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ABSTENTION, SEPARATION OF POWERS, AND RECASTING THE MEANING OF JUDICIAL RESTRAINT

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ABSTRACT—In his 1984 landmark article, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, Professor Martin H. Redish advanced the thesis that the abstention doctrines constituted a violation of separation of powers. Redish's theory was, and is, controversial. The suggestion that an embedded area of federal courts law is unconstitutional is, at the least, highly provocative. It is also ultimately unpersuasive. There are too many justifications underlying the legitimacy of abstention to support the conclusion that it violates the Constitution. Yet, as this Essay demonstrates, one does not have to be persuaded by Redish's constitutional conclusion to appreciate the landmark significance of his project. Prior to *Abstention, Separation of Powers, and the Limits of the Judicial Function*, the virtues of judicial restraint had been reflexively characterized as judicial deference to the decisions of political actors. Professor Redish, however, replaced this understanding with the more nuanced view that judicial restraint might also mean courts performing the tasks to which they were assigned. In so doing, Redish fundamentally recast the debate as to the proper understanding of the role and obligations of the federal judiciary and the meaning of judicial activism and judicial restraint.

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INTRODUCTION

Abstention allows federal courts to avoid deciding disputes affecting the states and state law, or at least to delay hearing such disputes until the matters have been heard by the state courts. In so doing, abstention accomplishes a number of goals. It lessens the possibility that federal courts will needlessly decide constitutional issues. It minimizes federal court friction with state courts, state executives, and state legislatures. It protects against unnecessary federal court intrusion into sensitive matters of state policy. For these reasons, the abstention doctrines have been generally considered models of judicial restraint.

Professor Martin H. Redish, however, powerfully challenged this view of abstention. In *Abstention, Separation of Powers, and the Limits of the Judicial Function*,[1] Redish contended that the abstention doctrines were not exercises of judicial restraint and humility; they were examples of judicial hubris. Abstention was not an instance of the federal judiciary's deferring to the other branches; it was an example of the federal courts rejecting the duly imposed obligations that the other branches had placed upon them.[2] Abstention, Redish concluded, was a violation of the separation of powers.[3]

Redish's theory was, and is, controversial. The suggestion that an embedded area of federal courts law is not only ill-advised but actually illegal is, at the least, a dramatic departure from a settled understanding. Redish's theory, moreover, is ultimately not convincing. There are too many strong justifications underlying the legitimacy of abstention to support the conclusion that it violates the Constitution.

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

[2] *See id.* at 77.

[3] *See id.*

Yet, one does not have to be persuaded by Redish's constitutional conclusion to appreciate the landmark significance of his project. And that is the point that I intend to develop in this Essay. *Abstention, Separation of Powers, and the Limits of the Judicial Function* rightly holds status as one of the most important and transformative accounts of the law of federal courts that has yet been written. But as I will argue, Redish's article holds this status not because it is correct but because it changed the way that the meaning of judicial restraint was conceptualized.

Part I of this Essay briefly describes the abstention doctrines and the nature of Redish's attack upon them. Part II discusses the academic reaction to Redish's thesis, including the arguments as to why Redish's bottom line that the abstention doctrines violate separation of powers has not proved convincing. Part III demonstrates why, nevertheless, Redish's thesis was, and is, so fundamental to the proper understanding of the role and obligations of the federal judiciary and to the meaning of judicial activism.

I. THE ABSTENTION DOCTRINES

A. Background

The term "abstention" refers to a set of judicially created doctrines under which federal courts may choose to decline to exercise their jurisdiction over cases otherwise appropriately before them.[4] *Railroad Commission of Texas v. Pullman Co.*,[5] decided in 1941, is generally considered the first major case on the subject, although there were some antecedents.[6] The *Pullman* Court held—creating what has become known as *Pullman* abstention—that a federal court should abstain when state law is unclear and a state court decision may make federal adjudication of a constitutional issue unnecessary.[7]

Abstention soon proved to be a growth industry, and by the time Redish wrote *Abstention and Separation of Powers*, the Supreme Court had created no fewer than five separate abstention doctrines. Each abstention doctrine, like *Pullman*, became known by the Supreme Court decision in which the particular doctrine was announced. *Burford* abstention (1943) held that federal courts should abstain in deference to complex state administrative procedures.[8] *Thibodaux* abstention (1959) decided that

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[4] *Id.* at 71; *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 783 (5th ed. 2007).

[5] 312 U.S. 496 (1941).

[6] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1059 n.1 (6th ed. 2009); *see also* Barber v. Barber, 62 U.S. (21 How.) 582, 584, 605 (1858) (holding that federal courts did not have jurisdiction over domestic relations matters such as alimony and divorce).

[7] *See Pullman*, 312 U.S. at 500.

[8] *See* Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943).

federal courts should abstain if state law is uncertain and important state interests such as eminent domain are at issue.[9] *Younger* abstention (1971), undoubtedly the most important of the abstention doctrines, announced that federal courts must abstain from enjoining ongoing state criminal proceedings absent extraordinary circumstances.[10] *Colorado River* abstention (1976) concluded that abstention could be required in deference to ongoing, parallel state proceedings in certain circumstances.[11]

After *Colorado River*, the burgeoning of abstention subsided. Still, in 1984, coincidentally the same year that Redish wrote *Abstention and Separation of Powers*, the Court in *Pennzoil Co. v. Texaco Inc.*[12] appeared once more to dramatically expand abstention, this time by flirting with the idea of applying *Younger* abstention to all civil litigation. But *Pennzoil* was quickly limited to its particular circumstances,[13] and one of the remarkable things about abstention is how stable the doctrine has been for over thirty years.

B. Standard Criticisms of Abstention

Abstention is not hard to criticize, and it may be useful to note some of the other commonly noted objections to it before reaching Redish's specific critique. One problem with abstention should already be obvious. Five separate strains of abstention have made the area inordinately convoluted, and even the Court itself at times seems unable to keep the lines of demarcation between the various doctrines analytically clear.[14] Second, the abstention doctrines often require federal courts to refuse to exercise jurisdiction in circumstances when access to the federal courts is most needed.[15] Both diversity and federal question jurisdiction are justified in large part on the notion that a federal forum may be necessary to avoid state court bias.[16] Abstention, however, is based in part on the assertion that

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[9] *See* La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27–30 (1959).

[10] *See* Younger v. Harris, 401 U.S. 37, 53 (1971).

[11] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

[12] 481 U.S. 1, 11 (1987) (applying *Younger* to a suit between two private parties).

[13] *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 367–68 (1989) (holding that *Younger* does not apply to all pending civil actions). As Professor Chemerinsky explains, *Pennzoil* may be limited to cases between private parties that involve judicial enforcement of court orders. *See* CHEMERINSKY, *supra* note 4, at 848.

[14] *See, e.g.*, *Colo. River Water Conservation Dist.*, 424 U.S. at 814 (grouping *Burford* and *Thibodaux* abstention into a single category and noting that "[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"); *see also, e.g.*, Karakas v. McKeown, 783 F. Supp. 1028, 1031 n.1 (E.D. Mich. 1992) (noting that there is disagreement in the cases and in commentary as to the number and nature of the abstention doctrines).

[15] *See* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 538–43 (1989).

[16] *Cf. id.* at 541 (discussing how avoiding possible state court bias is "[t]he premise of diversity jurisdiction").

principles of comity and federalism demand deference to state courts when the state has a particularly strong interest in a dispute's outcome.[17] Yet, as Professor Barry Friedman notes, "Where the state's interest in the outcome of the dispute is very high . . . so is the potential for state court bias against the federal claimant . . . ."[18] The "perverse" result of all this is that "the Court requires abstention in those cases where bias against federal claims is most likely."[19]

Third, applications of the doctrines often lead to nightmares in judicial administration. Under *Pullman* abstention, for example, the federal court is supposed to retain jurisdiction over the case while the ambiguous state law question is sent to the state courts for resolution. The case is then to be sent back to the federal court for final resolution. But lengthy delays in such a system are inevitable as cases are bounced back and forth from federal to state court. The litigation in *Thibodaux*, for example, took seven years to complete;[20] the litigation in *England v. Louisiana State Board of Medical Examiners*,[21] discussed below, took over nine.[22]

Fourth, the maneuvering between court systems also creates problems in the application of the law of res judicata. The adjudication of the state law issue by the state court will often include the litigation of facts or legal issues that are germane to the federal issues in the case. Should the federal court treat the issues resolved by the state court as res judicata? The Court in the *England* case, noted above, held that res judicata did not apply as long as the party seeking federal jurisdiction explicitly reserved its right to litigate the federal issues before the federal court.[23] But questions as to whether a litigant has adequately preserved its rights to return to federal court can lead to their own set of litigable issues.[24] Moreover, even when those issues are resolved, the requirement of having the litigant explicitly reserve its right to return to federal court invariably leads to an intractable practical concern for the litigant. The reservation requirement effectively demands that the litigant stand before a state court judge and state in not so many words, "I am here to litigate the state issue only and will reserve my right to litigate the federal issue in federal court because I do not trust the state courts to appropriately decide this issue." This is not, I would suggest,

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[17] *See id.* at 542.

[18] *Id.* at 542–43.

[19] *Id.* at 543.

[20] CHEMERINSKY, *supra* note 4, at 812 n.17.

[21] 375 U.S. 411 (1964).

[22] CHEMERINSKY, *supra* note 4, at 812 n.17.

[23] *See England*, 375 U.S. at 419.

[24] *See, e.g.*, San Remo Hotel, L. P. v. City & Cnty. of S.F., 545 U.S. 323 (2005) (discussing constitutional issues implicated by reservation of federal questions under *England*).

generally an effective way for a lawyer to build rapport with a state court judge.[25]

Fifth, the legal wrangling over abstention leads to yet another set of awkward litigation postures. Consider a case in which the litigant raises a constitutional challenge to a newly enacted state law. The incentive of the state defendant, should the defendant want the court to abstain, is to argue that the state law is ambiguous, a strategy that is not the best should the state later decide that it wants to prosecute the federal court plaintiff under that law. The federal plaintiff meanwhile must simultaneously undermine one of its own potential defenses to a later state court action by arguing, to avoid federal court abstention, that the law actually is clear.

Sixth, abstention is inconsistent with the Court's own rhetoric. In *Cohens v. Virgina*,[26] for example, Chief Justice John Marshall stated, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[27] At other times, the Court has described the exercise of jurisdiction as a "duty"[28] and declared that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[29] In stark contrast to these assertions, however, abstention is a vehicle in which federal courts, by definition, "decline the exercise of jurisdiction" and do not meet their "duties" and "unflagging obligations."

Finally, although this is less a criticism of the viability of abstention than it is of the case law underlying the doctrines, abstention cases include some of the most disingenuous in Supreme Court history.[30] Consider the juxtaposition of *Younger v. Harris*[31] and *Mitchum v. Foster*.[32] In *Younger*, as mentioned above, the Court crafted a judge-made rule that a federal court should not enjoin an ongoing state criminal proceeding absent extraordinary circumstances. In so holding, the Court declined to rely on an existing federal statute, the Anti-Injunction Act,[33] although that provision

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[25] There is of course no guarantee that a state court will even agree to hear the state law issue in these circumstances. *See* Harris Cnty. Comm'rs Court v. Moore, 420 U.S. 77, 88–89 (1975) (holding that a federal court should dismiss the case without prejudice when the state court refuses to allow the federal litigant to reserve its federal issues for the federal forum).

[26] 19 U.S. (6 Wheat.) 264 (1821).

[27] *Id.* at 404.

[28] Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909).

[29] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

[30] I recognize the enormity of this claim given that Court disingenuousness is not exactly a rare phenomenon. *See, e.g.*, ___ v. ____, __ U.S. __ ( ) (the reader should feel free to insert her own case citation).

[31] 401 U.S. 37 (1971).

[32] 407 U.S. 225 (1972).

[33] *See* 28 U.S.C. § 2283 (2006) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

explicitly maintained that a federal court should not enjoin state proceedings unless expressly authorized by Congress.[34] As the *Younger* Court stated:

> Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.[35]

One year after *Younger*, the Court in *Mitchum v. Foster* decided the question of whether 42 U.S.C. § 1983 provided an "expressly authorized" exception to the Anti-Injunction Act. Despite the fact that § 1983 has no express language indicating that the statute provides an exception to the Anti-Injunction Act,[36] the Court ruled that it created such an exception anyway because the policies underlying § 1983 supported having the availability of federal injunctive relief.[37] In so doing, the Court effectively created what can only be termed an "implied express exception," heretofore a linguistic impossibility. Moreover, although *Younger* had explicitly stated that it was not addressing the Anti-Injunction Act issue, the *Mitchum* Court somehow held that *Younger* actually stood as direct authority for the proposition that § 1983 was an expressly authorized exception to the Act.[38]

It gets better. As noted above, the *Mitchum* Court based its ruling in large part on the policy concern that § 1983 was designed specifically to allow federal courts to serve as protection for the individual against state power. As the *Mitchum* Court stated:

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[34] *See id.*

[35] *Younger*, 401 U.S. at 54.

[36] The relevant text of § 1983 is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

[37] *See Mitchum*, 407 U.S. at 242–43.

[38] *See id.* at 231 ("While the Court in *Younger* and its companion cases expressly disavowed deciding the question now before us—whether § 1983 comes within the 'expressly authorized' exception of the anti-injunction statute—it is evident that our decisions in those cases cannot be disregarded in deciding this question. In the first place, if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, as the appellant in that case argued, and there would have been no occasion whatever for the Court to decide that case upon the 'policy' ground of 'Our Federalism.' Secondly, if § 1983 is not within the 'expressly authorized' exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of *Atlantic Coast Line*, the anti-injunction statute would, in a § 1983 case, then be an 'absolute prohibition' against federal equity intervention in a pending state criminal *or* civil proceeding—under any circumstances whatever." (citation omitted)).

> This legislative history [of § 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
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> . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions . . . . [T]his Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.[39]

Nevertheless, despite the eloquence and power of this language, *Mitchum* turned out to be no more than a mirage. *Mitchum* involved an effort by a federal litigant to enjoin a state law civil nuisance action brought by the state to shut down an adult bookstore.[40] Because the federal lawsuit in *Mitchum* was an attempt to enjoin a state civil action, the case was therefore initially distinguishable from *Younger*, which had held only that federal courts could not enjoin state criminal actions and did not resolve whether federal courts were similarly barred from enjoining state civil enforcement actions.[41] *Mitchum*, in turn, decided only the Anti-Injunction Act question, again leaving open the question of whether *Younger* should extend to state civil enforcement actions.[42] The door quickly closed. Three years after *Mitchum*, the Court in *Huffman v. Pursue, Ltd.*[43] held that *Younger* barred the federal courts from enjoining a state law civil nuisance action brought to shut down an adult establishment, the exact same fact pattern as in *Mitchum*.[44] According to *Huffman*, *Younger* principles applied to federal actions to enjoin state civil enforcement proceedings brought "in aid of and closely related to criminal statutes."[45] The victory for the federal litigant in *Mitchum*, in short, had been completely Pyrrhic and the opinion's language setting forth the compelling reasons why § 1983 plaintiffs needed access to the federal courts completely hollow. It may be, as the *Mitchum* Court explained, "that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great,

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[39] *Id.* at 242 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

[40] *See id.* at 227.

[41] *See id.* at 230.

[42] *See id.* at 242–43.

[43] 420 U.S. 592 (1975).

[44] *See id.* at 595–99, 611–13.

[45] *Id.* at 604.

immediate, and irreparable loss of a person's constitutional rights,"[46] but that "essentiality" was not sufficient to overcome judge-made *Younger* abstention.

Equally important, for our purposes, the *Younger–Mitchum–Huffman* trilogy also sent a clear message. The Court would not allow the federal courts to be constrained from issuing § 1983-based injunctions by the application of a federal statute (the Anti-Injunction Act), but it would prohibit federal courts from issuing § 1983-based injunctions against state proceedings by the application of its own judge-made doctrines. As Redish stated, "It is difficult to imagine a starker illustration of judicial usurpation of legislative authority."[47]

C. Redish's Critique of Abstention

The Court's disregard of congressional directives in favor of marching to its own drummer was, of course, the central theme in *Abstention, Separation of Powers, and the Limits of the Judicial Function*. Redish's thesis was as simple as it was elegant: When federal courts abstain from exercising the jurisdiction vested in them by Congress, and when they abstain from enforcing federally enacted civil rights statutes, they are engaging in illegitimate judicial lawmaking, effectively violating constitutional guarantees of separation of powers.[48] As he explained:

> Presumably no one would deny that a federal court cannot legitimately invalidate a federal statute solely because of its unwise policies, or because it would make judges work harder than they believe they should, or because the judges themselves would not have enacted such legislation. Such behavior by the judiciary would amount to a blatant—and indefensible—usurpation of legislative authority. . . . Yet, in a sense, the abstention doctrines amount to such usurpation.[49]

Having thus articulated his thesis, Redish then proceeded to defend it against anticipated objections. Three of Redish's defenses to his thesis are especially notable[50]: he argues that (1) abstention is not justified by an implied delegation by Congress to the judiciary, (2) abstention is not supported by principles of equity, and (3) abstention is not necessary to serve as a safety valve against the potentially disastrous results that might occur if the federal courts did not refrain from exercising their jurisdiction in certain circumstances. Each of these contentions will be discussed in turn.

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[46] *Mitchum*, 407 U.S. at 242.

[47] Redish, *supra* note 1, at 88.

[48] *See id.* at 71, 114–15.

[49] *Id.* at 72.

[50] Redish actually discusses four anticipated objections to his work: the three discussed below and an additional objection relating only to his attack on *Pullman* abstention—specifically, that the exercise of *Pullman* abstention only delays and does not defeat federal jurisdiction. *See id.* at 90.

Implied Delegation. The "implied delegation" defense of abstention posits that Congress, in its governing statutes, intended to give the federal courts the authority to modify or limit the exercise of its jurisdiction to avoid "friction within the federal system."[51] To Redish, this justification was unpersuasive for a number of reasons. To begin with, Redish argued, Congress itself had explicitly limited the exercise of federal jurisdiction in a series of statutes indicating that it had chosen to specifically legislate on the subject rather than broadly delegate.[52] And while Redish conceded that "[i]t is true that the existence of this program of statutorily dictated abstention does not necessarily preclude Congress from vesting in the federal judiciary the authority to extend abstention beyond these legislative limitations," he nevertheless concluded that "it does establish that federal court abstention is not an area in which Congress has traditionally deferred to judicial discretion."[53]

Moreover, Redish continued, the implied delegation argument was seriously flawed for the basic reason that there was no evidentiary support for the proposition that Congress intended to allocate such discretion.[54] As he wrote:

> No supporter of partial abstention has pointed to anything approaching hard evidence in the legislative history of either the original enactment or the more recent reenactments of the substantive and jurisdictional civil rights statutes which suggests that Congress intended that the federal courts possess authority to modify or limit otherwise unlimited legislation.[55]

Redish's response to the implied delegation argument also addressed the contention that even if Congress may not have originally intended to delegate the authority to the federal courts to abstain, it had nevertheless acquiesced in the practice by not overturning the abstention doctrines by statutory directive. Again, Redish was not persuaded. To Redish, reliance on Congress's failure to overturn a judge-made doctrine as a rationale for keeping that doctrine in place "effectively condones through legislative inertia what was initially an improper and unauthorized judicial usurpation of legislative authority."[56]

Equity. The abstention doctrines, and most particularly *Younger*, are often defended based upon traditional notions of equity.[57] The *Younger* Court, for example, directly relied on traditional equitable principles in

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[51] *Id.* at 80.

[52] *See id.* at 81. These statutory limitations include such provisions as the Anti-Injunction Act, 28 U.S.C § 2283 (2006), and the Tax Injunction Act, *id.* § 1341.

[53] Redish, *supra* note 1, at 81.

[54] *See id.*

[55] *Id.* at 81–82.

[56] *Id.* at 82.

[57] Equity was also cited as a justification for abstention in the *Pullman* decision. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941).

holding that a federal court should not enjoin an ongoing criminal proceeding. As *Younger* explained, traditional equity rules required that a court should not issue an injunction when there was an available adequate remedy at law.[58] Based on this principle, the *Younger* Court reasoned that a federal court should not enjoin an ongoing state court prosecution because the state court defendant had an adequate remedy available in the form of his ability to raise his constitutional objections as a defense in the state court action.[59]

Redish's responses to the equity argument were particularly cogent. He noted that the traditional notions of equity, upon which *Younger* relied, came from the English system, which had a unitary composition,[60] and not from a federalism model that was divided into two distinct judicial structures. Traditional equitable principles regarding the availability of an adequate remedy at law as a bar to issuing an injunction, Redish maintained, meant the availability of that remedy in the same judicial system (the federal courts) and not the possible availability of a remedy in another judicial system (the state courts).[61] Even more powerfully, Redish took on the proposition at its core that the ability of a state defendant to raise his constitutional defenses in state court constituted an adequate remedy at law. As Redish noted, the position that state courts provided an adequate remedy at law for the vindication of federal rights was completely inconsistent with the basic premise underlying federal question jurisdiction and substantive statutes like § 1983—specifically, that state courts were not adequate protectors of federal rights.[62]

Safety Valve. Redish last addressed the contention that the abstention doctrine might be justified under a "safety valve" rationale, meaning that "the social and political results of an abolition of abstention would be so disastrous that Congress could not possibly have contemplated them."[63] Reviewing each abstention doctrine, Redish found no such disastrous threat to be imminent. Redish recognized, of course, that in the context of *Younger* abstention, the possibility that state defendants raising a Fourth Amendment claim would routinely "walk across the street to the federal courthouse to seek an injunction of the state proceeding as a violation of section 1983"[64] could constitute a substantial disruption. But he argued that

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[58] *See* Younger v. Harris, 401 U.S. 37, 43–44 (1971).

[59] *See id.* at 49.

[60] Redish, *supra* note 1, at 85.

[61] *See id.* at 85–86; *see also* Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring) ("[I]t was never a doctrine of equity that a federal court should . . . dismiss a suit merely because a State court could entertain it.").

[62] *See* Redish, *supra* note 1, at 111; *see also* Monroe v. Pape, 365 U.S. 167, 173–74 (1961) (asserting essentially the same rationale regarding § 1983—that the statute was enacted to "provide[] a remedy where state law was inadequate").

[63] Redish, *supra* note 1, at 90.

[64] *Id.* at 92.

the threat was considerably overstated because no deprivation of the defendant's rights would occur until after a conviction.[65] And although Redish conceded that the availability of the federal courts to enjoin state courts based upon other alleged constitutional violations could potentially be disruptive, he contended that any resulting friction was the result of the congressional decision to provide federal court protection against potential state deprivations of federal rights.[66]

II. CRITIQUING REDISH'S CRITIQUE

Redish's assertion that the abstention doctrines were unconstitutional and his defense of this position against possible counterarguments was brilliant, creative, and prescient. It did not, however, prove to be persuasive. The Supreme Court, as far as I am aware, has never directly engaged the theory that abstention constitutes a constitutional violation of separation of powers,[67] and although Redish's thesis provoked considerable discussion from leading federal courts scholars, the academic response has been generally one of disagreement.[68]

In *Jurisdiction and Discretion*,[69] for example, Professor David Shapiro directly questioned Redish's characterization of the abstention doctrines as judicial usurpation of the legislative process.[70] To Shapiro, abstention doctrines that bestowed discretion in the federal courts for exercising jurisdiction were nothing new and were fully consistent with other judicial doctrines,[71] common law history and traditions, and ideals of federalism

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[65] *See id.* at 92–93 ("By its terms, section 1983 authorizes injunctive relief only if a federal right has been violated.").

[66] *See id.* at 94.

[67] *But see* A.T. v. Cnty. of Cook, 613 F. Supp. 775, 777 n.4 (N.D. Ill. 1985) ("A nationally renowned authority recently has argued forcefully that the *Younger* doctrine violates principles of separation of powers in that the Court was substituting its policy judgments for those of Congress in carving out exceptions to broad congressional grants of jurisdiction." (citing Redish, *supra* note 1)).

[68] One notable exception to the academic commentary opposing Redish's position is Professor Donald L. Doernberg, who, citing Chief Justice John Marshall, has characterized the Court's failure to exercise the jurisdiction afforded to it as "treason to the [C]onstitution." Donald L. 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, 1002 (1989–90) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)). From the other side, Professor Calvin Massey has argued that not only are the abstention doctrines constitutionally permissible, but also that some aspects of abstention are constitutionally required. *See* Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811.

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

[70] *See id.* at 544.

[71] Among the examples Shapiro lists of other practices and doctrines that give federal courts discretion over whether or not to exercise jurisdiction are justiciability, forum non conveniens, exhaustion of remedies, and equitable discretion. *See id.* at 548–70. These are instances where, as Professor Shapiro states regarding justiciability, there is "a penumbra within which the Court sees itself as having discretion whether to exercise jurisdiction." *Id.* at 554.

and comity.[72] Characterizing the law in the statutes and constitutional provisions that formed the "charter" of federal jurisdiction to be "organic," Shapiro argued that the courts were in a better position to resolve how to exercise jurisdiction under those measures because jurisdictional matters "intimately affect the courts' relations with each other as well as with the other branches of government."[73] Thus, a grant of jurisdiction should be "read as an authorization . . . to entertain an action but not as an inexorable command."[74] Shapiro's prescription was that jurisdictional statutes should determine the amount of discretion the courts are afforded in making jurisdictional decisions, and the courts should operate within that grant of discretion to weigh principles of equitable discretion, federalism and comity, separation of powers, and judicial administration against a presumption of assertion of jurisdiction to make a final determination of whether abstention is appropriate.[75]

Michael Wells, in the not so subtly titled *Why Professor Redish Is Wrong About Abstention*,[76] challenged Professor Redish's institutional objections to the abstention doctrines as being based upon a "faulty premise."[77] Specifically, Professor Wells argued that § 1983, the statute that Redish argued was most undermined by abstention, was never intended to create such a broad cause of action in the first place.[78] Section 1983 was originally adopted by Congress to address the problem of the Southern states' failure to protect blacks from oppression by groups like the Ku Klux Klan.[79] It was not until 1960 that § 1983 became a broad vehicle by which individuals could bring actions against the state for violations of their federal rights.[80] Therefore, according to Professor Wells, abstention is merely a judge-made restriction on a judge-made expansion of federal jurisdiction, and not a repudiation of congressional intent as Professor Redish contended.[81] Further, Professor Wells argued that both the judicial expansion and restriction of jurisdiction are legitimate creations of federal common law due to the presence of a strong federal interest in resolution of the issue and Congress's failure to act on the issue.[82]

Professor Ann Althouse, meanwhile, questioned Professor Redish's contention that Congress alone has authority to determine the jurisdiction

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[72] *See id.* at 545, 550–52.
[73] *Id.* at 574.
[74] *Id.* at 575.
[75] *See id.* at 578–79.
[76] Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).
[77] *Id.* at 1097.
[78] *See id.* at 1098.
[79] *See id.* at 1103.
[80] *See id.* at 1103–04.
[81] *See id.* at 1098.
[82] *See id.* at 1124–25.

of federal courts as being based on the false notion that jurisdictional statutes are unambiguous and leave no room for judicial discretion.[83] To her, the jurisdictional statutes were not so clear. And because the statutes were written in general terms, the abstention doctrines did not represent a usurpation of congressional power, but rather a product of a Judicial Branch "partnership with Congress" wherein "each institution performs aspects of the jurisdictional law-making function that fall particularly within its capacity."[84] Furthermore, Professor Althouse argued there was no threat to democratic decisionmaking posed by the abstention doctrines because Congress retained the ultimate power to overrule any abuse of jurisdictional discretion though legislation.[85]

Finally, Professor Jack Beermann, although agreeing with Professor Redish that Congress ought to decide the jurisdiction of the federal courts, rejected, on other grounds, the conclusion that abstention violated the separation of powers.[86] First, Beermann pointed out a textual weakness in the separation of powers argument in that the Constitution does not explicitly allocate authority over jurisdiction.[87] Second, Professor Beermann challenged Professor Redish's conception of the separation of powers, suggesting that rather than having the branches conceived as only possessing exclusive powers, there might be instances, jurisdiction being one of them, where Congress and the judiciary enjoyed a shared power.[88] As Beermann wrote, "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."[89] Third, Beermann posited that abstention might also be defended on grounds that it could be necessary for the Court's own self-preservation because it allowed the Court to insulate itself from the backlash that could result if it were forced into making exceedingly unpopular decisions.[90]

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[83] *See* Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 (1989–90) ("Judge-made doctrines qualify and accommodate statutes that are written in general terms and that cannot anticipate the realities of litigation encountered by judges.").

[84] *Id.*

[85] *See id.* at 1048–49. Professor Althouse suggested, however, that abstention would raise different concerns if the Court were to continue to apply abstention after Congress explicitly outlawed the practice. *See id.* at 1048.

[86] *See* Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053, 1058 (1989–90).

[87] *See id.*

[88] To be sure, Beermann offers his notion of shared powers only tentatively and does not claim he fully endorses this position. *See id.* at 1065.

[89] *Id.* at 1062.

[90] *See id.* at 1065–66. For an example where the Court may have used a jurisdictional device—in that case, standing—to avoid exactly this sort of backlash, see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004), holding a noncustodial parent did not have standing to challenge

For many of the same reasons raised by the scholars cited above, I also find Redish's arguments that abstention is unconstitutional to be unconvincing. Furthermore, while I believe Redish did a remarkable job in anticipating counterarguments to his thesis, he did not, to my mind, entirely overcome those objections. His rejection of the implied delegation argument, for example, too quickly dismissed the argument that Congress has acquiesced in the Court's abstention decisions by not overturning them. To be sure, the rule that Congress's failure to overturn the Court's interpretation of a statute means that Congress has acquiesced in that interpretation is controversial.[91] But the Court has accepted the rule of legislative acquiescence in its statutory interpretation outside the abstention context, and there is no reason why it should not be equally applied in matters of jurisdiction.[92] To the contrary, although it may be true that legislative inaction may not always be an accurate guide to legislative intent because of problems of inertia and crowded legislative agendas,[93] the fact is Congress has consistently demonstrated that it can and will act when it believes the Court has too narrowly interpreted one of its jurisdictional statutes.[94]

Redish's attack on the Court's use of equity as a justification for abstention is equally incomplete. Although Redish's point that *Younger*

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the constitutionality of the use of the words "under God" in the recitation of the Pledge of Allegiance at his daughter's school.

[91] *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("[V]indication by congressional inaction is a canard.").

[92] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (refusing to overturn a previous Court decision holding that baseball was exempt from antitrust laws).

[93] *See* Redish, *supra* note 1, at 83 (citing Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 22–23 (1985)).

[94] Congress's decision to eliminate the jurisdictional amount requirement in the federal question statute, 28 U.S.C. § 1331 (2006), for example, was in part a response to the problem that the federal courts, including the Supreme Court, had ruled that there was no statutory basis for public assistance beneficiaries to sue in federal court for violations of their federal statutory rights to assistance benefits. S. REP. NO. 96-827, at 14, 16–17 (1980); *see also* Chapman v. Hous. Welfare Rights Org., 441 U.S. 600 (1979) (holding that a welfare recipient could not sue the state for purportedly not granting her relief required by federal law because there was no statutory jurisdictional basis to maintain a claim); *Jurisdictional Amendments Act of 1979: Hearings on S. 679 Before the S. Comm. on the Judiciary*, 96th Cong. 102–04 (1979) (statement of Michael Trister, Center on Social Welfare Policy and Law). In *Chapman*, the recipients had originally brought their action under § 1343, which allowed plaintiffs to bring civil rights claims without satisfying any jurisdictional amount requirement, but the Court ruled that their claim for relief under the federal statute was not a civil rights claim. *See Chapman*, 441 U.S. at 621. One year after *Chapman* was decided, Congress eliminated the jurisdictional amount requirement in the federal question jurisdiction statute (§ 1331), allowing claimants such as the plaintiffs in *Chapman* to bring their federal statutory benefits claims as a federal question rather than as a civil rights claim. Similarly, Congress passed § 1367, allowing federal question jurisdiction over pendent parties in reaction to the Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), which held that § 1331 did not authorize pendent party jurisdiction. (*Finley* and the passage of § 1367, of course, could not inform Redish's analysis because both occurred after Redish wrote *Abstention, Separation of Powers, and the Limits of the Judicial Function.*)

misapplied the traditional equitable "adequate remedy at law" rule in concluding that a federal court should not enjoin a state criminal proceeding is certainly cogent, the dismissal of this one equitable principle as a ground for decision does not mean that others are not available. Redish may be right that equity in England did not mean avoidance of friction within a federal system because England did not have a federal structure,[95] but that does not mean that equitable principles should not be expanded to reflect such a concern.

Redish's discussion of the safety valve rationale, in turn, also significantly understates the problem with the disruption of state proceedings that would occur without *Younger*'s prohibition against a federal court enjoining state criminal proceedings. Redish is likely correct that most of the attempts by state criminal defendants to enjoin state proceedings would be unsuccessful, but the ultimate disposition of the federal claim is not what is of concern. The greater disruption to the state criminal process is that costs in both time and resources for the state to have to defend against a federal injunctive action would be exorbitant, particularly since in most cases there would be little cost to the state defendant's pursuing the federal injunctive claim.

The most devastating attack on Redish's thesis, however, came from one Martin H. Redish. In *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, Professor Redish compared the utility of the theory that abstention constitutes a violation of the separation of powers to that of voting for Walter Mondale in the 1984 presidential election.[96] To the Redish of *Intersystemic Redundancy*, there was none. No matter what the "merits of [the separation of powers] argument, it is not one which the Supreme Court has ever accepted."[97] For Redish, it was time to move on.[98]

III. REDISH'S LASTING CONTRIBUTION

But as Redish may be incorrect in *Abstention, Separation of Powers, and the Limits of the Judicial Function* in asserting that the abstention doctrines constitute a constitutional violation, so too is he incorrect in *Intersystemic Redundancy* in minimizing the importance of his earlier work. Professor Redish may not have prevailed in convincing the bench and the academy as to the merits of his thesis, but he did prevail in changing the prevailing conceptions of the meaning of judicial activism and judicial restraint.

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[95] *See* Redish, *supra* note 1, at 89.

[96] *See* 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, 1370 (2000).

[97] *Id.*

[98] *See id.*

When Redish wrote *Abstention, Separation of Powers, and the Limits of the Judicial Function* in 1984, the lines as to what constitutes judicial activism were predictively drawn. Those who believed that the federal courts should be reluctant to interfere with the actions of the political branches, when possible, were considered judicial conservatives who favored judicial restraint.[99] Those who contended that the federal courts should be relatively uninhibited in exercising judicial power, even when that exercise entailed overturning the actions of the political branch, were characterized as activists.[100]

Of course, both terms were politically drawn and politically laden. Commitment to judicial restraint was seen to be salutary, connoting a respect for the rule of law and deference to the decisions of the elected branches.[101] The charge of judicial activism, in turn, was just that—an accusatory charge that implied an illegitimate legal decision made in pursuit of preferred results.[102] But there was a nonpolitical, academic side to this debate as well. Alexander Bickel's highly influential book, *The Least Dangerous Branch*, for example, characterized judicial efforts to avoid politically laden controversies as exemplifying passive virtues.[103]

Support for federal court abstention clearly fell on the judicial-restraint side of the ledger.[104] The abstention doctrines were devices that allowed the

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[99] *See* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 561 (2010).

[100] *See* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 625–26 (2002) (reproducing a Nixon quotation describing the former President's opinions on judicial appointments, from Richard Nixon Campaign Speech (Nov. 2, 1968), *in* 27 CONG. Q. WKLY. REP., May 23, 1969, at 798); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 207 (1985); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1223 (2002) ("[J]udicial activism is most often associated with judicial invalidation of decisions by elected representatives.").

[101] *See* Siegel, *supra* note 99, at 558.

[102] *See id.* at 564, 570; *see also* STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 6–7 (2009) (describing how Ronald Reagan, as a candidate, promised to appoint only judges "who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism" (quoting Ronald Reagan, Remarks During a White House Briefing for United States Attorneys, *in* 21 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1276, 1278 (Oct. 21, 1985))); Gerhardt, *supra* note 100 ("[The Court should not be] superlegislators with a free hand to impose their social and political viewpoints upon the American People." (quoting Richard Nixon Campaign Speech, *supra* note 100)).

[103] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (2d ed. 1986). Bickel, I should note, does not discuss abstention in *The Least Dangerous Branch*, focusing more on justiciability doctrines.

[104] *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (describing abstention as a doctrine under which "the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary" (quoting Cavanaugh v. Looney, 248 U.S. 453, 457 (1919), and Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 73 (1935))).

federal courts to delay or avoid hearing challenges to government action. An abstaining court would therefore not even be in a position to invalidate the actions of the political branches.

Redish, however, by demonstrating that the doctrine of abstention could be as easily characterized as an example of judicial activism as it could one of judicial restraint, exposed the false dichotomy underlying the restraint–activism distinction.[105] Courts that refused to become involved in controversial matters could be equally criticized for activism as those who willingly entered the fray. Courts that overturned the decisions of elected officials could be characterized as acting with judicial restraint because they adhered to Congress's jurisdictional directives. Conversely, courts that refrained from exercising their jurisdiction could be criticized for their activism.[106]

In accomplishing this task, Redish also advanced another important proposition—that the purpose of the federal courts was actually to decide cases and not avoid them. By contending that the federal courts' failure to decide cases properly before them constituted a constitutional violation, Redish powerfully showed that the activism charge leveled against the federal courts was profoundly off the mark. How was it activism for the federal courts to do what both the Constitution and Congress required them to do?

This is not to say, of course, that immediately after the publication of Redish's work, political charges of judicial activism aimed at federal courts exercising their jurisdiction faded from the scene. Needless to say, these charges continue to abound and flourish even though, as Neil Siegel documents, the analytic basis of those charges has become less clear.[107] But Redish did change the terms of the academic debate. After *Abstention, Separation of Powers, and the Limits of the Judicial Function*, the virtue of judicial restraint could no longer be measured on the basis of whether a court refused to exercise jurisdiction in a case properly before it.

CONCLUSION

In *Abstention, Separation of Powers, and the Limits of the Judicial Function*, Martin H. Redish set forth the dramatic thesis that the Court's

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[105] Professor Althouse contends that the recognition of "[t]his basic paradox of jurisdiction—that restraint is a form of activism and activism a form of restraint—dates back at least to *Marbury v. Madison*." Althouse, *supra* note 83, at 1038–39. Perhaps so. But Redish gave this point salience in the contemporary debate.

[106] As Professor Siegel documents, current political battles over constitutional interpretation reflect these changing conceptions. No longer do political conservatives consistently claim that deference to the decisions of political branches is judicial restraint. They now, in some circumstances, contend that a judge is an activist if she refuses to strike down popularly passed legislation. *See* Siegel, *supra* note 99, at 570 (citing Kirk Victor, *Court's in Session*, NAT'L J., May 23, 2009, at 37, 37).

[107] *See id.* at 588.

judge-made abstention doctrines violated constitutional norms of separation of powers. Redish's article was brilliant, creative, and prescient. It was also wrong. The constitutionality of the abstention doctrines can be justified on numerous grounds, and although the application of the doctrines may sometimes be problematic, the goals of comity and federalism that they are designed to serve are laudable.

Abstention, Separation of Powers, and the Limits of the Judicial Function, nevertheless, was and continues to be a critically important work in the law of federal courts. In the end, the article may not have changed the bottom line in the calculation of whether the abstention doctrines are constitutional. But through this work, Professor Redish did change the manner in which the "virtue" of judicial restraint was conceptualized—replacing the reflexive vision that insisted judicial interference with the decisions of political actors was activism with the more nuanced view that judicial restraint might also mean courts performing the tasks to which they were assigned. And for that, federal courts scholars owe him an enduring debt of gratitude.