.

93. *See supra* note 89.

solely to policies of judicial administration;[94] however, the categories themselves are in important respects quite different. We have seen how political policies of federal jurisdiction are laden with substantive values (enhancing federal law enforcement, respecting state sovereignty, promoting maritime commerce, etc.). In contrast, policies of judicial administration secure from jurisdictional law procedural rather than substantive ends. The immediate focus of these policies is on the kind and quality of the adjudication rather than on the result. Their ultimate focus is on substantive law only in a transsubstantive[95] sense. That is, policies of judicial administration strive for the most sensitive and widespread validation of substantive law in the lives of litigants and the public, *whatever substantive law might be.*

Policies of judicial administration have been underrated. In their stature and resonance as legal theory, they are as significant to the law of federal jurisdiction as policies from the political sphere.[96] This is probably a controversial view.[97] I accept the following burden in offering it. To be taken seriously, jurisdiction based on policies of judicial administration faces a challenge like that for other transsubstantive conceptions of procedure. It

---

94. *See infra* note 188.

95. For other references to procedure as transsubstantive, see Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-tras-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067-68 (1989); Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. Rev. 215, 224-25 (1987); Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633 (1988).

96. Much depends on this proposition. It would be difficult for this paper to be persuasive in offering policies of judicial administration as a superior base of authority for jurisdictional common law, if those policies proved inaudible or insignificant when compared to political policies for jurisdiction. Professor Judith Resnik noted that many seem willing to make such an assumption. "In discussions of federal courts and procedure, a stock term ["housekeeping"] is available . . . to describe some practice or rule as unimportant, trivial, or not worthy of much attention." Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 914 (1990).

97. Over time, many have taken positions which seem at odds with the conception of transsubstantive procedure offered in the text. From different perspectives, they have suggested that the acknowledged (or unacknowledged) internal pursuit of procedure is to confer particular substantive advantages. *E.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, LAW & SOC'Y REV. 95 (1974-75); Tobias, *Federal Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989).

must (1) reflect an intelligible and significant theory of value and (2) have proof in application. The paper thus offers a theory, pragmatic instrumentalism, and then applies it in the course of discussing four species of jurisdictional common law.

B. Pragmatic Instrumentalism—A Theory of Value for Policies of Judicial Administration

I will try to be brief in this section of the paper; however, because so little attention has been given to the jurisprudence of transsubstantive procedure, I must do some building from the ground up. My purpose is to explain why, when we think of policies of judicial administration as transsubstantive procedure, those policies can be valued and better understood as forms of pragmatic instrumentalism.

Pragmatism emerged as an American philosophical movement shortly before the turn of the century.[98] Leading figures were Charles Saunders Peirce, William James and John Dewey.[99] To an extent, the movement concerned itself with law and legal theory from the outset.[100] Dewey's work excited Oliver Wendell Holmes, Jr.[101] and pragmatist themes frequently ap-

---

98. For a more detailed synopsis of the movement and its applications in legal theory, see Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and* Will, 66 IND. L.J. 1, 26-37 (1990). Pragmatism has attracted a good deal of recent interest among legal commentators. For different interpretations, see R. POSNER, THE PROBLEMS OF JURISPRUDENCE 454-69 (1990); Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 (1990); Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

99. One of the main features of pragmatism, which comes out not only in Peirce but also in James and Dewey and their followers, is that it is a dynamic philosophy. In contrast to philosophers like Plato and Descartes who adopt the standpoint of a pure intelligence in contemplation of eternal verities, the pragmatists put themselves in the position of an enquirer adapting himself to and helping to modify a changing world.

A. J. AYER, THE ORIGINS OF PRAGMATISM 5-6 (1968).

100. Peirce's contacts with those trained and interested in the law were informal but possibly important to the development of his theories. P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 19 (1949). Dewey took a direct and visible interest in law. *See, e.g.*, Dewey, *Austin's Theory of Sovereignty*, 9 POL. SCI. Q. 31 (1894); Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

101. P. WIENER, *supra* note 100, at 186-87; Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85 (1942); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989).

peared in the writing of Roscoe Pound.[102] Pragmatism also greatly influenced the Realist Movement.[103]

A number of terms in addition to pragmatism have been applied to the movement, including instrumentalism, functionalism, and experimentalism.[104] Professor Robert Summers' concept, pragmatic instrumentalism, is particularly helpful to the approach in this paper.[105] He defines pragmatic instrumentalism this way:

> First, it conceives the primary task of legal theory to be the provision of a coherent body of ideas about law which will make law more valuable in the hands of officials. . . . Second,

---

102. D. WIGDOR, ROSCOE POUND 183-205 (1974); Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 93 n.319 (1989); Golding, *Jurisprudence and Legal Philosophy in Twentieth Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 450 (1986).

103. *See* L. KALMAN, LEGAL REALISM AT YALE 16-17 (1986); W. RUMBLE, AMERICAN LEGAL REALISM 4-8 (1968); Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 864-65 (1981). *Cf.* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 423 n.130 (1973) ("Llewellyn's private ambition, as he once confessed in a lecture, was to perform the role of a Dewey in jurisprudence, trying to do for law what the great man had done for other subjects. The most pleasing compliment that could be paid to Llewellyn was to compare him to John Dewey.") and D. WIGDOR, *supra* note 102, at 261 (noting "the realists' extremely pragmatic angle of vision").

104. While all three were pragmatists, the term is most frequently applied to Pierce and James. Dewey's work is called in addition instrumental, functional, or experimentalist. *See e.g.*, E. FLOWER & M. MURPHEY, A HISTORY OF PHILOSOPHY IN AMERICA 819 (1977) (describing Dewey as having developed "his functionalism into the mature instrumentalism which was his version of pragmatism."); M. WHITE, PRAGMATISM AND THE AMERICAN MIND 51 (1973) (describing "the emergence of [Dewey's] distinctly instrumentalist, pragmatist, or experimentalist outlook.").

Shreve, *supra* note 98, at 28 n.146.

105. *See R. Summers, Instrumentalism and American Legal Theory* 19 (1982). "Pragmatic instrumentalism" provides a more complete definition of the movement than the word pragmatism alone because the phrase draws attention to Dewey's instrumentalism, which is particularly important to modern legal theory. "Dewey's own focus was not so much on the methods of the natural sciences (as with Peirce) or on the life-situation of the individual (as with James), but more on issues of social theory, politics and law." Grey, *supra* note 101, at 791. Instrumentalism is appealing today because, as Morton White earlier described it, instrumentalism "holds that ideas are plans of action, and not mirrors of reality; that dualisms of all kinds are fatal; that the method of intelligence is the best way of solving problems; and that philosophy ought to free itself from metaphysics and devote itself to social engineering." M. WHITE, SOCIAL THOUGHT IN AMERICA 7 (1957).

This broader meaning of "pragmatic instrumentalism" is what I intend in the paper, even when (for the sake of the reader) I shorten the phrase to "pragmatism" or "instrumentalism."

> [it takes the view] that legal rules and other forms of law are most essentially tools devised to serve practical ends. . . . Third, [it focuses] on the instrumental facets of legal phenomena, including: the nature, variety, and complexity of the goals law may serve; law's implementive machinery; the kinds of means-goal relationships in the law; the variety of legal tasks that officials must fulfill to translate law into practice, the efficacy of law; and its limits.[106]

Two of the themes recurring in the writings of instrumental legal critics will be of particular interest in viewing policies of judicial administration as pragmatic instrumentalism. First, they insisted that greater attention be given to what those having roles in legal institutions (particularly courts) actually did. How well courts responded to the needs of society depended in part on the efficiency and instrumental sensitivity of the judicial process.[107] In deciding cases, then, judges had to be institutionally self-regarding—they best understood the needs of judicial administration[108] and bore greatest responsibility if those needs went unattended.[109] Second, these critics insisted that facts tested and in part shaped the law. Therefore, legal rules alone might not indicate how cases were or ought to be decided. Often such rules were capable of providing no more than a method for accommodating possible results, for coping with the variability of facts.[110]

Since pragmatic instrumentalism in American philosophy

---

106. R. SUMMERS, *supra* note 105, at 20.

107. The idea of judicial instrumentalism offered here differs (and conflicts) with discussion of the instrumental use of judicial decision to advance a particular set of political or socioeconomic values. For an example of the latter, see M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (reading Swift v. Tyson, 41 U.S. 1 (1842), as Justice Story's "attempt to impose a procommercial national legal order on unwilling state courts"). Instrumentalism in this paper connotes inquiry into needs and possibilities of the judicial process unattended by commitment to any particular set of "higher" values. Internally, judicial instrumentalism used here is "a theory that may be characterized as utilitarian, quantitative, conventionalist, and majoritarian in tenor." R. SUMMERS, *supra* note 105, at 42.

108. *Cf.* R. SUMMERS, *supra* note 105, at 21 (noting that a "pragmatic focus" in legal theory "extends beyond the law's external effects and includes the workings of its internal processes—its complex implementive technology, and its basic modes of operation").

109. *See supra* note 59. The influence of Dewey's instrumentalism is most evident here. *See* M. WHITE, *supra* note 105.

110. Roscoe Pound thus displayed "Jamesian pragmatism" in contending "that legal rules and precedents should be thought of as *guides* to decision rather than rigid prescriptions governing fixed categories." Golding, *supra* note 102, at 450 (emphasis in original). "[W]hat Pound was calling for was sensitivity to the *facts* in a case." *Id.* (emphasis in original).

did not so much invent as clarify ways of thought,[111] it follows that some attitudes toward procedure anticipated the instrumentalist movement. Yet the conscious influence of pragmatic instrumentalism was quite evident from the beginning of the twentieth century. Pound,[112] William H. Taft,[113] Thomas Shelton,[114] and Charles Clark[115] among others, used it to criticize what they considered to be the antiquated, formalistic character of civil procedure.[116] The most concrete and significant result of their reform efforts was the original Federal Rules of Civil Procedure in 1938.[117] Embracing two instrumentalist themes in the

---

111. Holmes wrote, "judging the law by its effects and results did not have to wait for W[illiam] J[ames]." 1 HOLMES—LASKI LETTERS 20 (M. Howe ed. 1953) (brackets in original). According to another commentator, "'[w]e were all Deweyites before we read Dewey, and we were all more effective reformers after we had read him.'" W. RUMBLE, *supra* note 103, at 8 (quoting J. Allen Smith).

112. *E.g.*, Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 405-06, 408-09, 412 (1906) [hereinafter Pound, *Causes of Popular Dissatisfaction*]; Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438 (1910); Pound, *Principles of Practice Reform*, 71 CENT. L.J. 221 (1910); Pound, *supra* note 59; Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 491, Pts. I & II (1910).

113. *E.g.*, Taft, *Adequate Machinery for Judicial Business*, 7 A.B.A. J. 453 (1921); Taft, *The Administration of Justice—Its Speeding and Cheapening*, 72 CENT. L.J. 191 (1911); Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3 (1916); Taft, *The Delays of the Law*, 18 YALE L.J. 28 (1909); Taft, *Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts*, 95 CENT. L.J. 261 (1922).

114. *E.g.*, Shelton, *Reform and Uniformity of Judicial Procedure*, 76 CENT. L.J. 111 (1913); Shelton, *Simplification of Legal Procedure—Expediency Must Sacrifice Principle*, 71 CENT. L. J. 330 (1910); Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 CENT. L.J. 207 (1913).

115. His writings were the most extensive and appeared over a longer span of time. *See generally* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (2d ed. 1947); PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK (C. Wright & H. Reasoner eds. 1965). For his views on improving procedure see, e.g., Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443 (1935); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, *supra* note 58; Clark, *Stability and Change in Procedure*, 17 VAND. L. REV. 257 (1963). He was particularly interested in pleading reform. *See, e.g.*, Clark, *The Code Cause of Action*, 33 YALE L.J. 817 (1924); Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934); Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517 (1925); Clark, *Simplified Pleading*, 27 IOWA L. REV. 272 (1942).

116. For example, Pound decried "[u]ncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice . . . ." Pound, *Causes of Popular Dissatisfaction*, *supra* note 112, at 408. On American civil procedure in the nineteenth century, see generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 157-78 (1973); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 39-42, 52-64 (1952); E. SURRENCY, *supra* note 83, at 131-43.

117. Narratives of events leading to adoption of the Federal Rules appear in Bone, *supra* note 102; Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-95 (1982); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil*

law noted earlier,[118] the federal rules enlarged the authority of trial courts to adjust the scope and complexity of particular cases to the capacities of the litigation process,[119] and diminished the constraining presence of legal rules[120] in fact-sensitive[121] procedural controversies. Reforms may have been incom-

---

Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 943-75 (1987).

118. *See supra* notes 107-10 and accompanying text.

119. A role- and context-regarding perspective characteristic of pragmatic instrumentalism often emerged in the original rules, encouraging the parties and court to search for the appropriate limits of each case. This was especially true in the area of complex litigation. For example, Rule 18 permitted liberal claim joinder while Rule 42(b) gave federal courts discretion later to try claims separately when useful in particular cases. G. SHREVE & P. RAVEN-HANSEN, *supra* note 41, at 222-23. Similarly, Rule 20 authorized permissive joinder of parties, enabling judges to use a "pragmatic approach to ideal lawsuit structure" and giving "the trial judge wide latitude to create convenient litigating units." Bone, *supra* note 102, at 105. *See generally* Comment, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958).

This perspective grew as the rules were amended. Particularly significant were the 1966 amendments to the multiparty rules, discussed in Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356 (1967); Comment, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531 (1968).

120. Often this was implemented by committing aspects of procedural decisionmaking to trial court discretion, for example in Rule 15 (amendment) and Rule 24(b) (permissive intervention). On the purposive use of discretion in the Rules, see Rosenberg, *supra* note 58.

This second feature reflects pragmatism's distrust of rules which interfere with the process of comprehending and reacting to the context of particular cases. Thus, the figure most responsible for creation of the Federal Rules urged a restricted role for rule-centered appellate courts in administering them. The Rules, Clark stated, were often best "interpreted in light of what the court or the litigant to whom they are addressed makes them mean and can reasonably be permitted to make them mean in the light of their purpose." Clark, *supra* note 58, at 503.

121. The term takes in all of the potential idiosyncracies that can make types of procedural decisionmaking rule-resistant. Earlier, I offered an example in applications to intervene:

> With reference to each disputed intervention application, such elements of the case as the litigation resources of the parties, the urgency of the parties' need to conclude the litigation, the complexity of existing issues, and the press of other matters on the court's docket must be examined. Courts should also seriously consider opportunities provided by intervention to obtain data making possible a more just or accurate decision. . . . [They should also consider particular interests of the applicant including] . . . the precise effects feared from the litigation, the value or tangibility of interests asserted to be endangered, the existence and relative desirability of alternative means, if any, to protect the applicant's interest, and perhaps the applicant's financial ability to commence his own suit.

Shreve, *Intervention*, *supra* note 2, at 909-10. Judge Friendly emphasized the rule-resistant character of intervention controversies in United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 990-91 (2d Cir. 1984).

plete,[122] but changes brought by the federal rules in these and other ways were impressive.[123]

The influence of pragmatic instrumentalism is also evident in developments elsewhere in procedure, including choice of law,[124] res judicata,[125] and personal jurisdiction.[126] To see how pragmatic instrumentalism helps to explain and delineate jurisdictional policies of federal judicial administration, let us turn to some examples.

VII. Licit and Illicit Jurisdictional Common Law

We will be able to consider a few types of jurisdictional common law from what is probably a much longer list.[127] First, the paper features two categories that place in sharp relief the possibility that jurisdictional common law may be both licit and illicit: abstention in favor of concurrent state litigation and state

---

122. Thus, Rule 24 still denies federal trial courts discretion to deal with the full range of pragmatic concerns surveyed in note 121, *supra*. Shreve, *Intervention*, *supra* note 2, at 912-16.

123. Comparing the relative simplicity and flexibility of the new rules with the law they replaced, Professor Subrin wrote: "The Federal Rules were the antithesis of the common law and the Field Code. Through the Federal Rules, equity had swallowed common law." Subrin, *supra* note 117, at 974. Professor Wright has observed that "[t]he success of the Federal Rules of Civil Procedure has been quite phenomenal," that they have created "a uniform procedure that is flexible, simple, clear, and efficient." C. Wright, *supra* note 23, at 405. The Federal Rules have become the model for the procedural rules of most states. *See generally* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986).

124. For example, from the first to the second Restatement of Conflict of Laws, the American Law Institute moved from a closed system of choice-of-law rules to an approach sensitive to the content of conflicting laws and to the needs of parties and courts in particular cases. Shreve, *Choice-of-Law Reviewing Standard*, *supra* note 73, at 343-44.

125. *See* Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 Ind. L.J. 615, 615-20 (1980). The American Law Institute underwent a change of perspective concerning res judicata similar to that for conflicts discussed *supra*, note 124. *See generally Symposium on the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 401 (1981).

126. The shift was from territorial formalism in Pennoyer v. Neff, 95 U.S. 714, 721-32 (1877), to a pragmatic approach for determining whether a nonresident defendant's contacts with the forum state justified personal jurisdiction, beginning in International Shoe Co. v. Washington, 326 U.S. 310, 316-19 (1945). *See generally* G. Shreve & P. Raven-Hansen, *supra* note 41, at §§ 12-15. For a recent exception to this trend see Burnham v. Superior Ct. of Cal., 110 S. Ct. 2105 (1990), discussed in Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. Davis L. Rev. 19 (1990), and Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C.L. Rev. 529 (1991).

127. *See supra* note 31.

sovereign immunity as common law. We then examine the forum non conveniens and *Younger* doctrines.

A. *Refusals to Exercise Jurisdiction Because of Concurrent State Litigation*

In a series of cases,[128] the Supreme Court developed the doctrine permitting federal courts to stay exercise of their jurisdiction or dismiss suits altogether "where there is a parallel state court proceeding in which the dispute can be resolved satisfactorily."[129] Federal courts are counselled to approach this doctrine cautiously. They are entitled to abstain on concurrency grounds only when evaluation under an approved list of factors suggests no other answer.[130] Abstentions that occur under the doctrine are based in common law. That is, they are refusals to exercise the jurisdiction[131] conferred by statute.[132]

This is a licit form of jurisdictional common law because it appears to be grounded entirely on policies of judicial administration. The Supreme Court has made this quite clear, saying that the doctrine was "one resting not on considerations of state-federal comity or on avoidance of constitutional decisions . . . but on 'considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[133]

This declaration can be confirmed in two ways. First, criteria governing these abstentions raise administrative rather than political concerns. These include "the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and

---

128. The leading examples are Moses H. Cone Memorial. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Colo. River Water Conservation. Dist. v. United States, 424 U.S. 800 (1976).

129. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 100 (1986). For other discussions of the concurrency doctrine, see Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651 (1985); Comment, *Federal Court Stays and Dismissals In Deference To Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977).

130. "Only the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 819. Federal courts are instructed to proceed "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses Cone*, 460 U.S. at 16.

131. The Court noted concerning the doctrine "that a stay is as much a *refusal to exercise federal jurisdiction* as a dismissal." *Moses Cone*, 460 U.S. at 28 (emphasis added).

132. *See, e.g.*, Doernberg, *supra* note 11, at 1015; Mullenix, *supra* note 129, at 104.

133. *Moses Cone*, 460 U.S. at 14-15 (quoting *Colorado River*, 424 U.S. at 817).

the order in which jurisdiction was obtained by the concurrent forums."[134]

Second, the pragmatist shape of inquiries whether to invoke the doctrine underscores their court-administrative orientation.[135] Results are to be reached through a supple, method-centered use of the criteria, an approach sensitive to variations in succeeding cases.[136] As the Court said in *Colorado River*, "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required."[137] It added in *Moses Cone* that the approach "does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case."[138]

Why federal courts should have authority to fashion and administer this doctrine will become clearer when we compare it to the next type of jurisdictional common law to be considered.

B. Common Law State Sovereign Immunity

The eleventh amendment is the only part of the Constitution that expressly limits the federal judicial power in the name of federalism. A substantial body of state sovereign immunity law has grown up around the amendment, barring most litigation against states and much against state officials. The most significant applications of that law prevent claimants from suing their own states or state officials.[139] While these situations are

---

134. *Colorado River*, 424 U.S. at 818 (citations omitted).

135. I attempted to show earlier in the paper how policies of judicial administration reflected transsubstantive procedure, *see supra* Part VI A, and how pragmatic instrumentalism served as a jurisprudence for transsubstantive procedure, *see supra* Part VI B.

136. On the pragmatist character of such an approach, see *supra* notes 119 & 121 and accompanying text.

137. *Colorado River*, 424 U.S. at 818-19.

138. *Moses Cone*, 460 U.S. at 16.

139. The Supreme Court extended state immunity in this fashion through a line of cases beginning with Hans v. Louisiana, 134 U.S. 1 (1890). Questions how to interpret (or whether to overrule) *Hans* have sparked a great deal of commentary. *E.g.*, Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931 (1989-90); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); W. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); Sherry, *The Eleventh Amendment and Stare*

not addressed by its text,[140] most understand this immunity to be a continuation of eleventh amendment doctrine.[141]

Justice Stevens does not. He has claimed that citizen suits are barred instead by a "judicially created doctrine of state immunity."[142] The basis for that doctrine is, according to Justice Stevens, "a prudential interest in federal-state comity and a concern for 'Our Federalism.'[143] The process of decision is one of "balancing of state and federal interests."[144] Others have also suggested a role for federal common law in setting levels of state immunity from federal suit.[145] However, if we compare this form of jurisdictional common law with concurrency-based absten-

---

Decisis: Overruling Hans v. Louisiana, 57 U. CHI. L. REV. 1260 (1990).

140. The eleventh amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

141. For further discussion of this topic see C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 46-74 (1972); J. ORTH, THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 12-29 (1987); Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment: Revisionist Scholarship and State Immunity*, 68 N.C.L. REV. (1990); Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643 (1985); Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DE PAUL L. REV. 321 (1989); Easley, *The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents*, 64 DEN. U.L. REV. 485 (1988); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983); Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 So. CAL. L. REV. 51 (1990); Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); W. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DE PAUL L. REV. 345 (1990); L. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

142. Pennsylvania v. Union Gas Co., 491 U.S. 1, 14 (1989) (Stevens, J., concurring). In addition, see Dellmuth v. Muth, 491 U.S. 223, 234 (1989) (Stevens, J., dissenting).

143. *Union Gas*, 491 U.S. at 25 (Stevens, J., concurring).

144. *Id.* at 2288.

145. Even if Justice Stevens is wrong in believing that citizen suits are not directly governed by the eleventh amendment (*see Hans* and the commentary about the case *supra* notes 139 & 141), some have suggested a role for federal common law in filling part of the vacuum created if the Supreme Court overrules *Hans*. *E.g.*, Field, *supra* note 141; Jackson, *supra* note 141.

tions,[146] it may be possible to see why only the latter is legitimate.

Authority to deny jurisdiction over concurrent federal litigation permits federal courts to make front-line adjustments in jurisdiction in order to conserve judicial resources and make the litigation process fairer to the parties.[147] Federal courts work no broad-stroke changes with this form of jurisdictional common law. Individual applications of the concurrency doctrine exert little pull on succeeding cases, since they are the results of method rather than the process of creating or expounding upon rules.[148] The value in authorizing such law is that it creates opportunities for federal courts to respond to needs that cannot be generalized and met by statutory grants of jurisdiction. It permits federal judges authority to adjust the judicial power to exploit particular opportunities to improve—fine tune—procedure.

Recall that, quite unlike concurrency-based abstention, the idea of common law state sovereign immunity seems grounded entirely on political policies.[149] For three reasons, the fine-tuning metaphor is therefore out of place. First, federal judges would not make state sovereign immunity law from a superior—or even equal—vantage point. While particular features of the case before the court dominate a concurrency inquiry, a decision where the balance between the federal judicial power and federalism should lie cannot be informed by any single case. The scope of inquiry for the latter must be commensurate with the broad-spectrum effect such decisions have. Congress is in a better position to comprehend this large picture.[150] When federal judges toss in their views on the politics of federal jurisdiction—views formed by anecdotal impressions about what might be going on outside their courtrooms—it seems much too generous to describe the process as fine tuning.

Second, the demands of judging create no special need to make common law about state sovereign immunity. It is appealing to permit federal courts to make front-line adjustments in

---

146. *See supra* Part VII A.

147. I am taking the words of the Court at face value. *See supra* note 133 and accompanying text. Professor Brown is less inclined to do so. *See* Brown,*Federalism*, *supra* note 32, at 145 ("*Colorado River* dismissals" advance at least some "federalism goals.").

148. *See supra* notes 119-21, 136 and accompanying text.

149. *See supra* notes 143 & 144 and accompanying text.

150. *See, e.g.*, HEARINGS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE COMMITTEE ON THE JUDICIARY, 97th Cong., 1st Sess, [No. J-97-30] (1981) (hearings on bills to reduce the federal question jurisdiction of United States District Courts).

procedure to respond to the idiosyncracies of a case, even when they are adjustments to the federal judicial power.[151] However, state sovereign immunity law is built on a political gesture of federalism.[152] And it is evident from the amount of procedural instability tolerated under current doctrine that the gesture is made with little concern about what is best for federal procedure. Particularly taxing have been distinctions required between state and municipal defendants,[153] between retroactive and prospective relief,[154] and between official-capacity and personal-capacity defendants.[155]

Third, the fallout from state sovereign immunity doctrine on later cases would be greater than that from the concurrency doctrine.[156] The former would almost certainly be rule-bound[157] and statute-like.[158] This would not make it unique as federal

---

151. On the function and value of such adjustments in concurrency doctrine, see *supra* notes 137, 138, the text accompanying these notes, and the text following note 148.

152. *See supra* note 143 and accompanying text.

153. "Suit is barred only when the state government is the defendant. Agencies of the state come under this heading, but its political subdivisions do not. Thus municipal corporations, counties and school boards may be sued in federal court . . . ." R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 40, at 86.

Whether the same function is performed by state or local government can vary state to state, creating a lack of uniformity among federal courts concerning when challenges to government action are covered by federal jurisdiction. Moreover, it is not always clear whether a particular defendant is a part of state or local government. *See, e.g.*, Clague, *Suing the University "Black Box" Under the Civil Rights Act of 1871*, 62 IOWA L. REV. 337 (1976). Finally, the relationship between state and municipal entities may be such that complete relief cannot be granted in litigation against only the latter. *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

154. Federal courts are free to enjoin state officials threatening to violate plaintiffs' rights under federal law. *See Ex parte* Young, 209 U.S. 123 (1908). They may not, however, order state officials to pay or release state funds when the order would be in practical effect like a judgment against the state treasury. Edelman v. Jordan, 415 U.S. 651 (1974). Between these two rules lies an uncertain area, where the law of federal jurisdiction becomes entangled with the law of remedies. *See* Lichtenstein, *Retroactive Relief in the Federal Courts Since* Edelman v. Jordan: *A Trip Through The Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982).

155. When local or state officials act in their official capacities, their liability is likely to be pegged to that of their government unit. Their liability exposure is usually greater when they are sued as individuals. *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 6.14 (2nd ed. 1986). This distinction can prove elusive in application. *Id.* at § 6.04. An example at the state level occurs in Kentucky v. Graham, 473 U.S. 159 (1985).

156. On the rule resistant, transitory character of concurrency-doctrine decisions, see *supra* notes 136-38 and accompanying text.

157. The highly rule bound character of the *Hans* doctrine (which Justice Steven believes to be jurisdictional common law, *see supra* note 142 and accompanying text) provides an example.

158. Common law of state sovereign immunity would be statute-like in a way com-

common law.[159] The reason for concern is that state immunity doctrine would represent rulemaking on matters to which the attention of Congress is specially directed by the language and history of article III.[160] Thus authority for a common law of state sovereign immunity would enable federal courts to make just the sort of broad-stroke adjustments between the contending interests of federal law enforcement and federalism that have been committed to Congress.

C. Forum Non Conveniens Doctrine

Concurrency doctrine (licit) and state sovereign immunity doctrine (illicit) permit fairly clean applications of the theory of limited authority for jurisdictional common law presented in this paper. So does what remains of the federal doctrine of forum non conveniens. It furnishes another example of licit jurisdictional common law.

Federal forum non conveniens doctrine reached full flower in *Gulf Oil Corp. v. Gilbert*.[161] As the Supreme Court would later say about the concurrency doctrine,[162] *Gulf Oil* made clear that refusal of jurisdiction on forum non conveniens grounds was reserved for extraordinary cases. The doctrine permitted federal courts to refuse jurisdiction when a plaintiff filed in a forum significantly less convenient than a second forum, and when it seemed likely that second forum would entertain the case if the plaintiff were forced to refile it there. Congress soon codified much of the *Gulf Oil* decision, providing for venue transfers within the federal court system.[163] Freestanding forum non conveniens doctrine survives, however, when the significantly more convenient forum is not located in the United States.[164]

There is a strong parallel between the concurrency and forum non conveniens doctrines. First, policies of judicial administration drive both. In *Gulf Oil*, Justice Jackson enlisted those

---

parable to the *Younger* doctrine. For descriptions of that characteristic in the latter, see *supra* note 35 and accompanying text; *infra* note 181 and accompanying text.

159. Substantive federal common law can be as rule-centered as statutory law. *See* the discussions appearing *supra* note 20.

160. *See supra* notes 47, 50, 83-85 and accompanying text.

161. 330 U.S. 501 (1947).

162. *See supra* note 130 and accompanying text.

163. *See* 28 U.S.C. § 1404(a) (1988).

164. For discussions of the doctrine in this context, see Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

policies in the creation of a series of criteria to be applied in determining when jurisdiction should be refused.[165] Second, each doctrine pursues those policies through pragmatic instrumentalism. Jackson stressed that forum non conveniens doctrine was but a method for sifting the facts of cases, and that the criteria to be applied were likely to lead to different results.[166]

D. The Younger *Doctrine*

Abstentions in a line of cases beginning with *Younger v. Harris*[167] provide the last and most complicated example of jurisdictional common law. This doctrine is illicit in some of its applications and suspect generally for overbreadth. The "Our Federalism" notion invoked by the doctrine straddles three concepts: equity, comity and federalism.[168] Only equity offers a basis for licit jurisdictional common law.

Principles of equitable restraint rest on concerns of judicial administration. Those principles offer one of the oldest examples of pragmatic instrumentalism.[169] Equity evolved to a large extent as a natural law reaction against legal formalism, "to temper and mitigate the rigor of the law."[170] However, among the problems encountered by equity were difficulties of legal justification, precisely because its decisions were less a result of rule-

---

165. They included

> the relative ease of access to sources of proof; availability of compulsory process for attendance of the unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil, 330 U.S. at 508.

166. *Id.* at 508. "[T]he combination and weight of factors requisite to given results are difficult to forecast or state . . . ." *Id.* On the comparable approach of the Court under the concurrency doctrine, see *supra* notes 136-38 and accompanying text.

167. For an explanation of the *Younger* doctrine and of the manner in which it functions as jurisdictional common law, see *supra* notes 32-37 and accompanying text.

168. *E.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592, 602-03 (1975); Steffel v. Thompson, 415 U.S. 452, 462 (1974).

169. Examples of pragmatism predate the pragmatist philosophical movement. *See supra* note 111 and accompanying text.

170. C. ST. GERMAIN, DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND 45 (W. Muchall trans., 18th ed. 1792). *See also* P. HOFFER, THE LAW'S CONSCIENCE 8 (1990) (discussing Aristotle's view on the necessity of equity to lessen the severity of law); 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 281 (1924) (equity necessary for the law to do complete justice); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 1 (1972) ("In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right . . . .").

bound ceremony.[171] Natural law justifications for equitable power failed to suggest a stopping point. The intrusions of equity on law and law courts had to be limited somehow, hence the introduction of what might now be called pragmatist considerations. This idea becomes clearer when we consider how pragmatism stabilized injunctions, one of three remedies to evolve from English equity practice.[172]

It remains true that authority for issuing injunctions is largely shaped by admonitions (reasons why injunctions should be refused). Taken together they make up what can be termed equitable restraint, or equitable discretion.[173] Most enjoy a long history, many as rather colorful maxims. For example, those who seek an injunction must have clean hands, and must not be tardy in seeking an injunction.[174] In promoting context-sensitive inquiry, even the hoariest of these maxims suggests a pragmatist approach. They are supple like equity.[175] Yet the maxims create a gauntlet that has long enhanced respectability of injunctions, making them seem more the result of a deliberative process.

One reason for refusing injunctions developed later. It was largely American in origin, and appeared about the same time as pragmatism. Sometimes referred to as "balancing the equi-

---

171. This prompted John Selden's famous observation that equity, "a roguish thing," depended upon the length of the Chancellor's foot. H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 50 n.8 (2d ed. 1948) (quoting Gee v. Pritchard, (1818) 2 Swanst. 402, 414, 36 Eng. Reprint 670, 679). In addition, see, G. McDOWELL, EQUITY AND THE CONSTITUTION 30-31 (1982); Emmerglick, *A Century of the New Equity*, 5 COLUM L. REV. 20, 24 (1905).

172. The other two were specific performance and judicial administration of estates. F. MAITLAND, EQUITY 22 (2d rev. ed. 1936). American courts borrowed from English equity practice early on, Glenn & Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945), Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913); and injunctive remedies have long been administered in the United States. For a description of early practice, see 1 J. STORY, *supra* note 170, at 163-64. For later developments, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 997 (1965).

173. *See generally* Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982); Schoenbrod, *supra* note 95; Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. LAW 477 (1979).

174. For discussion of these maxims, see W. DE FUNIAK, HANDBOOK OF MODERN EQUITY §§ 24, 98 (2d ed. 1956). A longer list appears in P. HOFFER, *supra* note 170, at 10-11. They "echoed the duality of equity—natural justice captioned as mechanical rules." *Id.* at 10.

175. Thus, while statutes of limitation apply the same time limit (*e.g.*, two years) to all legal claims within the statutory category, administration of the maxim that equity aids the vigilant (laches) employs no set time figure but determines the cost of delay on the particular facts of each case. W. DE FUNIAK, *supra* note 174 at 41-42.

ties,"[176] it means that the injunction should be denied when it would be much harder for a defendant to live under it than for a plaintiff to live without it. There is a strong affinity between balancing the equities and pragmatism. Like others, this limitation encourages sensitivity to the variability of context in injunction cases. The device of balancing the equities is pragmatic in the additional sense that it makes judges think about how their decisions will affect the lives of the parties and possibly others.[177]

In addition to aspects of equitable discretion discussed so far, there are a series of restraining concerns that arise so frequently in injunction cases that they form a special class, often called equitable jurisdiction. They can be summarized as follows. Plaintiff must show that without an injunction she will suffer immediate, substantial, and irreparable harm.[178] And she must also show that an injunction will be manageable[179]—that the case presents no serious difficulties for the court in framing or enforcing the injunctive decree.[180]

Little of this picture of equity's dynamic, instrumental per-

---

176. *See generally* Keeton & Morris, *Notes on "Balancing the Equities"*, 18 TEX. L. REV. 412 (1940); Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine in Equity*, 28 S. CAL. L. REV. 139 (1955). The doctrine became an important "tool for economic and social readjustment." P. HOFFER, *supra* note 170, at 147.

177. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937). *See also* Yakus v. United States, 321 U.S. 414, 441 (1944).

178. The irreparability requirement is sometimes formulated differently: that the party seeking the injunction have no adequate remedy at law. *See* D. LAYCOCK, *supra* note 32 at 8-9; Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEX. L. REV. 1065, 1070 (1979).

179. *Cf.* W. DE FUNIAK, *supra* note 174, at 24 ("Where the court has the theoretical power to grant an injunction but enforcement is impracticable or impossible, the court will not grant the injunction. It would be derogatory of the dignity of the court to enter orders it could not enforce.").

180. For an extended, illustrated discussion of the elements of equitable jurisdiction identified in the text, see Shreve, *supra* note 5, at 388-97.

Equitable jurisdiction serves judicial administration by asking the case-specific question, are the needs of the plaintiff and the posture of the case such that the costs of injunctive relief are worth paying? They are not if plaintiff's prospect of harm without an injunction is not immediate and substantial, or if damage recovery would not leave plaintiff far short of the advantage she would obtain from an injunction. Even when plaintiff can make this entire showing of need for an injunction, the final hurdle of manageability remains. That invites the court to examine the practical effects of an attempt to enjoin the defendant—the court's capacity for a coherent response. This is a more charitable view of equitable restraint than professors Fiss and Laycock have taken. *See* D. FISS, THE CIVIL RIGHTS INJUNCTION (1978); D. LAYCOCK, *supra* note 32 (both criticizing current remedies law for making it more difficult to obtain an injunction than damages).

sonality is reflected in the *Younger* doctrine. The Court has instead welded cases into an ersatz jurisdictional statute, a flat rule against jurisdiction over injunctive or declaratory cases when state judicial proceedings predate the federal case.[181] Because the rule forecloses individual, fact-sensitive inquiries necessary to determine whether equitable restraint is warranted, it is hard to tell which of the cases *Younger* barred were actually problematic on equity grounds. It is likely, however, that the Supreme Court has ordered *Younger* doctrine abstention in some cases where equitable relief would have been appropriate on balance.[182]

Close scrutiny of arguments for and against equitable restraint does not seem to be a priority under the *Younger* doctrine. When the case for equitable restraint is not strong, policies of federalism and comity are there to take up the slack. However, under the view taken in this paper, federalism and comity add nothing to the authority of federal courts to refuse jurisdiction because both promote political policies. We have seen the political character of jurisdictional policies of federalism.[183] If they have a separate meaning at all, it is likely that policies of comity are political as well.[184] Thus, particular appli-

---

181. *See supra* note 35 and accompanying text. Calcification of rules of equitable restraint is a perennial danger. For examples from an earlier time, see Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905).

182. Thus, for equitable restraint to be warranted because the state forum constituted an adequate remedy at law (or a means for averting irreparable injury) it would be necessary to examine the particular circumstances of each case. When invoking *Younger*, the Court tends to skip this.

> For example, the state-procedural frustrations facing the federal plaintiffs that were revealed in dissenting opinions in several of the cases should have been addressed by the majority. Moore v. Sims, 442 U.S. 415, 437-42 (1979) (Stevens, J., dissenting) (federal plaintiffs lost custody of their children for over one month because of inadequate notice and hearing provisions of state statutory scheme); Trainor v. Hernandez, 431 U.S. 434, 434, 451-52 (1977) (Brennan, J., dissenting) (state court granted a continuance on the validity of the attachment of federal plaintiffs' property, depriving them of their savings for an additional two weeks; state court also never acted on plaintiff's motion to temporarily enjoin execution of attachment); Younger v. Harris, 401 U.S. 37, 60, 65 (1971) (Douglas, J., dissenting) (state trial and appellate courts denied federal plaintiff's requests to prohibit prosecution under an unconstitutional statute).

Shreve, *supra* note 5, at 410 n.188. *Accord* LAYCOCK, *supra* note 32, at 135. *Cf.* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1117 (1977) (noting *Younger's* abandonment of an approach channelled through equitable discretion).

183. *See supra* notes 74-76 and accompanying text.

184. The contribution made by the concept of comity remains obscure. Apparently, it restrains federal courts so that state courts may instead hear certain matters. *See*

cations of *Younger* are illicit when federalism and comity are the only stumbling blocks, and the doctrine is suspect per se for appearing to countenance such results.

VIII. Concluding Thoughts on a Theory of Limited Authority For Jurisdictional Common Law

It is worth recalling an important ground rule in the legitimacy debate. The question is not whether particular forms of jurisdictional common law are wise in content,[185] but whether authority exists to make them at all.[186] I have argued that federal courts are competent to make jurisdictional common law when responding to needs of judicial administration, but that they are without authority to make it for political ends. There may be many angles from which this theory could be attacked. Here are two.

First, some might pose the following dilemma. Once concerns of judicial administration entitle a federal court to consider making jurisdictional law, how broad a range of jurisdictional policies may it consult thereafter? May only policies of judicial administration inform ultimate decisions whether to make jurisdictional common law or what content to give it? If so, federal courts would make law with impaired vision—able to weigh administrative concerns but unable to recognize the political consequences of adjusting the flow of cases between state and federal courts. On the other hand, if federal courts may also weigh political concerns in deciding matters of content, is the position of this paper really so different from that of the licit-per-se group? In other words, how important is the proposition that the politics cannot be a stimulus for jurisdictional common law, if courts are entitled to weigh political policies once the process has begun?

I offer this answer. Neither federal judges nor any other

Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. L. Rev. 59 (1981). *Cf.* Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 Wm. & Mary L. Rev. 725, 767 (1981) (Comity suggests deferral to state courts "[w]hen the degree of deference is relatively weak."). That would seem to place it in the shadow of the concept of federalism for purposes of the *Younger* doctrine. In any event, comity concerns appear to be political. *Cf.* Missouri v. Jenkins, 110 S. Ct. 1651, 1662 (1990) (discussing "principles of federal/state comity.").

185. *See supra* note 8.

186. If the law surveyed in this paper were instead statutory, the same questions of authority would not arise. For development of this point in the context of the *Younger* doctrine, see Althouse, *supra* note 12, at 1043-44; Shreve, *supra* note 5, at 416-17 n.226.

lawmakers should be blind to the effects of choices before them. For example, it is legitimate to weigh interests of federalism (or enforcement of federal substantive law, or some other political policy) against needs of judicial administration that prompted a federal judge to consider the possibility of jurisdictional common law.[187] This process clearly differs, however, from one where federal courts turn to jurisdictional common law simply as a means to a political end.[188]

From another angle, some might question whether it is realistic to expect the federal judiciary to go to the extra labor of distinguishing between licit and illicit jurisdictional common law. Not only does my recommendation of such an exercise place me in disagreement with most commentators who have declared themselves, but also the Supreme Court seems a very long way from accepting the concept of limited authority for jurisdictional common law. The Court appears to alternate between unqualified yes or no positions,[189] but things are even worse for my approach. The Supreme Court seems most hesitant to chart an independent course when addressing concerns of judicial administration and least troubled when addressing the politics of federal jurisdiction.[190] These sensibilities of course are just the opposite of what I maintain they should be.

---

187. In *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), efficient judicial administration clearly would have been served by expanding supplemental jurisdiction to reach plaintiff's claim outside 28 U.S.C. § 1332. Yet the Supreme Court refused, alluding to the political tensions of diversity jurisdiction. Despite some uncertainty in the language of the opinion, the result was at least arguably a refusal to make jurisdictional common law, rather than an act of statutory interpretation. On supplemental jurisdiction as a species of jurisdictional common law, see *supra* note 31.

188. Of course, there is nothing to stop federal courts from simultaneously invoking administrative and political justifications for considering jurisdictional common law. However, the examples offered in the paper suggest that often matters are not so complicated in practice. *See supra* Part VII A (refusals to exercise jurisdiction because of concurrent jurisdiction—based on concerns of judicial administration); VII B (common law state sovereign immunity—based on political concerns of federalism); VII C (forum non conveniens doctrine—refusals of jurisdiction based on concerns of judicial administration). *Cf.* VII D (*Younger* doctrine--in cases where equitable restraint is unjustified, abstention based on political concerns of federalism and comity).

189. *Cf.* Fallon, *supra* note 12, at 1164 (noting that conflicting Federalist and Nationalist models of decision are invoked by the Supreme Court "with some regularity, but only on a selective basis").

190. Thus, in Colorado River Water Conser. Dist. v. United States, 424 U.S. 800, 818 (1976), the Court stated that concurrency-based dismissals were more difficult to justify than abstentions (including those under the *Younger* doctrine) which promoted federalism.

> [In] the absence of weightier considerations of constitutional adjudication and

Perhaps the Court has taken this view because it regards policies of judicial administration as trifling compared to political policies shaping jurisdiction. For reasons I have argued in this paper, that judgment is wrong. Policies of judicial administration should be understood to rest upon a jurisprudence as full-bodied as that supporting the politics of federal jurisdiction.[191] And they are far more important to judges as lawmakers than political policies concerning federal jurisdiction.[192]

It is no sin to disagree with the Supreme Court; the distance between the apparent posture of the Court and the position advanced here is disheartening but not damaging in itself to a theory of limited authority. Still, it is best to acknowledge these frailties: (1) the theory may not offer a means for dividing all jurisdictional common law into licit and illicit categories,[193] and (2) the federal judiciary might resist even its most inviting applications.

Perhaps, then, it is useful to add a more modest objective for the paper. This theory of limited authority should open types of jurisdictional common law to more precise examination. For example, it makes clearer why common law state sovereign immunity may exceed the added separation of powers constraint imposed on federal courts by article III.[194] Similarly, the theory provides a means for isolating and vindicating as instruments of judicial administration common law doctrines like forum non conveniens[195] and core forms of pendent and ancillary jurisdiction as they existed prior to codification.[196]

The paper provides a means for understanding why attempts to hold hostage these last-mentioned, useful doctrines are unsound: it sets up a false dichotomy to suggest that we must either accept the legitimacy of all jurisdictional common law (including bald attempts to politically realign federal and state court jurisdiction); or reject the legitimacy of all (including

---

state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.

Id.

191. *See supra* Part VI.

192. *See supra* Part VII.

193. *See supra* note 188.

194. *See supra* notes 147-60 and accompanying text.

195. *See supra* notes 165-66 and accompanying text.

196. *See supra* note 31.

that meant to best distribute judicial resources and promote litigant fairness).