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# "BAD" JUDICIAL ACTIVISM AND LIBERAL FEDERAL-COURTS DOCTRINE: A COMMENT ON PROFESSOR DOERNBERG AND PROFESSOR REDISH\*

Jack M. Beermann\*\*

*"The Framers of our Constitution believed that a sharp separation of executive, legislative, and judicial power was essential to the preservation of liberty. In their view, the power of the central government had to be fragmented among three separate branches with separate functions if ours was to remain a government of laws and not of men."*

David M. McIntosh and Steven G. Calabresi<sup>1</sup>

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\* This comment was prepared for the Section on Federal Courts panel at the AALS annual meeting in January, 1990. The reader may be confused by references to elements of Professor Redish's paper not found in the final, published version. Since I wrote these comments, Professor Redish has completely reworked his paper. I feel a bit like a political scientist asked in September, 1989, to write an essay on the significance of the Berlin Wall to American foreign policy. I have decided, however, to leave my comments essentially in their original form with the following partial list of concepts and arguments that do not appear in Professor Redish's final draft to help the reader follow my arguments. I have also included a brief afterword with reactions to Professor Redish's final version.

In his preliminary draft, Professor Redish stated and elaborated on what he called the "representational principle" in an effort to link federal-courts doctrine to substantive constitutional values. He also argued that lower-federal-court jurisdiction is a matter of legislative competence under the Constitution. In this earlier draft, Professor Redish expressed his instinct that public-choice theorists are wrong in claiming that legislation does not reflect the will of the majority. He also accused related theorists of applying anti-democratic principles to measure the performance of the legislature. Finally, Professor Redish argued that federal common law violates the representational principle because it contravenes the Rules of Decision Act.

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1. Letter from Steven G. Calabresi and David M. McIntosh (Nov. 27, 1989) (announcing a Federalist Society conference on "The Presidency and Congress: Constitutionally Shared and Separated Powers" to be held on January 19-20, 1990).

*It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.*

James Madison<sup>2</sup>

## I. INTRODUCTION: THE RHETORIC OF SEPARATION OF POWERS

JUDICIAL ACTIVISM IS often portrayed as a liberal vice.

This perception is wrong both historically and, as Professor Redish argues,<sup>3</sup> currently as well. The federal judiciary has been and still is an activist institution, working with both substantive law and jurisdictional rules to achieve its own policy goals. It has done this in statutory, constitutional, and common-law matters. Specifically, the Supreme Court of the United States has actively shaped the jurisdiction of the federal courts in a restrictive and generally conservative manner.

Professors Doernberg<sup>4</sup> and Redish attack this last form of activism by the federal courts, activism in shaping their own jurisdiction. The conclusion common to the two papers, arrived at by different routes, is that when Congress has spoken regarding the scope of federal jurisdiction, the federal courts have no business tinkering with Congress's plan.<sup>5</sup> Thus, Professor Doernberg would discard the well-pleaded complaint rule<sup>6</sup> that limits the federal question jurisdiction of the lower federal courts, and Professor Redish would eliminate abstention of all sorts<sup>7</sup> and, presumably, all other prudential limitations on federal jurisdiction.

Each paper makes its case well. Professor Doernberg persua-

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2. THE FEDERALIST NO. 48, Vol. I, at 338 (J. Madison) (M. Walter Dunne ed. 1901).

3. See Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 CASE W. RES. L. REV. 1023 (1989-90) [hereinafter Redish, *Symposium*]; see also *supra* note \* (explaining events during the preparation of this symposium).

4. See Doernberg, *"You Can Lead A Horse to Water . . ." The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress,* 40 CASE W. RES. L. REV. 999 (1989-90).

5. See *id.* at 1020-21; Redish, *supra* note 3, at 1033-34.

6. Doernberg, *supra* note 4, at 1006-09.

7. Redish, *supra* note 3, at 1030-33.

sively argues that the well-pleaded complaint rule is contrary to the language and intent of the federal question statute<sup>8</sup> and the Declaratory Judgment Act.<sup>9</sup> Professor Redish's analysis, a sort of prologue to his earlier paper on abstention and separation of powers,<sup>10</sup> brings substantive support to the separation of powers attack on doctrines limiting jurisdiction by linking the attack to the positive constitutional value of representative democracy.<sup>11</sup> Taken together, these papers indict the Supreme Court's view of its own power to regulate the jurisdiction of the federal courts.

My sympathy for these papers bothers me. I have sympathy for them because the well-pleaded complaint rule includes and excludes cases without rhyme or reason and because abstention leaves too limited a role for federal court, civil rights enforcement. However, I am uncomfortable with the conclusion that proper interpretation and application of jurisdictional statutes by federal courts requires literalism of the sort Professors Redish and Doernberg demand. To use economic terminology, even though I generally agree with the papers' conclusions regarding the specific jurisdictional questions they address, I fear the negative externalities their methodologies might have for other questions that present a choice between judicial restraint and judicial creativity.

Perhaps my problem is that I am taking the separation of powers rhetoric in both papers too seriously. The arguments I prefer to use to justify broad federal jurisdiction, especially in civil-rights cases, involve the merits of the claims and not technical federal jurisdiction rules or structural analysis.<sup>12</sup> Unfortunately,

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8. See Doernberg, *supra* note 4, at 1006-09. The federal-question statute is codified at 28 U.S.C. § 1331 (1982) ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

9. See Doernberg, *supra* note 4 at 1009-16. The Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934) (codified at 28 U.S.C. § 2201 (1982)) states: "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

10. See Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) [hereinafter Redish, *Abstention*] (analyzing the different judicial abstention doctrines and arguing that "neither total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers, wholly apart from the practical advisability of either form of the doctrine").

11. See Redish, *Symposium*, *supra* note 3; *supra* note \*.

12. Cf. Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 499 (1989) ("substantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues, and have done so throughout our history").

because of its general conservatism on civil rights and related matters, the current Supreme Court is unlikely to abandon the well-pleaded complaint rule or abstention in response to arguments implicating the important federal interests that are sacrificed. However, the recent revival of serious separation of powers limits on government action<sup>13</sup> makes separation of powers rhetoric an attractive means to achieve ends that run counter to other current trends on the Court.<sup>14</sup>

The problem with using separation of powers as support for other substantive goals is that the Court itself does not seem to care about separation of powers except insofar as it serves the Court's substantive goals. There is no principled rejection by a conservative faction of the Court of judicial creativity; rather, the Court's separation of powers decisions appear, at least sometimes, to be as concerned with the policies underlying the challenged statute as with principles of separation of powers.<sup>15</sup> After the majority opinion in *National League of Cities v. Usery*<sup>16</sup> and the dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>17</sup> conservative members of the Court cannot claim that they object in principle to judicial frustration of congressional legislation. In addition, after *City of Richmond v. J.A. Croson Company*,<sup>18</sup> the conservative members of the Court cannot credibly ar-

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13. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (holding that the Comptroller General's role in exercising executive functions under the Gramm-Rudman-Hollings Act is unconstitutional, since a "direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers").

14. This revival of separation of powers notions by the Court makes Professor Redish's attack on federal common law look even more clever, since it adds a federalism-states' rights approach to which one would expect the current Court to be quite receptive.

15. See generally Carter, *Comment: The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1989) (discussing separation of powers analysis used in upholding the Ethics in Government Act's independent counsel provision in *Morrison v. Olson*, 108 S. Ct. 2597 (1988)).

16. 426 U.S. 833 (1976) (holding that the Tenth Amendment bars Congress from applying federal minimum wage and overtime rules to state and municipal employees), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

17. 469 U.S. 528 (1985). The majority criticized the *National League of Cities* approach as "inevitably invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.* at 546. The dissenters argued that the majority's decision "effectively reduces the Tenth Amendment to meaningless rhetoric." *Id.* at 560 (Powell, J., dissenting).

18. 109 S. Ct. 706 (1989). *Croson* placed significant constitutional restrictions on a local government's ability to use racial set-aside schemes in government contracting. *Id.* at 708; see also *Martin v. Wilks*, 109 S. Ct. 2180, 2181 (1989) (placing due process restrictions on the use of consent decrees to allow a city to give preferential treatment to members of minorities when making promotions). These two cases are likely to create substan-

gue that they object in principle to judicial creation of new constitutional rights against local government, rights that in the *Croson* case frustrate important local policies and create significant litigation burdens on the federal courts. The judicial creation of these rights should fall victim to the double whammy of violating separation of powers and federalism principles. However, like separation of powers rhetoric, federalism rhetoric is being used by the Court to serve substantive goals.<sup>19</sup>

I am, therefore, left with the problem of moving from an instinctive reaction against the separation of powers thesis to a coherent criticism of papers whose substantive outcomes I favor. Although there is much to say about the landscape to which the papers lead us, my comments center on their more general separation of powers aspects rather than the specifics of the statutes involved or the history of the interaction between Congress and the courts concerning those statutes. My conclusion is that these papers reach the correct results, because it would be better for federal courts to take jurisdiction of many cases that, under present law, are either held to be outside the federal question jurisdiction or that fall victim to abstention of one sort or another. However, separation of powers rhetoric (and I think in these matters it is rhetoric and nothing more) does not strengthen the argument and may actually weaken it.

## II. ALLOCATING CONSTITUTIONAL AUTHORITY OVER FEDERAL JURISDICTION

The question of the Constitution's allocation of power over federal jurisdiction becomes more difficult the more deeply it is explored. Neither Professor Doernberg nor Professor Redish confronts a serious textual problem with their theory that the Constitution vests in Congress the exclusive responsibility for determining the jurisdiction of the lower federal courts, thus making judge-made exceptions violative of separation of powers:<sup>20</sup> the Constitu-

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tial litigation brought to enforce these newly created rights unless congressional efforts to overrule the decisions succeed.

19. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986) (requiring federal court abstention from enjoining a state administrative proceeding due to concern for comity and federalism).

20. "Separation of powers," in the context of jurisdictional power, may mean nothing more than honoring specific constitutional provisions. For example, it has been argued that the phrase "separation of powers," when used in reference to the government of the United States, refers to observance of constitutionally (textually) mandated allocations of power

tion does not explicitly mention authority over jurisdiction. Textual arguments against judicial power to regulate jurisdiction rely on article I, section 1's vesting of the legislative power in the Congress and the *implicit* vesting in Congress of the power to regulate the jurisdiction of the lower federal courts. This power is said to arise either from the explicit grant to Congress of the power "to constitute Tribunals inferior to the supreme Court"<sup>21</sup> or from Congress's general power to make laws considered "necessary and proper"<sup>22</sup> to carry out its enumerated powers. The fact that the constitutional text does not mention power to regulate the jurisdiction of the lower courts, together with its explicit grant to Congress of the power to make regulations and exceptions regarding Supreme Court jurisdiction,<sup>23</sup> supports the contrary inference, that the Constitution was not intended to confer on Congress power over lower-court jurisdiction. Although it has been argued, in light of this structure, that the Constitution requires Congress to vest all constitutionally permissible jurisdiction in any lower federal courts it chooses to establish,<sup>24</sup> the Court itself has settled

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among the three branches and that it has no independent meaning. See Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109, 111 (1984) (contending that "separation of powers is not a distinct analytical doctrine" and that the cases in which the Supreme Court has purportedly relied "on the doctrine have in fact been decided by referring to other traditional sources of decisional authority"). Although I agree that separation of powers does not have the sort of doctrinal meaning that specific clauses of the Constitution have developed, principles of separation of powers are often thought to exert normative force over an issue of allocation of power. Professor Glennon is correct, however, that many cases loosely referred to as "separation of powers" cases center doctrinally on a specific clause of the Constitution. For example, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), is accurately characterized as involving the proper interpretation and application of the procedures for making law and presenting legislation to the President that are prescribed in U.S. CONST. art. I, § 7. See Glennon, *supra*, at 118-19. The federal Constitution, unlike many state constitutions, has no separation of powers clause that might take on independent meaning. In state constitutions with separation of powers clauses, courts have interpreted such clauses to prohibit legislation regarding the measure of damages in tort cases on the ground that the legislation encroaches on the judicial function of granting remedies. See *Boyd v. Bulala*, 647 F. Supp. 781, 790 (W.D. Va. 1986) (Construing Virginia law and holding that "the legislature may not mandate the amount of judgment to be entered in a trial. Such a measure . . . impermissibly interferes with the function of the judicial branch, thereby violating the separation of powers."), *aff'd in part, rev'd in part on other grounds*, *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).

21. U.S. CONST. art. I, § 8, cl. 9.

22. U.S. CONST. art. I, § 8, cl. 18.

23. See U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulation as the Congress shall make.").

24. See, for example, Justice Story's dictum in *Martin v. Hunter's Lease*, 14 U.S. (1 Wheat.) 304 (1816):

on the view that Congress may establish lower federal courts without vesting all of Article III's jurisdiction in those courts.<sup>25</sup> I wonder if that doctrine, and not abstention and the well-pleaded complaint rule, would be the casualty of Doernberg's and Redish's theory of separation of powers. Nevertheless, the Court could plausibly rely on the above separation of powers arguments built on constitutional text to refuse to grant Congress power to control jurisdiction.

The separation of powers problems with federal court jurisdictional doctrines identified by Professor Doernberg are somewhat different, and less serious, than those identified by Professor Redish, but all of the problems depend on the assumption that the Constitution allocates power over federal jurisdiction to Congress. Professor Doernberg's argument is that Congress has made certain choices regarding federal jurisdiction, and when the Court does not follow those choices, it violates separation of powers.<sup>26</sup> To a certain extent, this analysis turns every mistake the Court makes, at least about statutes, into constitutional separation of powers violations because all such mistakes frustrate the wishes of the legislative branch. It is difficult to see what separation of powers rhetoric adds to the argument that the Court simply misinterpreted Congressional language and history. Professor Redish's attack<sup>27</sup> is more serious (and easier) because, with abstention, the Court explicitly declines jurisdiction over cases it acknowledges meet statutory requirements, thus more obviously thwarting an easily discernible manifestation of congressional intent. However, Professor Doernberg's arguments raise similar concerns, because he identifies policies, not necessarily incorporated into the jurisdictional statutes, that the Court relies upon to justify the creation

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The language of the article [U.S. CONST. art. III] throughout is manifestly designed to be mandatory upon the legislature . . . . The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish.

. . . .

If, then, it is the duty of congress to vest the judicial power of the United States, it is the duty to vest the *whole judicial power*.

*Id.* at 328-30 (emphasis original).

25. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

26. See Doernberg, *supra* note 4, at 1020-21.

27. See Redish, *Symposium*, *supra* note 3, at 1030-33.



and application of its well-pleaded complaint rule.<sup>28</sup> Thus, with both the well-pleaded-complaint rule and abstention, the Court, by advancing policies of its own, arguably encroaches on the (implicit) constitutional authority of Congress to legislate the jurisdiction of the lower federal courts.<sup>29</sup>

Because of the lack of explicit textual authority, the assumption that the Constitution allocates power over federal-court jurisdiction to Congress depends, at least in part, on the conclusion that determining jurisdiction is by nature a legislative function. On this view, article I, section 1's vesting of legislative power in Congress is all the text necessary to make the allocation. However, neither paper makes a serious attempt to present a model of the judicial and legislative powers or even to argue specifically that jurisdiction-shaping is inherently legislative. The notion that control over the courts' jurisdiction is in principle a legislative function does not overwhelm me with intuitive appeal. These authors would have their work cut out for them in order to argue the point convincingly. As noted, constitutional text is not illuminating.<sup>30</sup> A careful look at the history of the Constitution and the custom of the federal courts in their two-hundred-year history would provide a starting point for analysis of the constitutional question, since text, history, and custom are traditional sources for the kind of separation of powers analyses the papers present. Despite attempts by both authors, and by Professor Redish in his earlier work,<sup>31</sup> the relevance to separation of powers analysis of a longstanding judicial assertion of power to adjust congressionally mandated jurisdiction is not adequately confronted. Although this history may not be sustained or certain enough to constitute a tradition worthy of constitutional force, it is a possibility to be reckoned with.<sup>32</sup> In any case, neither Professor Redish nor Professor

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28. The policies include limiting the number of cases on the federal docket, *see* Doernberg, *supra* note 4, at 1005, avoiding federal usurpation of state authority, *id.* at 1005-06, and ensuring that federal judges are not called upon to decide primarily state matters in which they may have little expertise, *id.* at 1006.

29. This authority is implied, not explicit. *See supra* text accompanying notes 21-22.

30. *Id.*

31. *See* Redish, *Abstention*, *supra* note 10.

32. *See* Glennon, *supra* note 20, at 115-16, 134. Professor Glennon points out that, although custom is often relevant to the Supreme Court's understanding of the appropriate constitutional allocation of powers, the Court has not consistently applied the same factors to evaluate the probative value of a custom. *Id.* at 123. He advocates a three-part test for determining whether a longstanding custom regarding power of the branches of government should have constitutional weight. He argues that the branch asserting the power

Doernberg has presented a convincing case for excluding completely the power of jurisdictional modification from the judicial sphere.

### III. THE MYTH OF SEPARATE POWERS

Separation of powers, as conceived of by Redish and Doernberg, is distinctly classical, that is, a product of post-Civil War and pre-realist legal thought.<sup>33</sup> Professors Redish and Doernberg view the powers of government as contained within separate, indentifiable spheres: They both view the legislative power, granted to Congress under article I of the Constitution, as

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must have acted, not merely announced its assertion of authority, that the other branch or branches affected must have had notice of the practice, and that the other branch or branches must have acquiesced in the practice. *Id.* at 134. Silence, for Professor Glennon, is not acquiescence. Professor Doernberg argues in his paper that the Court has changed the rules for federal question jurisdiction so many times that Congress's silence, and even its repeated reenactment of the judicial code, cannot be interpreted as acceptance of the well-pleaded complaint rule. *See* Doernberg, *supra* note 4, at 14. However, this Congressional silence might be interpreted as acquiescence in the general practice of judicial modification of the jurisdictional rules.

Professor David Shapiro's comment on Redish's earlier work argues that there is a well-established custom of judicial control over statutory jurisdiction. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) ("the existence of this discretion [to accept or decline jurisdiction] is much more pervasive than is generally realized, and . . . has ancient and honorable roots at common law, as well as in equity"). Professor Redish persuasively argues that some of Shapiro's examples do not suffice to establish a custom worthy of constitutional recognition. *See* Redish, *Judicial Parity, Litigant Choice and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 349-51 (1988) [hereinafter Redish, *Judicial Parity*]. However, at bottom Professor Redish rejects the notion that custom is relevant to separation of powers. He argues that "to the extent the practices [Professor Shapiro] points to are in fact analogous to judge-made abstention, they are subject to the very same normative attack, and should likewise be rejected." *Id.* at 351. Professor Redish thus rejects the relevance of the history of institutional arrangements within government to separation of powers analysis.

33. One commentator has argued that the Supreme Court abandoned the conceptualist approach to separation of powers by 1933. *See* Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 485 (1989) ("Rather than discrete compartments of scrupulously segregated powers, the edifice of government [by 1933] appeared as an ordered collection of weight-bearing and subsidiary components . . ."). There are commentators who argue that the Court should maintain the separate-spheres version of separation of powers. *See* Carter, *supra* note 15, at 109 ("the de-evolutionary tradition . . . holds that the constitutional scheme of balanced and separated powers should be used as a brake"); *see also* Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 54 ("I believe that the neoclassical approach is the superior mode for analyzing separation of powers questions"). In addition, Justice Scalia argues for it on the Court. *See* *Morrison v. Olson*, 108 S. Ct. 2597, 2622-23 (1988) (Scalia, J. dissenting) (arguing that clearly delineated boundaries between the branches were intended by the framers to ensure equilibrium among the branches).

exhausting the range of policy-making power, at least as between the judicial and legislative branches.<sup>34</sup> Furthermore, they claim to be able to discern the limits on the jurisdiction that Congress has prescribed.<sup>35</sup> They emphatically reject the possibility that Congress or the framers of the Constitution would have wanted the courts to be empowered to decline jurisdiction in cases involving conflicting values that Congress might not have specifically addressed.<sup>36</sup>

Even if it were desirable, I doubt it is possible to identify the boundaries between the three branches of the United States government. The distinction between legislative power and judicial power, for example, is not clear enough to base any conclusions on it, and the existence of a long tradition of judicial adjustment in legislative grants of power illustrates the unlikelihood that the judiciary would maintain identified boundaries against persuasive policy attack. More fundamentally, Professor Redish's and Professor Doernberg's entire concept of separation of powers may not adequately represent the ways in which the three branches of the government of the United States interact. The idea of assigning primary responsibility for the exercise of certain powers to different branches does not foreclose the possibility that the other branches were also intended to exercise those powers to some degree.<sup>37</sup> There are many examples of shared power in the Constitution: the Presidential veto power<sup>38</sup> and the Senate's confirmation

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34. See Doernberg, *supra* note 4, at 1020; Redish, *Symposium, supra* note 3, at 1030-33.

35. See Doernberg, *supra* note 4, at 1016-19; Redish, *Symposium, supra* note 3; *supra* note \*.

36. See Doernberg, *supra* note 4, at 1019; Redish, *Symposium, supra* note 3, at 1033.

37. The Supreme Court's view of separation of powers appears to waver between a relatively inflexible "separate spheres" model and a much more flexible "overlapping" model. Compare *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial . . . The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power . . . must be resisted.") and *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Chadha* and reiterating the notion of inflexible separate spheres) with *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989) ("The Framers did not require — and indeed rejected — the notion that the three Branches must be entirely separate and distinct . . . [Instead, they] recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility. . . .") and *Morrison v. Olson*, 108 S. Ct. 2597, 2620 (1988) ("[W]e have never held that the Constitution requires that the three Branches of Government" operate entirely independently.).

38. U.S. CONST. art. I, § 7.

power of both executive and judicial appointments,<sup>39</sup> to name two. Furthermore, there is constant potential for conflict over the extent to which Congress's power to make law can collide with the President's power to execute the law when Congress tries to be specific about enforcement methods. This problem is exacerbated when it arises in the context of executive matters like foreign affairs and the military, over which the President claims exclusive control.

The boundary between the legislative power over the jurisdiction of the federal courts and the judicial power to adjust the jurisdiction so granted in conformity with policies not shared by the legislature is uncertain. Uncertainty does not necessarily mean that we should not strive to establish a workable boundary, but the uncertainty of the line may be a virtue rather than a vice. In the *Federalist Papers*, James Madison repeatedly referred to the Constitution's separation of powers as a system under which the different branches would fight each other for control.<sup>40</sup> Contemporary analysis of separation of powers echoes this theme, arguing that separation of powers does not mean distinct spheres of authority but, rather, general assignments with sufficient overlap to create conflicts between the branches.<sup>41</sup> Professor Farina calls this conception of separation of powers "dynamic equilibrium."<sup>42</sup> In fact, the failure of the Constitution's language specifically to assign jurisdiction-regulation to Congress suggests intentional ambi-

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39. U.S. CONST. art. II, § 2.

40. See, e.g., THE FEDERALIST NO. 51, Vol I, at 136 (James Madison) (M. Walter Dunne ed. 1901) (arguing that the only way to restrain the three branches of government is by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.").

41. See M. WHITE, PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION 103 (1987) ("Madison is primarily concerned to warn the reader of the difficulty in discriminating and defining with sufficient certainty the provinces of the legislative, the executive, and the judiciary"); Farina, *supra* note 33, at 495-96 ("By the time of the ratification, the prevailing understanding of separation of powers was no longer a simplistic call for absolute segregation of conceptually distinct functions . . . [Separation of powers] expressed the expectation that, through the carefully orchestrated disposition and sharing of authority, restraint would be found . . ."); Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 171 (1986) ("The term [separation of powers] is misleading, however, for it suggests that the Constitution separates the powers each institution exercises rather than the institutions themselves. More aptly, the Constitution mandates a system of shared political powers . . ."); West & Cooper, *Legislative Deference v. Presidential Dominance: Competing Models of Bureaucratic Control*, 104 POL. SCI. Q. 581, 582-85 (1990) (detailing the demise of the traditional, more rigid view of separation of powers).

42. Farina, *supra* note 33, at 497.

guity on the part of the founders, creating an ideal situation for the turf fights that Madison hoped the "separation" of powers would create.

This counter-model of separation of powers, a model of overlapping competence or at least uncertain boundaries, may serve two distinct purposes. First, because the separate branches may be subject to capture by interest groups advancing their own private interests, dividing government power makes it less likely that any single faction could capture enough power to influence governmental action without at least participating in a coalition of factions far more broadly based than it alone. The fighting between the branches over policy would tend to make government action itself more difficult, thus blunting the effect any single branch, and therefore faction, could have. This is said to protect liberty by making regulation less likely.<sup>43</sup> Second, by leaving the boundaries between the branches overlapping, the founders ensured that the tendency of people in government to engage in turf fights would prevent government tyranny, that is, governmental power used in furtherance not of public interests or even narrow factions, but, rather, in the interests of the governors themselves.<sup>44</sup>

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43. See THE FEDERALIST NO. 73, Vol. II, at 72 (A. Hamilton) (M. Walter Dunne ed. 1901) (the executive veto "furnishes an additional security against the enactment of improper laws"); see also THE FEDERALIST NO. 62, Vol. I, at 423 (J. Madison) (M. Walter Dunne ed. 1901) (discussing the advantages of the Senate as an additional check on the House of Representatives: "the faculty and excess of law-making seem to be the diseases to which our governments are most liable"); Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 57 (1987) (arguing that separation of powers was designed to make it more expensive for factions to gain wealth transfers through favorable legislation).

44. See Carey, *Separation of Powers and the Madisonian Model: A Reply to Critics*, 72 AM. POL. SCI. REV. 151, 154 (1978) (The tyranny that Madison feared "involves those in positions of authority using their powers arbitrarily and capriciously to abuse the nongovernmental portion of society. In this situation, the conflict comes down to the governors versus the governed . . ."). Professor Carey tries to rebut a rather familiar argument in favor of the separation of powers. The argument is that separation of powers protects liberty by making government more cumbersome, thus reducing the overall extent of government regulation. See Farina, *supra* note 33, at 516-26 (The Framers concluded that "government which moved too quickly in establishing and altering policy was, over time, less likely to make wise choices and more likely to threaten individual liberty. Therefore, they deliberately created a lawmaking process that was slow, even cumbersome.") (footnote omitted). Professor Carey argues, somewhat controversially, that the system of checks and balances was not designed to thwart majority rule and thus make government more cumbersome. He argues that, in Madison's view, competing factions in American society would prevent tyranny. Carey, *supra*, at 155 ("Madison believed the social checks and balances inherent in the extended republic were an adequate protection against majority tyranny") (footnote omitted). He admits Madison's recognition that, insofar as separation

I do not mean to endorse these views of separation of powers. I put them forward as historical models only to challenge the idea that the Constitution intended to apportion powers among radically separate spheres. The historical view of separation of powers as representing overlapping domains should cast doubt on the simple picture of definitional allocations presented by the papers.

Once separation of powers is understood this way, it is easy to imagine why the federal courts might covet the power to expand their own jurisdiction: in order to create and protect federal rights.<sup>45</sup> More cynically viewed, the judges might expand their jurisdiction to become more powerful or prestigious. On the other hand, the federal courts might find it desirable to restrict their own jurisdiction for a number of reasons. On a raw power level, the courts might disagree with Congress's substantive judgments, or they might wish to avoid work. Further, judicial prestige might be linked to a political movement that favors more restricted jurisdiction for federal courts. However, self-preservation might also explain the courts' unwillingness to entertain certain classes of cases. The judicial branch's effectiveness might be undercut by an overload of cases or by continuous adjudication of cases that are so controversial that they excite widespread anti-federal court sentiment.<sup>46</sup>

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of powers and checks and balances made the process more deliberative, it would have the desirable side effect of increasing the chances that the public interest would be the moving force behind government action. *Id.* at 155-56. However, Professor Carey insists, relying on Madison's characterizations of tyranny in the Federalist Papers, that Madison saw the main purpose of separation of powers as pitting government officials against each other so none could use government for their own private purposes. *Id.* at 154-55. It is unclear whether Professor Carey's analysis is in conflict with the conventional wisdom that separation of powers "preserves liberty by preventing the concentration of too much authority in a single branch of government." Carter, *supra* note 15, at 138. If Professor Carter is worried only about its being too easy for one branch to enact its own policy, then Professor Carey would disagree with him. Professor Carter's vision of separation of powers, however, may implicitly include the corruption thought to accompany concentrations of power.

45. Professor Redish argues that jurisdiction-expanding doctrines do not present the same problems as jurisdiction-contracting ones because the former do not undermine any "substantive legislative scheme." Redish, *Judicial Parity*, *supra* note 22, at 355. He admits, however, that "that fact may not ultimately save those doctrines from separation-of-powers attack," presumably because they still undermine Congress's exclusive legislative control over the jurisdiction of the federal courts. *Id.* at 355-56.

46. Along these lines, Professor Barry Friedman has argued that federal courts should have the power to abstain to avoid friction with state courts, especially when any federal interests at stake are not very important. He argues further that the friction, combined with lowered status if too many routine cases are cognizable in federal court, might threaten the federal courts' ability to perform their core function. See Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 548-49 (1989) ("[U]necessary fric-

Although I do not agree with the reasoning, I can imagine a principled defense of abstention along the following lines. The federal courts have a limited amount of political capital. Civil rights cases often present delicate matters of federal-state relations, and court decisions enforcing the federal Constitution against state and local government might be extremely controversial. If the federal courts act every time a potentially controversial case comes within their jurisdiction, they might lose all credibility and respect and, ultimately, be completely unable to fulfill their function as a protector of federal rights.<sup>47</sup> As a co-equal branch of government, the federal courts might be justified in engaging in self-preservation so their core role in the system is not threatened. Doctrines like abstention allow the federal courts to exercise some modicum of control over their agenda. The well-pleaded complaint rule allows the federal courts to avoid overload. More generally, the interplay between Congress and the courts over these matters looks remarkably like the inter-branch squabbles envisioned by Madison in the *Federalist*.

#### IV. THE NORMATIVE/FORMALIST DEFENSE OF CONGRESSIONAL CONTROL OVER FEDERAL JURISDICTION

Professor Redish provides normative support for his view of legislative supremacy through the representational principle, which identifies Congress as the democratic branch of government and thus the legitimate policymaking body.<sup>48</sup> The principle of representative democracy is supposed to convince us to err on the side of exclusive congressional control over the jurisdiction of the courts. As we shall see, however, the normative force of the representational principle, when applied to the United States government in 1990, may not be so great, and when pushed may degenerate into formalism.

The normative force of Redish's critique based on the repre-

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tion ultimately takes its toll on the ability of federal courts to protect federal rights . . . . [With abstention] the federal courts could avoid the lessened status that might follow from over-involvement in mill-run litigation." (footnote omitted))

47. See Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 471-77 (1974) (analyzing federal court restraint in light of the risk of executive revision of judicial decrees by nonenforcement). Judge Gibbons's analysis of separation of powers problems illustrates the ways in which overlapping powers with uncertain boundaries make for a self-executing allocation of authority characterized by skirmishes at the frontiers.

48. See *supra* note \*.

sentational principle appears to depend on the democratic nature of our particular representative system.<sup>49</sup> On this point, he runs up against the empirical branch of public-choice theory that argues that Congress is not particularly open to influence by the people because of the combination of capture by interest groups and rent-seeking behavior by representatives.<sup>50</sup> Professor Redish has given two responses to the public-choice challenge, one in the present paper and one in an earlier response to some of his critics. In the earlier work he responds that, even if the public-choice critics are correct that Congress is not representative in the democratic sense, the allocation to Congress of power over federal court jurisdiction should be respected because "the separation-of-powers critique at least has the positivistic force of law behind it."<sup>51</sup> This formalistic characterization of the normative force of the separation of powers critique saps his argument of much of its force. Given the uncertainty over the Constitution's allocation of power regarding federal jurisdiction, without actual democracy Professor Redish offers no reason for courts to place the "positivistic force of law" behind his view. Such moral force is necessary to convince courts to create a non-textual constitutional doctrine, especially one that would limit the courts' own power where the allocation of authority in the text of the Constitution is ambiguous. This response also supports the theory that he is more interested in separation of powers for its rhetorical value than for its usefulness in promoting the moral value of democracy.

Professor Redish's present paper takes a different approach to the public-choice problem with the theory, one that I am afraid is not much more satisfactory. In this paper, he has two different answers to the public-choice critics. First, he disputes the factual assertion that congressional action does not reflect the popular will.<sup>52</sup> He may be correct about this, but his "instinct" that legislative motives are mixed and often reflect at least a combination of the public interest and other factors<sup>53</sup> does not successfully refute public-choice theory. Second, he argues that the distinction made in the public-choice literature between public values and private interests is anti-democratic because it evaluates Congress's

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49. *Id.*

50. *See supra* notes 43-44 and accompanying text.

51. Redish, *Judicial Parity*, *supra* note 33 at 363.

52. *See supra* note \*.

53. *Id.*



work by an external standard.<sup>54</sup> But that response depends on an unstated baseline assumption that Congress is democratic. It seems unfair to criticize work aiming to prove that Congress is undemocratic by applying a presumption that Congress is democratic. The point of the public-choice critique is that some legislation, because it benefits a small number of influential parties, can best be explained as growing out of a relationship with Congress different from the ideal of representatives pursuing the best interests or desires of the electorate-at-large.<sup>55</sup> If this model is convincing, then without diminishing the moral force of democracy in the abstract, the separation of powers argument from the representational principle is weakened substantially.

Furthermore, Professor Redish should not be heard to complain about external anti-democratic standards, because his conception of separation of powers suffers from the same combination of evils in at least two ways. First, his implicit, quite narrow conception of the nature of judicial power is the product of an extra-constitutional aversion to judicial power.<sup>56</sup> This is illustrated most clearly by his attack on federal common law. He states that, although he does not find it necessary to decide whether federal common law violates the Constitution, he concludes that federal courts should abandon it because it violates "our democratic structure."<sup>57</sup> Professor Redish is thus also willing to apply external standards, albeit, in his view, in service of democratic values.<sup>58</sup> His conception of separation of powers, however, if applied in other areas, has the potential to function anti-democratically because it could be employed to strike down legislation that assigns authority beyond branch boundaries. Separation of powers, a principle not mentioned in the Constitution, could thus be viewed as an anti-democratic external standard when applied to limit Congress's authority.<sup>59</sup> In fact, Professor Redish's insistence that con-

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54. *Id.*

55. See *supra* notes 43-44 and accompanying text.

56. Professor Redish's analysis explicitly rejects federal common law and appears to reject all sorts of policy-based statutory construction favored by commentators with a less constrained normative image of the judicial role. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (asserting that statutes "should — like the Constitution and the common law — be interpreted 'dynamically,' . . . in light of their present societal, political, and legal context") (footnote omitted).

57. See *supra* note \*.

58. *Id.*

59. The separation of powers doctrine might enhance democracy if it were applied to force government decisions to be made by a more accountable branch, but it is always

stitutional limits be observed so scrupulously is curious. After all, a pure representational principle would stand contrary to application of a constitution as against legislative action.

In sum, Professor Redish's representational principle, as a normative reason behind the assignment of legislative authority to the most democratic branch, is on the surface a persuasive force in favor of observing that assignment. However, public-choice theory and the historical fact that judicially created jurisdictional limitations have not appeared high on the political agenda suggest that the democratic process may not be the best one for resolving jurisdictional issues. Further, the federal courts, as enforcers of constitutional rights, also occupy an anti-majoritarian role in the protection of minority and fundamental rights. Although on the surface, limitations on jurisdiction might not appear consistent with expanding counter-majoritarian rights, reasons of political capital, discussed above, and legal consciousness, discussed below, indicate that the limitations might serve the cause of protecting rights.

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subject to the irony that in its application it frustrates the democratically chosen method of formulating policy. Justice William Rehnquist at one time advocated applying a cousin of separation of powers, the delegation doctrine, against congressional delegations of legislative power to administrative agencies, partly on the ground that legislative decisions should be made by a democratically controlled branch. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (a.k.a. *The Benzene Case*) (Rehnquist, J., concurring) (calling for invalidation of a portion of the Occupational Safety and Health Act of 1970 on the ground that Congress improperly delegated its responsibility to determine the permissible level of benzene exposure). He has apparently given up the delegation critique in favor of the *Chevron* reasoning that courts ought to defer to agency policymaking because the agencies are more accountable than the courts since the President is democratically elected and thus subject to popular control. Under *Chevron*, traditional statutory construction methods would give way to a two step inquiry: agency action should be reversed only if it contravenes a clear statutory command or if it is not the product of a permissible construction of the statute. The agency is allowed to take into account presidential policy. See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Compare *The Benzene Case*, with *Sullivan v. Zebley*, 110 S. Ct. 885, 897-900 (1990) (White, J. joined by Rehnquist, C.J., dissenting) (arguing that Court should, under *Chevron*, defer to agency's regulations as permissible construction of statute) and *NLRB v. United Food and Commercial Workers Union Local 23, AFL-CIO*, 108 S. Ct. 413, 426 (1987) (Scalia, J. concurring, joined by, inter alia, Rehnquist, C.J.) (arguing for stricter application of *Chevron* against judicial rejection of agency action). It is a close and complicated question whether the delegation doctrine, the *Chevron* doctrine or a method of judicial review conducted along more traditional statutory interpretation lines would optimize democracy in these cases.

## CONCLUSION: THE CONSCIOUSNESS OF RESTRAINT

At bottom, my major concern over the separation of powers theory put forward by the papers of Professors Doernberg and Redish is that their logic does not stop at the limiting of federal court authority over its own jurisdiction. Normally this would not worry me, because I am no great believer in the role of logic in law. However, we are witnessing a resurgence from some quarters of formalist legal reasoning that is linked to a distinctly conservative attack on judicial activism. I fear that using judicial restraint to expand federal jurisdiction might lend indirectly to interpreting civil rights laws more restrictively on the merits. Indeed, I find it difficult to imagine that judicial activism in the form of protection of minorities and fundamental rights could survive as an island in a sea of restraint.

There are some ironies here as well. Separation of powers, after all, is a judge-made doctrine. Much of its force is the result of judicial assertion of power to overrule, on separation of powers grounds, the "democratically chosen" programs of the other branches. A further irony is that the separation of powers doctrine is being offered here to expand the power of the legislative branch as against the judiciary. The support for such a doctrine, as an original matter, arose largely from concern about concentration of legislative power. The other branches, including the judiciary, were presumably equipped with tools to prevent Congress from overwhelming the rest of government, and the people, with its legislative power.<sup>60</sup> In fact, the framers' experience that under early state constitutions, which attempted to constrain power in neatly separate spheres (as Professors Redish and Doernberg would construe separation of powers under the Constitution), too much power tended to land in the hands of the legislature may have led the framers to reject the static conception of separation of powers in favor of the more dynamic one raised here.<sup>61</sup> In this light, the fact that the federal courts are likely to respect a specific congressional reaction to a judicially created jurisdictional limitation should at least provide solace to those in sympathy with the thesis put forward by the papers.

In conclusion, conceptual distinctions like public/private, leg-

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60. See generally Farina, *supra* note 33, at 488-89 (discussing the history and purpose of the separation of powers doctrine).

61. *Id.* at 490.

islative/judicial/executive, and subjective/objective are useful only in service of other values. I agree with the normative preference for democratically chosen solutions to public-policy problems. In many situations this leads me to favor assigning authority to Congress, and ultimately I might agree with Professors Doernberg and Redish that Congress ought to decide the jurisdiction of the federal courts free from judicial resistance. However, the reasons are much more complicated than the incantation of democratic values and the assertion of a clear boundary between legislative and judicial authority.

#### AFTERWORD

As noted in footnote \*, Professor Redish's published paper bears little resemblance to the draft upon which I was asked to comment. Rather than completely rework my comments, I have the following observations on Professor Redish's article that is before you.

Professor Redish concentrates in his final draft on his most powerful point that, barring unconstitutionality, it is fundamentally inconsistent with our democratic system for unelected judges to refuse to follow congressionally promulgated jurisdictional statutes. Stated without context, it is hard to argue with Professor Redish about this general principle. However, in the current context, as I argue above, the federal courts might have good reason to struggle to avoid some cases potentially within the original district-court jurisdiction, just as good policy might dictate a presumption that some cases are within the Supreme Court's appellate jurisdiction.<sup>62</sup> The complication that Professor Redish is unwilling to confront is the constitutional uncertainty over whether Congress has been assigned exclusive authority over lower-federal-court jurisdiction.

Professor Redish's attack on "democracy bashers" is overstated in a way symptomatic of his unwillingness to take sophisticated separation of powers analysis seriously. In place of analysis he offers an apocalyptic vision of unelected judges acting as philosopher kings, repealing legislation such as Title VII or the anti-trust laws.<sup>63</sup> However, the slope is not that slippery. Professor

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62. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (reasoning that, for purposes of needed uniformity in federal laws, the Supreme Court can exercise its appellate jurisdiction when it appears that a state court has not based its decision on state law).

63. Redish, *Symposium*, *supra* note 3, at 1033.

Redish gives no example of anyone who has advocated granting an unlimited veto power over legislation to judges. Political and cultural realities temper judicial activism in much the same way that the President finds it impossible to veto every piece of legislation with which he disagrees. Professor Redish errs here by focusing on logic to the exclusion of reality. Besides, as I noted earlier,<sup>64</sup> interaction between the courts and Congress allows ample opportunity for correction of judicial mistakes and arrogance. Although it is true that under the representational principle Congress ought never be forced to correct the courts except in rare cases of good-faith judicial error, Professor Redish has not demonstrated that an active judicial role in interpreting and applying statutes violates separation of powers.

Professor Redish's characterization of public-choice theorists as "democracy bashers" misses the point of at least one strand of public-choice theory that uses the public-choice critique to achieve greater democracy.<sup>65</sup> He finds irony in being forced to "defend basic democratic values, at the very time when much of the world, long deprived of democracy, is demonstrating how highly valued that form of government actually is."<sup>66</sup> However, East Germany always called itself the "German Democratic Republic," and the world judged the democracy of its institutions by their actual operation, not their underlying theory. Realities, not labels, are what count. Such a committed defender of democracy as Professor Redish should welcome public-choice's proposals for increasing the influence that the average person can have on government policy. Professor Redish's rejection of this strand of public-choice theory reveals that his true concern is with his own theory.

I agree with Professor Redish that it is ironic that the great proponents of abstention are also supporters of judicial restraint, but although abstention's proponents may be acting out of distaste for civil-rights enforcement, it is possible to defend the position on democracy grounds. As Professor Althouse demonstrates, the doctrines Professors Redish and Doernberg attack could be recast in statutory-construction terms.<sup>67</sup> The courts could justify narrow

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64. See *supra* text accompanying notes 35-47.

65. See, e.g., Caraley, *Elections and Dilemmas of American Democratic Governance: Reflections*, 104 POL. SCI. Q. 19, 33-36 (1989).

66. Redish, *Symposium*, *supra* note 3, at 1027.

67. See Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 (1989-90) ("Professors Redish and Doernberg portray the Supreme Court as defiant and usurping, but it is more realistic to characterize the

construction of jurisdictional grants on the grounds that this construction forces Congress to decide controversial issues that might otherwise come before the courts. Further, as I argued above, the courts might employ abstention and other jurisdiction-limiting doctrines to preserve political capital for cases in which Congress or the Executive has attempted to subvert the political process or oppress minorities.

By my defense of separation of powers, I do not mean to argue that our Constitution is perfect, and I have never been quite convinced that separation of powers is more important to the protection of liberty than expansive application of the bill of rights and the fourteenth amendment. Nonetheless, something in the fluidity of the boundaries between the branches of government, at least in contexts in which the ability of one branch to maintain its voice in the operation of government is at stake, seems important to the simultaneous existence of order and democracy. Maybe it is a conservative instinct at work, but I fear that taking courts out of the process might unbalance the forces that preserve an open political process and minority and other fundamental rights. I prefer to attack the Court's narrowing of the civil-rights jurisdiction on the merits.

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Court as engaged in a partnership with Congress. Within this partnership, each institution performs aspects of the jurisdictional law-making function that fall particularly within its capacity.")