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WHY ABSTENTION IS NOT ILLEGITIMATE: AN ESSAY ON THE DISTINCTION BETWEEN "LEGITIMATE" AND "ILLEGITIMATE" STATUTORY INTERPRETATION AND JUDICIAL LAWMAKING

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ABSTRACT—When Professor Martin Redish condemned abstention doctrines as violating norms of "institutional legitimacy," he provoked an informative debate, but one that has largely subsided. This Essay revisits the once-heated debate about abstention's legitimacy, clarifies its terms, and identifies its stakes. The legitimacy question is not whether abstention decisions are legally correct, but whether applicable statutes and the Constitution render such decisions ultra vires. Most often, the answer to that question is no. Recent versions of both textualist and purposivist theories of statutory interpretation recognize that statutory meaning always depends on "context." And when relevant statutes are read in a sufficiently capacious semantic context (as textualists would insist) or policy context (as purposivists would demand), abstention emerges as justified in some cases. Indeed, if abstention were illegitimate, then a number of other federal courts doctrines—many of which are difficult to justify by reference either to the language of pertinent statutes or to Congress's most pressing purposes in enacting them—would be illegitimate also.

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INTRODUCTION

In *Cohens v. Virginia*, Chief Justice John Marshall proclaimed that for a court not to exercise the jurisdiction that Congress had conferred on it would constitute "treason to the constitution."[1] In the even more iconic case of *Marbury v. Madison*, the Supreme Court rested the necessity of judicial review at least partly on the mandatory character of its jurisdiction.[2] In noting that it must rule on constitutional issues to decide cases in which such issues arose,[3] the Court did not even consider that it might, alternatively, respond to cases presenting constitutional issues by declining to exercise jurisdiction at all. Subsequent decisions have echoed similar themes about federal courts' absolute, or at least nearly invariant, obligation to exercise the jurisdiction that Congress confers on them.[4]

As is also well known, however, federal courts law includes a number of judge-made abstention doctrines under which federal courts do precisely what *Cohens* said they must not: although acknowledging jurisdiction over a case, they decline to exercise it. Perhaps the two best known abstention doctrines are *Pullman* and *Younger* abstention.[5] Under *Pullman*, federal courts will initially decline to exercise jurisdiction over cases in which

[1] 19 U.S. (6 Wheat.) 264, 404 (1821).

[2] 5 U.S. (1 Cranch) 137 (1803).

[3] *See id.* at 178 (explaining that if a law and the Constitution both apply to a case and are in conflict, "the court must determine which of these conflicting rules governs the case").

[4] *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–14, 817 (1976); Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959).

[5] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1057–1128 (6th ed. 2009) [hereinafter HART & WECHSLER] (discussing *Pullman* and *Younger* abstention).

plaintiffs present sensitive federal constitutional claims that the resolution of a difficult state law issue might moot or alter.[6] Instead, federal courts will wait for state courts to resolve the state law issues that might make the resolution of federal constitutional claims unnecessary. The *Younger* doctrine takes its name from *Younger v. Harris*, in which the Supreme Court held that federal courts must virtually always abstain from adjudicating suits seeking injunctions against pending state criminal proceedings.[7] Subsequent cases have extended *Younger* abstention to encompass suits for injunctions against a broader array of state judicial and quasi-judicial proceedings,[8] including some in which neither a state nor its officials appeared as parties.[9] At *Younger*'s high tide during the 1970s and early 1980s, the Court flirted with extending its bar from suits to enjoin judicial proceedings to suits challenging the law enforcement practices of state executive officials.[10]

The most fundamental question about federal abstention doctrines involves what I shall characterize as their legal legitimacy. "Legitimacy" is an elusive term, which can mean different things in different contexts.[11] In the aspect with which I am concerned, it speaks to issues of lawful authority rather than to questions about whether authority is exercised correctly, wisely, or well.[12] In the case of abstention doctrines, the legitimacy question is whether a court that decides to abstain from deciding a case within its jurisdiction acts ultra vires, by making a kind of decision that the Constitution and applicable statutes manifestly give it no authority to make. If, for example, Congress has conferred jurisdiction and has clearly not given the courts any discretion to decline its exercise, and if the Constitution makes it mandatory for the federal courts to exercise all the jurisdiction that Congress confers, then for federal courts to abstain based on controversial notions of sound policy would be ultra vires and therefore illegitimate. By contrast, if a court has reasonably but mistakenly interpreted a statute or the Constitution to confer a discretion to abstain, when a better interpretation would find no such discretion, then a charge of legal illegitimacy would be too strong. The matter would involve an ordinary question of judgment or interpretation about which reasonable people could differ. An allegation that a court has acted illegitimately

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[6] *See id.* at 1059–61. The *Pullman* doctrine originated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[7] 401 U.S. 37, 53 (1971).

[8] *See* HART & WECHSLER, *supra* note 5, at 1059 (discussing considerations supporting abstention).

[9] *See, e.g.*, Juidice v. Vail, 430 U.S. 327 (1977).

[10] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1983); Rizzo v. Goode, 423 U.S. 362, 379–80 (1976).

[11] *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005) (distinguishing legal, sociological, and moral senses of legitimacy).

[12] *See id.* at 1818–20.

registers a stronger condemnation than does a complaint about ordinary legal error.

In a landmark 1984 article entitled *Abstention, Separation of Powers, and the Limits of the Judicial Function*, Professor Martin Redish levied the charge that abstention doctrines breach the demands of "institutional legitimacy,"[13] apparently in the robust sense that I have just explicated. Abstention, he argued, constitutes a "usurpation" of Congress's authority under the separation of powers.[14] Redish's article provoked an illuminating debate among federal courts scholars. Among the most distinguished contributions came from my colleague and coauthor David Shapiro.[15] In an article entitled *Jurisdiction and Discretion*, Shapiro defended the legitimacy of the general practice of abstention—although not every aspect of the abstention doctrines that the Supreme Court had developed—by arguing that against the background of "experience and tradition," "a grant of jurisdiction should normally be (and indeed generally has been) read as an authorization to the court to entertain an action but not as an inexorable command."[16] In my view, the exchange between Redish and Shapiro ranks among the most edifying in federal courts scholarship.

In this Essay, I want to reexamine the question of abstention doctrine's legitimacy that Professor Redish so memorably framed in 1984. Both the doctrine and the surrounding scholarly landscape have changed a good deal in the decades since Professors Redish and Shapiro first weighed in on the issue. Since the 1980s, the Supreme Court has not only arrested the expansion of abstention doctrine, but also pruned some of its branches. Over the same period, important advances have occurred in the literature on statutory interpretation. As I shall try to show, these advances facilitate both the identification and the assessment of some of the assumptions on which positions about the legitimacy of abstention doctrine depend.

An additional reason for revisiting questions about the legitimacy of abstention involves similarities between abstention and other federal courts doctrines. The somewhat freewheeling approach to statutory construction that the Supreme Court has taken in abstention cases—by reading statutes that confer jurisdiction as implicitly including a license for courts to decline to exercise it[17]—is in some ways representative of the approach that the

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[13] Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 115 (1984).

[14] *Id.* at 72, 76, 82, 88, 114.

[15] *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

[16] *Id.* at 574–75.

[17] In invoking equitable principles as a basis for abstention, the Court has not always adverted specifically to issues of statutory construction, but the assumption that Congress legislated against the background of equitable practice when enacting jurisdictional statutes, and therefore should be presumed to have anticipated that courts would continue to exercise equitable discretion, is almost invariably implicit even when it is not explicit. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) (noting that the historical practice of courts of equity in sometimes declining to

Court has taken in interpreting other statutes involving federal jurisdiction. To put the point bluntly, a number of central elements of modern jurisdictional doctrine rest on exercises in statutory interpretation that, at least at first blush, are not easy to justify by appeal to plain statutory language or legislative intent. Examination of the "institutional legitimacy"[18] of the federal courts' role in developing and applying abstention doctrines will, thus, open a window onto broader questions involving legally legitimate judicial power, especially in the federal courts field.

In undertaking a reconsideration of issues framed by *Abstention, Separation of Powers, and the Limits of the Judicial Function*, I adopt an interpretive approach that is, I believe, appropriate in dealing with so iconic a piece of scholarship. Among other things, I shall focus my analysis of Professor Redish's position almost exclusively on that trailblazing article, with little effort to capture changes or nuances in his views as reflected in subsequent writing.[19] I shall also take a number of interpretive liberties in reading the article to find within it suggestive, incipient traces of positions that have subsequently achieved influence in the scholarly literatures on abstention and statutory interpretation.

In the end, my substantive conclusions diverge substantially from those that Professor Redish advanced in 1984. Nevertheless, this Essay renders testimony to the continuing salience of the question that Redish put forward for debate and to the breadth of the resources that he brought to bear in answering it. Indeed, as will become clear, I believe that Redish's question was not only difficult, but also deep, and that we can learn enormously about the judicial role in shaping federal courts and other doctrines by coming to terms with it.

The Essay unfolds as follows. Part I briefly sketches some relevant historical background and provides a preliminary capsule summary of Professor Redish's interconnected arguments that abstention doctrine reflects a judicial usurpation of Congress's prerogative to establish jurisdictional policy. The next three Parts then examine Redish's specific arguments in greater critical detail. Part II critiques Redish's assumptions about proper methodology in statutory interpretation. Part III examines and

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exercise jurisdiction "informs our understanding of the jurisdiction Congress has conferred upon the federal courts"); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941) ("The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.").

[18] Redish, *supra* note 13.

[19] *Cf.* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1349 (2000) (proposing an expansion of abstention doctrine to deal with the problem of duplicative litigation in federal and state court).

rejects his pioneering argument that democratic theory requires the narrow-gauged interpretive methodology that he championed. After denying that rule of law values categorically mark abstention doctrines as illegitimate, Part IV follows Redish partway, but partway only, in concluding that some developments in abstention doctrine during the 1970s and 1980s might have overstepped the bounds of proper judicial decisionmaking.

Part V steps back to take a wider lens view of abstention, and debates about its legitimacy, as compared with other federal courts doctrines. Although abstention doctrines find little obvious support in either the language or the most conspicuous, animating purposes of relevant statutes, the same is true of a number of other doctrinal structures in the federal courts field. To condemn all of these doctrines as illegitimate would be both practically and jurisprudentially unsound. It may be equally mistaken, however, to conclude that the methodological assumptions that underlie all established doctrines would provide legally legitimate foundations for future decisions by the Supreme Court. So emphasizing, Part V argues that past practice is relevant to, but not dispositive of, questions involving the legitimate judicial role in interpreting jurisdictional statutes. The root difficulty is that all interpretation necessarily occurs in context, and there is no formulaic, algorithmic way to specify in advance how broadly or narrowly the pertinent interpretive context should be defined. Legitimate judging requires good judgment, even when reasonable people reasonably disagree about what good judgment requires. Although I do not claim to be able to resolve this conundrum, I hope, by taking up Professor Redish's question, to move us toward a better understanding of its nature.

I. PROFESSOR REDISH'S CHALLENGE TO THE LEGITIMACY OF ABSTENTION: CONTEXT AND CONTENT

In order to capture the significance and originality of *Abstention, Separation of Powers, and the Limits of the Judicial Function*, it may be useful for me to begin with a short, opinionated sketch of the context in which Professor Redish wrote in 1984. Having done so, I shall then offer a preliminary statement of the article's central claims.

A. Abstention Doctrine in the 1970s and 1980s

At least three bits of context deserve attention. First, Professor Redish published *Abstention, Separation of Powers, and the Limits of the Judicial Function* at a time when abstention was perhaps the hottest, most contentious topic in the federal courts curriculum. In the 1970s and 1980s, the Burger Court expanded abstention doctrines along several dimensions. The largest developments came in *Younger* doctrine. In a series of decisions, the Court extended the prohibition of federal injunctions against pending state criminal proceedings to encompass civil cases brought by state officials to enforce state law, civil disputes between private parties in

which important state interests were at stake, and state administrative proceedings of a judicial nature.[20] As noted above, a couple of cases invoked *Younger* to foreclose federal injunctive relief against alleged police misconduct.[21] The Burger Court also gave renewed vitality to *Pullman* doctrine, which the Warren Court had never questioned, but for which it had not shown great enthusiasm either.[22] With *Pullman* much in the consciousness of bench and bar alike, several of the Justices sought to expand that doctrine significantly beyond its traditional reach by authorizing abstention in any case in which a party's claim to relief under state constitutional law had the potential to moot a federal constitutional claim.[23] Because most state constitutions contain bills of rights analogous to the federal Bill of Rights, there are few cases presenting federal constitutional issues in which state constitutional claims could not also be raised.[24] In addition, a 1976 decision, *Colorado River Water Conservation District v. United States*,[25] launched a new abstention doctrine of initially uncertain scope. Although the opinion included a paean to the federal courts' "virtually unflagging obligation"[26] to exercise jurisdiction conferred, the result—refusal to hear a case—spoke louder than qualifying rhetoric.

Second, within the political and jurisprudential climate of the 1970s and 1980s, the themes of judicial federalism that the Burger Court sounded in its abstention decisions had potential relevance in a number of broader, ongoing debates, both among the Justices and within the legal academy. One involved the comparative weight of federal interests in the prompt and efficacious enforcement of federal rights and state interests in noninterference with state judicial and law enforcement functions.[27] A related question concerned judicial "parity": from either a constitutional or an empirical perspective, should state courts be viewed as fungible with federal courts?[28] Many of the most important statutes defining the jurisdiction of the federal courts have their origins in Reconstruction legislation that reflected Congress's suspicion of state courts' capacity or

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[20] For a survey, see HART & WECHSLER, *supra* note 5, at 1121–28.

[21] *See supra* note 10 and accompanying text.

[22] *See* HART & WECHSLER, *supra* note 5, at 1065.

[23] *See* Wisconsin v. Constantineau, 400 U.S. 433, 442–43 (1971) (Burger, C.J., joined by Blackmun, J., dissenting); *id.* at 443–44 (Black, J., joined by Blackmun, J., dissenting).

[24] Frequently, however, state court interpretations of state constitutional provisions will reflect and be driven by the federal courts' interpretation of parallel federal constitutional provisions. *See* HART & WECHSLER, *supra* note 5, at 462–80.

[25] 424 U.S. 800 (1976).

[26] *Id.* at 817.

[27] *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151–64 (1988) (tracing the assumptions of competing "Nationalist" and "Federalist" models reflected in Supreme Court decisions).

[28] *See id.* at 1153–54, 1161–62.

willingness to enforce federal rights fairly.[29] Suspicion of state courts persisted through much of the civil rights revolution of the 1950s and 1960s. By the 1970s and 1980s, some thought a new day had arrived in which state courts deserved more trust and respect.[30] Others continued to believe federal courts indispensable to the effective enforcement of federal constitutional and statutory rights.[31]

Third, the Burger Court was methodologically undisciplined.[32] Its predecessor, the Warren Court, had been widely regarded as both liberal and activist. While the Burger Court was more conservative, it disappointed those who had expected a more methodologically rigorous approach. Its Justices inhabited not only a post-Realist, but also a post-Warren Court, legal universe in which much seemed up for grabs. The Court's leading liberal, William Brennan, used to inform his law clerks that the most important number in the Supreme Court was five, because with five votes, he said, anything was possible.[33] The Court's staunchest conservative, William Rehnquist, seemed no more disciplined by concerns about methodological consistency.[34] What would come to be called constitutional "originalism" remained in its gestational stages.[35] "The new textualism" had not yet emerged as a theory of statutory interpretation.[36] Many thought the Burger Court "rootless[ly] activis[t]."[37] Whether or not the Burger Court's abstention decisions were "rootless," their expansive, pathbreaking character certainly invited the label "activist," however analytically imprecise that term may be.

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[29] *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 240 (1972) (explaining that Reconstruction legislation was a reaction against the use of state courts "to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights").

[30] *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 631 (1981) (arguing that the view of state courts as less protective of constitutional rights "derive[s] primarily from a special historical experience, involving the division of the country on the issue of racial segregation, which is no longer of dominating significance in governing the attitudes of state court judges").

[31] *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[32] *See generally* Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 215 (Vincent Blasi ed., 1983) (observing that the Burger Court "charted a middle course demarcated by numerous fine, unconvincing distinctions").

[33] *See* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008).

[34] *See* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 299 (1976) (arguing that "[t]oo often" Justice Rehnquist's "unyielding insistence on a particular result appears to have contributed to a wide discrepancy between theory and practice in matters of constitutional interpretation").

[35] *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926–39 (2009) (tracing the development of originalism from the early 1970s through 2009).

[36] On "the new texualism," see, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

[37] *See* Blasi, *supra* note 32.

With a methodologically undisciplined Supreme Court having a pro-federalism agenda that prominently included a fascination with abstention doctrine, no one knew in 1984 how abstention's future might unfold. As Professor Redish surveyed the landscape, the Court had so far followed what he characterized as a "partial abstention model"[38] that required federal courts to abstain only in cases that satisfied the expanding but still limited criteria of *Pullman*, *Younger*, and other specific abstention doctrines. But burgeoning themes in the Court's opinions led him to fear that the Justices might adopt a "total abstention model,"[39] which would have called for federal courts always to decline to adjudicate federal constitutional claims whenever the claimants had fair opportunities to present their grievances to state tribunals. Accordingly, Redish devoted large chunks of *Abstention, Separation of Powers, and the Limits of the Judicial Function* to demolishing the purported justifications for total abstention.

B. Professor Redish's Arguments

As I read *Abstention, Separation of Powers, and the Limits of the Judicial Function*, its argument had three interrelated components. I shall set them out more fully below when I separately and critically examine each in turn. Before doing so, however, I need to place all three preliminarily on the table, for not to do so would risk unfairness. For one thing, Redish's arguments flow so seamlessly into one another that it is sometimes difficult to pry them apart. For another, they provide each other with mutual support.

With all of these caveats, I would preliminarily state Redish's three arguments as follows:

First, abstention doctrines cannot be justified as a matter of ordinary statutory interpretation. The relevant statutes confer jurisdiction without reference to abstention.[40] When Congress vested jurisdiction, there was no reason to think that Congress meant to authorize federal courts to decline to exercise the jurisdiction conferred.[41]

Second, as a matter of democratic theory, Congress, rather than the federal courts, should make the fundamental decisions about jurisdictional policy.[42] For the courts to claim an inherent power to abstain, or to treat every jurisdictional statute as if it included an authorization for them to do so, was a usurpation of policymaking prerogatives that the Constitution rightly vested in Congress.[43] And for courts to adopt interpretive principles that presumed a congressional intent to vest the courts with broad

[38] *See* Redish, *supra* note 13, at 75.

[39] *Id.* at 105.

[40] *See id.* at 71.

[41] *See id.* at 77.

[42] *See id.* at 74, 76.

[43] *See id.* at 76–77.

discretion was wholly insupportable.[44] This approach not only misgauged what reasonable Congresses almost certainly would have wanted, but also shifted policymaking responsibility from the democratically accountable legislature to the unaccountable judiciary.

Third—and this is the point on which I take the greatest liberties—the Supreme Court's aggressive, controversial, and divisive practice in crafting and expanding abstention doctrines contravened rule of law ideals. Abstention doctrines not only lacked foundations in statutory or constitutional language, but also represented judicial policymaking undisciplined by the traditional strictures of "legal process."[45] Absent restraining mechanisms that the Court had failed to develop, the judgments that underlay abstention doctrine too closely resembled naked policy preferences, asserted in the teeth of apparently contrary congressional dictates, for the entire body of abstention law not to stand condemned. Rather than constituting mutually supporting precedents, leading cases establishing the various doctrines were spreading manifestations of a dangerous pathology in the understanding and exercise of judicial power.

II. STATUTORY INTERPRETATION

Professor Redish's statutory interpretation argument—that pertinent statutes did not authorize abstention but instead prohibited it—can be reconstructed as unfolding in four steps. First, none of the statutes involved in abstention cases includes any express authorization for abstention.[46] Second, when Congress confers jurisdiction, it ordinarily means, and should be understood as meaning, to mandate the exercise of jurisdiction.[47] Third, although implied authorizations of abstention are not logically impossible, separation of powers principles require "a heavy burden of proof on one who would assert that [Congress] implicitly intended to allow the judiciary to amend unlimited legislation."[48] Fourth, with the burden of proof thus located, there is no evidence whatsoever that Congress intended to give the federal courts total discretion about whether to abstain:

> The language of the relevant statutes leaves no room for judicial limitation or modification—certainly no more so than the language of other jurisdictional statutes. Moreover, the very purpose of [the Reconstruction] legislation [often involved in abstention cases] was to interpose the federal judiciary between the state and individual, largely because of concern about the functioning of state judiciaries.[49]

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[44] *See id.* at 78–79.

[45] *Id.* at 74, 102.

[46] *See id.* at 71, 84.

[47] *See id.* at 81–82, 112–13.

[48] *Id.* at 78.

[49] *Id.* at 84.

To assess this argument, one first needs to identify the theory of statutory interpretation that it reflects. In a 1991 book entitled *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory*,[50] Professor Redish advanced a theory of statutory interpretation that places great reliance on statutory purpose.[51] In 1984, he, like most of the American legal academy, was less clear and apparently less self-conscious about statutory interpretive methodology.[52] Throughout *Abstention, Separation of Powers, and the Limits of the Judicial Function*, he relied on a mix of sometimes undifferentiated appeals to the relatively plain meaning of relevant statutory texts and to statutes' purposes.

Although that mixed approach would have raised few eyebrows in 1984, over the past twenty-five years, scholars have labored zealously and often insightfully to distinguish purpose-based and text-based theories of statutory interpretation. Modern purposivist theories characteristically draw their inspiration from, and seek to refine, an approach initially developed during the 1950s by Professors Henry Hart and Albert Sacks.[53] According to Hart and Sacks, judges should begin by reading statutes carefully and then "conjure up plausible organizing purposes for" them,[54] predicated on the assumption that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably."[55] As both purposivists and their critics have emphasized, an approach that calls for judges to reconstruct the purposes or intentions of reasonable legislators contrasts sharply, at least in some cases, with more rigidly text-focused theories, which purport to be more concerned with what statutes say than with what individual legislators meant or intended to do when enacting them.

Within the textualist camp, scholars have come to distinguish between a "plain meaning" approach to statutory interpretation and a so-called "new textualism."[56] The plain meaning school maintains that the implications of statutory language are often unmistakable to any competent speaker of English and that, when the linguistic import is clear, a statute's plain meaning conclusively determines its application. New textualist theories

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[50] MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY (1991).

[51] *See id.* at 19–28.

[52] *See generally* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242 (1992) (noting that in the 1970s and early 1980s "[h]ardly anybody in legal academe thought that something useful could be said about the interpretation of statutes in general").

[53] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

[54] Frickey, *supra* note 52, at 249.

[55] HART & SACKS, *supra* note 53, at 1374–80.

[56] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73, 79 (2006).

also insist on the centrality of statutory language but acknowledge that texts can have meaning only in context.[57] According to new textualists, Congress invariably legislates against the background of a number of linguistic and cultural understandings that influence, and indeed determine, what a linguistically competent person would understand a statute to say.[58]

Two examples may illustrate the new textualist position. As Judge Easterbrook, a pioneering exemplar of the new textualism, has written, statutes defining criminal offenses and prescribing criminal penalties characteristically presuppose the availability of traditional defenses such as insanity and "necessity":

> For thousands of years, and in many jurisdictions, criminal statutes have been understood to operate only when the acts were unjustified. The agent who kills a would-be assassin of the Chief Executive is justified, though the killing be willful; so too with the person who kills to save his own life. . . . The process [by which courts interpret statutes in light of historical context] is cooperative: norms of interpretation and defense, like agreement on grammar and diction, make it easier to legislate at the same time as they promote the statutory aim of saving life.[59]

Justice Scalia, another leader in the development of the new textualism, has similarly emphasized that "Congress must be presumed to draft . . . in light of . . . background [legal] principle[s],"[60] including those that call for criminal statutes to retain the common law requirement of *mens rea*,[61] for statutes not to apply extraterritorially to noncitizens,[62] and for limitations periods to be "subject to 'equitable tolling.'"[63] In the view of Justice Scalia as much as Judge Easterbrook, it would be unreasonable, if not impossible, to demand that Congress replicate as much of the legal universe as it wishes to retain whenever it enacts a new statute. Background legal understandings are therefore nearly as pertinent to statutory interpretation as rules of grammar and syntax.

As I shall explain below, the plain meaning and new textualist approaches blur into one another along a spectrum. In *Abstention, Separation of Powers, and the Limits of the Judicial Function*, Professor Redish's text-based arguments stood close to the plain meaning end. Nevertheless, in anticipation of the new textualists, he acknowledged the relevance of historical context.[64] Indeed, in light of longstanding equitable

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[57] *See id.* at 79–80.

[58] *See id.* at 92–93, 100–01.

[59] Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913–14 (1999).

[60] Young v. United States, 535 U.S. 43, 49–50 (2002).

[61] *See* Brogan v. United States, 522 U.S. 398, 406 (1998).

[62] *See id.*

[63] *Young*, 535 U.S. at 49–50 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

[64] *See* Redish, *supra* note 13, at 85.

maxims that sometimes required the equivalent of abstention—for example, the maxim that courts should not grant equitable relief except in cases of "irreparable injury"—Redish credited the argument that relevant statutes should be read as authorizing abstention in conformity with traditional equitable principles.[65] In refuting the argument that the relevant statutes contemplated a more general judicial discretion to abstain, he did not deny the pertinence of established understandings of courts' equitable discretion. He argued instead that traditional equitable principles could not justify the abstention doctrines at which he directed his attack because those doctrines aimed to promote federalism values.[66] Federalism, Redish wrote, was a value unknown to historic courts of equity.[67] Accordingly, he thought, it could not justify federalism-based abstention.

In my view, Redish was right to concede—in line with new textualist thinking—that the permissibility of abstention as a matter of statutory interpretation depends on historical practice and the assumptions that historical practice reflected. The alternative would be untenable. If Congress legislated against a background in which courts had long exercised equitable discretion, a linguistically competent and legally informed interpreter of its legislative output might reasonably assume that Congress would have expected equitable discretion to continue to exist.

Yet that concession, which seems to me to be unavoidable, also seems fatal to any purely textual argument that abstention was not just mistaken, but also legally illegitimate, more or less across the board. In order to behave in accordance with the tradition of equitable discretion, courts must identify, interpret, and apply that tradition. The effort to do so can of course give rise to debate and disagreement about which interpretations and applications are correct or even colorable. Nevertheless, once one acknowledges the need for courts to interpret and apply traditional equitable principles in determining when to exercise and when to refrain from exercising their jurisdiction, the charge that all forms of abstention doctrine are "usurpation[s]" of legislative power, outside the bounds of properly judicial authority to define or enforce, crumbles.

In maintaining otherwise, Redish insisted that "traditional equitable principles" were subject to clear limitations that abstention doctrines inherently and manifestly transgressed. But his argument to that effect was deeply embarrassed by the traditional equitable maxim, which provided the foundation for the core of *Younger* abstention doctrine, that forbade courts of equity to enjoin pending criminal prosecutions.[68] In characterizing *Younger* as an illegitimate usurpation, Redish maintained that the prohibition against enjoining pending criminal prosecutions originated in

[65] *See id.* at 85, 91.

[66] *See id.* at 85–86.

[67] *See id.*

[68] *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

the unitary British system, and therefore had no application to cases in which federal courts were asked to enjoin state courts within the context of American federalism.[69] Although I am doubtful about the persuasiveness of this interpretive claim on the merits, there is no need to debate that issue here. Whether or not one judges Redish to be ultimately persuasive that the traditional anti-injunction maxim should be judged inapplicable when federal courts are asked to enjoin state courts, the question clearly lies within the jurisdiction of federal courts to make and is one about which reasonable people might differ. Allegations of usurpation, ultra vires action, and illegitimacy thus seem misplaced.

Beyond inferences drawn from statutory text, *Abstention, Separation of Powers, and the Limits of the Judicial Function* appealed to congressional intent or statutory purposes. Much of the pertinent legislation was enacted by Reconstruction Congresses. Beyond any shadow of doubt, Reconstruction defined a "policy context"[70] in which reasonable legislators would have had the goal of increasing the availability of federal courts to enforce federal rights based on a suspicion of state officials and state courts. Given this policy goal, Redish argued, reasonable members of Congress surely would not have wished to authorize federal courts to reverse or dilute the policy judgment that people complaining of federal rights violations should have access to a federal forum.[71]

Professor Redish is undoubtedly correct that it would make no sense to imagine "reasonable" Reconstruction legislators authorizing complete judicial nullification of legislation intended to establish the federal courts as guardians of federal rights.[72] But it is a separate question whether reasonable legislators—"reasonable persons pursuing reasonable purposes reasonably,"[73] as Hart and Sacks would have said—would have wanted to permit the federal courts, acting within principled bounds, to accommodate the statutes' principal policy goals with other values of enduring concern, including federalism values in some cases. This is a hard and perhaps impossible question to answer without making value judgments. So acknowledging, I tend to agree with Professor Shapiro that the question of whether abstention is consistent with congressional purposes in enacting jurisdictional statutes to protect federal rights "is difficult, if not impossible, to answer in gross"[74] and that one must get down to cases. The development of narrowly crafted abstention principles differs from the de facto nullification of a jurisdictional grant. Without wanting to defend everything that the Supreme Court has done in developing abstention

[69] *See* Redish, *supra* note 13, at 85–86.

[70] I borrow the term from Manning, *supra* note 56, at 92.

[71] *See* Redish, *supra* note 13, at 110–11.

[72] *See id.* at 111.

[73] HART & SACKS, *supra* note 53, at 1374–80.

[74] Shapiro, *supra* note 15, at 574.

doctrines, I would conclude once again that Redish's stringent position that there is no room for reasonable interpretive debate about whether abstention is consistent with congressional purpose or intent in *Pullman*- or *Younger*-type cases goes too far.

In so saying, I know that I have so far overlooked Redish's claim that the burden of proof on this question rests on one who believes that reasonable legislators would have wished to preserve any judicial discretion whatsoever[75]—an argument to which I shall come shortly. For now, I mean only to argue that without that contestable presumption about the burden of proof, the most that Redish's other arguments could hope to establish is that abstention doctrines rest on an erroneous interpretation of the relevant jurisdictional statutes, not that doctrines such as *Pullman* and *Younger* are wholly ultra vires.

At the risk of piling on, I would cite another pertinent consideration that Professor Redish's 1984 article never addressed directly: stare decisis. In a subsequent book, Redish dismissed appeals to stare decisis by saying that the Supreme Court can overrule its precedents.[76] As a general matter, this assertion is true enough. But it is one thing to overrule a single precedent and another to tear up long-entrenched doctrines root and branch. In constitutional law, precedent is most important when settled expectations have developed in reliance on doctrines that have, over time, become woven into the fabric not only of the law, but also of surrounding political and social life.[77] In my view, the *Younger* rule that federal courts should not enjoin pending state criminal prosecutions reflects the kind of settlement of a once-contentious issue, the upsetting of which would have potentially dramatic repercussions, that should command respect today as a matter of stare decisis, even if one believed it mistaken as an original matter.[78]

When all these considerations are cumulated, I agree with Professor Redish that sensible statutory interpretation would limit the scope of abstention doctrine. And I do not mean to suggest that the Supreme Court has specified the applicable limits correctly in every instance. But the question that Redish framed for discussion involved the legitimacy, not the ultimate correctness, of decisions establishing abstention doctrines. Insofar as the question is whether all abstention doctrines are categorically illegitimate, the answer is no—at least unless Redish was correct that anyone who wants to establish the legitimacy of abstention doctrines must

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[75] *See* Redish, *supra* note 13, at 78–79.

[76] *See* REDISH, *supra* note 50, at 44–45.

[77] *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1148–50 (2008).

[78] For a brisk survey of materials bearing on whether *Younger* was correctly decided as an original matter, see HART & WECHSLER, *supra* note 5, at 1091–96.

bear a special, heavy burden of proof.[79] It is to his arguments on this point, involving political democracy, that I now must turn.

III. DEMOCRACY AND ELECTORAL ACCOUNTABILITY

As I have noted, Professor Redish's statutory interpretation arguments rely on a burden-shifting premise that he defends partly on grounds of democratic political theory. The relation of democratic theory to statutory interpretation begins to come into focus when one recognizes—as all leading modern theories of statutory interpretation acknowledge—that statutes must always be interpreted in context.[80] According to my colleague John Manning, the principal difference between new textualist and purposivist theories involves the elements of context that they find most salient. "Textualists," he writes, "give primacy to the *semantic* context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words."[81] By contrast, "[p]urposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment [of a statute] would suppress the mischief [at which the statute aims] and advance the remedy."[82]

Although no precise metric of measurement exists, both textualists and purposivists could view the contexts that they take to be relevant to statutory interpretation either more or less broadly. Among textualists, adherents of the older "plain meaning" tradition sought to ascertain how an intelligent and linguistically adept person would understand the words of a statute without having much, if any, specialized knowledge about legal history or traditions.[83] By contrast, new textualists, as noted above, adopt a more capacious view of the relevant context, under which traditional legal practice can be highly relevant. Similarly, purposivists can take a more or less capacious view of a statute's policy context. One might think of the mischief that a statute set out to remedy or the central value that it sought to promote as exclusively defining its policy context. Alternatively, one might broaden the lens to take account of the entire range of values—some of which might actually be in tension with one another—that reasonable legislators who voted to enact a statute could reasonably be expected to have held.

Abstention, Separation of Powers, and the Limits of the Judicial Function included both textualist and purposivist elements, but it took a narrow view of both the relevant semantic and the relevant policy context.

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[79] *See* Redish, *supra* note 13, at 78–79.

[80] *See* Manning, *supra* note 56, at 79–80 (discussing the importance of context for textualism and purposivism).

[81] *Id.* at 91.

[82] *Id.*

[83] *See id.* at 79 & n.28.

As I reconstruct its underlying logic, the article relied on considerations of democratic theory to justify this methodological choice. Read loosely, but I think reasonably sympathetically, Redish appears to have thought that Congress can discharge its lawmaking function most effectively if it is taken at its relatively plain words and if its central, animating purposes in enacting legislation are the only ones treated as relevant in characterizing the policy context in which it acted. To put the point in more negative terms, an interpretive methodology that employs a narrow definition of the interpretive context minimizes the risk that courts, by appealing to a broader range of considerations, will increase their interpretive discretion and usurp policymaking powers that appropriately belong to Congress. What Philip Frickey once wrote about purposivist theories that take a broad view of the relevant policy context could easily be adapted to apply as well to textualists who hold capacious understandings of the pertinent semantic context: "[I]f I ask what 'reasonable people pursuing reasonable purposes reasonably' would have wanted in a given context, am I not likely to assume that those reasonable people are similar to the reasonable person I know best—myself—and, thus, would want what I think is the right answer?"[84] If Redish's argument from democratic theory stands up, it would support his preference for a narrowly defined interpretive context and for his premise that a "separation-of-powers principle should be deemed to impose a heavy burden of proof on one who would assert that a legislative body implicitly intended to allow the judiciary to amend unlimited legislation."[85]

Although Professor Redish's argument from democratic theory is subtle and sophisticated, in my view it ultimately proves unpersuasive. In explaining why, let me begin with the normative argument in favor of judicial discretion in the exercise of jurisdiction that David Shapiro asserted in his 1985 reply to Redish. Shapiro argued, in essence, that recognition of judicial discretion to develop abstention doctrines has left us with a better, more finely tuned body of law than we otherwise would have.[86] According to Shapiro, judicial discretion, and judicial abstention as a subcategory thereof, were justified by their fruits as well as by their historical pedigrees.

For reasons that I shall briefly describe below, I am inclined to agree with Shapiro that the benefits of well-designed abstention doctrines would exceed the costs and, more generally, that courts often have an important role to play in so interpreting statutes as to render them sensible and workable. For now, however, I want simply to assume that he was correct on this point in order to reach a more fundamental question of principle that Professor Redish also sought to frame. Although Redish took a deeply

[84] Frickey, *supra* note 52, at 251.

[85] Redish, *supra* note 13, at 78.

[86] *See* Shapiro, *supra* note 15, at 574.

skeptical view of the purported benefits of federal abstention doctrines,[87] and thus disagreed with Professor Shapiro's assessment that judge-made doctrine gave us better law than we would have had otherwise, Redish also argued that considerations of legal legitimacy—as defined by interpretive principles crafted to maximize democratic legitimacy—would suffice to condemn abstention regardless of the balance of policy arguments.

Despite Redish's having maintained that democratic theory justifies imposing the burden of proof on anyone who seeks to defend a nontextually based judicial discretion to abstain, Shapiro's response said almost nothing explicit about issues of democratic theory. Obviously, however, Shapiro must have disagreed with Redish's belief that concerns of legal legitimacy and democratic theory provided him with the functional equivalent of a trump card. There are at least two possible grounds on which Shapiro might have supported his position.

First, although democracy is undoubtedly a value of constitutional stature, it is not the only constitutional value. Within a basically democratic political system—which Shapiro assumed that we have—it might make sense, at the margins, to trade a relatively small sacrifice of democratic control for substantially enhanced policy outcomes. (In an analogous situation, the maintenance of an independent Federal Reserve Board reflects a minor sacrifice of democratic accountability that most think justified by gains in the promotion of other values.)

Second, Professor Shapiro might have maintained, as I believe, that the debate about the justifiability of abstention doctrines does not necessarily require us to choose between an interpretive principle that supports political democracy and an alternative that treats the achievement of fine-tuned jurisdictional legislation as more important. With both abstention and other forms of judicial discretion being deeply embedded in longstanding tradition and current legal doctrine, I would interpret Shapiro—reading his article as liberally as I have read Professor Redish's—as resisting the claim that judge-made abstention doctrines necessarily involve deviations from democratic ideals. "Democracy" admits of many conceptions or interpretations, not every one of which is maximally populist.[88] As Shapiro wrote in a subsequent article, "our complex democracy" can be understood as presupposing that "courts have a unique responsibility to accommodate change to a complex and relatively stable structure of rules and principles."[89] Certainly it would impose a huge, potentially unmanageable burden on Congress if it could not embody its

[87] *See* Redish, *supra* note 13, at 91–98.

[88] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 70 (1996) (distinguishing between the majoritarian and communal conceptions of democracy).

[89] David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925, 960 (1992).

central policy judgments in relatively succinct legislation and rely on the courts to work out interstitial details in light of preexisting law.[90] If a conception of democracy that welcomes discretion-conferring interpretations of jurisdictional statutes not only tends to produce better law than a conception that insists on narrower, discretion-denying interpretations, but also makes it more feasible for Congress to legislate, I see no a priori reason to prefer the latter to the former—provided, of course, that the tolerance for judicial discretion does not get so far out of hand as to invite too close an approximation of government by judiciary. In his reply to Redish, Professor Shapiro argued explicitly that discretion and abstention should not get too far out of hand.[91]

If this analysis is correct, then Professor Redish's invocation of democracy and electoral accountability was not the kind of conversation stopper that he imagined. The rivals whose views he sought to vanquish were not necessarily anti-democrats but adherents of a different conception of democracy—one that emphasizes the role of courts in facilitating legislation by so interpreting new enactments as to render them consistent with surrounding law and the values that surrounding law expresses. Or so I would insist on their behalf. Among the enduring contributions of *Abstention, Separation of Powers, and the Limits of the Judicial Function* was to introduce issues of political theory into what had previously appeared to be garden-variety debates about the desirability of abstention as a matter of policy.

IV. WHAT ABOUT THE RULE OF LAW?

Professor Redish's argument that abstention involved judicial usurpation of congressional prerogatives sounded partly in terms of a democratic preference for legislative decisionmaking, but it also included related themes of protest against judicial power run amok. Those themes emerged in the extended condemnation in *Abstention, Separation of Powers, and the Limits of the Judicial Function* of two Supreme Court decisions that did not, on their faces, involve abstention at all.

As Redish emphasized, the Supreme Court's development of the *Younger* abstention doctrine was abetted by, and indeed depended on, a tendentious interpretation of the Anti-Injunction Act,[92] which could easily have been read as a statutory bar to federal injunctions against most state judicial proceedings.[93] If the Supreme Court had so interpreted the Anti-Injunction Act, then the nonexercise of federal jurisdiction would have

[90] *See* Easterbrook, *supra* note 59 (noting that norms of interpretation that call for new legislation to be interpreted in light of "historical and governmental" as well as linguistic contexts "make it easier to legislate").

[91] *See* Shapiro, *supra* note 15, at 574–77.

[92] 28 U.S.C. § 2283 (2006).

[93] *See* Redish, *supra* note 13, at 86–88.

reflected the acknowledgment of a congressional mandate, not the application of discretionary, judge-made doctrines. But the Anti-Injunction Act includes several exceptions, including one applicable to injunctions "expressly authorized" by Congress. In *Mitchum v. Foster*,[94] the Court held that 42 U.S.C. § 1983 constitutes an "expressly authorized" exception to the anti-injunction mandate, even though § 1983 makes no specific mention of injunctions against state judicial proceedings. In *Abstention, Separation of Powers, and the Limits of the Judicial Function*, Professor Redish mocked the idea of an "express authorization" that was implicit rather than explicit as a contradiction in terms.[95] In his view, only a naked and discreditable result orientation could explain the Court's ruling. By holding that Congress had not mandated abstention in *Younger*-type cases, *Mitchum* preserved the Court's authority, which it had already asserted in *Younger* to prescribe abstention when, but only when, the Justices (rather than Congress) deemed abstention appropriate.

Professor Redish also devoted a substantial section of his article to attacking the Supreme Court's decision in *Parratt v. Taylor*,[96] which purported to rest on an interpretation of the Due Process Clause. According to *Parratt*, when state officials engage in random and unauthorized misconduct, the only "process" that a state can reasonably be required to provide, and thus the only process that the Due Process Clause demands, is a post-deprivation hearing in state court.[97] Redish characterized *Parratt*'s constitutional reasoning as flatly indefensible.[98] In his view, *Parratt* was a de facto abstention holding, which required federal courts to defer to actual or potential actions in state court.

By linking his attack on abstention with other criticisms of methodologically undisciplined, result-driven judicial decisionmaking, Redish drew upon rule of law ideals that require judges, as much as other officials, to act in accordance with established law. More particularly, Redish relied on the idea of "legal process,"[99] and the discipline to which it subjects judges, as a central element of his indictment against abstention doctrines. As I read him—liberally and loosely, I acknowledge—Redish presented the objection that abstention doctrines, and especially the "total abstention" model that he thought some of the Justices as well as some commentators favored, had come so unloosed from the traditional disciplines of law and the "legal process" that they affronted the ideal of the rule of law. "The rule of law" is a complex, contested ideal that

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[94] 407 U.S. 225, 243 (1972).

[95] *See* Redish, *supra* note 13, at 87 (characterizing the Court's notion of "an 'implied' express exception" as "an oxymoron if ever there was one").

[96] 451 U.S. 527 (1981).

[97] *See id.* at 543–44.

[98] *See* Redish, *supra* note 13, at 99–102.

[99] *Id.* at 74, 102.

undoubtedly means different things to different people.[100] But it is surely intelligible to believe that judicial decisionmaking that is neither tightly constrained by preexisting authorities nor disciplined by exacting norms of judicial craft and intellectual integrity reflects an objectionable betrayal of rule of law ideals.

If I am correct that Professor Redish's attack on abstention and surrounding doctrines included a strand of rule-of-law-based argumentation, then David Shapiro's rejoinder on this point makes a fascinating contrast. First, Shapiro contended that not all abstention doctrines do constitute judicial lawmaking in defiance of legal process ideals.[101] Through a patient recitation of multiple examples, he attempted to demonstrate that "far from amounting to judicial usurpation, open acknowledgment of reasoned discretion is wholly consistent with the Anglo-American legal tradition" and with the legal process ideals that underlie it.[102] Second, in a more normative vein, he offered an account of what discretionary judicial decisionmaking ought to be:

> [N]othing in our history or traditions permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear cases simply at its pleasure. Authority to act necessarily implies a correlative responsibility. Thus when jurisdiction is conferred, I believe there is at least a "principle of preference" that a court should entertain and resolve on its merits an action within the scope of the jurisdictional grant. For this preference to yield in a particular case, the court must provide an explanation based on the language of the grant, the historical context in which the grant was made, or the common law tradition behind it.[103]

Abstention doctrines crafted in conformity with that account, he suggested, would accord wholly with properly interpreted legal process and rule of law ideals.[104] Tellingly, however, Professor Shapiro attempted no case-by-case defense of the Burger Court's then-ongoing expansion of previously established abstention doctrines.

In my view, Professor Redish's rule of law critique of the Supreme Court's practice in developing and extending abstention doctrines was a timely one in 1984. Its aptness came from the frequently freewheeling approaches to both constitutional and statutory interpretation that largely predominated in the 1970s and 1980s. Not terribly long before Redish's article, the Court's methodologically undisciplined decisionmaking in

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[100] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

[101] *See* Shapiro, *supra* note 15, at 545–74 (showing "that the existence of . . . discretion is much more pervasive than is generally realized, and that it has ancient and honorable roots at common law as well as in equity").

[102] *Id.* at 545.

[103] *Id.* at 575 (footnote omitted).

[104] *See id.* at 579–85.

constitutional cases, perhaps as most famously reflected in *Roe v. Wade*,[105] provoked John Ely's celebrated critique[106] and helped to inspire the originalist movement.[107] A similar yearning for interpretive discipline contributed to the rebirth of interest in theories of statutory interpretation, including the "new textualism."

In the prevailing jurisprudential climate of the 1970s and early 1980s, rule of law anxieties seem to me to have been as well placed in an assessment of abstention doctrine as in criticisms of the Supreme Court's constitutional jurisprudence. As the Burger Court sought to revitalize constitutional federalism, *Younger* abstention doctrine, in particular, grew like Topsy.[108] And some of the expansions seemed much more driven by free-floating and even ad hoc ideas of sound policy than by principles reflected in, or even consistent with, preexisting authorities. When the Court held in *Rizzo v. Goode*[109] and *City of Los Angeles v. Lyons*[110] that *Younger* principles—which originated in notions of deference to state judicial proceedings—might bar injunctions against alleged police misconduct, the editors of *Hart and Wechsler's The Federal Courts and the Federal System*—who then included Professor Paul Bator, generally a stalwart among academic defenders of doctrines of judicial federalism—were aghast. Their damning response (characteristically) took the form of a rhetorical question: "Do you understand the *content* of a rule that would take the Younger doctrine of non-interference with state judicial proceedings and convert it by analogy into a principle of non-interference with state executive officials?"[111]

In endorsing this critique, I acknowledge that difficult issues loom just below the surface. Anyone who assumes that jurisdictional statutes should be interpreted in light of previously recognized equitable and other exceptions (such as the forum non conveniens doctrine[112]), as I do, must face an inevitable question about how to interpret or specify the pertinent prior practice. Unless history definitively fixes the list of permissible exceptions, the relevant practice could be characterized, at the limit, as one

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[105] 410 U.S. 113 (1973).

[106] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[107] On the origins of originalism, see, for example, Solum, *supra* note 35.

[108] *See generally* HART & WECHSLER, *supra* note 5, at 1121–28 (detailing extensions of the *Younger* doctrine).

[109] 423 U.S. 362 (1976).

[110] 461 U.S. 95 (1983).

[111] PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1432 (3d ed. 1988).

[112] *See generally* HART & WECHSLER, *supra* note 5, at 1426–30 (discussing contemporary federal doctrine and the traditional, underlying notion that a court may, when an alternative forum is available, decline to exercise jurisdiction if the convenience of the defendant and witnesses and the interests of justice would make the alternative forum more appropriate).

in which courts have crafted exceptions to jurisdictional grants whenever they believed such exceptions would constitute good policy. Although that characterization seems to me to go too far, I doubt—as I shall explain more fully below—that it is possible to give an adequate answer to the question of the level of generality with which pertinent background practice should be described that is not at least partially question-begging. In the end, there is no escaping the need for case-by-case judgments. In my judgment, however, the Court's decisions in *Rizzo* and *Lyons* were a leap too far: at least in the absence of a far more cogent, precedent-based justification than the Court managed to provide, its rulings in those cases overstepped the bounds of properly judicial decisionmaking.

It may be a mark of the potency of Professor Redish's arguments—which were less cautious and qualified than those that I have offered—that the Supreme Court has subsequently responded, apparently deliberately, to the rule of law objections to which its past practice had given rise. The Court has arrested the growth of *Younger* doctrine. The signal development came in a 1989 decision, written by Justice Scalia, that held *Younger* did not require abstention in deference to a state judicial proceeding that did not involve the coercive enforcement of state law.[113] To require abstention outside the context of coercive proceedings "would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States,"[114] the Court reasoned. The Court has further held that abstention is appropriate only in actions seeking equitable or other discretionary relief.[115] And it has curbed if not entirely eliminated some abstention-like doctrines of relatively marginal significance.[116]

Nevertheless, the Court has not eliminated the main elements of abstention doctrine as they existed at the time of Redish's critique. The cores of the *Pullman* and *Younger* doctrines remain. Although the Court has said that abstention is permissible only in cases involving equitable or discretionary remedies, it has filed down this rule's teeth by allowing lower courts to "stay" action in federal suits pending the outcome of state court proceedings, even when they are forbidden formally to abstain.[117] For most if not all practical purposes, the distinction between abstaining and staying

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[113] *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 373 (1989).

[114] *Id.* at 368.

[115] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996). For critical discussion of *Quackenbush*, including a skeptical assessment of its treatment of precedent, see HART & WECHSLER, *supra* note 5, at 1063–65.

[116] *See* Marshall v. Marshall, 547 U.S. 293, 311–12 (2006) (holding that the "probate exception" to federal jurisdiction applies only to cases of in rem jurisdiction in which a state court has already assumed jurisdiction over the res); Ankenbrandt v. Richards, 504 U.S. 689, 695 (1992) (holding that "the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts").

[117] *See Quackenbush*, 517 U.S. at 721.

a federal action pending the completion of state court proceedings makes no difference whatsoever.[118]

With abstention doctrines pruned a bit from where they stood in 1984 but not fundamentally altered, much less eliminated, a version of the rule of law question remains to be asked and answered: Are the core abstention doctrines that remain in place, and continuing judicial practice in applying them, an inherent affront to rule of law ideals?

In my view, the answer to that question is "no." To begin with, as suggested by what I have said already, any root-and-branch condemnation of abstention doctrine would have seemed to me to be too strong even in the 1970s and 1980s. As David Shapiro argued, abstention has honorable precursors and analogues in our legal tradition, including the nonexercise of jurisdiction under equitable maxims, the forum non conveniens doctrine, judge-imposed demands for the exhaustion of remedies, and discretionary standards governing the exercise of pendent and ancillary jurisdiction.[119] As experience with these discretionary, mostly judge-shaped analogues suggests, there is no reason that abstention doctrine and practice could not be disciplined.[120] In my judgment, there is now enough discipline to satisfy the requisites of the rule of law.

What is more, even if one agreed with Redish's rule of law critique of the development of abstention doctrines, highly important rule of law values would tell strongly against the adoption of his proposed remedy, involving those doctrines' total abandonment. The reason involves the role of precedent in American law.[121] The doctrine of precedent admittedly includes many complexities, especially in constitutional law. As Professor Redish has emphasized, the Supreme Court treats the doctrine as one of policy.[122] Particular decisions are undoubtedly vulnerable to overruling.[123] The important point, however, is that rule of law ideals require reasonable stability. Although the Court can overturn almost any single precedent that it believes sufficiently badly reasoned, it cannot too dramatically alter the legal landscape all at once. In determining which past decisions most deserve overruling, time and acceptance matter.[124] A good deal of time has passed since the decisions in *Pullman* and *Younger*.

Whether precedents are workable, and conduce to sensible results, matters too. The *Younger* doctrine, in particular, stands up well when tested

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[118] *See* HART & WECHSLER, *supra* note 5, at 1064.

[119] *See* Shapiro, *supra* note 15, at 547–60.

[120] *See id.* at 575 (defending judicial discretion in conjunction with a "principle of preference" that courts should decide cases within their jurisdiction or provide a reason for not doing so based on text, context, or common law).

[121] *See* Fallon, *supra* note 77.

[122] *See* REDISH, *supra* note 50, at 44–50.

[123] *See id.*

[124] *See* Fallon, *supra* note 77, at 1146–50.

against these criteria. Under modern constitutional doctrine, "it is hard to imagine a criminal prosecution in which a constitutional claim could not be raised; and it would be unworkable if every prosecution could be interrupted by suit for a federal injunction at any stage in the proceedings."[125] Although *Younger* can be controversial as applied to some cases, its basic premise that federal courts should not interrupt pending state criminal prosecutions is an eminently sensible one. It commanded the votes of eight of the nine Justices of the Supreme Court in 1971, including Justices Brennan and Marshall, who ardently championed aggressive intervention by federal courts to protect federal rights in other contexts.[126] Over the decades since 1941, *Pullman*, too, has proved workable, and procedures have been developed to reduce the delays in the adjudication of federal constitutional claims that it once occasioned.[127]

If revived today, Professor Redish's rule of law argument would border on internal contradiction. In the name of judicial restraint, it would ask the Supreme Court to demolish doctrines that have structured judicial federalism, and done so reasonably successfully, for many decades. In the name of the rule of law, it would also upset the law-based expectations of past Congresses that jurisdictional legislation would be interpreted in light of longstanding background understandings that federal courts sometimes should and would abstain.[128]

V. ABSTENTION IN RELATION TO OTHER FEDERAL COURTS DOCTRINES

So far I have looked at abstention in relative isolation from other federal courts doctrines. But we may gain perspective on the important notions of legal and interpretive legitimacy on which Professor Redish rested his critique of abstention if we widen the lens of inquiry. Above, I characterized *Abstention, Separation of Powers, and the Limits of the Judicial Function* as embracing an interpretive theory under which the Supreme Court must treat statutes as meaning what they would appear to mean in a relatively narrow semantic or policy context. If adopted across the board as an entailment of the constitutional separation of powers, Professor Redish's stringent approach would, I believe, condemn a myriad of federal courts doctrines as illegitimate. On the one hand, this recognition

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[125] HART & WECHSLER, *supra* note 5, at 1095.

[126] *See id.* at 1095–96 (discussing *Younger*'s near unanimity).

[127] *See generally id.* at 1069–75 (discussing the procedural aspects of *Pullman* abstention). Among the procedural developments, nearly all states have established mechanisms that allow federal courts to "certify" state issues for resolution by state supreme courts, without requiring one of the parties to initiate proceedings in a state trial court. *See id.* at 1072–75.

[128] *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 265, 274 (Ian Shapiro ed., 1994) ("[L]egislative action is conditioned by expectations of court behavior and cannot be comprehended independently of those expectations.").

corroborates the arguments that I have advanced already by confirming that his standards of legal and interpretive legitimacy are too rigid. On the other hand, acknowledgment that the Supreme Court has very often taken an extremely liberal interpretive approach in dealing with jurisdictional statutes indicates the continuing pertinence of the legal legitimacy questions that Professor Redish's 1984 article raised. By looking at and reflecting on a number of federal courts doctrines besides abstention, we can hope to make progress toward developing general standards of legal and interpretive legitimacy, or at least toward understanding the criteria that such standards would need to satisfy.

A. Potential Implications of Professor Redish's Interpretive Approach

If the premise were granted that the Supreme Court acts ultra vires whenever it interprets statutes based on a broad view of their semantic or policy contexts to reach conclusions that a narrower focus would not support, a number of federal courts doctrines besides abstention would almost certainly stand condemned. Although I cannot attempt a precise tally, some revealing suggestions emerge from Professor Shapiro's 1985 survey, in which he identified numerous contexts in which the courts have read jurisdictional grants as including an implied authorization of discretion regarding the jurisdiction's exercise, and from Barry Friedman's 1990 article, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*.[129] Friedman expanded the scope of inquiry even further beyond abstention than Shapiro had by identifying lines of cases in which the Court has adopted a broad view of a statute's semantic or policy context in order to hold that it did not impose limitations on previously existing federal jurisdiction, appearances to the contrary notwithstanding.

Shapiro's and Friedman's examples—which would suggest that if abstention doctrines are "illegitimate," then a number of other federal courts doctrines that involve statutory interpretation are illegitimate too—include the following:

Forum non conveniens. Applying traditional forum non conveniens principles, federal courts have long treated otherwise applicable jurisdictional and venue statutes as permitting them to dismiss cases when the convenience of the parties and witnesses and the interests of justice identify another available forum as more appropriate for resolving a dispute.[130] Although 28 U.S.C. § 1404 now provides an express authorization for transfers of cases from one district court to another, the

[129] Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990).

[130] *See* Shapiro, *supra* note 15, at 555–57.

traditional doctrine of forum non conveniens continues to apply when the appropriate court is not one to which the statute authorizes transfers.[131]

The Anti-Injunction Act.[132] Since the early days of constitutional history, the United States Code has included an anti-injunction statute barring federal courts from issuing injunctions against state court proceedings.[133] With little regard for the statutory language, the Supreme Court inaugurated a tradition of recognizing implied exceptions as early as 1836.[134] A 1948 revision of the statute created a series of express exceptions to the anti-injunction mandate.[135] The Court, however, has felt free to continue to take interpretive liberties with the statute, at least from time to time. In *Leiter Minerals, Inc. v. United States*,[136] the Court ruled that the Anti-Injunction Act included, or at least would tolerate, an implied exception for injunctions sought by the United States. In *Mitchum v. Foster*,[137] which I discussed above, the Court held—oxymoronically, in the eyes of Professor Redish[138]—that a statute licensing suits against state officials for constitutional violations impliedly creates an "expressly authorized" exception to the anti-injunction stricture.

Arising under jurisdiction. In 1875, a Reconstruction Congress enacted legislation giving the federal district courts jurisdiction of all civil actions "arising under" the Constitution, laws, and treaties of the United States.[139] In conferring "arising under" jurisdiction, the statute, now codified as 28 U.S.C. § 1331, copies the language that Article III employs in defining the permissible outer bounds of federal jurisdiction. In a statement on the Senate floor, the law's principal drafter averred that it would "confer the whole [jurisdictional] power which the Constitution" authorizes.[140] Yet the Supreme Court, apparently for policy reasons, has always read § 1331 as conferring a more narrowly circumscribed jurisdiction than the Constitution would permit. Among other things, the Court has held that § 1331 jurisdiction does not extend to any case in which a federal question does not appear on the face of the plaintiff's well-pleaded complaint, even when the case will predictably turn, as a practical matter, on a federal issue introduced by way of defense or a reply to a

[131] The transfer statute would not, for example, allow transfer of a case to a court in another country, but neither does it deprive a district court of the ability to abstain on forum non conveniens grounds. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

[132] 28 U.S.C. § 2283 (2006).

[133] *See* HART & WECHSLER, *supra* note 5, at 1030.

[134] *See* Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 405–06 (1836).

[135] *See* HART & WECHSLER, *supra* note 5, at 1031–32.

[136] 352 U.S. 220 (1957).

[137] 407 U.S. 225 (1972).

[138] *See* Redish, *supra* note 13, at 87.

[139] *See* HART & WECHSLER, *supra* note 5, at 774–76.

[140] *See id.* at 775 (quoting Senator Matthew Hale Carpenter).

defense.[141] Even when a federal question appears on the face of a well-pleaded complaint, the Court has held that § 1331 jurisdiction will not lie unless federal law creates the plaintiff's cause of action or the federal question embedded in a state law cause of action is sufficiently important to merit "having a federal forum for the issue."[142]

Official immunity in § 1983 actions. Read literally, § 1983 creates a cause of action against every state and local government official who violates "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[143] It makes no reference to official immunity. The Supreme Court, however, has held that officials who are sued for damages enjoy either "absolute" or "qualified" immunity from suit, depending on the character of their official functions.[144] The Court has sometimes suggested that the statute should be construed as incorporating immunities previously recognized in common law.[145] But the leading case establishing the currently applicable qualified immunity standard justified its holding solely on policy grounds, without reference either to the language of § 1983 or to Congress's purposes in enacting it.[146]

Habeas corpus. Through nearly all of the twentieth century, federal habeas corpus jurisdiction to review state criminal convictions came from a statute first enacted in 1867 that authorized the writ for persons "restrained of . . . liberty in violation of the constitution."[147] Often with little or even no regard for the statutory language, the Supreme Court crafted rules precluding the exercise of the jurisdiction in cases involving unexhausted state remedies, procedural default, and repetitive petitions.[148] Congress very substantially revised the statutory framework in 1996,[149] with the effect of either reinforcing or displacing much of the Court's common-law-like handiwork. Even now, however, the Court has apparently retained an important judicially crafted limitation on the availability of federal habeas relief: it has adhered to its prior position that federal habeas courts should

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[141] *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). For discussion of the merits of the "well-pleaded complaint rule," see HART & WECHSLER, *supra* note 5, at 776–80.

[142] *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 319 (2005).

[143] 42 U.S.C. § 1983 (2006).

[144] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[145] *See, e.g.*, Tower v. Glover, 467 U.S. 914, 920 (1984) ("If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.").

[146] The leading case of *Harlow v. Fitzgerald* was not a § 1983 case but one involving the immunities of federal officials sued directly under the Constitution in *Bivens* actions. *See* 457 U.S. at 805. But the Court, in crafting immunity rules for *Bivens* actions, announced that it would apply the same immunity standards in suits against state officials under § 1983. *See id.* at 818 n.30.

[147] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

[148] *See* Friedman, *supra* note 129, at 12.

[149] *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

not grant relief based on Fourth Amendment claims that were fully and fairly litigated in state court, even though the text of the revised statute includes no such exclusion.[150]

Presumption against jurisdiction stripping. Apart from the arguably special case of habeas corpus,[151] the Supreme Court has not established clear constitutional limits on the authority of Congress to strip the federal courts of all jurisdiction over constitutional claims.[152] The Court has affirmed repeatedly, however, that it will not interpret a statute as depriving the federal courts of jurisdiction unless Congress has made its intent to do so extraordinarily clear.[153] Application of the Court's clear statement rule has sometimes resulted in statutory "interpretations" that are difficult to reconcile with statutory language and that find little or no support in Congress's transparently motivating purposes.[154]

Scope of Supreme Court appellate jurisdiction. The statute that authorizes Supreme Court review of final state court judgments in cases involving federal issues does not expressly limit the Court's review to federal issues.[155] Nevertheless, in *Murdock v. City of Memphis*,[156] the Court held that it would ordinarily review only federal, and not state, issues that a state court had decided. Commentators have argued that this exclusion runs contrary to the intent of the Reconstruction Congress that enacted the original version of the current statute as well as to the statute's plain language.[157] The obvious explanation for the Court's result lies in notions of sound jurisdictional policy, including a desire to respect the status of state courts as ultimate expositors of state law, and possibly—though only barely so in the case of the Court's original decision—in the policy of

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[150] *See* Stone v. Powell, 428 U.S. 465, 494 (1976); Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 1028–29 (2010) (noting that *Stone* remains good law following passage of the AEDPA).

[151] *See* Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) (holding that a statute precluding the exercise of habeas corpus jurisdiction over petitions by detainees who fell within the traditional scope of the writ, in the absence of any constitutionally adequate substitute, violated the Suspension Clause).

[152] *See* HART & WECHSLER, *supra* note 5, at 308–14 (discussing relevant authorities and the questions that they leave unresolved).

[153] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 298–99 (2001); Webster v. Doe, 486 U.S. 592, 603 (1988).

[154] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 423 & n.123 (2010) (identifying "cases in which the Court has rewritten or mangled a statute in the application of a clear statement rule").

[155] *See* 28 U.S.C. § 1257 (2006).

[156] 87 U.S. (20 Wall.) 590, 635 (1875).

[157] *See* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1319 (1986).

constitutional avoidance, which counsels the adoption of otherwise plausible interpretations that avoid serious constitutional issues.[158]

B. Legitimacy in Context

In thinking about the legitimacy of the just-listed doctrines and of the judicial role in crafting them, we can begin by considering two perspectives that define nearly polar alternatives. According to one view, most or all of the doctrines that I have just laid out should be deemed illegitimate for the same reasons that Professor Redish regards abstention as illegitimate: they usurp congressional prerogatives in establishing jurisdictional policy. Once again, however, the position that so many well-settled doctrines are illegitimate seems to me to be not only practically but also jurisprudentially unsound. Regardless of whether doctrines were right or even legitimate at the outset, they can achieve legal legitimacy by becoming woven into the fabric of law and surrounding, accreting expectations.[159] As the legal philosopher H.L.A. Hart emphasized, standards of legality and legal legitimacy necessarily have their ultimate foundations in the social practice of judges and other officials,[160] not the commands of a sovereign lawgiver or the ideals of legal theorists.[161] Neither commands nor ideals are law unless accepted standards or a "rule of recognition"[162] identifies them as such. Conversely, norms that judges follow, and believe that they and other officials have duties to follow, normally achieve validation as law through that pattern of acceptance. Although any good legal theory must contemplate the possibility of most or even all officials being mistaken about particular issues of legal validity, no theory rooted in social practice can plausibly characterize too many officials as being mistaken about too much. Professor Redish's standards for gauging legal legitimacy would run

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[158] Although *Murdock*'s holding that the Supreme Court lacks jurisdiction to review state court holdings of state law has important parallels in the ruling in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), that federal courts sitting in diversity must follow state court precedents on state law issues, the Court decided *Murdock* more than sixty years before it embraced the *Erie* rule as a constitutional dictate. Accordingly, it seems highly unlikely that the avoidance doctrine—to which the Court did not allude—had any influence on the actual decision in *Murdock*. Even in a post-*Erie* legal universe, it is far from clear that *Erie* would bar the Supreme Court from deciding state law issues in a "case" initially decided by a state court and properly within its constitutionally contemplated appellate jurisdiction, which extends to "Cases," not issues. *See* U.S. CONST. art. III, § 2, cl. 2. Any potential tension with *Erie* that might result from the Supreme Court's ruling on state law issues in cases otherwise properly before it would be ameliorated if the Court's state law holdings were deemed to lack the authority to bind state courts in future cases, with the result that state courts would be the ultimate expositors of state law in all cases not reviewed by the Supreme Court.

[159] *See* Fallon, *supra* note 77, at 1146–50.

[160] *See* H.L.A. HART, THE CONCEPT OF LAW 116, 256 (2d ed. 1994). On the capacity of Hartian theory to illuminate American constitutional practice, see generally Fallon, *supra* note 77.

[161] *See* HART, *supra* note 160, at 44–49 (debunking theories that equate law with the commands of a sovereign lawgiver).

[162] *See id.* at 94–110.

afoul of this precept. With generations of judges now having accepted and enforced the doctrines described above, it is difficult to maintain that all of them could be legally illegitimate today. The thought that large swathes of doctrine are legally illegitimate ought to provoke a rethinking of any measure of illegitimacy that would dictate this conclusion.

An opposite approach, which is roughly that of Professors Friedman and Shapiro, is to rationalize nearly all of the existing doctrinal structure and the interpretive methodology that has given rise to it. Both stipulate that Congress, within very broad limits, can impose any jurisdictional mandates that it wishes.[163] But both also argue that longstanding interpretive practice, and the Constitution as read in light of that practice, justify the courts in resisting the conclusion that Congress has imposed mandates to exercise jurisdiction whenever the courts believe that such mandates would be imprudent.[164] Friedman goes further by maintaining that the Supreme Court can justifiably decline to interpret statutes that would most naturally be read to restrict federal jurisdiction as having done so.[165] Under his proposed "dialogic approach," the courts are entitled to place considerable reliance on their own views about sound jurisdictional policy, without always needing to play the role of Congress's faithful agent, when construing statutes bearing on federal jurisdiction.[166]

Although I agree that courts can play an important role in fine-tuning jurisdictional legislation under the separation of powers,[167] I also believe that more limits are needed than Friedman appears to contemplate when he treats it as legitimate for the Supreme Court, when it disagrees with Congress's jurisdictional policy choices, to "construe its way around [a] statute, no matter how implausible the construction."[168] One can accept that long-settled doctrines are legally legitimate today, because adequately

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[163] *See* Friedman, *supra* note 129, at 48–49; Shapiro, *supra* note 15, at 583–84.

[164] *See* Friedman, *supra* note 129, at 10; Shapiro, *supra* note 15, at 545–47, 570–74.

[165] *See* Friedman, *supra* note 129, at 48–49.

[166] *See id.* at 48–49 (maintaining that questions such as whether the federal courts must "exercise every bit of jurisdiction imposed upon them by Congress" receive their answers from a dialogic interchange between Congress and the Supreme Court in which the Court can and sometimes does resist congressional policy decisions).

[167] *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 408:

> [Experience demonstrates] how difficult it is to expect that Congress will, by virtue of detailed textual specification, be able to get things right the first time, or, when initial legislative efforts misfire, to fix things later. There are thus real pitfalls in the assumption that Congress can and should be expected to resolve matters in legislative text without the aid of courts acting as junior partners in shaping a workable legal system.

Meltzer based his conclusion on case studies that included Congress's enactment of a supplemental jurisdictional provision, now codified in 28 U.S.C. § 1367 (2006), in response to the Supreme Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), *see* Meltzer, *supra*, at 398–403, its amendments of the federal officer removal statute, § 1442(a)(1), *see* Meltzer, *supra*, at 400–01 n.229, and the Anti-Injunction Act, § 2283, *see* Meltzer, *supra*, at 407–08 n.254.

[168] Friedman, *supra* note 129, at 48–49.

justified by stare decisis, without also concluding that the interpretive assumptions that would have been necessary to defend those doctrines' initial development are also legally legitimate in every instance. Questions involving appropriate and legitimate methodologies of statutory interpretation in cases of first impression are not only distinctive but also distinctively difficult.

Having distinguished questions about the legitimacy of settled doctrines from the question of legitimate interpretive methodology in cases of first impression, especially in the domain of federal courts law, I must confess immediately that I have no sharp answer to the latter question. Nevertheless, critical reflection on *Abstention, Separation of Powers, and the Limits of the Judicial Function*—viewed now as engaged in a highly illuminating, even edifying dialogue with Professors Friedman and Shapiro—will generate some significant conclusions.

As my discussion of the legitimacy of abstention doctrines has indicated, the most recurring analytical division in the literature on statutory interpretation pits textualists against purposivists. If the case study of abstention sheds any light, however, an even more important divide may separate those who take a broader view from those who take a narrower view of a statute's interpretive context—its "semantic context" in the case of textualists and its "policy context" in the case of purposivists.[169] The broader the interpretive context that an interpreter deems appropriate, the greater the latitude that will emerge for interpretive judgment and for what—in the case of federal courts doctrines that I reviewed above—might fairly be characterized as policy-driven statutory interpretation.

If this conclusion is correct, then the crucial question is how to fix the breadth of the semantic or policy context within which statutes ought to be interpreted. In Part III of this Essay, I argued against Professor Redish's insistence that considerations of democratic theory dictated that the relevant context should always be defined narrowly. I did not, however, endorse the polar opposite view that courts should always adopt the broadest possible understanding of the semantic or policy context in which Congress enacted a statute.

In defending the Supreme Court's entitlement to adopt a broad view in every case in which a narrower view would produce bad policy (as seen from the Court's perspective), Professor Friedman appears to rely on the notion, which Professor Shapiro defends expressly,[170] that acceptance of broad judicial discretion in the interpretation of jurisdictional legislation will yield good results. And if we further ask by what gauge the goodness of results ought to be measured, we can tease out two deeper assumptions. The first is one of genuine, specialized judicial expertise concerning the

[169] *See supra* notes 81–82 and accompanying text.

[170] *See* Shapiro, *supra* note 15, at 574, 588.

consequences of the exercise of federal jurisdiction.[171] Better than Congress, the courts understand how litigation works in practice. The second assumption is one of widely shared public values in light of which the practical consequences of jurisdictional allocations can be assessed. In other words, by bringing specialized expertise to bear on the interpretation of jurisdictional statutes, courts will help to establish a jurisdictional scheme that Congress and the public will rightly accept, at least in the long run, as well or reasonably designed.

Although I feel considerable sympathy for this line of analysis, for reasons stated earlier, it also needs to be recognized that reasonable people can, and do, reasonably disagree about many propositions of fact and value.[172] As debates about the proper reach of abstention doctrine vividly illustrated during the 1970s and 1980s, reasonable people can certainly disagree about the respective competencies of state and federal courts, the weights of competing state and federal interests, and the amount of discretion that a reasonable Congress would have delegated to the federal courts. In the end, the question of when judges are entitled to take a broad view in order to resist conclusions about statutory meaning that they think improvident inevitably requires the exercise of judgment, including predictive judgment about what the actual, practical effects of alternative constructions would turn out to be. And if history teaches anything, it may be that the requisites of good judgment defy expression in clear, ex ante rules.

For the most part, I believe that assumptions of judicial expertise and broadly shared long-term values—which would tend to support the Supreme Court in taking a broad view of the relevant interpretive context—are likely to be better founded in the domain of federal courts law than in many if not most other fields. Wisely, in the articles that I have discussed, Professors Friedman and Shapiro did not offer general theories of statutory interpretation but theories about the judicial role in interpreting jurisdictional legislation. If there is any practical and normative matter with respect to which judges possess genuine expertise, it involves the appropriate distribution of judicial functions. Disagreement with judicial choices, even if reasonable, will typically prove passing. Under these circumstances, the Supreme Court should be entitled to focus on what it takes to be long-term public values, occasionally in contrast with immediately prevailing sentiments. For example, an appropriately long-term view may have justified the Court in resisting the conclusion that Reconstruction Congresses—whatever their immediate attitudes toward state courts—should be interpreted as having mandated jurisdictional

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[171] *See id.* at 574.

[172] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1364–69 (2006).

revolutions that would have demeaned state courts and thrust potentially insupportable burdens onto federal courts.

Again, however, I hesitate to generalize too much. As I have said, even in the forbidding intricacies of federal courts law, reasonable experts sometimes differ passionately, and the publicly contested stakes can grow high. When we acknowledge this to be the case, one important conclusion follows directly: just as it may be impossible to lay down determinate rules for good interpretive judgment, so it may be impossible to formulate sharply edged conditions of interpretive legitimacy and illegitimacy. Another significant conclusion may then emerge as a corollary: given reasonable disagreement, we should refrain from charging illegitimacy too readily, lest we devalue the term. In judging legitimacy and illegitimacy as much as in determining the meaning of a statute, everything depends on context. For me, at least, this is a sobering conclusion, which I draw with more confidence than satisfaction, for it generates infinitely more questions than it resolves.

CONCLUSION

The legitimacy question that Professor Martin Redish framed for debate in *Abstention, Separation of Powers, and the Limits of the Judicial Function* remains as fresh, important, and perplexing today as it was when he first raised it. We have to accept that courts will make mistakes, but it is a stronger ground for outrage when they act ultra vires. In this Essay, I have argued that Professor Redish was wrong to conclude that the best reading of the Constitution and relevant statutes precludes federal judicial abstention under all circumstances. I have further argued that the adoption of Redish's implicit standards for judicial legitimacy would have the practically and jurisprudentially untenable consequence of threatening a myriad of other federal courts doctrines.

My criticisms of Professor Redish's arguments aside, his raising of the question of abstention doctrine's legitimacy was an enduring contribution to legal thought and debate, especially but not exclusively in the domain of federal courts law. In taking up that question, I have meant to pay tribute to its profundity without pretense of having spoken the final word. Sometimes the deepest questions will simply not yield to sharply etched, once-and-for-all answers.