

THE HUMBLE AND THE TREASONOUS: JUDGE-MADE JURISDICTION LAW

Ann Althouse*

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“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution.”

-Chief Justice John Marshall¹

WHEN THE SUPREME Court of the United States makes jurisdictional doctrine, does it constitute judicial “usurpation” of legislative power?² Is the doctrine of abstention institutionalized “treason”?³ There are many attacks leveled at the Court’s jurisdictional lawmaking, most of them grounded in policy and differing notions of federalism. But what are we to make of the separation of powers critique?

To Professors Doernberg⁴ and Redish,⁵ complex doctrines of federal jurisdiction become eminently simple if only we recognize that in our constitutional system, Congress, and Congress alone, controls the jurisdiction of the lower federal courts. Statutes dictate the extent of the federal courts’ power, and the courts should just follow the statutes and stop making up doctrines that restrict *1036 their own power. Commentators are wasting their time worrying about whether the state courts can be trusted or whether federal courts are needed to vindicate federal rights. The courts cannot legitimately consider these “policy matters” in determining whether they have jurisdiction. The statutes are in place. Congress has, pursuant to its proper role in our constitutional structure, considered all the policy questions. The courts, assuming what Professor Redish has called an attitude of “humility,”⁶ must exercise the jurisdiction given. In the heated words of Chief Justice John Marshall, anything less is “treason to the [C]onstitution.”⁷

* Associate Professor of Law, University of Wisconsin Law School. J.D., New York University Law School (1981). I would like to thank Jack Beermann, Steve Herzberg, and Vicki Schultz for their comments on an earlier draft of this paper. I would also like to thank Bill Marshall for inviting me to participate in the panel on The New Separation of Powers, Federal Courts Section, at the 1990 AALS Meeting and to write this Comment in conjunction with the panel.

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¹ Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

² Redish, *Judge-Made Abstention and the Fashionable Art of “Democracy Bashing,”* 40 CASE W. RES. L. REV. 1023, 1032 (1989-90) (hereinafter Redish, *Symposium*).

³ 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).

⁴ See *id.* at 1018 (the Court’s rejection of jurisdiction ignores a congressional command to exercise the same).

⁵ See Redish, *Symposium, supra* note 2, at 1032-33 (discussing the “intricate network of statutorily dictated federal judicial abstention” rules established by Congress and questioning “how Congress could have made its goal clearer”).

⁶ See *id.* at 1031 (judicial humility in the face of jurisdictional statutes is required, short of a finding of unconstitutionality); see also Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective,* 83 NW. U. L. REV. 761, 784 (1989) (“[I]t is important for the judiciary to approach [statutory interpretation] with the humility dictated by its role as an unrepresentative organ within our representational democratic structure.”).

⁷ Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see Doernberg, *supra* note 3, at 1002.

Such a vision of the structure of federal jurisdiction seems very tidy, predictable, and logical. Unfortunately, it rests squarely and heavily on several unsupportable notions: that the existing jurisdictional statutes are so perfectly clear that they leave no room for varying interpretations;⁸ that it is possible for a judge to ascertain legislative meaning unaffected by the judge's ideas about what jurisdiction should be; and that it is possible for the outside observer to determine whether the judge has adhered to this proper form of decision-making.

Realistically, one might observe that the separation of powers critique is really just a lawyer's tool that might convince judges who endorse judicial restraint that they have no discretion to decline civil rights cases. Even if the separation of powers vision is pure fantasy, one could say, it is a useful fantasy: it works to undercut the abstention doctrine. Ironically, the seemingly pristine logic of separation of powers, which purports to exclude any non-legislative policy-making, may itself rest on the policy judgment that federal courts should provide an open forum to federal rights claimants. What may be worse than the mere irony and internal inconsistency of this explanation is that separation of powers logic is quite unlikely to work as planned.

As this Comment suggests, embracing separation of powers *1037 logic would probably not lead the Court to open the federal courts to the cases that now meet the abstention barrier. If anything, separation of powers logic would threaten to restrict access to federal courts more than the flexible, judge-made doctrines that now prevail. On the other hand, if the separation of powers theory, with its severe principles of judicial restraint and passiveness, did increase access to federal courts, those courts might find it difficult to summon up the activism needed to give a wide scope to individual rights.

I. THE ATTACK ON JUDGE-MADE JURISDICTION LAW AND THE PREFERENCE FOR FEDERAL COURT

The separation of powers critique rests on the belief that when the Court lays down a particular jurisdictional rule, one can tell whether the Court is restricting itself to proper statutory interpretation or is instead making up a rule based on its own ideas about what federal jurisdiction ought to be. The judiciary either moves circumspectly, in a way wholly determined by textual edicts, or it leaps about arrogantly, exercising the unauthorized power to make new law. Professor Redish writes about statutory interpretation and the creation of judge-made jurisdictional doctrine as if they are two distinctly independent processes. When the Court operates in its statutory interpretation mode, presumably, it simply and humbly restates the law as dictated by Congress. When it lapses into its judge-made doctrine mode, though, it illegitimately strikes out on its own and negates the will of Congress. Of course, if the Court uses the Constitution to negate

⁸ See Redish, *Symposium, supra* note 2, at 1026 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)) (judicial abstention ignores the "carefully structured pre-existing legislative network").

the will of Congress, it operates in a third mode – constitutional interpretation – and regains its legitimacy.⁹

But the Court’s jurisdictional doctrine-making will not fit into such neat compartments. Rather, its jurisdictional work forms a highly complex and interdependent structure that lacks clear divisions between the truly constitutional, the completely statutory, and the decidedly judge-made. Without doubt, some of the Court’s written opinions claim to rely on a purely constitutional or statutory basis, while other opinions appear to float free of these textual sources, buoyed by notions of federalism, equity, and judicial restraint. For example, the Court itself bills *Younger v. Harris*¹⁰ *1038 as a judge-made doctrine untied to any textual source and characterizes *Mitchum v. Foster*¹¹ as a painstaking exegesis of section 1983.¹² Taken at face value and viewed in isolation, *Mitchum* may appear on the surface to be a purely statutory exercise; and thus, according to Professor Redish’s approach, a “humble” and appropriate judicial pronouncement.¹³ And, likewise, *Younger* may seem like a blatant usurpation of legislative power; “treason” according to Professor Doernberg, invoking Chief Justice Marshall.¹⁴

There is, however, a reason why the Court spoke one way in *Mitchum* and another in *Younger*, a reason that has nothing to do with whether one was humble and the other treasonous. Because of the inherent restraint in nonaction, openly declining to exercise jurisdiction has seemed acceptable to the Court. The unacceptability of openly acting beyond the prescribed jurisdiction, on the other hand, looks obvious. Thus, the Court creates jurisdictional doctrines like *Younger* that express toleration for the idea that jurisdiction exists and yet cannot be exercised. But the Court would not compose a doctrine that expressed toleration for the idea that a federal court may decide a case and bind the parties when jurisdiction does not exist.¹⁵ When the Court is inclined toward restraint, it has not felt inhibited from articulating free-standing doctrines like abstention.¹⁶ Inhibition sets in, however, when activism appeals to the Court. In such situations, the Court confines itself to statutory or constitutional interpretation.¹⁷ Nevertheless, it may find ways to avoid undesirable limitations that are every bit as effective as freestanding, admittedly judge-made doctrines.¹⁸ This basic paradox of jurisdiction – that restraint is a *1039 form of activism and activism a form of restraint – dates back at least to *Marbury v. Madison*.¹⁹

⁹ See *id.* at 1031 (short of a finding of unconstitutionality, the Court lacks authority to review the congressional vesting of jurisdiction).

¹⁰ 401 U.S. 37, 41 (1971) (“national policy” forbids federal courts from enjoining pending state court proceedings).

¹¹ 407 U.S. 225, 226 (1972) (“The question before us is whether this ‘Act of Congress’ comes within the ‘expressly authorized’ exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court.”).

¹² 42 U.S.C. § 1983 (1982).

¹³ See *supra* note 6 and accompanying text.

¹⁴ See Doernberg, *supra* note 3, at 1019 (finding treason to the Constitution to be rampant and contending that the *Younger* Court refused to accept the original congressional grant of jurisdiction as well as that mandated by the Anti-Injunction Act).

¹⁵ See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1869) (noting that in any case the “first question necessarily is one of jurisdiction”).

¹⁶ See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁷ See *supra* note 11 and accompanying text.

¹⁸ See *infra* text accompanying notes 32-45.

¹⁹ 5 U.S. (1 Cranch) 137 (1803).

Because the Court only uses *admittedly* judge-made doctrines when it seeks to restrict jurisdiction, the strict separation of powers approach may appeal to those who, like Professor Redish, favor maximum access to federal courts for the enforcement of constitutional rights.²⁰ If this preference for federal courts, rather than the appeal of abstract theory, motivates those who embrace the separation of powers approach then it is basically a strategic alternative to the federalism-based arguments that stress the importance of federal courts and the inferiority of state courts. Moreover, if the preference for federal courts and the value of state courts are fundamental to jurisdictional decision-making, then we must inevitably return to that debate. The separation of powers argument does not provide an easy escape from the problems of federal jurisdiction. It is another way to argue in favor of one solution to those problems.

By switching from policy-oriented arguments about federal interests, rights, and federalism, and embracing instead an abstract concept, one may feel entitled to claim some sort of intellectual high ground. It then becomes possible to denounce opponents as unprincipled.²¹ The problem is, one cannot count on the abstract concept to lead to the desired result. The same tool in the hands of a justice who favors a good measure of deference to the states is unlikely to produce increased access to federal court – as the next section of this Comment will show.

By professing unconcern for practical reality and a pure, unalloyed love for an idea, one loses control over outcomes and argues unwittingly for bad results. Despite the seemingly “principled” quality of the separation of powers argument, there is something unprincipled about embracing an abstraction and taking it to its logical limit, without the stabilizing effect of considering **1040* policy implications. The vision of the Court reasoning abstractly about textual language and disembodied principles, insensible to the effects of its decisions, is truly frightening.²² Fortunately, the Court has never pursued that kind of blind role. Indeed, I doubt that the human mind is even capable of functioning this way, though it is certainly capable of attempting or pretending to function this way – and of believing that it has succeeded.

Professor Redish must deny that his advocacy of separation of powers analysis is tied to a desire for increased federal court access. To do otherwise would destroy his argument, as well as his belief in his argument, which I am sure is sincere. Because his separation of powers analysis attempts to exclude policy judgments, he cannot advocate its use for reasons other than the value of keeping governmental powers separate. He

²⁰ In his Article, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 368 (1988) (hereinafter Redish, *Judicial Parity*), Professor Redish first emphasized his strong conviction that state courts are inferior to federal courts and thus that questions of federal constitutional law belonged in federal court; and then concluded that the abstention doctrine violated the separation of powers doctrine.

²¹ See Redish, *Symposium*, *supra* note 2, at 1030 (“By investing the unrepresentative judiciary with the authority to determine these ‘right’ answers, however, these scholars would effectively establish jurists as the equivalent of Platonic-philosopher kings....”).

²² I am reminded of a conversation that I and two other law professors once had with a philosophy professor. The philosophy professor contended that a court faced with the question of when life support devices could be withdrawn from a patient should simply define “death” and then determine if this particular patient was “dead” according to that definition. The court should not think about the consequences of this definition and determination. The proper approach involved reasoning in the abstract and not asking directly which person should die. It would be “unprincipled” for the judge to connect the decision to that very real result. The way to keep judges “judicial,” and to make it appropriate to entrust such decisions to them, is to confine them to a realm of abstract reason.

When the three law professors (who in most matters would represent a broad spectrum of legal positions) persisted in arguing that this vision of legal decision-making was both dangerous and not humanly possible, the philosophy professor left the room.

maintains it is merely a coincidence that this theory also produces a result he endorses as a matter of policy.²³ Professor Redish writes as he would have the duly humble judge write: using appropriately judicial methods, analyzing only statutes and constitutional provisions, and refusing to perceive any play in them.²⁴ He may genuinely lack any awareness that his own thinking about logical, abstract precepts is influenced by his ideas about how things ought to work in real life. But when a single mind is doing the thinking, I find it very difficult to believe that it is a mere coincidence when logical calculations from statutory and constitutional texts match policy judgments.²⁵ *1041

II. WHAT KIND OF JURISDICTION LAW WOULD REALLY FOLLOW FROM THE SEPARATION OF POWERS APPROACH?

What would happen if the Court took the separation of powers critique to heart? It would not construct a nonstatutory, free-standing doctrine like *Younger*, of course. But would federal court access really increase? The Court could not use strict separation of powers analysis as a means of pulling an occasional “misshapen stone” – such as *Younger* – from the entire “grotesque structure” of federal jurisdiction.²⁶ It would need to rebuild the entire structure on a foundation of strict separation of powers, analyzing all statutory and constitutional questions with the understanding that no judge-made doctrines could ever be employed to mitigate the harsher effects of those decisions.

Let us reconsider the *Younger-Mitchum* sequence of cases as if the Court had adopted the strict separation of powers approach advocated by Professors Redish and Doernberg. A state court criminal defendant has decided he would prefer to transform his federal defense into an affirmative claim for relief under section 1983. Filing his case in federal court, he asserts that the state prosecutor, acting “under color of state law,” is imminently threatening to deprive him of a federal right by prosecuting him under a state statute that violates his federal right of free speech. His claim fits within the language of section 1983²⁷ and is thus within the related jurisdictional grant.²⁸ *1042

²³ See Redish, *Symposium*, *supra* note 2, at 1033.

²⁴ See *id.* at 1030-32.

²⁵ Cf. Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 499 (1988) (“substantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues”).

²⁶ The “building” imagery is courtesy of Justice Jackson from his opinion in *Michelson v. United States*, 335 U.S. 469 (1948). Speaking of the judge-made rules that governed when and how litigants in a criminal case could use evidence of character, Justice Jackson worried that “[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.” *Id.* at 486.

²⁷ It is also necessary, in rebuilding the entire federal jurisdictional structure, to reanalyze the interpretation of § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961). See Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1097-98 (1985) (viewing *Monroe*’s interpretation of section 1983 as judge-made law and thus abstention as an appropriate judge-made limitation). While Professor Redish argues that the Court was merely interpreting the law in *Monroe*, see Redish, *Judicial Parity*, *supra* note 19, at 346-49 (“The point ignored in Professor Well’s analysis is that the Court’s expansive construction of the substantive civil rights cause of action ... does not purport to be purely judge-made law, but rather assumes the democratically protective mantle of statutory interpretation.”), in doing so he indulges in the same kind of specious arguments criticized in this comment, *infra* notes 39-47 and accompanying text.

²⁸ 28 U.S.C. § 13 43(a)(4) (1982).

Such a claim also “arises under” federal law within the meaning of 28 U.S.C. § 1331 (1982), though it may not have met the jurisdictional amount that still applied at the time.

Another statute, however, presents a problem. Under the Anti-Injunction Act, a federal court “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.”²⁹ (In the actual *Younger* case, the Court skipped over this statutory issue and created its freestanding abstention doctrine.) This statute, to which the federal courts in their strict adherence to separation of powers must wholly defer, presents an obstacle to jurisdiction. Yet there is also a question of interpretation: is section 1983 an “expressly authorized exception” to the Anti-Injunction Act?³⁰ (In *Mitchum*, decided a year after *Younger*, the Court held that it was.) Section 1983 certainly makes no express reference to the Anti-Injunction Act. Legislative history indicates that the authors of section 1983 were concerned about the problem of state courts’ actually contributing to the deprivations of federal rights, and moreover, they had no confidence in the state courts’ capacity to enforce federal rights.³¹ The express text of the statute, though, does not specifically authorize the injunction of state courts.³² If the Court decides it has power to give relief despite the Anti-Injunction Act, is it acting in a humbly deferential fashion or is it shaping jurisdiction according to its own conception of how things ought to be?

Suppose the Court, despite its increased humility in the face of congressional enactments, sees that it can push the “expressly authorized” statutory language in the direction that suits its conception of what federal jurisdiction ought to be (or what it imagines Congress must have intended). *Would* the Court find that section 1983 is an “expressly authorized exception” if it also believed that it was powerless to construct an abstention doctrine to control how frequently state court defendants could move their federal questions into federal court? Without a device such as abstention, any criminal defendant with a motion to suppress evidence *1043 allegedly seized in violation of the fourth amendment (to name but one of the many federal constitutional claims that arise in criminal cases) might try to initiate a federal lawsuit. This free access to federal court would create an appalling inefficiency and place a heavy burden on both the state court, which must wait for the federal answer to a question that it could have answered, and the federal court, which will be pressured to decide a case quickly so that the state litigation could proceed.³³ I would guess that the Court, aware of the uncontrolled disruption of state procedure and wasteful allocation of judicial resources, would conclude that section 1983 is not an “expressly authorized exception” to the Anti-Injunction Act.³⁴

²⁹ 28 U.S.C. § 2283 (1982).

³⁰ *Mitchum v. Foster*, 407 U.S. 225, 282-83 (1971).

³¹ *See id.* at 240 (“Proponents of [§ 1983] noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”)

³² 42 U.S.C. § 1983 (1982). Cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (applying a high standard of scrutiny before finding that federal statutes authorize suit against a state in federal court and thus abrogate eleventh amendment immunity).

³³ Alternatively, other doctrines, such as ripeness, or the irreparable injury requirement for an injunction, could be developed as alternatives to *Younger*. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 92-95 (1984) (hereinafter Redish, *Abstention*). It is hard to see the value of throwing out *Younger* only to replace it with doctrines that are just as judge-made and that are designed to achieve practically the same result.

³⁴ *See supra* text accompanying notes 29-31.

The *Younger-Mitchum* chronology supports this prediction. The *Younger* Court itself evaded the Anti-Injunction Act problem and went on instead to create an abstention doctrine, which was manifestly unnecessary if the Anti-Injunction Act flatly barred relief. *Mitchum* decided the statutory issue one year later, after the *Younger* doctrine was in place to ensure that removing the Anti-Injunction Act bar would not yield the disruption and waste described above. Without *Younger*, could *Mitchum* have happened? Because the Court was able to create a flexible abstention doctrine in *Younger*, it could keep most federal questions that originated in a state court proceeding in the state court in the first instance,³⁵ and it could still create a narrow route for the few, exceptional cases in which the state court is inadequate to deal with the federal question.³⁶ If the Anti-Injunction Act barred relief, on the *1044 other hand, this flexibility would vanish: the separation of powers approach would have yielded even less federal court access than the course the Supreme Court actually took.

Alternatively, the Court, with due humility, could have arrived at the same basic doctrinal structure that now exists, using purely statutory interpretation. *Mitchum*, surveying the legislative history of section 1983, emphasized that Congress was concerned that the state courts were actually “being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”³⁷ Citing precisely this congressional concern, the Court could hold that section 1983 expressly authorizes injunctions against state courts – but only when those courts are actually implicated in the violation of federal rights, either through active abuse of federal rights or by failing to provide an adequate forum for their adjudication.³⁸

III. THE REAL AND THE FAKE STATUTORY INTERPRETATION

If the Court could derive the equivalent of the *Younger* doctrine from an interpretation of the Anti-Injunction Act, does that mean that “treason” depends upon the

³⁵ These questions would still be subject to federal review by the Supreme Court or by a federal habeas court. 28 U.S.C. § 2254 (1982) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application in behalf of a person in custody pursuant to the judgment of a State court ... [after] the applicant has exhausted the remedies available in the courts of the State....”)

³⁶ The *Younger* abstention doctrine provides for a series of exceptions which all, save one, can be characterized in terms of the state court’s adequacy to handle the federal claim. There is no abstention if the proceeding lacks jurisdiction to handle the federal question, *Moore v. Sims*, 442 U.S. 415, 425-26 (1979), or if proceeding is biased, *Gibson v. Berryhill*, 411 U.S. 564 (1973), or if the proceeding is not “judicial in nature,” *New Orleans Pub. Serv., Inc. v. Council*, 109 S. Ct. 2506 (1989). *But see Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (citing *Younger* and relying on “equitable restraint” when faced with enjoining nonjudicial state officers); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (same).

In addition, there is no abstention if the prosecution has instituted proceedings in bad faith or for harassment purposes when it means that the state court is never able to address the federal claim. *See Younger v. Harris*, 401 U.S. 37, 47-48 (1971) (explaining *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (permitting injunction prohibiting the enforcement of certain state criminal statutes)).

The one exception to *Younger* abstention that has nothing to do with state court adequacy arises when the federal lawsuit challenges a state statute that is “flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.” *Younger*, 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). This exception has never been used, however. Nor does it make sense: if the state courts can ever be trusted to enforce any federal law, they should be trusted when the constitutional question is most clearcut.

³⁷ *Mitchum v. Foster*, 407 U.S. 225, 240 (1971).

³⁸ For a discussion of the *Younger* exceptions in terms of the adequacy of the state court, *see supra* note 36.

formulation used? We might attempt to assure ourselves that if the Court were to embrace this interpretation, it would merely be an attempt to cover up its treason by disguising illicit judge-made law as statutory interpretation. But is not *Mitchum* judge-made law dressed up as *1045 statutory interpretation? Professor Redish, himself, has called *Mitchum* “a highly questionable opinion”³⁹ and “one of the most bizarre contortions of Supreme Court analysis,”⁴⁰ but he still considers it “insulated from a separation-of-powers critique.”⁴¹ According to Professor Redish, *Mitchum*’s difficulties stem from poor reasoning⁴² and not from the desire to make jurisdiction conform to the judicial notion of what jurisdiction should be; *Mitchum*, therefore, does not violate separation of powers. In Professor Redish’s words, it wears “the democratically protective mantle of statutory interpretation.”⁴³

When Professor Redish writes about the Anti-Injunction Act now, he takes it for granted that *Mitchum* represents the true meaning of that statute.⁴⁴ He contends that the statutory jurisdictional structure is utterly clear and could not be made clearer: Congress has told the federal courts they have jurisdiction over civil rights cases, and it has also barred injunctions in some instances, not including civil rights cases, as outlined in the Anti-Injunction Act.⁴⁵ Yet how can the Anti-Injunction Act be considered clear given the serious problems with *Mitchum*? Are we to approve of *Mitchum*, even though it was wrongly decided, because it was written with proper humility? Even if we do approve of it, can we use it as a basis for claiming that Congress clearly intended to empower the federal courts to enjoin ongoing state proceedings whenever a plaintiff states a claim that falls within section 1983 (as interpreted – humbly? – by *Monroe v. Pape*⁴⁶)?

In another article, Professor Redish conceded that even statutory interpretation violates the separation of powers credo if it is *1046 “so devoid of even colorable support that it amounts to little more than a ruse for naked judicial lawmaking.”⁴⁷ But if *Mitchum* does not violate separation of powers, it is difficult to imagine the Court going too far as long as it speaks in terms of constitutional and statutory interpretation. Deciding whether a particular decision is “real” statutory interpretation (wearing “the democratically protective mantle of statutory interpretation”) or “fake” statutory interpretation (mere “naked judicial lawmaking”) is a task inescapably tinged with subjectivity. As the Court’s observers, how do we decide if we see real or fake, clothed or naked interpretations? I would suggest that we see real, clothed, judicial decision-making when we agree with the result, just as Professor Redish agreed with the result in *Mitchum*.

³⁹ Redish, *Abstention*, *supra* note 33, at 86.

⁴⁰ *Id.* at 87 (“an ‘implied’ express exception ... [is] an oxymoron if ever there was one”).

⁴¹ *Id.* (Professor Redish noted that it is insulated “at least to the extent it is applied to bar injunctions of *ongoing* state proceedings.”)

⁴² *Id.*

Ignoring the questionable connection between the *Mitchum* Court’s interpretation and congressional intent, Professor Doernberg flatly states that “Congress intended” that the federal courts would issue injunctions against state courts without restraint since the Court in *Mitchum v. Foster*, 407 U.S. 225 (1972), “held that the first exception [to the Anti-Injunction Act] includes actions brought under section 1983.” Doernberg, *supra* note 3, at 1019.

⁴³ Redish, *Judicial Parity*, *supra* note 19, at 349.

⁴⁴ See Redish, *Symposium*, *supra* note 2, at 1032 nn. 37-39.

⁴⁵ See *id.* at 1031-32 (suggesting that Congress vested this power in the federal courts because it questioned the state courts’ commitment to protecting civil rights).

⁴⁶ See *Monroe v. Pape*, 365 U.S. 167 (1961).

⁴⁷ Redish, *Judicial Parity*, *supra* note 18, at 348 (criticizing the interpretation of § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961)).

There is no way to choose the right answer by asking which is the real statutory interpretation and which is the fake. The judge's sense of what federal jurisdiction ought to be will inevitably affect statutory interpretation, just as it affects the creation of freestanding doctrines. It is not necessarily that the judge tries to *disguise* policy-based decisions as statutory interpretation. A judge operating humbly and faithfully within the separation of powers model would naturally frame decisions in terms of statutory construction. By the same token, a Supreme Court observer who believes the separation of powers credo, like Professor Redish or Professor Doernberg, would not determine which decisions fail to align with the observer's favored policies and, on that basis, pick which decisions are mere "naked judicial lawmaking." Yet that observer may very well perceive "fake" statutory interpretation in the decisions that reach results they disfavor.

IV. WHO SAYS THE CONSTITUTION GIVES CONGRESS EXCLUSIVE CONTROL OVER FEDERAL JURISDICTION?

The Supreme Court extensively shapes federal court jurisdiction, both expanding and constricting it, making it conform to its ideas about what jurisdiction should be. It will continue to shape jurisdiction this way regardless of what conventions of opinion-writing bind it. Unlike Professors Redish and Doernberg, I do not find this process disturbing. The consciousness of the real effects of decision-making is an indispensable and desirable element of *1047 judging, not an illicit deviation from the judicial role.

But what about the role of Congress in controlling federal jurisdiction? Does not the express constitutional text require the Court to accept the lines drawn by Congress? Think again: *what* constitutional textual source denies the judiciary any control over its own jurisdiction? Article III only provides: "The Judicial Power of the United States shall be vested ... in such inferior Courts as the Congress may from time to time ordain and establish."⁴⁸ It takes an act of judicial interpretation to determine that those words yield Congress plenary power over the scope of federal jurisdiction. In his original draft of his Article for this Symposium,⁴⁹ Professor Redish mentioned, but glossed over, this point. He cited the article III language and added that "no one today seriously questions" Congress's power over federal jurisdiction.⁵⁰ Apparently, longstanding acceptance should deflect our attention from the actual text of the Constitution when the question is Congress's authority over jurisdiction – but not when the question is the Court's authority. Professor Redish went on to say this "congressional authority makes perfect sense."⁵¹ But to discuss governmental power in terms of its "sense" is to make a policy

⁴⁸ U.S. CONST. art. III, § 1.

⁴⁹ Professor Redish changed his Article substantially after my Comment and Professor Beermann's Comment were presented at the Symposium. See Beermann, "Bad" Judicial Activism and Liberal Federal Courts Doctrine: A Comment on Professor Doernberg and Professor Redish, 40 CASE W. RES. L. REV. 1049, 1049 n.* (1989-90).

⁵⁰ Redish, *Abstract: Representational Democracy and the Law of Federal Jurisdiction*, 1, 9 (1989) (unpublished manuscript on reserve at the Case Western Reserve Law Review office prepared in anticipation of the Symposium).

⁵¹ *Id.* at 10.

This "perfect sense" stems from the way jurisdictional provisions are often important to the success of a substantive legislative program. See *id.* Even this policy argument – which the Court could not even consider if it were dedicated to the style of thought Professor Redish advocates – is not convincing. It only shows why the Court should not defy or undercut grants of jurisdiction. It does

argument; and Professor Redish has taken great pains to forbid policy arguments with respect to judicial power to make jurisdictional law. In the new version of his Article, Professor Redish has scratched this problematic argument, but he has put nothing in its place. I am left wondering about the paradox: How do we know that the Court exceeds its power in contributing to the law of jurisdiction when the rule that Congress alone controls jurisdiction itself comes from the Court? Is it “treason to the [C]onstitution” *1048 to decline the jurisdiction given?⁵² The source of the treason-to-decline-jurisdiction rule was Chief Justice Marshall, a humble judge, who had no authority (according to Professor Redish) to make jurisdictional rules.

The notion of judicial passive-obligation in the face of congressional dominance is just as judge-made as the idea that the judiciary retains some power to shape its own jurisdiction along with Congress. This is not to say that the Constitution leaves the judiciary wholly unrestrained. The jurisdictional statutes provide the general outlines that limit judicial lawmaking. The Court could not, for example, interpret the grant of federal question jurisdiction to impose a \$100,000 jurisdictional amount.⁵³ But judicial interpretation of statutes is an inevitable aspect of legislation; and, except where the statutory language is completely clear, interpretation is unavoidably influenced by judicial notions of what jurisdiction should be.

Because Congress retains the power to rewrite jurisdiction grants to undo any unwanted judicial accretions, it is difficult to take the threat to democracy seriously. Professor Redish attempts to create the impression that the Court blatantly defies utterly clear statutes, and that the Congress is at a loss to think of a way to amend the statutes to make them more clear (short of saying “and we really mean it” or “read our lips”). Yet it seems perfectly obvious that if Congress wanted to eliminate the *Younger* doctrine, it could simply amend section 1983 to add genuinely clear language, such as: “The federal courts may enjoin ongoing state court proceedings, notwithstanding 28 U.S.C. § 2283, and they shall not abstain in deference to such proceedings, despite the capacity of the state court to enforce the federal claim asserted under this section.” If the Court were to continue to authorize abstention after an amendment like this, I would join Professor Redish in denouncing the Court for “judicial usurpation at its most indefensible extreme.”⁵⁴ Because Congress can respond to the Court’s opinions in this way, and because Congress retains the power to end the Court’s jurisdiction-shaping role with unambiguous and express language, there is no separation of powers problem – certainly *1049 no problem as outrageous as Professors Redish and Doernberg claim. *Younger* may be inadvisable as a matter of federalism and policy, and it may be wrongly decided as a matter of statutory interpretation, but it is not an assault on democracy.⁵⁵

not explain why the Court should have no role in contributing to the development of jurisdictional provisions in a way that supports the general goals laid out in the statute. *See infra* text accompanying notes 56-58.

⁵² *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 808 (1821).

⁵³ Compare 28 U.S.C. § 1331 (1982) (no textual reference to jurisdictional amount) with 28 U.S.C. § 1332 (1982) (for federal jurisdiction in diversity cases, the amount in controversy must exceed \$ 50,000).

⁵⁴ Redish, *Symposium*, *supra* note 2, at 14.

⁵⁵ For my own views about the advisability of the *Younger* doctrine, see generally Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051 (1988) (federal interests support using the state courts to enforce federal law in their ongoing proceedings).

In practice, the Court's role in shaping and "fine-tuning"⁵⁶ jurisdiction has been largely supportive of Congress, not adversarial as the "separationists" would have it. Judge-made doctrines qualify and accommodate statutes that are written in general terms and that cannot anticipate the realities of litigation encountered by judges. Judges are therefore in a better position to fill out some of the details in jurisdictional statutes.

There is good reason to think Congress implicitly authorizes this kind of law-making or would authorize it, if it gave the matter and thought. Congress relies on the courts to adapt legislation and to avoid undesirable and unanticipated results, such as, perhaps, interfering with ongoing state court proceedings in which federal rights can be enforced. Professors Redish and Doernberg portray the Supreme Court as defiant and usurping, but it is more realistic to characterize the Court as engaged in a partnership with Congress. Within this partnership, each institution performs aspects of the jurisdictional law-making function that fall particularly within its capacity. Congress sets the initial broad outlines of jurisdiction; the Court adapts those statutes in response to actual case settings; and Congress retains the ultimate power to redefine jurisdiction, subject to constitutional limitations, defined by the Court.⁵⁷

What is objectionable about this arrangement? Professor Redish can only propose a kind of clear statement rule: Congress should expressly authorize the federal courts to make jurisdictional law if it wants their assistance – silence implies lack of authority.⁵⁸ But why not, for the reasons described above, assume **1050* authority, either as a matter of federal common law power or as a matter of implicit congressional authorization, *unless* Congress says otherwise? Even if Professor Redish would prefer to assume a lack of judicial power and rejects this partnership model of jurisdictional lawmaking, he needs to explain separately how the Constitution mandates his preference. Yet there is nothing to invoke except *judicial* assertions to the effect that Congress has complete power over federal jurisdiction, and these assertions are contradicted by the very judicial practices he criticizes.

CONCLUSION

What substantial difference would the separation of powers approach make? It would cut off one way of speaking about what jurisdiction should be. It asks judges to submerge realistic thinking about how jurisdiction should be allocated and to restrict itself to the language of textual interpretation. It is difficult to see how this kind of constraint enhances the representative character of government which Professor Redish emphasizes. How would more judicial obfuscation improve the democratic process? Slogging through the Court's elaborate discussions of the legislative history of section 1983, which are rarely, if ever, convincing as a matter of pure history, I have welcomed straightforward discussions of policy. These passages are rays of light, illuminating the Court's true

⁵⁶ See Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) ("[T]he courts are functionally better adapted to engage in the necessary fine tuning than is the legislature.")

⁵⁷ For a similar and far more detailed account of the interaction between the courts and Congress in making jurisdictional law, see Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 84 Nw. U. L. REV., (1990) (manuscript).

⁵⁸ See Redish, *Symposium, supra* note 2, at 1031-33.

motivations.⁵⁹ I am grateful for any frankness from the Court about how it thinks cases should be allocated between federal and state courts, and, more fundamentally, about how individual citizens who claim violations of constitutional rights should fare within the federal system. We may well disagree with these decisions, but at least we can directly address the source of the disagreement. Centering the debate about federal jurisdiction on the real issues at stake in the cases has far more potential for vitalizing democracy than the futile attempt to constrain judges with separation of powers theory.

Finally, with all of this concern that judges might intrude on the legislative function and interfere with the will of the majority, we should not forget the importance of preserving the judicial function, particularly the role of the federal courts in protecting **1051* the rights of minorities. If we pound away at the Court with arguments about how important it is to defer to Congress in the interests of democracy, we may unintentionally push it into a generalized position of restraint that will affect its view of constitutional rights. Professor Redish, manifesting his usual tendency to believe that it is possible to keep things neatly separated, assumes the Court will be able to approach constitutional interpretation with full vigor even though it has taken a position of extreme deference in statutory interpretation.⁶⁰ But if the Court becomes dedicated to a credo of congressional dominance, adopted in response to arguments about statutes, it may find it difficult to rouse itself from that passivity and carry out its counter-majoritarian role of enforcing constitutional rights. The separation of powers theory could undermine the Court's capacity to stand up to the Congress and to engage in activism for the protection of the very rights that make us care about jurisdiction in the first place.

⁵⁹ See, e.g., *Monell v. Department of Social Serv.*, 436 U.S. 658, 711 (1978) (Powell, J., concurring) (stressing the need to find municipalities to be "persons" to avoid casting "grave doubt" over the exercise of jurisdiction over school boards in desegregation cases).

⁶⁰ See Redish, *Symposium, supra* note 2, at 1031 (finding it difficult "to comprehend how scholars could realistically suggest that recognition of the obligation to act when so directed by the legislature, that is, of what is really a form of judicial *humility* in the face of legislative directive, would somehow undermine the judiciary's performance of its vital counter-majoritarian checking function").

Quite aside from the potential for ideas about the judiciary's nonrepresentative character and the value of judicial restraint to spill over into constitutional interpretation, statutory and constitutional interpretation often arise together in the same case. The kind of extreme deference to statutes advocated by Professor Redish would make it difficult for the Court to give full play to a constitutional right that limits the reach of a statute.