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The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory

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THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY. By *Martin H. Redish.* Durham: Carolina Academic Press. 1991. Pp. viii, 192. $24.95.

Despite the central position of federal jurisdiction in the American political scheme, few scholarly books have addressed the subject. Most federal courts scholarship remains primarily in textbooks,[1] hornbooks,[2] and law review articles.[3] Professor Martin Redish[4] has taken a step toward filling this void with the publication of *The Federal Courts in the Political Order.*

Redish believes scholars have shrunk from applying political theory to issues of federal jurisdiction, yet he is not the first scholar to marry political theory and jurisdictional doctrine. All scholarly discourse on federal jurisdiction has been, in some sense, premised on political theory. Nevertheless, *The Federal Courts in the Political Order* makes a valuable contribution to the federal courts literature by identifying and criticizing the political premises behind the various commentaries regarding federal jurisdiction and providing its own normative political theory to buttress jurisdictional doctrines.

Professor Redish criticizes and builds jurisdictional doctrines from two fundamental precepts of American political theory: the representational and countermajoritarian principles. These two principles are at once complementary and antipodal; they are two sides of the same coin.

The representational principle provides simply that judges may not ignore constitutionally valid legislative policy choices (p. 4). The countermajoritarian principle, in contrast, provides that courts may not avoid their duty to adjudicate constitutional challenges to legislative, executive, or agency action (p. 4). To Redish, any political system providing for judicial review logically and ineluctably recognizes each of these theoretical underpinnings. Consequently, because jurisdictional doctrines such as judge-made abstention and most political question doctrine (which itself might be viewed as a horizontal or interbranch form of abstention) allow courts to avoid their constitutionally mandated functions, they impermissibly flout the representational and countermajoritarian principles. Judges' time would be better

1. *See, e.g.,* PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988).

2. *See, e.g.,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (1989).

3. *See, e.g.,* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1961); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

4. Louis and Harriet Ancel Professor of Law, Northwestern University.

spent grappling with the merits of the cases before them than fashioning abstruse excuses to avoid such substantive inquiry.

Redish fortifies his two fundamental principles, therefore, by debunking the validity of the abstention and political question doctrines. Indeed, *The Federal Courts in the Political Order* largely derives from law review articles Redish had previously published on each subject;[5] it does not cover all, or even most of the issues one might encounter in a traditional federal courts curriculum. It does not discuss, for example, federal habeas corpus, or even federal question jurisdiction. Rather, it focuses squarely on the judge-made doctrines that regulate the exercise of judicial review.

Redish opens the book by using the representational principle to attack some of the modern, "progressive" views on the appropriate role of the judiciary (Chapter Two). Specifically, the representational principle leaves no room for hermeneutics that allow judges to make any policy choices outside of those made in validly enacted legislation. Take, for example, "neo-republican" theory. Neo-republican theory takes root from public choice theory, which postulates that legislation represents compromises among elite special interests in derogation of the public good[6] and adds that judges should free themselves from the shackles of legislative intent and seek to identify superior values upon which to make decisions.[7] From the perspective of the representational principle, Redish views neo-republican theory as "the epitome of anti-democratic thought" (p. 13). Any dichotomy between public values and private interests is inherently false in a democratic system (p. 14).

Redish criticizes other modes of statutory construction along similar lines. The "textual deconstructionist" (pp. 20-22), "political deconstructionist" (p. 22), and "functionalist" (pp. 22-24), as well as the "neo-republican" (pp. 24-25) models of statutory interpretation all posit that legislative intent, if it in fact may be discerned, should not bind the decisionmaker. Consequently, each model suffers from the same antidemocratic plague and misguided assumptions about the judiciary's ability to identify objectively anything other than legislative intent. Curiously, Professor Redish does not believe that the judiciary

5. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984-85).

6. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

7. *See* Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1582 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

should always remain value-neutral; occasionally, he notes, it must exercise its "gap-filling" function:

> [While t]he most important insight [of the representational principle] is that nonconstitutionally controlled issues — including those involving judicial jurisdiction — are to be resolved on the basis of judicial policy assessment only to the extent that the representative branches have not already made that policy choice through legislative action . . . situations will arise in which a good-faith judicial effort to determine whether — and how — a statute resolves a specific question will . . . be effectively fruitless. In such an event, judicial resolution on the basis of the court's own assessment of the competing social and political policies will probably be unavoidable . . . . But, . . . judicial resort to such a practice [should] come only as a last resort . . . . [p. 19]

Considering the vigor with which Redish derides judges for making policy choices, one might wonder why Redish allows for *any* "exceptions" to the formalistic rigor of the representational principle. Worse, because much, if not all, judicial decisionmaking involves some form of gap-filling, the exception comes dangerously close to swallowing the rule. In short, the gap-filling exception stands as a bald anomaly — Redish simply fails to reconcile this exception logically with the representational principle, and therefore to explain his dogmatic retreat.

Before using the representational principle as a foil against judge-made abstention, Redish discusses the implications of the principle for federal common law. Not surprisingly, the representational principle requires that judges cannot make federal common law. Legislatures may vest broad discretion in courts to fashion "common law," as in labor law,[8] but courts that make such rules are really engaging in statutory interpretation (p. 33).

To argue that the making of common law and "gap-filling" according to independent, judicial policy choices are forms of statutory interpretation borders on the preposterous. Evidently Redish has assumed, through the representational principle, that all lawmaking must devolve from legislatures. As a result, he must transmute what the ordinary observer would call judicial lawmaking — such as the making of a common law of labor agreements — into statutory interpretation. The history of our political system reveals, however, that lawmaking has *never* been confined solely to legislatures; at the very least, courts have always been assumed to have *some* power to make law.[9] The real question is not who can make law, but what confines each governmental branch's lawmaking power.

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8. *See* § 301 of the Labor Management Relations Act (codified at 29 U.S.C. § 185(a) (1988)), interpreted in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (§ 301 allows judges to develop a common law governing collective bargaining agreements).

9. *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. (forthcoming 1992).

Redish does not discuss the limits on the extent to which *legislatures* may convey lawmaking power to the courts. The representational principle and separation of powers concerns may have even greater force than Redish has acknowledged. Would legislatures violate the representational principle by abdicating their obligation to make policy; for example, by passing a law vesting *all* lawmaking authority in federal courts as far as the Constitution would allow Congress to legislate? Redish should have expended greater effort to define the contours of proper legislative constraint.[10]

Moreover, Redish construes the Rules Decision Act[11] — providing that state law applies in federal courts except when preempted by federal or constitutional law — as an independent congressional judgment that courts should not create federal common law. That position is a far cry from the posture of those arguing that courts have no independent authority to make federal common law, and it echoes the logic of *Erie Railroad Co. v. Tompkins.*[12] Whatever the weaknesses of Redish's interpretation of the Rules Decision Act, they do not detract from his cogent criticism of Professors Westen and Lehman's construction of the Rules Decision Act to justify judicial power to make federal common law.[13] Redish convincingly demonstrates that Westen and Lehman premise their argument that federal common law is itself a "rule of decision" on the belief that statutory interpretation and common lawmaking are not inherently different (p. 32). Given that a difference exists (and Redish argues persuasively that it does, though this is a controversial argument whose persuasiveness may depend largely on its aesthetic appeal), courts should be able to recognize it and thus limit themselves to the tasks of statutory interpretation and gap-filling.[14]

In some sense, the chapter on federal common law is an interlude; it is judge-made abstention that feels the full brunt of Redish's onslaught with the representational principle rapier. Judge-made abstention — the jurisdictional doctrine by which federal courts, despite having valid jurisdiction, refrain from deciding a case on the merits to further federalism and judicial efficiency[15] — is judicial usurpation of legislative power (p. 49). Because abstention frustrates the enforce-

10. See p. 33 for Redish's minimal offering in this regard.

11. 28 U.S.C. § 1652 (1988).

12. 304 U.S. 64 (1938). For a discussion of this point, see John H. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 704 (1974).

13. *See* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

14. Pp. 33-42. One might query whether federal common law is really a form of gap-filling; if so, then Redish would have to concede that the Rules Decision Act allows federal common lawmaking just as Westen and Lehman argue. In that case, Redish's earlier failure to account for gap-filling in terms of the representational principle would take on even greater significance.

15. *See* Railroad Commn. of Tex. v. Pullman, 312 U.S. 496 (1941); Younger v. Harris, 401 U.S. 37 (1971).

ment of validly legislated policy choices and amounts to the exercise of an independent policy choice without requisite statutory authority, any such decision not to exercise jurisdiction violates the separation of powers principle (p. 50). Abstention, even when it merely delays a federal court's decision on the merits, amounts to statutory repeal (p. 50).

Redish does not believe that notions of discretion are inherent in the concept of jurisdiction. Professor David Shapiro, one of the most noteworthy critics of Redish's position in this regard, has pointed out that the judiciary has always exercised some quantum of bounded discretion, as exemplified by doctrines such as *forum non conveniens,* pendent and ancillary jurisdiction, and ripeness, and by general common law history.[16] Redish responds to this criticism (correspondingly updating and clarifying the position taken in his law review article) with two types of arguments. First, he distinguishes from abstention each of the putatively analogous examples of discretion-based doctrine by highlighting various functional differences between abstention and those other doctrines (pp. 64-67). For example, *forum non conveniens* is "geographically, rather than systemically, based."[17] Arguments of this kind are facile — Shapiro's argument is easily neutralized by atomization and piecemeal criticism of each analogy — but they miss the point. Why should the judiciary ever, under any doctrine, exercise discretion without statutory authorization?

Aware of that criticism, Redish suggests that Shapiro's "empirical" argument is irrelevant to Redish's own "normative" critique (p. 63); hence, Redish's normative argument applies to the abstention "analogues" as well. Indeed, he suggests that pendent and ancillary jurisdiction also may be subject to separation-of-powers attack (p. 66). Yet Redish's rebuttal to Shapiro ignores Shapiro's *normative* theme: that courts might be institutionally better adapted to the jurisdictional fine-tuning involved in abstention, thus justifying abstention as judge-made doctrine on institutional grounds.[18]

The second half of the book establishes the countermajoritarian principle as the lens through which to focus case-and-controversy (standing), mootness, ripeness, and political question doctrines. The countermajoritarian principle proceeds from Professor Redish's belief that "judicial review is [not] a *physical* necessity of a constitutional system, [but] a *logical* or *practical* necessity" (p. 79). Consequently, courts have an unflagging obligation to enforce the provisions of the Constitution. The judiciary is the only institution designed for such a function.

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

17. P. 65. He further notes that Congress eventually codified the doctrine of *forum non conveniens* at 28 U.S.C. § 1404(a) (1988). *Id.*

18. *See* Shapiro, *supra* note 16, at 574.

The countermajoritarian principle thus contrasts with Professor Alexander Bickel's "passive virtues"[19] rationales of discretionary judicial restraint. Furthermore, Redish has no qualms with the antidemocratic nature of judicial review. He sees judicial review as a logical necessity of a constitutional system. Courts should not therefore create complex and technical doctrines merely in order to minimize the political impact of the judiciary (p. 87).

Once one accepts, as Redish does, such a grand, indeed active, role for the judiciary, the various justiciability doctrines — as fashioned by the courts and rationalized by various commentators — are easy prey. For example, Redish assails the "injury-in-fact"[20] requirement for a Constitutional "case-or-controversy"[21] as

> fundamentally inconsistent with recognition of the judiciary's important political role in providing a constitutional check on the majorit[]arian branches, as dictated by the Counter-Majoritarian principle. By superimposing a "private rights" model of adjudication on constitutional litigation, use of the injury-in-fact requirement effectively undermines judicial performance of that role. [p. 89]

In turn, the "private rights" model, which posits that courts should only decide disputes between individuals,[22] straightjackets courts from properly adjudicating many cases of "*macro*-impact on the national political process" (pp. 93-94). Moreover, injury-in-fact is not an intrinsic feature of judicial restraint. Instead, "the appropriate battleground for judicial restraint is in the fashioning of the substantive decision" (p. 95).

Redish paints "political question" doctrine[23] as the most pernicious of the "passive virtues." The book's penultimate chapter is devoted entirely to this subject. In short, Redish reasons, first, that political question doctrine exists, contrary to Professor Louis Henkin's assertions,[24] and second, that one cannot argue in any principled way that the judiciary is responsible for interpreting some constitutional clauses but not others (p. 117). Only if the judiciary has the last word on the whole literary corpus of the Constitution can it felicitously check the majoritarian branches (pp. 124-25, 134-36). Like the repre-

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19. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962); Bickel, *supra* note 3.

20. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

21. *See* U.S. CONST. art. III, § 2, cl. 1.

22. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

23. Political question doctrine holds that certain questions and their resolutions fall within the particular purview of legislative or executive power and consequently are not suited to judicial review. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962). In other words, the actions of certain political branches must be accorded some finality. *See* Coleman v. Miller, 307 U.S. 433, 454-55 (1939).

24. Pp. 112-16 (discussing Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976)).

sentational principle, the countermajoritarian principle functions categorically; it has no bounds.

In *The Federal Courts in the Political Order*, and indeed in his career, Professor Redish certainly has carved a niche for himself. As this book demonstrates, one can construct a political theory that derides the "passive virtues" while avoiding the subjectivity, indeterminacy, and potential for juridical abuse inherent in the more "progressive" political theories suggested to operate the constitutional system. In taking this stance, however, Redish ultimately counsels toward allowing the judiciary very little flexibility in jurisdictional matters. To some federal courts scholars, Redish's antipragmatic theories will smack of fetishistic formalism; to others they will savor of the comfortable securities of consistency and clarity. And, although lacunae blotch those theories, they are undoubtedly important and provocative.

— *James Hopenfeld*