January 1991

Bright Lines

George D. Brown
Boston College Law School, browngd@bc.edu

BOOK REVIEW

BRIGHT LINES

GEORGE D. BROWN*

THE FEDERAL COURTS IN THE POLITICAL ORDER. By Martin H. Redish. Durham: Carolina Academic Press, 1991. Pp. viii & 192.

I. *THE FEDERAL COURTS IN THE POLITICAL ORDER*—OVERVIEW

Martin Redish's[1] *The Federal Courts in the Political Order* is an important contribution to the field of federal jurisdiction. Professor Redish begins by drawing upon principles of American political theory. He argues that by examining those principles, we can broaden our understanding of federal jurisdictional doctrines in much the same way that constitutional law scholars have broadened the study of constitutional law. For Professor Redish, the traditional questions of "*if* and *when* a federal court is to adjudicate an issue of constitutional or federal law"[2] bring into play questions of political theory every bit as much as do the substantive outcomes a court may ultimately reach. Other federal courts scholars have directed considerable attention to the linkage between jurisdictional doctrines and constitutional law. They have repeatedly made the points that restrictive federal courts law can serve as the vehicle for producing restrictive substantive doctrine,[3] and that narrow views of the role of the federal courts clash sharply with the Warren Court vision of expansive constitutional law.[4] These are not the issues on which Redish focuses. Instead of focusing on substantive outcomes, Professor Redish's goal is to illuminate the adjudicatory function of the federal courts by developing and applying principles that underlie our entire constitutional system.

Redish's analysis rests on two such principles. The first, the "representational principle,"[5] flows from the American system's emphasis on popular sovereignty and political accountability. The principle pos-

---

* Professor of Law, Boston College Law School.

1. Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University.

2. M. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 3 (1991) [hereinafter THE FEDERAL COURTS] (emphasis in original).

3. *E.g.*, Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

4. *See* Amar, Book Review, 102 HARV. L. REV. 688, 702-06 (1989) (discussing tension between desegregation cases and classic view of federal courts).

5. THE FEDERAL COURTS, *supra* note 2, at 9-10.

its that "[b]asic policy judgments not derived from constitutional text or structure are, for the most part, to be made by the representative branches of government."[6] The second, the "counter-majoritarian principle,"[7] focuses on the fact that ours is a constitutional democracy and that constitutional limits, to be meaningful, must be enforceable. Redish writes that "(t)he concept of a formalized, written counter-majoritarian constitution logically requires, for its continued viability, interpretation and enforcement by some governmental organ independent of the majoritarian branches."[8] Redish is not the first to write about the problem caused by the coexistence of the two principles. The tension between them is the subject of much modern writing about the legitimacy of judicial review.[9] Where this book is particularly helpful is in applying that tension to questions about the jurisdiction of the federal courts in both their constitutional and nonconstitutional roles. Redish's analysis leads him to recommend substantial, even "drastic,"[10] alterations in jurisdictional rules governing both domains.

Redish begins his analysis in the nonconstitutional area. For him, the representational principle should dominate the structuring of the federal courts' role here. His particular focus is on the fashioning of federal common law and on judicially-developed abstention doctrines. He would eliminate the extensive body of judge-made law in both areas. Federal common law and abstention are illegitimate, a "usurpation"[11] of the basic policymaking function from the accountable political branches by the "unrepresentative and unaccountable federal judiciary."[12] It is important to note, as I shall develop below, that Redish reaches this conclusion largely because Congress has already acted within these two areas. His sweeping conclusion of invalidity therefore rests more on textual analysis than on the basic institutional principles which he purports to examine.[13] Even so, the clear message of the first half of the book is that the structural imperative of the representational principle dictates a decidedly subordinate role for the federal courts.

When, however, the book turns in its second half to an analysis of the courts' role as constitutional adjudicators, a very different picture emerges; the counter-majoritarian principle comes into play and "dictates a moral and political obligation on the judiciary to provide a

6. *Id.* at 9.
7. *Id.* at 75-76.
8. *Id.* at 75.
9. *E.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
10. THE FEDERAL COURTS, *supra* note 2, at 85; *see also id.* at 4 (analysis "should dramatically alter existing jurisdictional doctrine").
11. *Id.* at 9.
12. *Id.*
13. *See infra* notes 50-59, 91-95 and accompanying text.

forum for adjudication of constitutional claims."[14] The Constitution requires an enforcement organ. That organ must not be reluctant to exercise its power, even though enforcement will frequently strike down policy choices made by the same political branches whose capacity and legitimacy are exalted under the representational principle. Again, Redish proposes a drastic alteration in existing caselaw—what he refers to as "Supreme Court jurisdictional doctrines that have dangerously undermined or ignored the judiciary's essential role in our constitutional system."[15] The major changes he emphasizes are elimination of the injury-in-fact component of the standing inquiry[16] and rejection of any "political question" doctrine.[17]

It is apparent from this brief summary that Redish's analysis of the federal courts makes them sound almost like two totally distinct institutions. The image of mild-mannered Clark Kent entering a phone booth to emerge as Superman comes to mind. When the representational principle is in force the "unrepresentative and unaccountable federal judiciary"[18] must stay within its bounds since "representatives elected by the people are more likely to reflect the public will than are unelected dictators, regardless of how benevolent such dictators might be."[19] In fashioning federal common law, the federal courts have ignored these restraints and engaged in "a form of judicial civil disobedience to legislative will."[20] Redish's rhetoric about the courts' role in the nonconstitutional area could come from a floor speech by Senator Jesse Helms on what is wrong with the Supreme Court. Senator Helms, of course, would almost certainly be criticizing the Court for going too far in some aspect of constitutional adjudication. In this domain, however, Redish waxes eloquent about the need for expansive judicial power. He argues that "if the Court is to perform the essential function of protector against a lawless government, it must draw the final constitutional calculus."[21] Redish's problem with the Supreme Court in this area is that its self-imposed limitations prevent it from going far enough.

Redish's analysis therefore raises an initial question and reservation: can a single institution perform in such a schizophrenic manner? Is it not more likely, for example, that the constant deference Redish calls for in the nonconstitutional area would spill over into constitutional decisions in both substantive doctrines favoring the po-

14. THE FEDERAL COURTS, *supra* note 2, at 75.
15. *Id.* at 85.
16. *Id.* at 88-103.
17. *Id.* at 111-36.
18. *Id.* at 9.
19. *Id.* at 16.
20. *Id.* at 37.
21. *Id.* at 135.

litical branches and threshold doctrines evincing a reluctance to get involved at all? On a more general level, much of the book is premised on the possibility, if not the necessity, of drawing bright lines between aspects of the judicial function and with respect to separation of powers generally. Redish cites with approval the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*,[22] a case in which the Court's approach to separation of powers was at its strict, formalist zenith. Other, more recent cases show a considerably more relaxed approach to separation of powers issues[23] and, in the Court's words, a movement away from "bright line" rules.[24] Redish does not discuss them although, as I shall argue below, they are relevant to his abstention argument and may well undermine it.

Redish's analysis also runs counter to the concept of federal adjudication as an essentially unitary process, a position that has been advocated by a number of federal courts scholars.[25] According to these writers, common law decisionmaking, statutory interpretation and constitutional adjudication are essentially similar exercises. Each contains an inescapable component of judicial policy formulation; yet legislative sources (including the Constitution) play a significant role across the spectrum of judicial activity.[26] Redish, on the other hand, seeks to compartmentalize the judicial process. Thus, he emphasizes "the fact that usually the differences between common law and statutory interpretation are, both conceptually and politically, qualitatively distinct."[27] At times, however, he comes close to acknowledging the artificiality of such sharp distinctions.[28]

There is one more bright line argument that plays an important role in the book's overall analysis: Redish views the statutes that govern general federal question jurisdiction,[29] enforcement of civil rights[30] and rules of decision in federal courts[31] as so clear and dispositive that they leave no room for doctrines such as federal common law and abstention.[32] The legislature has spoken; the courts must follow. Indeed, Re-

22. 462 U.S. 919 (1983).

23. *See generally* Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114, 126-28 (1990).

24. Thomas v. Union Carbide, 473 U.S. 568, 586 (1985).

25. *E.g.*, Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5-6 (1985).

26. *See* Weinberg, *Federal Common Law*, 83 NW. U.L. REV. 805, 834-36 (1989).

27. THE FEDERAL COURTS, *supra* note 2, at 32.

28. *Id.* at 62 (Court's development of extensive body of law under section 1983 "does not purport to be purely judge-made law, but rather assumes the democratically protective mantel of statutory interpretation").

29. 28 U.S.C. § 1331 (1986).

30. 28 U.S.C. § 1343 (1986); 42 U.S.C. § 1983 (1986).

31. 28 U.S.C. § 1652 (1986).

32. THE FEDERAL COURTS, *supra* note 2, at 29-74.

dish relies so heavily on the dispositive nature of the statutory answers that he leaves the reader in considerable uncertainty as to whether basic institutional considerations would, by themselves, yield the answers he puts forth.

In sum, Redish offers both a challenging look at a number of significant doctrines affecting the federal courts and a call for wholesale change. Much of the analysis rests on what I have referred to as bright line assumptions. If one accepts the assumptions, the conclusions may well follow. Most readers, I suspect, will find the lines blurred and indistinct, at least some of the time. The issue then becomes how helpful the book's analysis is in answering what turn out to be (or, more precisely, to remain) hard questions about the nature and role of the federal courts.

This Review will focus on the federal courts portion of *The Federal Courts in the Political Order*. The federal courts portion comprises more than one half of the book and contains, I believe, its most challenging material. Specifically, Parts II and III of this Review center on Redish's treatment of federal common law and abstention. These are areas in which Redish stands somewhat alone. In Part IV, I put forth the conclusion that Redish is at his strongest in forcing us to ask basic questions about the legitimacy of judicial doctrine and the controlling force of relevant statutes. The fact that I am not persuaded by his answers detracts only somewhat from the value of the endeavor. Part V is a brief section about the book's treatment of constitutional adjudication, included primarily to link constitutional adjudication with the subjects reviewed in Parts II and III. This Review's final section, Part VI, discusses a number of omissions from the book, especially recent judicial developments. Redish drew his book from several of his many law review articles.[33] Perhaps he and the publishers worked on the principle of "why gild the lily?" Still, I note in this part that discussion of some recent decisions of the Supreme Court would have enriched the book, especially because there are themes in those cases that are similar to, perhaps even influenced by, the writings of Martin Redish.

II. Redish's Critique of Federal Common Law

After positing and developing the "representational principle,"[34] Redish applies it first to the power of the federal courts to fashion common law.[35] Strictly speaking, the validity of federal common law is not a matter concerning the jurisdiction of the federal courts. It has,

33. *See id.* at vii (citing articles).
34. *Id.* at 9-10.
35. *Id.* at 29-46.

however, been treated as closely related. The justification is that because the federal courts are courts of limited jurisdiction, a generalized exercise of lawmaking must be guarded against because it would amount to a de facto enlargement of jurisdiction.[36]

An examination of any federal courts casebook will demonstrate,[37] however, that not only is there plenty of federal common law around, but there is also pressure to create more. Yet questions persist as to its legitimacy.[38] The Court has largely ignored these questions.[39] Among commentators, however, three somewhat distinct views have emerged. At one end of the spectrum stands Professor Redish. As discussed below,[40] he argues that virtually all federal common law is illegitimate. Most analysts stand somewhere near the midpoint of the spectrum, viewing some, but not all, forms of federal common law as valid.[41] This "special" common law might, for example, be limited to enclaves of particular federal concern.[42] Once the genie is out of the bottle, however, fixing meaningful limits is no easy task. Thus, under a third view, all federal common law is valid.

Redish is certainly correct in treating the legitimacy of federal common law as an important issue.[43] It goes to the heart of the role of the federal courts as lawmaking bodies. It also can be seen as the private law dimension of the question whether federal courts, as opposed to the state courts, are to be in the forefront of addressing important social issues. In this respect, Redish's discussion of the *Agent Orange* litigation[44] is particularly relevant. One question that Redish fails to address in his analysis is why the federal courts are somehow different from the state courts in their authority to create common law. Both court systems are constructed in accordance with similar constitutional precepts; yet state courts obviously and without question function as common law courts. Limited governmental powers do, in theory, differentiate the national government from those of the states, but the concept of limited powers itself does not explain why the federal courts cannot function as common law courts within the national sphere.

The difficulty in justifying distinctions between the two court systems may lead to an expansive view of the federal courts: federal courts

36. *See* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

37. *E.g.*, M. REDISH, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 484-564 (2d ed. 1989).

38. *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980). *See* Merrill, *supra* note 25, at 7-8 (discussing inconsistent statements by Supreme Court).

39. THE FEDERAL COURTS, *supra* note 2, at 29.

40. *See infra* text accompanying notes 51-60.

41. *See* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 883, 885 (1986).

42. *See id.* at 911-12.

43. *See* Field, *supra* note 41, at 883-90 (discussing general problem of legitimacy).

44. THE FEDERAL COURTS, *supra* note 2, at 42-44.

are federal counterparts to the common law courts of the states. Professor Weinberg has strongly advocated this position, writing in part in response to Redish's position at the opposite pole.[45] For Weinberg, "our courts are, and must be, courts of coordinate powers. The judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon."[46] The contrast between these polar positions held by Weinberg and Redish can be seen in their different treatment of the *Agent Orange* litigation.[47] In this litigation, a federal court of appeals refused to fashion federal common law that would govern claims for injuries by Vietnam veterans. Weinberg finds refusal to make federal law in such circumstances "irresponsible."[48] Redish concedes the strong arguments for a federal rule, but argues that the federal courts lacked power to fashion it in that specific instance,[49] just as they lack power to develop federal common law as a general matter.

Redish finds the prohibition in the Rules of Decision Act.[50] That statute provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[51]

For Redish the statute means what it says. What it says is that state law governs cases in federal courts unless there is a federal law on point that comes from a source other than the federal courts. The statute is both a directive to the federal courts and a limitation on them. Its historical purpose was to protect state interests by allowing state law to be displaced primarily through acts of Congress, the body in which state interests are considered and protected.[52] The statute serves important, "inextricably intertwined"[53] values of federalism. Fairly read, it bars virtually all forms of federal common law, such as those involving federal proprietary interests,[54] foreign relations,[55] and the implication of private damage remedies from federal statutes.[56] Judicially created nonstatutory federal law is valid if Congress can be

45. Weinberg, *supra* note 26, at 805-07.
46. *Id.* at 813.
47. *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980).
48. Weinberg, *supra* note 26, at 842.
49. THE FEDERAL COURTS, *supra* note 2, at 43.
50. 28 U.S.C. § 1652 (1986).
51. *Id.*
52. THE FEDERAL COURTS, *supra* note 2, at 35-36.
53. *Id.* at 31.
54. *E.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
55. *E.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
56. *E.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979).

said to have delegated to the federal courts the power to make it.[57] Delegated lawmaking falls under the statute's exceptions for cases "provide[d]" for by Act of Congress.[58] Most federal common law, however, represents "free-standing substantive common law principles,"[59] and the Rules of Decision Act prohibits it.

If Redish is right about the Act, how can there possibly be so much federal common law on the books? As noted, Supreme Court decisions do not provide much of a clue. In the 1988 decision in *Boyle v. United Technologies Corporation,*[60] the Court split sharply over whether to allow a federal common law defense to a state tort action against a military contractor. The point of contention was how close this fact pattern was to cases involving the rights and duties of the United States and cases granting immunity to federal officials sued under state law.[61] The applicability of federal common law to these areas was well established in previous decisions. Neither side explained why the Rules of Decisions Act was not applicable to this case, or to the earlier cases, for that matter.[62]

Academic analysts vary widely in reconciling the Act's existence with that of a large body of federal common law. Some admit that it is a serious problem.[63] Professor Weinberg, on the other hand, argues essentially that we ought to forget about the Act.[64] For her, it is "a relic of a prepositivist, prerealist time, with scant relevance for us today."[65] Another, more common, academic approach is to fit federal common law within the Act's exception for cases "where . . . Acts of Congress . . . require or provide . . . ." Professor Peter Westen and Jeffrey Lehman take this approach, arguing that because federal common law and statutory construction are essentially identical, the Act should be read as, in effect, explicitly authorizing both forms of judicial activity.[66] The Act may also be satisfied by other statutory authority, such as federal jurisdiction statutes.[67] Alternatively, it can be argued that federal statutes on a particular subject matter constitute an authorization for the

57. THE FEDERAL COURTS, *supra* note 2, at 33-34.
58. *Id.* at 34.
59. *Id.* at 43.
60. 108 S. Ct. 2510 (1988).
61. *See id.* at 2514-15 (discussing areas of "uniquely federal interests").
62. *See* Weinberg, *supra* note 26, at 848-49 (discussing *Boyle*).
63. *See* Merrill, *supra* note 25, at 26-32.
64. *See generally* Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L. REV. 860 (1989).
65. *Id.* at 866; *see also id.* at 867 (Act "simply without any modern meaning").
66. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 388 (1980); Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971, 983 (1980).
67. *See* Weinberg, *supra* note 26, at 832.

federal courts to deal with that subject by filling in the statutory scheme with federal common law.[68]

Redish recognizes and discusses these objections to his absolutist reliance on the Rules of Decision Act.[69] His general criticism is that they render the Act a nullity,[70] or that they "strain the concept of 'statutory interpretation' to the linguistic and conceptual breaking point by characterizing the unabashed exercise of judicial lawmaking power as falling within the category of 'interpretation' every time a court can find a statute even remotely relevant to the problem at hand."[71]

Redish may be right that these efforts are less than convincing. Even so, the Rules of Decision Act does not constitute the unambiguous, bright line support for his position that he contends. It provides that state laws are the rules of decision, with certain exceptions, in cases "where they apply."[72] Professor Weinberg suggests that this statutory language is a tautology,[73] an assertion that Redish views as part of her general dismissive attitude toward the Act.[74]

Let us, however, follow Redish down the road of insisting that the Act makes sense, and controls, in its entirety. Take another look at the relevant text:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, *in cases where they apply.*

I have emphasized the last five words to highlight the problem they pose. Without these five words the statute would mean that state law applies in all cases except those covered by federal nonjudicial law. This is exactly the way Redish reads it. However, these five words are in the Act, and he insists that it makes sense as a whole. The most logical way to read them is that the draftsman contemplated cases in which the rules of decision would come neither from state law nor from the federal sources listed. The obvious candidate is federal common law. Of course, the Act provides no guidance as to when this law would be "applied." Perhaps the Supreme Court is to fashion criteria based on the presence of a strong national interest, or the structural logic of the federal system. A similar view is, in fact, a justification for much existing federal common law,[75] and reconciles it with the statute.

---

68. *See* Field, *supra* note 41, at 887, 927-30.
69. THE FEDERAL COURTS, *supra* note 2, at 31-42.
70. *Id.* at 32.
71. *Id.* at 36.
72. 28 U.S.C. § 1652 (1986).
73. Weinberg, *supra* note 26, at 816.
74. THE FEDERAL COURTS, *supra* note 2, at 156 n.26.
75. *See, e.g., Boyle*, 108 S. Ct. at 2514.

I am certainly not the first to see room to maneuver in the Rules of Decision Act, and I do not contend that the suggested construction of "where they apply" is compelling. It does, however, make more sense than Redish's rather forced reading of these words. He views them as a choice-of-law authorization, vesting "in the interpreting court the power to decide which state laws 'apply' to which cases."[76] This power seems inherent in the Act's previous directive that state laws are the general rules of decision. Thus Redish offers a reading which makes the language superfluous.

My main point is not to encourage an endless debate over "where they apply," but to demonstrate that an advocate of literalism, such as Redish, will inevitably have problems giving the phrase crystal clear meaning. What if one concludes, under one of the arguments given above or by some other route, that the Act is not dispositive as to the legitimacy of federal common law? It is on this point that I think Redish comes up short. He stakes everything on the purported command of the Act, and tells us very little about what basic constitutional principles would dictate apart from it. He discusses federalism and separation of powers, but only as aids to construction of this particular statute.

Remember that in the book, Redish promises to explore "the institutional appropriateness of the entire enterprise of federal common lawmaking."[77] Although he hints at underlying constitutional issues,[78] Redish is able to finesse them because of the happenstance of the Rules of Decision Act. He notes the Supreme Court's cryptic statement that the Act is "merely declaratory of what would in any event have governed the federal courts,"[79] but does not explore the constitutional ramifications of the statement or the problem. What *is* the inherent lawmaking power of the federal courts? If it is somehow limited by the Constitution, do those limits come from explicit text such as article III or the tenth amendment, or from broader structural principles such as separation of powers and federalism? Does *Erie*[80] answer these questions? Redish suggests in a sentence that it does,[81] but does not elaborate. He does not answer them because the Rules of Decision Act constitutes a bright line that obviates the necessity for that task. A full understanding of the federal courts in the political order seems to call for something more.

---

76. THE FEDERAL COURTS, *supra* note 2, at 156 n.26.
77. *Id.* at 29.
78. *Id.* at 35, 37.
79. *Id.* at 157 n.27.
80. Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938).
81. THE FEDERAL COURTS, *supra* note 2, at 29.

III. REDISH'S CRITIQUE OF ABSTENTION

After disposing of the federal common law, Redish turns to doctrines of federal court abstention.[82] These are judge-made doctrines under which a federal court declines to hear cases over which it has jurisdiction. The doctrines are triggered by various factors, but the overall themes are respect for the competence of state courts and a desire not to interfere with their functions. The doctrines work in differing ways.[83] The federal plaintiff may be sent to the state court system to try the entire case,[84] may be sent there for the state portion only,[85] or may be required to remain in state litigation already pending.[86] Under *Pullman* abstention the plaintiff may return to the federal trial court if federal questions remain, but abstention generally results in trial in the state system with federal review in the Supreme Court or, for criminal defendants, in federal district court on habeas corpus.

Federal court abstention has long been controversial.[87] The most disputed form is *Younger* abstention.[88] It is probably also the most significant both in terms of cases affected and, at the doctrinal level, as an example of the federal courts law developed by the current court.[89] Under *Younger*, a federal court must abstain if state court proceedings are pending, the federal plaintiff is a party to those proceedings and can raise the federal question, the state courts can hear this question fully and fairly, and the federal court can identify an important state interest in the litigation.[90] *Younger* cases present a clash of important values in the federal system. The federal plaintiff generally sues under section 1983,[91] the basic civil rights statute, and generally asserts constitutional claims. On the other hand, that same plaintiff is often a party in state enforcement proceedings and is asking the federal court to disrupt those proceedings. The problem presented by *Younger* is how to reconcile individual and systemic claims given a nonunitary court system in which both sets of courts are empowered to hear federal claims. On a more general level, all of the abstention doctrines flow

82. *Id.* at 47-74.

83. *See generally*, C. WRIGHT, THE LAW OF FEDERAL COURTS 302-30 (4th ed. 1983).

84. *See id.* at 308-11.

85. *See id.* at 303-07.

86. *See id.* at 322-30.

87. *See, e.g., id.* at 305-07 (discussing *Pullman* abstention).

88. The doctrine derives its name from Younger v. Harris, 401 U.S. 37 (1971).

89. *See* Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336 (1989) (stating that *Younger* is broadest of the abstention theories). *But see* THE FEDERAL COURTS, *supra* note 2, at 49 (*Pullman* is best known type of abstention).

90. *See* C. Wright, *supra* note 83, at 323-30.

91. 42 U.S.C. § 1983 (1986).

from the problem of broad, overlapping jurisdiction between the two systems.

Redish believes that all forms of abstention are illegitimate, particularly if the federal plaintiff presents a civil rights claim. As with making federal common law, he finds that Congress has barred any such action by the federal courts. Indeed, he views abstention as a form of federal common law,[92] but the source of the prohibition is not the Rules of Decision Act. Rather, it is the "detailed and carefully balanced existing statutory network"[93] of federal question jurisdictional statutes and section 1983. The jurisdictional statutes constitute a directive to enforce the substantive program.[94] Redish views abstention as a blatant act of "judicial lawmaking of the most sweeping nature"[95] that both ignores a congressional directive and undermines an important legislative program. If anything, it is worse than federal common law, in terms of separation of powers principles.[96] Once again, however, he does not present those principles as triggered by inherent limitations on the federal courts but by the presence of dispositive statutes.

Redish's views on abstention are widely discussed in legal scholarship[97] and appear to have had an impact on the Supreme Court itself.[98] I have developed my own extensive critique of them elsewhere[99] and will set forth here in brief why I consider his repudiation of abstention unconvincing. Obviously, one must begin with statutory texts. The mere fact that Congress has enacted jurisdictional statutes is not dispositive. The federal courts cannot act at all until Congress has established them and conferred jurisdiction that reaches a particular case. To analyze abstention it is necessary to analyze the statutes.

Consequently, one would expect Redish to set forth the relevant statutes in the text, as he did with the Rules of Decision Act,[100] and demonstrate why declining to exercise jurisdiction violates them. At times he appears to view this as a self-evident proposition, particularly

92. THE FEDERAL COURTS, *supra* note 2, at 38.

93. *Id.* at 48.

94. *Id.* at 67. One might quibble that § 1983 clearly does not create any substantive rights. However, it does make certain the availability of judicial enforcement of rights derived from other federal sources, primarily the Constitution.

95. *Id.* at 55.

96. *Id.*

97. *See, e.g.*, Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. REV. 543, 544 (1985) (discussing Professor Redish's article); Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

98. *See* Brown, *supra* note 23, at 150 (discussing Court's recent insistence that *Younger* is narrow exception to general duty to exercise jurisdiction, emphasizing power of Congress).

99. *Id.* at 122-32, 140-48.

100. THE FEDERAL COURTS, *supra* note 2, at 30.

when he refers to the statutes as "seemingly unlimited,"[101] as constituting "dictates,"[102] and as imposing a "duty."[103] Is the matter this clear cut? Section 1331 of Title 28, the general federal question jurisdictional statute, provides as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[104] Certainly the word "shall" is mandatory, a point in Redish's favor,[105] but the key term is "jurisdiction." Redish fails to recognize that the concept of jurisdiction has traditionally included a certain amount of discretion.[106]

Although Redish denies that the relevant jurisdictional and remedial statutes are "essentially open-textured,"[107] he at times indulges in his own construction. Thus he finds the term "civil action" sufficiently "*ambiguous*"[108] to allow for doctrines of standing, ripeness and mootness,[109] as well as arguably permitting judicial creation of the doctrines of pendent and ancillary jurisdiction.[110] He also describes the Court's extensive body of decisional law on when a case "arises under" the laws of the United States as representing "constructions of broadly phrased jurisdictional statutes."[111] If statutory phrases such as "civil actions" and "arising under" leave room for judge-made doctrines of jurisdiction, why doesn't "jurisdiction" do the same? At the end of his abstention chapter, Redish admits that it might, but argues that this would frustrate the clear intent of Congress that federal courts be available to enforce federal rights.[112] Congress, however, did not use language that necessarily forecloses the exercise of judicial discretion. To turn from the jurisdictional statutes, section 1983 authorizes action at law and suits "in equity."[113] The latter term certainly carries with it an extensive history of discretion. Underlying the statutory scheme is article III's conferral on the federal courts of the "judicial power."[114] That term, as well as the relevant statutes, suggests a range of things that courts can do once vested with jurisdiction. Contrary to Redish's premise for his abstention analysis, perhaps there is open-texturedness in the picture after all.

---

101. *Id.* at 51.
102. *Id.* at 47.
103. *Id.* at 73.
104. 28 U.S.C. § 1331 (1986).
105. THE FEDERAL COURTS, *supra* note 2, at 173 n.167.
106. Shapiro, *supra* note 97, at 545-61.
107. THE FEDERAL COURTS, *supra* note 2, at 55 (discussing views of Professor Bator).
108. *Id.* at 64, 66 (emphasis added).
109. *Id.* at 64.
110. *Id.* at 66.
111. *Id.*
112. *Id.* at 73.
113. 42 U.S.C. § 1983 (1986).
114. U.S. CONST. art. III.

If one accepts the argument that the statutory case is not open-and-shut, a second set of questions arises: whether the exercise of judicial discretion over jurisdiction can be reconciled with Congress' power over the federal courts. For Redish the answer is clearly no, especially given the close relation between the jurisdictional grants and federal substantive rights. It is possible, however, to view the development of federal jurisdiction as an ongoing dialogue between Congress and the Court.[115] The dialogue permits judicial resolution of specific questions that are left open by the broad statutory scheme. The Court's role goes beyond filling gaps; it participates in making basic policies about the federal judiciary. Under this view the development of federalism-based abstention principles is a legitimate limitation on the exercise of granted jurisdiction, as are other limits that the Court has developed over the years.[116]

Redish rejects this approach for several reasons: the mere fact that the Court has done this doesn't validate it;[117] the other limits are not analogous;[118] Congressional silence should not be viewed as ratification[119]; and Congress has addressed judicial federalism in the past.[120] I think that the notion of a dialogue is more complex than Redish admits. Let us consider one example: thc doctrine of forum non conveniens. Professor Shapiro cited it as support for discretionary doctrines such as abstention.[121] Redish retorts that it is "largely geographically, rather than systemically, based."[122] Even accepting this—and the doctrine has "public factor" elements that are systemic in a broad sense[123]—forum non conveniens is a doctrine under which federal courts decline to exercise a jurisdiction that Redish has presented as mandatory. He notes that Congress has codified the doctrine in 28 U.S.C. section 1404,[124] and argues that this "underscores the point that, when Congress wishes the federal judiciary to exercise such broad-based discretion, it does so by means of an express statutory grant."[125]

What section 1404 authorizes, however, is transfer, not dismissal. The Supreme Court has held that federal courts retain the power to dismiss on the nonstatutory forum non conveniens ground.[126] Even

115. *See* Brown, *supra* note 23, at 142-43.

116. *See generally* Shapiro, *supra* note 97. For an excellent recent development of the dialogue concept, see Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. L. Rev. 1 (1990).

117. The Federal Courts, *supra* note 2, at 63.

118. *Id.* at 63-67.

119. *Id.* at 53-54.

120. *Id.* at 53.

121. Shapiro, *supra* note 97, at 555-57.

122. The Federal Courts, *supra* note 2, at 65.

123. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981).

124. The Federal Courts, *supra* note 2, at 65.

125. *Id.*

126. *Piper Aircraft Co.*, 454 U.S. at 235.

though such dismissals are rarely granted,[127] Redish would have to argue that they are unconstitutional. Perhaps the Court was wrong after passage of the statute but, more to the point, why were forum non conveniens dismissals valid *before* Congress "codified" the doctrine? The answer must be that courts had the power to grant them.

In my view, the forum non conveniens example illustrates the jurisdictional dialogue at work and cuts against Redish's categorical approach. It also raises again the question of what powers courts possess inherently when authorized to exercise "jurisdiction," at least until Congress explicitly takes them away. As I have argued elsewhere,[128] one's views on this question may well reflect the extent to which one accepts the strict, compartmentalized version of separation of powers epitomized in *Immigration and Naturalization Service v. Chadha.*[129] Redish's citation of *Chadha* with apparent approval[130] indicates he belongs in this camp. The Court, however, has moved away from *Chadha* and "bright line" rules[131] toward a more flexible view of separation of powers.[132] Powers can be shared to some degree; indeed, there is "a 'twilight area' in which the activities of the separate Branches merge."[133] Jurisdictional rules, which are not rules of decision, might well fall within this area.

Of course, Redish would most likely respond that the relevant statutes take this power away. Even this statement, however, would be an admission that the burden is on the critics of abstention rather than its proponents, a position Redish rejects.[134] We do not know his views on the fundamental issue of judicial power because he never reaches it. In the book, Redish promises to approach abstention beginning "with an analysis of the judiciary's proper role in a democratic society."[135] The analysis tells us that courts must obey valid limits on their authority. Since Redish never gets beyond statutory issues, the analysis does not tell us what courts may do if we do not accept his version of how to read the statute. As with the chapter on federal common law, I think the book is weakened by not venturing into these deeper waters. In that context at least, there are hints at constitutional limits, even

127. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 91 (1985) (doctrine retains "only a limited vitality in the federal courts").

128. Brown, *supra* note 23, at 125-32.

129. 462 U.S. 919 (1983).

130. THE FEDERAL COURTS, *supra* note 2, at 23.

131. *Thomas*, 473 U.S. at 586.

132. *See generally* Brown, *supra* note 23, at 126-28.

133. Mistretta v. United States, 488 U.S. 361, 386 (1989).

134. THE FEDERAL COURTS, *supra* note 2, at 51.

135. *Id.* at 49. This is an example of the somewhat broad claims made for the book. The cover states that "it calls for a significant restructuring of the relationship between the federal judiciary and the political branches of the federal government."

barriers.[136] In the abstention context, once the bright lines dim, the arguments against the doctrine's legitimacy seem even weaker.

IV. WHY REDISH'S CRITIQUES ARE IMPORTANT

The fact that Redish's particular critiques of federal common law and of abstention are not convincing as to the illegitimacy of these doctrines should not lead to the conclusion that these doctrines are without problems. Redish forces us to focus on questions of legitimacy in the face of the statutes he cites and, by implication at least, on the need to move beyond these sources to broader issues of authority and limits. Serious questions about federal common law and abstention remain, even if Redish's answers fail.

I shall first consider the questions that remain after Redish's analysis of federal common law. I think the problems are greatest here. The fact that there is a lot of federal common law on the books does not validate the enterprise,[137] given the obvious bearing of the Rules of Decision Act and the Court's suggestions that the Constitution itself imposes limits.[138] Let us follow Redish and begin with the Act. He is surely correct in criticizing the Court for "largely ignor[ing] the Act in fashioning federal common law."[139] Some members of the Court have recently directed attention to the Act's bearing on choice of law in transfer of cases under section 1404.[140] Perhaps that attention will carry over to the more basic issue of federal lawmaking itself.

The task for the Court would then be to fit federal common law within the text of the Act. As suggested above,[141] the Court might develop a construction based on the phrase "where they apply." The guiding notion would be that there are situations where the logic and structure of our constitutional system lead to the conclusion that state law should not apply. The Court could establish principles of non-applicability along the lines of existing notions such as unique federal interest or unsuitability of state law. While conceptually appealing, these principles may be too free-wheeling for the current Court to endorse.

A more likely route for the Court would be to attempt to fit federal common law under the Act's exception from state law where "the Constitution or treaties of the United States or Acts of Congress otherwise

136. *Id.* at 35, 37.
137. *See id.* at 63 (arguing against "proof by adverse possession").
138. Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945).
139. THE FEDERAL COURTS, *supra* note 2, at 45.
140. Ferens v. John Deere Co., 110 S. Ct. 1274, 1285 (1990) (Scalia, J., dissenting).
141. *See supra* text accompanying note 75.

require or provide."[142] One can find the basis for such an approach in *Boyle*, an important case that Redish does not discuss. The majority in *Boyle* began its analysis by reference to prior holdings:

> [A] few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'[143]

It would not stretch construction "to the breaking point," as Redish puts it,[144] to apply the Act's reference to "require or provide" for federal law to the Court's notion of areas "committed" to federal law. Commitment of a subject matter to federal control is, however, a broader concept than requiring an authorization for judicial lawmaking. If the Court finds this acceptable statutory construction, let it say so.

In order to apply such a statutory scheme, the Court might invoke and develop the constitutional values of federalism and separation of powers, as applied in *Erie* to federal common law under the Act. Dissenting in *Boyle*, Justice Brennan started down this road.[145] Although he did not cite the Rules of Decision Act, he invoked the traditional narrowness of federal common law and the need to link it to direct exercises of congressional power.[146] Sounding like Redish, he denounced the government contractor defense established in *Boyle* as an illegitimate exercise of legislative authority.[147]

The problem with Justice Brennan's position is that it admits the validity of *some* federal common law. Indeed, this reflects a problem with the Court's position. How do we delimit the confines of valid federal common law? The importance of Redish's arguments is that they force the Court to justify the existence of any federal common law. At the other end of the spectrum, Professor Weinberg's arguments[148] force the Court to explain why it cannot fashion federal common law across the board.

Perhaps we will end up with traditional answers such as federal enclaves, presumption in favor of state law, etc.[149] There is a certain irony in the fact that the likely effect of Redish's strongly revisionist

142. 28 U.S.C. § 1652 (1986).
143. *Boyle*, 108 S. Ct. at 2514.
144. THE FEDERAL COURTS, *supra* note 2, at 36.
145. *Boyle*, 108 S. Ct. at 2519 (Brennan, J., dissenting).
146. *Id.* at 2524 (justifying immunity defense by noting that federal officer's authority comes from statute).
147. *Id.* at 2528.
148. *See supra* text accompanying note 46.
149. *See* Weinberg, *supra* note 26, at 807-09.

scholarship will be an extension and reinforcement of current doctrine. Even this would be a gain, however, and shows the value of an analysis that focuses on legitimacy. There is something troubling about a case like *Boyle* in which the same Court that generally exalts Congress' role as lawmaker makes important new law on its own, limiting the question of legitimacy essentially to a discussion of existing precedents without an explanation of why those precedents are valid.

In addition to the area of federal common law, Redish's critique of abstention could also have an impact on the courts. Although Redish's critique of abstention is the less problematic of the two areas and can essentially be answered along the lines suggested above, I believe that further discussion of his views is merited here. The Court itself has done little to explain judicial authority to engage in abstention, apart from its early suggestions that the practice is rooted in equity.[150] In particular, the Court has never justified abstention against the statutory background on which Redish relies, although dissenting opinions have seemed to call for such an inquiry.[151] The Court's failure to address the jurisdictional statutes is surprising since it has stated that federal courts have a "virtually unflagging" obligation to exercise the jurisdiction granted them.[152] The Court obviously views abstention as a legitimate exception to that obligation, but has not elaborated on whether the source of the discretion is "jurisdiction," "equity" or the "judicial power" itself.

The Court recently noted the authority issue and suggested that its source was a mixture of equity and congressional understandings about judicial discretion with respect to relief.[153] Redish's work may already have played a role in bringing the Court to this point. The fact that the Court itself seems concerned about the legitimacy issue[154] is all the more reason for it to address Redish's statutory critique. Examining and explaining in detail the source of authority for a doctrine like *Younger* would also help the Court develop more coherent limitations on the doctrine than it has been able to do to date. The concept of "important state interest," for example, has been somewhat elusive.[155] Perhaps, as with the federal common law, we will end up at more or less the same place as we are now. At least we will know how we got there. I believe that Redish is wrong in presenting his arguments

150. Younger v. Harris, 401 U.S. 37 (1971).

151. *See* Brown, *supra* note 23, at 144-45 (discussing opinions of Justices Douglas and Brennan).

152. Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976).

153. New Orleans Public Service, Inc. v. Council of City of New Orleans, 109 S. Ct. 2506, 2513 (1989).

154. *See* Brown, *supra* note 23, at 150-51.

155. *See, e.g.*, Pennzoil Co. v. Texaco, 481 U.S. 1 (1987).

as unanswerable. I believe that the Court is wrong in not answering them.

V. A Note on Constitutional Adjudication

My focus in this Review is on the "federal courts" portion of *The Federal Courts in the Political Order.* Nonetheless, there are obvious links between this portion and the second half, where Redish discusses jurisdictional doctrines which affect constitutional adjudication, such as standing, ripeness and mootness. These doctrines are an important part of the basic corpus of federal courts law. Moreover, an understanding of the nature and role of the federal courts in their nonconstitutional capacity ought to have implications here as well.

In the second half of the book, Redish calls for "judicial aggressiveness in the exercise of . . . jurisdiction to interpret and enforce the counter-majoritarian Constitution *against* the majoritarian branches."[156] Thus he calls for "a substantial reduction in the self-imposed limits on federal judicial power to adjudicate constitutional challenges."[157] The general problem with this call for aggressiveness is that, in the first half of the book, Redish has painted a picture of an almost subservient judiciary. The emphasis there is on Congress' central role: "Well-accepted principles of separation of powers mandate that an electorally accountable legislature make the basic policy decisions concerning how the nation is to be governed."[158] Redish seems to draw a bright line between the judiciary's constitutional and nonconstitutional roles. Yet the aggressiveness that courts show in the former context might well carry over to the latter. If the Court cannot do the lesser activity of common lawmaking, perhaps it should be reluctant to enter into the greater one of constitutional adjudication. Let us briefly consider this point in three different contexts.

Suppose the political branches decided to gang up on the judicial branch and strip the federal courts, including the Supreme Court, of any meaningful role. Scholars have long debated the extent of limits on Congress to do this, including limits within article III.[159] Redish alludes to the debate,[160] and takes the position that the due process clause limits congressional power to take jurisdiction simultaneously from the state and federal courts.[161] But what are the limits on Congress' powers over the federal courts? Redish's insistence on the need for

156. The Federal Courts, *supra* note 2, at 139 (emphasis added).

157. *Id.*

158. *Id.* at 74.

159. *See, e.g.*, Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 896-97 (1984).

160. The Federal Courts, *supra* note 2, at 131.

161. *Id.*

vigorous constitutional enforcement suggests a view of the judiciary as truly equal and coordinate.[162] However, his earlier emphasis on judicial subservience points toward broad congressional power over the courts in any capacity.[163]

A second constitutional issue is how to deal with the concept of "constitutional common law." The term is that of Professor Monaghan, who posits a variety of sub-constitutional principles such as remedies for constitutional violations.[164] The Court derives them from the basic instrument, but Congress possesses substantial power to change these results. Redish dismisses the thesis as "oxymoronic."[165] He writes that it "turns the principle of separation of powers—under which the unrepresentative judiciary acts as a counter-majoritarian check on the representative branches by enforcing the Constitution—on its head, by effectively vesting in the representative branches authority to overrule the judiciary's constitutional judgments."[166] Once again, bright line analysis provides the answer for Redish. The Supreme Court, however, has reached quite a different answer, recognizing a wide range of congressional power over constitutional remedies. Justice Stevens has justified this approach, in the context of constitutional remedies against federal officials, in terms that could come right out of the first half of Redish's book: "When [a] novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual . . . I feel very deeply that we should defer to the expertise of Congress."[167]

The third and most important context in which deference to the legislature as a fundamental value might make a difference is the exercise of judicial review over substantive congressional legislation.[168] Redish admits that the content of doctrine applied might be deferential in terms of tending to uphold legislation,[169] but does not accept the possibility that deference could lead to reluctance to get involved at all. Consider the matter, however, from the perspective of a Court that agrees with Redish that Congress makes "the basic policy decisions" for the nation. Judicial invalidation of a congressional statute, whatever

162. *See* Amar, *supra* note 4, at 702 (describing federal courts as "equal and coordinate to Congress," and as "active expounders of public norms rather than passive resolvers of disputes").

163. Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 295 (1988).

164. Monaghan, *Foreword, Constitution Common Law*, 89 HARV. L. REV. 1 (1975).

165. THE FEDERAL COURTS, *supra* note 2, at 41.

166. *Id.*

167. *Boyle*, 108 S. Ct. at 2528 (Stevens, J., dissenting).

168. I leave to one side the question of judicial review of state legislation.

169. THE FEDERAL COURTS, *supra* note 2, at 84.

provision is its source, is quite an important policy choice. Congress cannot change it. The legislative branch's special legitimacy might lead the Court toward doctrines that give Congress' actions a good deal of insulation from any judicial review. This is somewhat the position of the current Court;[170] Redish obviously rejects it.

Rather than drawing bright lines around the components of the judicial function, Redish might strengthen his call for vigorous assertions of judicial power in constitutional cases by accepting the position that common lawmaking, abstention and constitutional adjudication are all variants of the same institutional function: the exercise of judicial power. Each aspect of this function draws on the techniques of the others, and the legitimacy of any one reinforces the legitimacy of the others.[171] Perhaps Redish could accept this position as a matter of the inherent nature and role of the federal courts. His failure to reach these ultimate questions and his insistence that the statutes provide bright line answers in nonconstitutional areas prevent us from knowing and, in my view, take away potential support for his constitutional jurisdiction arguments.

Of course it may be that Redish views the Court's role and processes in a constitutional case as fundamentally different from what it does in a common law case. Redish is somewhat ambivalent on this broad issue. Several of the book's passages point toward differences. Redish describes the Court as "expositor" of the Constitution.[172] He refers to the judiciary's "important political role" when it hears constitutional cases.[173] He finds fault with analogies to traditional private law adjudication, based in part on the fact that constitutional decisions "generally go well beyond the interests of the individual litigant bringing the suit."[174] On the other hand, he recognizes the courts' "special claim of competence."[175] Do the courts derive this competence solely from the fact that they are isolated from "majoritarian political influence"?[176] One could, after all, set up a body of "constitutional pronouncers" with life tenure and other article III protections. At times Redish suggests that courts are appropriate for the constitutional function, precisely because they are *courts*. Thus they are not "merely debating societies."[177] They cannot issue "free-standing and binding leg-

170. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975).

171. Under this view, opposition to implied rights of action would rest primarily on grounds of statutory construction, rather than on a negative approach to federal common law.

172. THE FEDERAL COURTS, *supra* note 2, at 7.

173. *Id.* at 89, 109.

174. *Id.* at 94.

175. *Id.* at 132.

176. *Id.*

177. *Id.* at 104.

islation,"[178] but must deal with real disputes brought before them for resolution and in which they can issue orders.[179] "Such limitations ensure both that the federal judiciary will function as courts and not as legislatures or executives, while not interfering significantly with performance of their political role as enforcer of the counter-majoritarian constitutional checks."[180]

A conservative might reply that this sounds like such old-fashioned notions as the rule against advisory opinions, and that some of the jurisdictional doctrines Redish criticizes are designed to limit courts to functioning "as courts." My point is that the constitutional part of the book shows the limits of a bright line analysis in understanding the whole range of the federal court's activities. Redish posits a "judicial-political" model of constitutional adjudication,[181] in which "the federal courts perform their important political role in a judicial manner."[182] Perhaps there is nothing inherently wrong, then, with federal common law in which it might be said that federal courts perform their inherently judicial functions in a political manner.

VI. OMISSIONS

The Federal Courts in the Political Order is a timely discussion of important issues. Without detracting from this evaluation, I feel that it could have been strengthened by more extensive discussion of developments since publication of the law review articles from which the book is largely drawn. This is particularly true of judicial developments.

A good example is *Boyle v. United Technologies*,[183] discussed above in connection with federal common law. *Boyle* represents the Supreme Court's most recent and important foray into that doctrinal jungle. The two main opinions emphasized issues of legitimacy. Redish could have analyzed *Boyle* both as an example of the Court's failure to apply the Rules of Decision Act and as an example of how he would apply it to an important federal common law case. I would particularly like to know his views on the Brennan dissent.[184] Justice Brennan's position on federal common law is close to Redish's, albeit without the Act as guiding star.

In a similar vein, I would have liked to see some discussion of *New Orleans Public Service, Inc. v. Council of City of New Orleans*,[185]

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 103-05.
182. *Id.* at 109; *see also id.* at 103 (referring to "hybrid judicial and political functions performed in the adjudication of constitutional issues").
183. 108 S. Ct. 2510 (1988).
184. *Id.* at 2519 (Brennan, J., dissenting).
185. 109 S. Ct. 2506 (1989).

the Court's 1989 decision on *Younger* abstention. As noted above, the Court's analysis of the validity of *Younger* seems motivated by a need to respond to the Redish critique. How would he respond to the response, particularly to the introduction of remedial discretion[186] as a possible justification? Finally, he might have addressed the flexible separation of powers cases. After all, separation of powers lies at the core of the first half of the book. He cites *Chadha* with approval,[187] but gives no hint that the recent flexible decisions represent a substantial departure from its formalistic approach. Redish has criticized this development in another law review article, but the reader of the book is relegated to a footnote reference to that article.[188]

Redish does a better job of incorporating recent academic writing. His rebuttal to his critics in the areas of federal common law[189] and abstention[190] makes the book particularly current. There are, however, other writers, such as Professors Amar and Chemerinsky, discussion of whose work would have enriched the enterprise. For example, Professor Chemerinsky's development of the "litigant choice theory" as an alternative to current abstention doctrine[191] receives only footnote mention.[192] This is surprising given the fact that his views tend to bolster the Redish critique and the fact that some of the book came directly from an article responding, in part, to Chemerinsky.[193]

As a last note in this category, I found myself wondering how the Redish critique would apply to other federal courts doctrines. He states that "[c]onceivably, all jurisdictional doctrine could be tested under the two precepts I have gleaned from American political theory, with varying results."[194] He limits this observation's applicability to a brief critique of the Court's construction of the diversity jurisdiction statute.[195] What about the extensive body of "arising under" doctrine on federal question jurisdiction? These cases might be criticized as undue deprivation of a federal forum. They might also be explored for limits on the outer boundaries of judicial policymaking authority under broad statutes.

VII. Conclusion

In this Review I have focused on what I have called the "federal courts" portion of *The Federal Courts in the Political Order.* I believe

186. *Id.* at 2513.
187. The Federal Courts, *supra* note 2, at 23.
188. *Id.* at 180 n.110.
189. *Id.* at 156 n.26.
190. *Id.* at 60-67.
191. *See, e.g.*, Chemerinsky, *supra* note 163.
192. The Federal Courts, *supra* note 2, at 188 n.3.
193. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329 (1988).
194. The Federal Courts, *supra* note 2, at 138.
195. *Id.*

that Redish's discussions of federal common law and federal court abstention are more challenging and original than those of justiciability doctrines. Redish's thesis is that both federal common law and abstention are illegitimate under basic notions of separation of powers because Congress has precluded any such judicial activity. His analysis suffers from two flaws: first, the relevant statutes are by no means as clear as he portrays them; second, the application of separation of powers doctrine stops with the notion that courts should obey statutes. What is lacking is a discussion of more fundamental issues concerning the federal courts' nature and role in a system of separated, but sometimes shared, powers. Questions abound. What are the inherent powers of federal courts, and how far do they extend if not limited by Congress? What differentiates their common law powers from those of state courts? Does the Constitution, particularly as expounded in *Erie*, provide answers? Are there a range of judicial administration issues, such as discretionary refusals to exercise jurisdiction, where Congress and the Supreme Court share power? What is the bearing on these issues of the Court's recent separation of powers cases? Because the book does not grapple with these issues, I think that Redish's case for a drastic alteration of existing doctrine is less strong than it might be. Still, he raises important questions that need to be answered. The Court has not yet provided those answers, but there are increasing signs that it might. Grappling with Redish's contentions will be an essential part of any such enterprise.