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JURISDICTION AND DISCRETION REVISITED

Daniel J. Meltzer*

INTRODUCTION

Ben Kaplan, an astute man with the highest of standards, once told me that “pound for pound,” David Shapiro was the most valuable member of the Harvard Law School faculty. Ben had a good basis of knowledge, having been a colleague, a fellow civil procedure teacher, and a co-reporter with David on the American Law Institute’s Restatement (Second) of Judgments. A skeptic might observe that David’s slim figure helps him on the evaluative scale that Ben chose, but I am confident that Ben’s judgment would not have changed even had David been on steroids.

The phrase “luminous intelligence,” though it has the ring of a cliché, aptly characterizes David’s mind. He is a superb analyst, but unlike some, David’s analyses are always clear, succinct, and precise. David illuminates every issue about which he writes or speaks: he gets to the heart of a matter without oversimplifying, and he explores (or discovers) the complexities of a problem without generating confusion or uncertainty. David once wrote that “an author’s ability to make compelling statements of contrasting views is, for me, a powerful signal of the author’s worth as a scholar,”¹ and no one is better able to see all sides of a question than David. David’s work has ranged broadly—teaching and writing about administrative law, labor law, the legal profession, constitutional federalism, and even critical legal studies.² But his primary interest, and the focus of his writing, concerns civil procedure and federal jurisdiction, topics about which he seems to know everything.

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¹ David L. Shapiro, Foreword: A Cave Drawing for the Ages, 112 Harv. L. Rev. 1834, 1834 (1999) (introducing a symposium celebrating the fiftieth anniversary of Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949)).

My own association with David has been anchored in our joint work on a federal courts casebook. But even before I joined him on that project, I had learned, early in my teaching career, the important lesson that I should never publish anything without getting David's comments. He is a marvelous and generous editor, a superb stylist, and an acute critic. He also possesses what seems to me to be a wasting asset in academia, a brilliant sense of humor, which one finds in his writings and also in various ephemera (marginal comments on drafts, e-mail correspondence, etc.).

For all these reasons, and more, I am delighted that the Notre Dame Law Review has seen fit to commemorate his distinguished achievements, and I am honored to have been asked to participate.

I. Shapiro's Jurisdiction and Discretion

In this Article, I want to explore a set of themes underlying Shapiro's work, themes most clearly set forth in his pathbreaking article, Jurisdiction and Discretion. That article, recently cited as one of the most influential articles published in the New York University Law Review, took as its topic various assertions by judges and commentators "that the federal courts are obligated to exercise the jurisdiction conferred on them by the Constitution and by Congress." Proponents of that view spanned the centuries and included none less than Chief Justice John Marshall and Justice William Brennan.

Shapiro's broad-ranging survey of jurisdictional doctrines and their origins showed how sharply such statements depart from central features of the legal landscape. The article, when published, seemed to me to be an almost unanswerable response to those positing an obligation of the federal courts to exercise all jurisdiction that ap-


4 See, e.g., Shapiro, supra note 2.


7 Shapiro, supra note 5, at 543.

8 See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("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 constitution.").

peared to fall within the scope of a textual grant from Congress. More broadly, Shapiro's *Jurisdiction and Discretion* was an important counter to a conception of the separation of powers in which Congress has exclusive policymaking authority, not only at the wholesale but also at the retail level, in determining whether federal jurisdiction may be exercised. Part of the power of Shapiro's response, as Barry Friedman has noted,\(^\text{10}\) lies simply in its comprehensive and sophisticated demonstration that judicial decisionmaking that rounds out the edges of jurisdictional enactments is deeply entrenched, both as a matter of historical experience and of contemporary practice. "Is" may not be "ought,"\(^\text{11}\) but claims that judicial practices are politically illegitimate are far more difficult to sustain when those practices are widespread and longstanding and when there is a pattern not of congressional opposition but, instead, of apparent congressional acquiescence.\(^\text{12}\)

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10 See Friedman, supra note 6, at 1553–54.
12 See Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. Rev. 109, 137–44 (1984); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (arguing that the lawfulness of presidential action often depends on whether Congress has granted, been silent about, or purported to restrict presidential authority).

The claim of congressional acquiescence is not uncontroversial. Indeed, a narrower, objection to Shapiro's view than the one noted in the text is that the limitations on the exercise of federal jurisdiction that Congress has enacted should be taken as effectively occupying the field and thus precluding the development by the federal courts of additional limitations. See Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 BYU L. Rev. 321, 337–38.

The difficulty with that objection, it seems to me, is its premise that Congress intended to occupy the field. For example, while the Anti-Injunction Act, now 28 U.S.C. § 2283 (2000), was first enacted in 1793, its existence was never viewed by the courts as precluding their development of doctrines of limitation, which they formulated throughout the nineteenth and twentieth centuries. The subsequent enactment in the 1930s of additional statutory limitations—the Tax Injunction Act of 1937, 28 U.S.C. § 1341, and the Johnson Act of 1934, 28 U.S.C. § 1342—occurred against a background of judge-made limitations, but there is nothing in their text or legislative history to suggest that they were meant to sweep those limitations aside rather than, instead, supplementing them. One other doctrine sometimes mentioned as an example of a statutory limitation on jurisdiction, the exhaustion requirement in habeas corpus, 28 U.S.C. § 2254(b), see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 74 n.18, 81 (1984), is in fact a codification and elaboration by Congress (first in 1948, with subsequent amendments) of a judge-made doctrine, see *Ex parte* Royall, 117 U.S. 241, 251 (1886); here, too, congressional action does not appear to question the legitimacy of the initial judicial action. Another example of codification, also one that reflects no apparent congressional
Moreover, Shapiro’s argument did not merely establish the depth and breadth of the tradition of judicial discretion, but also defended it as normatively justified.

Because citation counts are in vogue in some quarters, it may not be amiss to mention that Shapiro’s article has been cited in six Supreme Court decisions and 164 law review articles. Indeed, *Jurisdiction and Discretion* has become so much a part of the current understanding that it is cited even in opinions with which Shapiro himself would disagree and by a jurist like Justice Scalia, who, as we shall see, does not find its themes entirely congenial.

Still, for several reasons, I think there is profit in exploring further the themes sounded in Shapiro’s article. First, while much of the Supreme Court’s work product resonates with Shapiro’s argument, the Court has also, as I just suggested, rendered some decisions that are difficult to square with its premises. Second, while the article is typically cited approvingly in the secondary literature, it also is frequently disapproved of judicial discretion, is the partial statutory codification of the doctrine of forum non conveniens, 28 U.S.C. § 1404(a).


Search of WESTLAW, Journals and Law Reviews Database (JLR) (Jan. 7, 2004) (search for law reviews citing Shapiro, supra note 5).

Compare *Quackenbush*, 517 U.S. at 731 (holding that a federal court may dismiss or remand an action on abstention grounds only if it seeks equitable or otherwise discretionary relief), with Shapiro, supra note 5, at 571 (“[L]aw and equity have long ceased to be separate systems, in both England and the United States, and thus arguments that discretion should be limited as if they were still separate seem a bit strained.”); compare Wyoming, 502 U.S. at 474 (Thomas, J., dissenting) (urging abstention in a dispute between two states falling within the Supreme Court’s exclusive original jurisdiction), with Shapiro, supra note 5, at 561 (deeming criticism of the Court’s refusal to exercise such jurisdiction “unanswerable”).


See *Quackenbush*, 517 U.S. at 721, 731; *Wyoming*, 502 U.S. at 474 (Thomas, J., dissenting).

quently taken merely as advancing one side of a debate and paired with cites to commentary (usually that of Professor Martin Redish) taking the diametrically opposite view. Shapiro, thus, has not quite convinced all comers. Finally, and most fundamentally, the broad question that Shapiro raises about the proper allocation of decisional authority between judges and the legislature is a profound one, which reaches beyond questions of federal court jurisdiction about which I think there is room for additional observations. I would like to examine and elaborate on some of his key arguments, especially those that seek not merely to describe but also to justify judicial discretion.


See, e.g., Lee & Wilkins, supra note 12, at 337-38; Shreve, supra note 20, at 767.
II. Jurisdiction and Discretion in the Supreme Court and the Academy

A. The Supreme Court's Treatment of Jurisdiction and Discretion

Let me begin by tracing the influence of Jurisdiction and Discretion in the Supreme Court. Several of the Court's citations are relatively routine. In one instance, the Court cited Shapiro's article for the proposition that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question."22 In a second case, Wyoming v. Oklahoma,23 both the majority and dissenting opinions followed the peculiar tradition of treating Congress's grant of original Supreme Court jurisdiction in suits between two states as discretionary,24 despite the fact that the congressional statute granting jurisdiction over such cases makes that grant exclusive.25 Justice Thomas's dissent, however, at least acknowledged Shapiro's telling criticism of that tradition—a criticism rooted in the critical idea that judicial discretion has limits and that judicial decisionmaking must be faithful to the basic prescriptions established by Congress.26 For the Supreme Court to decline to exercise original jurisdiction that Congress has made exclusive, particularly when alternative fora (even a federal district court located in a particular state) might be thought to lack both the disinterest and the dignity required to resolve a dispute between two states,29 is, as Shapiro noted, particularly difficult to justify.

Several other Supreme Court decisions have cited Shapiro's article in support of conclusions of which I suspect he would not approve. Thus, Justice O'Connor's opinion for the Court in Wilton v. Seven Falls Co.30 cites Jurisdiction and Discretion in connection with an argument that the text of the Declaratory Judgment Act, which states that the federal courts "may" exercise jurisdiction,31 confers "on federal courts unique and substantial discretion in deciding whether to declare the

24 See id. at 450-51; id. at 474-75 (Thomas, J., dissenting).
25 "Granting" is not an entirely accurate verb, as, strictly speaking, Article III of the Constitution constitutes a self-executing grant of original jurisdiction.
27 See Wyoming, 502 U.S. at 475 n.* (Thomas, J., dissenting).
28 See Shapiro, supra note 5, at 575-77.
29 See, e.g., Meltzer, History and Structure, supra note 18, at 1598-608.
rights of litigants.\textsuperscript{32} That characterization of the discretion available in declaratory actions as substantial is surely correct, but the Court's statement that the discretion is unique could be taken to imply that jurisdictional grants lacking expressly discretionary language should be construed as permitting little if any authority to decline to exercise jurisdiction—an implication with which Shapiro would not agree.

The seeds for such an implication had been planted some years earlier by Justice Scalia in \textit{New Orleans Public Service, Inc. v. Council of New Orleans},\textsuperscript{33} a case in which, interestingly enough, then Deputy Solicitor General Shapiro represented the United States and the Federal Energy Regulatory Commission as amici curiae.\textsuperscript{34} In reversing the courts below, which had abstained from the exercise of jurisdiction, the Supreme Court disposed of the case as the Brief for the United States proposed. The majority's rationale for rejecting abstention, however, differed somewhat from the rationale that Deputy Solicitor General Shapiro advanced. Writing for the Court, Justice Scalia, after reciting what he termed "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds," acknowledged that "[t]hat principle does not eliminate, however, and the categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted. See Shapiro, Jurisdiction and Discretion . . . ."\textsuperscript{35} Though citing Shapiro's article, Justice Scalia subtly re-shaped its argument by suggesting that the courts' traditional discretion was limited to declining to "grant certain kinds of relief" (for example, injunctive and declaratory relief, the forms of relief sought in the \textit{New Orleans Public Service} case), and that the courts could not decline to exercise jurisdiction altogether.\textsuperscript{36} Shapiro's arti-

\textsuperscript{32} \textit{Wilton}, 515 U.S. at 287 (emphasis added).
\textsuperscript{33} 491 U.S. 350 (1989).
\textsuperscript{35} \textit{New Orleans Pub. Serv.}, 491 U.S. at 359.
cle, by contrast, established that the common law background of discretion, to which Justice Scalia did allude,\textsuperscript{37} was far broader.\textsuperscript{38}

The seed planted in the \textit{New Orleans Public Service} opinion finally sprouted into a significant restriction on the notion of judicial discretion in \textit{Quackenbush v. Allstate Insurance Co.}\textsuperscript{39} The case was a common law action for breach of contract, and it was removed from state to federal court on the basis of diversity of citizenship. The plaintiff moved to remand the action to state court, arguing that so-called \textit{Burford} abstention was appropriate.\textsuperscript{40} The district court agreed and ordered the case remanded.\textsuperscript{41} The court of appeals reversed, holding that the remand on abstention grounds was in error, and the Supreme Court unanimously agreed with that conclusion.\textsuperscript{42}

Although Justice O'Connor's opinion for the Court cited \textit{Jurisdiction and Discretion},\textsuperscript{43} and quoted the language from \textit{New Orleans Public Service} acknowledging that the Court's application of abstention doctrines reflected "the common-law background against which the statutes conferring jurisdiction were enacted,"\textsuperscript{44} the opinion proceeded to declare that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."\textsuperscript{45} In \textit{Quackenbush}, the relief sought was simply damages at law for contractual breach, a form of relief that was not discretionary, and hence, the Court ruled, a federal court could not remand the case to state court on abstention grounds.

Justice O'Connor's crabbed characterization of the scope of judicial discretion required her to engage in some analytical wriggling to

\begin{footnotes}
\item[37] \textit{New Orleans Pub. Serv.}, 491 U.S. at 359 (citing Shapiro, \textit{supra} note 5).
\item[38] See Brown, \textit{supra} note 20, at 150.
\item[39] 517 U.S. 706 (1996). The description that follows draws on \textit{Hart \& Wechsler, supra} note 3, at 1192-211.
\item[40] See \textit{Burford v. Sun Oil Co.}, 319 U.S. 315 (1943). See \textit{generally} \textit{Hart \& Wechsler, supra} note 3, at 1203-13 (discussing \textit{Burford} abstention). In \textit{Quackenbush}, the plaintiff was California's Insurance Commissioner, who had been appointed trustee of an insurance company ordered into liquidation by a California court. \textit{Quackenbush}, 517 U.S. at 709. The commissioner argued that federal adjudication might interfere with California's resolution of the underlying insolvency and that the viability of the insurer's set-off claims depended on a disputed question of state law pending before the California courts in another case arising out of the same insolvency. \textit{Id}.
\item[41] \textit{Quackenbush}, 517 U.S. at 709-10.
\item[42] Shapiro was of counsel to the plaintiff's unsuccessful effort to have the decision below reversed. See \textit{Brief for the Petitioner, Quackenbush v. Allstate Ins. Co.}, 571 U.S. 706 (1996) (No. 95-244).
\item[43] \textit{Quakenbush}, 517 U.S. at 715 (quoting \textit{New Orleans Pub. Serv.}, 491 U.S. at 359).
\item[44] \textit{Id} at 717.
\item[45] \textit{Id} at 731.
\end{footnotes}
explain a number of precedents. She acknowledged that several prior Supreme Court decisions had in fact upheld abstention in damages actions at law, but distinguished those precedents either as not having addressed the issue fully or as having merely stayed or postponed a federal action rather than remanding it to state court or dismissing it outright.

She also acknowledged that "federal courts have discretion to dismiss damages actions . . . under the common-law doctrine of forum non conveniens," but contended that the abstention doctrine was "of a distinct historical pedigree" and that it more narrowly circumscribed judicial discretion to dismiss or remand a case than did the doctrine of forum non conveniens. Thus, the Court concluded that although a doctrine like Burford abstention "might support a federal court's decision to postpone adjudication of a damages action," it could not support outright dismissal of an action filed in federal court or, as in the case before it, remand of a removed case to state court.

The difficulties with the various components of this reasoning have been pointed out, and they suggest that the Court's reformulation of Shapiro's approach has little to commend it. Consider first the Court's distinction between the dismissal or remand of a federal action, which the Court prohibits, and the stay of the action, which the Court suggests might be justified. In a case like Quackenbush, the practical effect of a stay may be not merely to postpone, but to permanently prevent, federal court litigation. For even if the plaintiff re-filed a state court action, the defendant could remove that action too and presumably have it stayed as well. Even where a stay might permit a litigant to re-file successfully in state court without facing the prospect of removal—as might be true where the only basis for federal jurisdiction is diversity and the suit is against an in-state defendant—


47 Quackenbush, 517 U.S. at 720–23. The Court distinguished Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), which held that a federal court should not entertain a § 1983 action for damages arising from a state tax scheme, on the ground that it had been construed by the subsequent decision in National Private Truck Council, Inc. v. Oklahoma Tax Commission, 515 U.S. 582, 589–90 (1995), as "a case about the scope of the § 1983 cause of action, not the abstention doctrines." Quackenbush, 517 U.S. at 719 (citation omitted).

48 Quackenbush, 517 U.S. at 721–22.

49 Id. at 730.

50 See, e.g., HART & WECHSLER, supra note 3, at 1192–94.

the stay’s effect is likely to be no different in the end than that of a dismissal. As Richard Fallon, David Shapiro, and I have pointed out (albeit in the interrogative form), “[i]f the federal action is stayed pending resolution of the state action, won’t the state court’s determination be dispositive of the federal action under doctrines of claim and issue preclusion? If so, isn’t the practical effect of a stay identical to that of an order dismissing the federal action?”

Indeed, that functional similarity between a dismissal or remand on the one hand, and a stay on the other, was recognized by the Supreme Court in its decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. as the basis for finding that an order staying a federal action, like an order dismissing such an action, is appealable. In Quackenbush, the Court relied on that aspect of the Moses H. Cone decision in order to uphold the existence of appellate jurisdiction to review the district court’s decision to remand the action on abstention grounds, but then, in discussing the merits of the remand, the majority simply breezed by the persuasive demonstration in Moses H. Cone that an abstention-based stay did not differ in substance from an abstention-based dismissal.

The other distinction drawn by the Court in Quackenbush—between dismissals based on forum non conveniens, where judicial discretion is broader, and dismissals based on abstention, whose “distinct historical pedigree” justifies only a narrow ambit of judicial discretion—is also not robust. Again, to quote skepticism voiced by Fallon, Shapiro, and me, isn’t the Court’s distinction little “more than an ipse dixit”? Is there any reason of principle why “the considerations of convenience and judicial administration that underlie forum non conveniens doctrine [should] be treated as more important than the considerations of comity and federalism that support abstention doctrines?”

Finally, the Court’s attempt sharply to distinguish equitable (and other “discretionary”) remedies from legal remedies is difficult to sustain in a world in which law and equity have long been fused. (Imagine a case in which a plaintiff sought both forms of relief, as, for example, if a plaintiff sued in the alternative for specific performance

52 Hart & Wechsler, supra note 3, at 1193.
54 Id. at 8–10.
56 Id. at 716–31.
57 Id. at 722–23.
58 Hart & Wechsler, supra note 3, at 1194.
59 Id.
of a contract and for damages for breach; would abstention be appropriate as to the former type of relief but not the latter?) Quackenbush is not the only instance in which the Court, in recent years, has based important decisions on efforts to maintain a sharp and increasingly nonfunctional distinction between law and equity, and commentators (myself included) have generally not been kind to these efforts.\textsuperscript{60}

Clearly Shapiro’s article has been a starting point of reference for a number of important Supreme Court decisions. Unfortunately, as often happens to commentators, Shapiro’s wisdom has sometimes fallen on deaf ears.

B. The Academy

Little point would be served in trying to discuss all of the references to 	extit{Jurisdiction and Discretion} in the secondary literature. Let me instead try to focus on a particularly interesting commentary that takes issue with aspects of Shapiro’s analysis, for that commentary relates to the preceding discussion of the Quackenbush decision and it highlights an important feature of the underlying problem that Shapiro addresses.

Writing six years after the publication of 	extit{Jurisdiction and Discretion}, Professor Shreve advocated a broader judicial role, in rounding out jurisdictional statutes, than that deemed appropriate by Chief Justice Marshall or Justice Brennan.\textsuperscript{61} But Shreve’s argument is far more limited than Shapiro’s, as Shreve contends that courts should not decline to exercise jurisdiction on the basis of what he calls “political” policies. He argues that “policies of judicial administration accounted scarcely if at all for the language in article III, section 1, reposing in Congress special authority over the federal judicial power,” and that therefore

\textsuperscript{60} See sources cited supra note 36.

\textsuperscript{61} See Shreve, supra note 20. Shreve preferred to deem the judicial role that he favored a kind of jurisdictional common law rather than a question of the proper judicial role in interpreting the jurisdictional statutes. The line between statutory interpretation and judicial lawmaking is an indistinct one. See Hart & Wechsler, supra note 3, at 685. However, in one respect Shreve’s description seems to beg the question. He says he means “by jurisdictional common law doctrine federal courts use either to explain why they adjudicate claims for which Congress has not conferred jurisdiction or to explain why they refuse to adjudicate claims that Congress has constitutionally authorized them to hear.” Shreve, supra note 20, at 772. But proponents of a broad judicial role would take issue with the proposition that judicial decisions fleshing out jurisdictional statutes at the margin are in tension with what Congress has or has not authorized, and would contend, instead, that they are the best understanding of exactly what Congress, in light of a broad set of background understandings, should be taken to have authorized. Professor Shreve later acknowledges as much. See id. at 782.
“[s]eparation of powers concerns . . . are . . . less likely to be aroused” by decisions based on concerns about judicial administration than by decisions based on the courts’ pursuit of “political ends.”\footnote{Shreve, supra note 20, at 788–89 (footnotes omitted).}

Shreve’s conclusion, however, does not follow from his premise. One could just as easily argue that the presence of “political” ends in Article III suggests that those are just the kinds of factors relevant to interpretation of jurisdictional grants under Article III. Indeed, Justice Brennan has come close to suggesting as much.\footnote{In Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), Justice Brennan, in dissent, objected to basing jurisdictional decisions on concerns about the volume of litigation. Quoting Chief Justice Marshall’s statement in \textit{Cohens v. Virginia}, 19 U.S. (6 Wheat.) 264, 404 (1821), that the Court has “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,” Justice Brennan stated that}

\[1\]he narrow exceptions we have recognized to Chief Justice Marshall’s famous dictum have all been justified by compelling judicial concerns of comity and federalism. . . . It would be wholly illegitimate, however, for this Court to determine that there was no jurisdiction over a class of cases simply because the Court thought that there were too many cases in the federal courts. \textit{Merrell Dow}, 478 U.S. at 829 n.7 (Brennan, J., dissenting) (citations omitted).

\footnote{This point echoes the recognition that claims of expertise by administrative agencies are an incomplete justification for lawmaking by agencies and that agency policymaking necessarily involves value-based or political choices. See generally \textsc{Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy} (1990); Richard B. Stewart, \textit{The Reformation of American Administrative Law}, 88 \textit{Harv. L. Rev.} 1669 (1975).}

\footnote{See Younger v. Harris, 401 U.S. 37 (1971).}

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\footnote{Shreve does not himself discuss \textit{Pullman} abstention. But Professor Redish criticizes it as illegitimate. See Redish, \textit{supra} note 12, at 75–76 (citing \textit{Pullman} as one of several abstention doctrines, each of which “could be characterized as a judicial usur-}
conveniens law is viewed by Shreve, quite understandably, as a doctrine of judicial administration.70 But if an American court refuses to entertain an action and remits the parties to another tribunal that seems quite likely, ex ante, to reach a different outcome—notably when the other forum is overseas and would not, for example, employ common law juries, recognize American style class actions, follow the American rule on attorney’s fees, or apply American substantive law on pain and suffering or punitive damages in tort cases—the “administrative” objective may carry important political overtones.

Perhaps most fundamentally, as Shreve himself notes,71 every decision by Congress to confer jurisdiction on the federal courts in a particular category of cases can be viewed as resting on the belief that those courts are “better,” in some relevant sense, than the state courts. (Indeed, were that not so, it is not clear why Congress would ever want to confer federal subject matter jurisdiction; relying exclusively on the state courts, subject to Supreme Court review, would eliminate the befuddling complexities arising from the pervasive overlap of federal court and state court jurisdiction.) And most if not all the respects in which Congress might view federal courts as “better” would presumably be deemed “political” by Shreve. Thus, whenever a federal court declines to exercise jurisdiction, even for reasons of “judicial administration,” a value judgment is being made that the importance of the posited basis for declination outweighs any preference for federal adjudication embodied in the congressional grant of jurisdiction. Most any declination, then, can be seen as political, in the sense that the court, after due regard for the political considerations underlying congressional action, finds those considerations insufficiently forceful to merit the exercise of federal jurisdiction.

The point here is not simply that this effort to limit or reformulate Shapiro’s position does not improve it. More fundamentally, if one embraces a lawmaking role for courts in rounding out the edges of jurisdictional enactments, that role will inevitably involve courts in making decisions that might be variously characterized as substantive, controversial, value-laden, or political. The larger question, I believe, is what can be said about the appropriateness of that role?

70 Shreve, supra note 20, at 802–03.
71 Id. at 784–87.
III. Judicial Discretion Explored: Predictability and Legitimacy

Questions about broad judicial authority to make law can be helpfully separated into distinct but overlapping questions. Frank Michelman has recently suggested that in assessing the extent to which legal decisionmaking is constrained, one can identify several different goals that we ask legal decisionmakers to promote: to settle disputes, to provide predictability and stability in legal doctrines, and to establish morally appropriate and justifiable outcomes.\(^7\) Dispute settlement seems the easiest of these three aspirations for judges to achieve; when cases are filed in their courts, judges usually succeed in overseeing a process that ultimately resolves the dispute.\(^7\) But given the pervasive recognition that judicial decisionmaking, in general, is only relatively constrained,\(^7\) it is predictability and stability in legal doctrines, on the one hand, and the legitimacy of decisionmaking (and in this case, of judicial decisionmaking in particular), on the other, that pose the more difficult challenges for the judicial role that Shapiro endorses.

A. Predictability and Stability

Judicial rounding out of jurisdictional statutes plainly creates a possibility that the resulting doctrine may be sufficiently uncertain or indeterminate as to fail to provide adequate guidance to litigants about where disputes may and may not be filed. Before offering some observations about particular doctrines, let me first address the question of how important predictability is in this context.

No one favors lack of clarity in legal doctrine, but for primary actors, predictability in jurisdictional doctrines is considerably less important than predictability about rules governing primary conduct.\(^7\)


\(^7\) Of course, effective dispute resolution presupposes reasonable expedition, which may be impaired if legal doctrines are relatively indeterminate and consequently difficult to litigate and subject to greater likelihood of appellate reversal. Some have suggested that this is a particular problem with respect to abstention doctrines. *See, e.g.*, Lee & Wilkins, supra note 12, at 337 (“It has become commonplace for commentators to criticize abstention, which often requires numerous round trips by litigants between state and federal courts, as inefficient and wasteful.”). I discuss these problems below.

\(^7\) Michelman, supra note 72, at 963–64; *see also* Steven L. Winter, *A Clearing in the Forest* 316 (2001).

\(^7\) For one illustration of this point (albeit a somewhat elliptical one), see Hart & Wechsler, supra note 3, at 22 (Supp. 2003) (noting the absence of strong reliance interests on the shape of the jurisdictional doctrine of complete preemption).
Businesses and individuals may tailor their conduct to tort or contract or statutory doctrines to ensure compliance with legal requirements or to take advantage of legal opportunities.\textsuperscript{76} It is far less likely that primary actors will conform their conduct to doctrines governing which court will exercise jurisdiction. Less likely, of course, does not mean impossible; one can conjure up counter-examples. In a heated civil rights protest or political dispute, the differences between state and federal courts in a particular locality could be so sharp and predictable that an actor might be willing to undertake conduct if, but only if, any dispute would be heard by a federal but not a state court (or vice versa). Perhaps in some commercial contexts, the differences in the sensibilities of juries matters importantly (as in the preference of plaintiffs' class action lawyers for venue in Madison County, Illinois\textsuperscript{77}), and insofar as business decisions may be based on anticipated liabilities, a decided difference in the likely liability could affect a rational calculus. Could, but is not likely to; in a world of bounded rationality, effects such as these are likely to be limited and muted.

The point is not that forum choice does not matter; indeed it does, which is why so much jockeying in litigation concerns forum choice. But again, it is not clear how that translates into ex ante incentives. In many instances, forum selection ex post involves a choice not simply between adjudicative systems but between particular judges. For example, when one is deciding whether to remove a state court litigation that is already before a particular judge,\textsuperscript{78} even if one does not know to which federal judge the case might be removed, one can compare the individual state court judge with an array of possible federal judges. Moreover, litigation may have the effect of concentrating the mind; human actors often lack perfect foresight and surely

\textsuperscript{76} On whether academics have exaggerated this effect, see Edward A. Purcell, Jr., Brandeis and the Progressive Constitution 253-54 (2000).


\textsuperscript{78} See Theodore Eisenberg & Lynn M. LoPucki, Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. 967, 1002 (1999) (concluding that "debtors shopped to New York and now shop to Delaware in large part to secure particular judges or to avoid judges in their home districts").
often see things in hindsight that they might have but failed to focus on initially. Finally, a considerable amount of forum choice is dictated by the preferences of lawyers rather than those of their clients. For all of these reasons, I suspect that uncertainty about jurisdictional doctrine is not likely to have significant ex ante effects on primary behavior.

A different kind of reliance, however, occurs within the litigation itself. The Federal Rules of Civil Procedure and the rules of most states encourage early determination of jurisdiction, partly for legalistic reasons (how can a court begin to adjudicate without having first assured itself and the parties that it has power to do so?), but also for intensely pragmatic ones (it is wasteful to invest time and money in adjudication that may come to naught if it later turns out that the court lacked power to hear the case). There is also a strong tradition, drawing on those pragmatic concerns, urging that jurisdictional rules be clear. The judicial role that Shapiro advocates might be thought to cut against that tradition.

Shapiro addresses this objection directly in Jurisdiction and Discretion. He defends a conception of measured judicial discretion, in which courts, having been vested with discretion by Congress, determine whether to exercise it in a particular case not upon whim or ad hoc decision but rather upon "criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose." He stresses that the criteria must be "capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch," and that the discretion he endorses "carries with it an obligation of reasoned and articulated decision . . . that can therefore exist within a regime of law." Finally, he stresses that over time, judicial decisions narrow the bounds of existing discretion, providing predictability for the future.

This conception of adjudication clearly resonates with the Legal Process school, and Shapiro has in fact described himself "[a]s a continuing believer in the value of the lessons taught by the legal process
His position, then, entails several distinct though related notions. First, it views Congress, when enacting jurisdictional grants, as not seeking, and appropriately not seeking, complete advance specification. Second, it views courts rather than legislatures as the appropriate institution to provide fine-grained specification. Third, it views Congress as having implicitly authorized such post hoc specification by courts. And finally, it rests on confidence that judicial elaboration of the reasons for jurisdictional decisions will eventually generate a body of law that is reasonably determinate. I am sympathetic to these commitments, but wish to test them by looking at three jurisdictional doctrines that have figured importantly in the debate over jurisdiction and discretion.

The first doctrine is so-called *Younger* abstention. Here, the Court has succeeded in developing a doctrinal framework with relatively determinate boundaries. The *Younger* case itself is just over thirty years old (though it had important antecedents), and within a reasonably short time the Court elaborated a set of additional decisions that gave the doctrine considerable detail and specification in just the way that Shapiro envisioned. Indeed, by the time that the Burger Court gave way to the Rehnquist Court, the framework was largely in place: the federal courts should abstain when there are pending state court proceedings brought by the state—or, in rare instances, state proceedings between private litigants that affect important state interests. There is much to be debated about the merits of these decisions, and in my judgment a sound basis for criticism of a good number of them. But at least on grounds of stability and predictability, they fare reasonably well. Like all doctrines, they have some soft spots and uncertainties, but the lines drawn are reasonably lawlike and predictable.

A different example is so-called *Pullman* abstention. Nearly twice the age of *Younger*, *Pullman* abstention has been harder to do-


90 See generally Hart & Wechsler, *supra* note 3, at 1227–58 (discussing the *Younger* decision and subsequent developments).


mesticate into formally realizable rules. As David Currie aptly observed many years ago,

the delays and added cost of abstention, which have been chroni-
cled in hideous detail, give the practice a Bleak House aspect that in
my mind is too high a price to pay for the gains in avoiding error,
friction, and constitutional questions. Last of all, if the question
were a close one, I think the balance would be swung by the time
saved if federal courts did not have to go through the troubles of
deciding whether or not to abstain—an issue whose difficulty is at-
tested to by the substantial number of Supreme Court decisions at-
tempting with only limited success to define the limits of the
doctrine.93

I am confident that a judiciary composed of David Shapiros would
exercise discretion in a fashion that was sensible and perhaps that
would become clear over time, but that is a different judiciary from
the one that we have.94

One might respond that any uncertainty in the articulated crite-
ria for Pullman abstention matters less if, as noted earlier, primary ac-
tors rely little if at all on jurisdictional doctrine. And one way to
reduce the litigation costs, and particularly the serious cost when juris-
dictional decisions are reversed on appeal, is to confer a different
form of discretion upon district judges. Shapiro discusses a form of
discretion that he calls “allocative” discretion—the “delegation of de-
cision-making authority within a particular hierarchy (here, the judici-
ary)—which is distinct from the discretion that is his primary con-
cern, “normative” discretion—discretion delegated by the legisla-
ture to the judiciary.95 In the case of Pullman abstention, the district
courts have been given a measure of allocative discretion, for, al-
though the decisions of the courts of appeals do not line up perfectly,
the clear weight of authority establishes abuse of discretion as the ba-
cis standard of review.96 That limited scope for appellate review

93 David P. Currie, The Federal Courts and the American Law Institute (Part II), 36 U.
94 See Frederick Schauer, Slippery Slopes, 99 HARV. L. REV. 361, 373–76 (1985);
(2003).
95 See Shapiro, supra note 5, at 546.
96 A number of circuits have simply stated that review is for abuse of discretion. See, e.g.,
Porter v. Jones, 319 F.3d 483, 492 (9th Cir. 2003) (“We review a decision to
abstain and stay proceedings under Pullman for abuse of discretion.”); Pittman v.
Cole, 267 F.3d 1269, 1285 (11th Cir. 2001) (“We review a district court’s decision to
abstain on Pullman grounds for an abuse of discretion.”). Others follow that same
standard in general but add particular qualifications. See, e.g., Nationwide Mut. Ins.
Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 652 (5th Cir. 2002) (“We
clearly reduces the likelihood that a district court's decision whether to abstain will be reversed.

But insofar as the only way to assure that unpredictable decisions cause little harm is substantially to insulate district court decisions from appellate review, it comes at a serious cost. As Professor Rosenberg has noted, deeply rooted in our concept of the rule of law is the notion that trial court decisions are not unreviewable and that losing litigants have at least one opportunity to seek appellate correction. Judge Friendly has also stressed the benefits of multi-member appellate panels with a broader range of experience than a single trial judge, as well as the centrality of the notion of equal treatment, a notion that cannot be fully realized if disparate trial court judgments are subject to sharply limited review. Finally, the "governance costs" of establishing some consistency among courts rise when large numbers of actors (lower federal court judges) are charged with fashioning a consistent doctrine.

I have always been sympathetic to the critique of Pullman voiced by Currie. And Currie is hardly alone. In 1977, my colleague Martha Field, who had several years earlier written what remains the most comprehensive study of Pullman abstention, came to the conclusion that "Pullman abstention is not worth its costs." Field suggested an abstention for abuse of discretion. The exercise of discretion must fit within the narrow and specific limits prescribed by the particular abstention doctrine involved. A court necessarily abuses its discretion when it abstains outside of the doctrine's strictures.; Beavers v. Ark. State Bd. of Dental Examiners, 151 F.3d 838, 840 (8th Cir. 1998) ("We review the district court's decision to abstain for an abuse of discretion. . . . The underlying legal questions, however, are subject to plenary review."); Riley v. Simmons, 45 F.3d 764, 770 (3d Cir. 1995) ("We review the district court's decision to abstain for abuse of discretion, but the district court's analysis of the law on abstention is subject to de novo review."). But see Moe v. Dinkins, 635 F.2d 1045, 1048 n.7 (2d Cir. 1980) (noting that appellate courts "have used a more searching standard of review [than abuse of discretion], and have reversed abstention orders whenever convinced the decision was improper or wrong").

97 Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 641-42 (1971).
99 Cf. Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 DUKE L.J. 1, 20-22 (1992) (noting that where a rule must be agreed upon by a number of rulemakers, its formulation entails costs).
gested that if state court input on issues of state law is needed, certification is available. She seems right to me that "[t]he balance between costs and benefits . . . leaves certification well ahead of abstention." While not going as far as Field would go, the Supreme Court has also observed that certification is a vastly preferable procedural route. And today, virtually every state now authorizes its courts to hear certified questions, although the statutes have some limits and the process does not always work smoothly. (Nor, insofar as certification is being invoked when Pullman abstention might have been, does the swifter and cleaner procedural route eliminate the uncertainties inherent in application of the doctrine's criteria.)

Strictly speaking, the sponginess of jurisdictional criteria like those governing Pullman abstention is not necessarily a byproduct of the kind of judicial discretion that Shapiro favors; statutes, after all, can embody explicitly articulated standards that are spongy and uncertain in their application. But the thrust of Shapiro's article is that judges have the capacity to engage in more refined analyses, in the context of a particular case, than Congress can when enacting a general statute. And whenever a decision becomes more complex, refined, and multi-dimensional, it affords greater opportunity for decisionmakers to miscalculate or misapprehend and for the resulting doctrinal pattern to be more uncertain.

There will always, then, be the question whether the additional value added by the refinements that judges can provide is worth the cost. Pullman abstention has always seemed to me to be a close case in this respect, but for many years I have been doubtful that the game is worth the candle. Any difference in this respect between Shapiro and me when Jurisdiction and Discretion was published in 1985, however, has narrowed considerably insofar as abstention today is tending to morph into certification and insofar as certification processes prove, in general, to work reasonably smoothly.

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104 See HART & WECHSLER, supra note 3, at 1201 n.5.

105 See id. at 1200-03.


A final example of the exercise of discretion, one highlighted by Shapiro, is the scope of "arising under" or federal question jurisdiction set out in 28 U.S.C. § 1331.108 Justice Holmes famously argued that the statutory grant of federal question jurisdiction embraced only cases in which federal law creates the cause of action,109 but his position has not carried the day. Instead, federal question jurisdiction also reaches some, but not all, cases in which there is a federal ingredient embedded in a state law cause of action.110 Shapiro suggests that no formulation can account for the pattern of decisional law "unless it accords sufficient room for the federal courts to make a range of choices based on considerations of judicial administration and the degree of federal concern."111 And he appears to approve of that approach, as well as the principal applications of it by the Supreme Court as of the time that he wrote in 1985.112 The following year, the Supreme Court endorsed his approach in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,*113 where the majority approvingly cited Shapiro as one of several commentators endorsing the proposition "that our § 1331 decisions can best be understood as an evaluation of the nature of the federal interest at stake."114

Here, too, I am entirely confident that I would be happy in a world in which the existence of federal question jurisdiction was decided by David Shapiro. But academics are experts in a way that generalist federal judges are not,115 and many academics are unusually good analysts. (Many academics, I should hasten to add, are entirely lacking in other qualities necessary to be a good judge.) Academics may also, as Peter Schuck has suggested, have a taste, as a matter of professional inclination, for complexity.116 The question remains whether the men and women who comprise the federal bench have been or will be able to craft a sufficiently determinate body of doctrine by following the approach that Shapiro proposes.

108 *See* Shapiro, *supra* note 5, at 566–70.
109 *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); *see also* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214–15 (1921) (Holmes, J., dissenting) ("[F]or it is the suit, not a question in the suit, that must arise under the law of the United States [for federal question jurisdiction to exist."]) 110 *Compare, e.g.*, Smith, 255 U.S. at 202 (recognizing jurisdiction), *with* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817 (1986) (finding no jurisdiction).
111 Shapiro, *supra* note 5, at 568 (footnote omitted).
112 *Id.* at 568–70 & nn.150–62.
113 478 U.S. 804 (1986).
114 *Id.* at 814 n.12.
Here, as elsewhere, I think that underlying Shapiro's work is an implicit confidence in the capacity of judges. As Larry Alexander has suggested, "[t]hose who favor rules are somewhat pessimistic about the abilities of those who must decide under norms. Those who favor standards are optimists." Alexander goes on to suggest that "what explains the optimists' embracing of standards is often that they are picturing as the decisionmakers either themselves, persons very much like themselves . . . or persons they advise." I think Shapiro may at times be just a little too sanguine that judicial discretion will be exercised in a fashion that will be conducive to predictable, stable, and relatively expeditious and efficient decisionmaking, and decisions under § 1331 are one place to test that suggestion.

An opening observation is that, in looking at judicial discretion in rounding out the boundaries of § 1331, Shapiro focuses on Supreme Court decisions. That is, of course, customary in this field as in many others. But the Court's decisions (and on this subject, they are few in number) may be significantly unrepresentative of decisions generally. The Justices, at least today's Justices, are an unusually smart group of judges who focus (by comparison to other judges) on an unusually small number of cases, with assistance from an unusually talented set of law clerks and from briefs whose average quality far exceeds that seen in the lower federal courts. But even in these favorable conditions, scholars often find that the Court's analysis of jurisdictional refinements falls short.

118 Id.
119 Moreover, as Fred Schauer has noted, a decisionmaking process that never errs may, nonetheless, be so complex, costly, or uncertain ex ante as to be less desirable than an alternative system composed of relatively simple rules that, precisely by suppressing consideration of what might be viewed as pertinent considerations, permits cleaner and more inexpensive decisionmaking. See Schauer, supra note 106, at 146–49.
120 Consider, for example, the discussion in the Merrell Dow opinions of an earlier precedent on the scope of arising under jurisdiction, Moore v. Chesapeake & Ohio Railway Co., 291 U.S. 205 (1934). Moore was a state law tort action that incorporated issues of federal law, and the Supreme Court ruled that the case did not arise under federal law. Id. at 217. The majority in Merrell Dow explained Moore as a case in which "the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action" and hence federal law was relatively unimportant. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 814–15 n.12 (1986). The dissent, by contrast, argued that any effort to distinguish Moore from other decisions on the basis of the unimportance of the federal interest was "infinitely malleable" and inappropriate, and viewed Moore as a "sport," a moribund decision
In the lower courts, the analytical shortcomings are more evident still. To illustrate the point, I would note a recent commentary published in 2002, which found that since 1994, there were sixty-nine decisions of the federal courts of appeals discussing the existence of jurisdiction under § 1331 when there was not a federal cause of action. In forty-five of those sixty-nine cases—fully sixty-five percent—the district court’s jurisdictional determination was reversed on appeal. It goes without saying that reported cases are a small subset of all cases and reported appeals a still smaller subset. Nonetheless, even acknowledging these sample biases, a reversal rate of nearly two out of three is extremely disquieting.

I have had occasion to read a fair number of those sixty-nine decisions, and I think it is fair to say that one finds some surprising statements in them. Overall, the decisions leave me, at least, doubtful whether federal judges, as intelligent and dedicated as most of them are, can in fact establish a coherent framework for the boundaries of subject matter jurisdiction predicated not upon a federal claim for relief but instead upon a federal ingredient in a state law claim for relief. These decisions also suggest to me that while, as Shapiro stresses, the exercise of discretion often generates precedents that narrow the reach of future discretion and establish a stable framework of law (as, I indicated above, has happened with respect to Younger abstention), sometimes that process is far less successful.

that was ripe for overruling. Id. at 821 n.1 (Brennan, J., dissenting). Shapiro himself would, I think, contend that both opinions missed the key point: Moore was simply a case in which the federal issue, however important it was deemed to be, did not arise on the well-pleaded complaint. See Hart & Wechsler, supra note 3, at 882.

121 Note, supra note 20, at 2280.
122 Id.
123 Why, then, am I saying it?
125 One could find other stories of judicial success and judicial failure in administering this form of discretion in making jurisdictional determinations. To take one example, consider this comment on Burford abstention:

I agree with David Shapiro that judicial discretion regarding jurisdiction is not entirely bad. There are good reasons to allow the federal courts to fine tune their jurisdiction. But I also agree with his conclusion that discretion as to the exercise of jurisdiction ought to be principled. There is no principle in a contradiction. Over its lifetime, Burford has often seemed close to a contradiction, at least as it has been reflected in the lower court decisions before the New Orleans decision. One could read New Orleans and Ankenbrandt, decided just three years apart, as making directly contradictory state-
As is true of nearly anything that one could say about Shapiro's work, this is not a problem that has not occurred to him. In a commentary on an article by Professor Martin Redish about the allocation of subject matter jurisdiction, he suggested that Redish was "less willing than I am to live with complexity and a certain amount of fuzziness at the margins." Shapiro acknowledged the power of the argument that jurisdictional rules should be simple and easy to apply, but added that he thought complexity and fuzziness are "not only inevitable but even desirable in giving room for flexibility, fine-tuning, recognition of difference, and accommodation of unforeseen developments."

Shapiro's commentary on Redish argues against a suggested bright-line rule providing that a case would arise under federal law not only when the cause of action is itself federally created, but also whenever the decision may turn on the interpretation or application of federal law. In objecting to that proposal, Shapiro correctly notes that such an approach might vastly expand the scope of federal court jurisdiction. The harder question, I think, is whether to move in the other direction and accept a different bright-line rule—that of Justice Holmes, who would have restricted federal question jurisdiction to federal causes of action. Resisting that approach, Shapiro correctly notes that under the approach he favors, the hard cases in which § 1331 jurisdiction might be invoked in the absence of a federal


128 Id.; see also Shapiro, supra note 5, at 567 ("[O]riginal [as distinguished from appellate] jurisdiction is best determined at the outset of the case . . .").

129 Shapiro, supra note 127, at 1841.

130 See id.; see also Shapiro, supra note 5, at 566–70 (rejecting such a proposal and arguing for an approach that affords federal courts the opportunity to dictate their own judicial administration).

131 See Shapiro, supra note 127, at 1841.
cause of action are few and thus any resulting uncertainty is limited in scope. But if the costs of a more complex approach are realized in a relatively small fraction of cases, so, too, are the benefits. Holmes's rule would exclude from federal court a few cases—like *Smith v. Kansas City Title and Trust Co.*—whose decision by federal courts under the federal question jurisdiction would seem to most observers to be appropriate and even important. But that observation alone cannot carry the day, for it is in the nature of a rule that "its terms control the decision even in those cases in which [the rule's] generalization failed to serve its underlying justification."

Insofar as I disagree with Shapiro, it is largely at the margin. I generally share his confidence in judicial capacity. The question here (and as Holmes liked to remind us, the question in most areas of the law) is one of degree. Shapiro does acknowledge, but does not greatly emphasize, concerns "that judges might mistake legislative purposes; that they might do better by deferring to legislators' expressed judgments about equity than by enforcing their own; that they might, by treating statutes flexibly, be purchasing case-specific benefits at the price of increased uncertainty, imposing resulting burdens on the interpretive system." I have come to the view that the case-specific benefits of efforts to develop and apply a refined interpretation of § 1331 of the kind that Shapiro and the Supreme Court both recommend comes at too high a price in uncertainty.

**B. Discretion and Legitimacy**

A decent measure of predictability may be a necessary condition for a functioning legal system, but it is not a sufficient one. Legal rules, however determinate they may be, must also be viewed as legitimate. Shapiro, of course, believes that the role he advocates is a legiti-

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132  See Shapiro, *supra* note 5, at 568 n.149.
133  Cf. Schauer, *supra* note 106, at 140–42 (noting that rules, by their nature, produce suboptimal results, and that the costs of suboptimality depend on the frequency of such results and their consequences).
134  255 U.S. 180 (1921).
135  Schauer, *supra* note 106, at 49. Indeed, as Schauer later observes, the idea of a rule "is possible only if formulated generalizations can have meanings differing from the result that a direct application of the justification behind a rule would generate on a particular occasion." *Id.* at 61.
136  See Meltzer, *Judicial Passivity*, *supra* note 18 passim.
137  See, e.g., Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("[M]ost of the distinctions of the law are distinctions of degree.").
mate one for judges. And although the majority of his attention in *Jurisdiction and Discretion* is devoted to demonstrating the range and nature of discretion that has been exercised, Shapiro’s article includes a normative defense of that tradition.

Judicial lawmaking, and judicial lawmaking by federal judges in particular, sometimes faces an uphill battle in gaining recognition as legitimate. By contrast, the Constitution’s specification of the statutory lawmaking process, and the democratic accountability that underlies it, confers considerable legitimacy on congressional enactments. Those processes are hardly without their flaws. One may think that partisan gerrymandering is a serious and growing concern; that, even after the *McConnell* decision, monied interests figure too heavily in the political process; or that legislators often make decisions that are partisan, self-interested, foolish, or cruel. But even so, few doubt that congressional enactments deserve to be viewed as politically legitimate.\footnote{140}

Judges, by contrast, lack the patina of legitimacy that elections, however flawed their processes, confer. Thus, judicial lawmaking has to acquire legitimacy in other ways, and federal judicial lawmaking raises concerns along both separation of powers and federalism dimensions.\footnote{141} The problem of legitimacy, of course, is most acute in


Sophisticated commentary never tires of reminding us that legislatures are only imperfectly democratic. Beyond the fact that the appropriate answer there is to make them more democratic, however, the point is one that may on analysis backfire. In fact the existing antimajoritarian influences in Congress and the state legislatures, capable though they may be of blocking legislation, are not well situated to get legislation passed in the face of majority opposition. That makes all the more untenable the suggestion under consideration, that courts should invalidate legislation in the name of a supposed contrary consensus. Beyond that, however, we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.

*Id.* at 49–50 (footnotes omitted). Legislative rules have other advantages. They often rest on fuller and different kinds of investigation than judges undertake. Legislatures have a broader range of techniques available and are free to make arbitrary decisions when necessary. And legislation typically clarifies the law up front, saving lawyers, clients, and the legal system the multiple costs of uncertainty. These are points that Shapiro has noted in other writing. See Shapiro, *supra* note 86, at 551–58; see also Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv. J. on Legis. 123, 126–30 (1992) (outlining the many costs of statutory ambiguity).

\footnote{141} See Meltzer, *Judicial Passivity*, supra note 18, at 378.
constitutional decisionmaking, where decisions are most open-ended and are, for all practical purposes, irreversible. But even with regard to subconstitutional matters, like those addressed by Shapiro, the question of the legitimacy of lawmaking by federal judges inevitably arises.

It is hard for any body of judicially-fashioned law to be viewed as legitimate without some sense that, as a general matter, the legal rules are correct. 142 Correctness with respect to judicial rounding out of statutes seems at a minimum to require a measure of fidelity to legislative supremacy, as Shapiro himself stresses. 143 But application of that criterion itself raises hard questions: What does it mean to render a decision faithful to a legislature? Can judges in fact render decisions faithful to the legislature? Even if they can, are they likely to do so, or are other motivations likely to move them in other directions? On this dimension, too, Shapiro's allegiance with the Legal Process school is apparent. For he clearly believes that one can identify purposes associated with legislation, a key premise of the Legal Process school. 144 A sophisticated student of statutory interpretation, 145 he is well aware of the standard concerns about the difficulties of identifying a purpose or set of purposes underlying a statute, given that statutory purposes can be framed in varying degrees of generality and are often multiple, conflicting, and only partially realized, and that statutory enactments may embody the balance of interest group forces more than the implementation of public purposes. 146 Nonetheless, I think it is fair to say that his inclination is to search for an identifiable and sensible public purpose rather than to view a statute as merely the end product of a political battle reflecting the distribution of raw power.

For example, in an article discussing Federal Rule of Civil Procedure 16, and the Federal Rules of Civil Procedure more generally, Shapiro, while acknowledging the difficulty of ascribing purposes to

142 See Michelman, supra note 72, at 970.
143 See Shapiro, supra note 5, at 547.
146 See, e.g., Shapiro, supra note 1, at 1846:
While much legislation represents a carefully-wrought compromise between conflicting forces—a compromise that might be perverted or even wrecked by a refusal to adhere to the text—this criminal statute is surely more sensibly viewed as an over-general prohibition enacted by a legislature that, at least implicitly, contemplated the necessity of judicial fine-tuning.
legislation (or, in this case, to a federal rule of procedure), ends up reasonably comfortable in doing so:

Although lawyers and judges do it all the time, it is not easy to talk about the "purposes" of a group of people. To some extent, of course, individuals share a common purpose when they act together. But it is just as true that, unless the speech were written for them, no two members of the group would give the same account, to himself or others, of why it is acting. Of course, the articulated goals of the leaders of the group are likely, with good reason, to receive the greatest weight in any analysis, but leaders too may differ among themselves, and may have goals they are unwilling to elaborate on in public.

Nevertheless, the published (and to a significant extent the unpublished) history of the federal rules, and the common sense of the situation the rulemakers were in, justify certain conclusions about what they thought they were up to. Indeed, I very much doubt that there would be significant disagreement about the major goals they were seeking to achieve, or the assumptions that underlay their actions.\(^\text{147}\)

The Federal Rules process, of course, is a distinctive kind of legislative process. While it is not entirely free from the play of interest group politics, conflicting purposes and statutory compromise (principled or not),\(^\text{148}\) few would doubt that there are comprehensible purposes that underlie it. Even so, Shapiro, in his article on Rule 16, is more explicit than in *Jurisdiction and Discretion* about the possibility that judges, seeking to round out a legislative rule, will not always do so in a way that is faithful to the purposes of those who promulgated the rules:

The evolution of Rule 16 is a story repeated in the evolution of many rules of open-textured quality. The framers have a general idea of what they want to achieve, and adoption of the rule is followed by some developments that constitute just what was intended, by some that raise questions not focused on by the framers but that they would happily have accepted (or would be likely to accept if they were able to reflect on current conditions), and by some that might well horrify them no matter how cognizant they were of contextual change.\(^\text{149}\)

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147 See Shapiro, *supra* note 75, at 1972 (footnotes omitted).


Still, in the end Shapiro suggests that delegation to judges of substantial discretion under Rule 16 was both authorized and appropriate—in this case

not only because the Rule was an innovative one, but because cases do vary in ways that are difficult to spell out in advance, because judges vary in their ability and willingness to make effective use of such techniques, and because 'local legal cultures' vary in their receptiveness to certain techniques and practices.  

When one turns to Jurisdiction and Discretion, one finds less explicit recognition of the possibility that judicial decisionmaking may misfire, and instead a set of reasons elaborated to justify the judicial role that Shapiro favors: (1) jurisdiction is difficult to define in gross;  

(2) "courts are functionally better adapted to engage in the necessary fine tuning than is the legislature;"  

and (3) the law of "jurisdiction [is] of special concern to the courts because [it] intimately affect[s] the courts' relations with each other as well as with the other branches of government." In addition, he notes two reasons why the exercise of such discretion should not be unduly troublesome: (1) if the court is to decline to entertain an action, it must overcome a principle of preference for adjudication by providing "an explanation based on the language of the grant, the historical context in which the grant was made, or the common law tradition behind it;"  

and (2) criteria followed by the courts must be "capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch."  

Some of these considerations appear to be specific to the determination of jurisdiction. If federal judges are generalist judges and ignorance is an occupational hazard for generalists, the hazards posed by jurisdictional issues may be less serious. Such issues tend to recur, and they involve conduct within rather than outside of courts, making judges somewhat more like specialists and increasing their claim to have a comparative advantage vis-à-vis the legislature. Indeed, Judge Posner contends that specialized courts, "[h]aving a stronger sense than generalists of how the issues in cases within their jurisdiction should be decided, . . . are more likely to see themselves as helping
the legislature achieve the goals of a program than as being obliged to stop with the legislative text."156

But my sense is that Shapiro's faith in judicial capacity extends well beyond lawmaking that involves the procedural and jurisdictional rules concerning adjudication. For example, in other writing he has applauded the opinion of Justice Harlan in Moragne v. States Marine Lines, Inc.,157 where the court took on the responsibility of adjusting the common law of admiralty to a changed statutory framework concerning wrongful death158—a position that others have criticized as substituting judicial for legislative judgment about the scope of wrongful death remedies.159 And in an introduction to a symposium revisiting Lon Fuller's great article, The Case of the Speluncean Explorers,160 Shapiro, commenting on one of the contributor's arguments against judicial recognition of common law defenses to statutory crimes, asked the following questions—which, if not entirely rhetorical, at least suggest to me a clear point of view:

Should the courts regard themselves only as messengers when applying the broad language of a statute to a particular problem as long as the words used are "plain"? Should it matter that the legislature, in the light of centuries of experience, may have come to expect the process of interpretation to comprise elements of both agency (the court as applier of the legislature's mandates) and partnership (the court as fine tuner of the legislature's general, and sometimes overly general, proscriptions and commands)?161

156 See Richard A. Posner, Reply: The Institutional Dimension of Statutory and Constitutional Interpretation, 101 Mich. L. Rev. 952, 964 (2003) (making this point with regard to the law of evidence). Posner is not entirely clear whether he endorses the phenomenon that he describes. Insofar as federal courts view themselves as having greater interpretive latitude in particular areas of expertise, they may take on that role free from some of the other drawbacks that accompany specialized courts—proliferation of jurisdictions and special attractiveness to interest groups to invest in seeking to influence the behavior and appointment of such judges. See, e.g., Neil K. Komesar, Imperfect Alternatives 145 (1994); Harold H. Bruff, Specialized Courts in Administrative Law, 43 Admin. L. Rev. 329, 331–32 (1991); Rochelle Cooper Dreyfuss, Specialized Adjudication, 1990 BYU L. Rev. 377, 379–82; Jeffrey W. Stempel, Two Cheers for Specialization, 61 Brook. L. Rev. 67, 89 (1995).


158 See Shapiro, supra note 145, at 953.


161 See Shapiro, supra note 1, at 1843.
Thus, Shapiro's faith in judicial decisionmaking extends broadly—as indeed do the principal considerations that he adduces in defending such decisionmaking.

That is a faith that I share, and in a recent article, I sought to consider and respond to concerns about the kind of robust judicial role that Shapiro proposes. Let me try to summarize some of the observations I made there—observations that are inspired in no small part by Shapiro's work and that may help to reinforce and perhaps elaborate on the argument in *Jurisdiction and Discretion*.

A starting point, one also stressed by Shapiro and already mentioned, is a recognition of the limits of congressional foresight. Certainly it is hard, as Shapiro notes, to imagine that when Congress first enacted diversity jurisdiction in 1789, jurisdiction over civil rights actions in 1871, or the general federal question jurisdiction in 1875, it could have anticipated the particulars involved in the rich set of interactions between those statutory grants of jurisdiction and the concerns that Shapiro identifies as appropriate for the guidance of judges in exercising those jurisdictions—concerns of equitable discretion, federalism and comity, separation of powers, and judicial administration.

But the limited capacity of Congress to legislate in detail is not simply a product of cognitive or imaginative limitations of the men and women who inhabit the legislative branch of a developed government. It is that in part, but it is also a particularly acute problem in the American system of government, for an interrelated set of reasons.

One is simply the vast scale of legislation and regulation that falls at the doorstep of Congress.

Whether one compares today's Congress to that of 1789 (or indeed, to that of any era in our past), or to the legislature of any other nation in the world, the magnitude of the job of lawmaking imposed on our House and Senate is rivaled by few other legislative

163 See id. at 349 & n.15, 391 & n.196, 396 & n.215, 403 & n.237.
164 See Shapiro, supra note 5, at 574; see also Meltzer, *Judicial Passivity*, supra note 18, at 383–90 (noting that Congress lacks the time to address all of the manifold problems calling for its attention).
165 See Judiciary Act of 1789, ch. 20, §1, 1 Stat. 73 (1789).
167 See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875). I put to one side the enactment in 1801 by the lame duck Federalist Congress of a grant of federal question jurisdiction, see Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801), which the Jeffersonians promptly repealed the following year. See Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (1802).
168 See Shapiro, supra note 5, at 579–88.
institutions. The breadth of those responsibilities, when viewed against the limited time and attention that legislators can devote to any single one of the myriad of bills under consideration, seriously tests any interpretive approach premised on the capacity of Congress to resolve up front all important questions relating to a statutory scheme.\(^{169}\)

A second point concerns a cluster of institutional and political factors that make the American legislative process less conducive to the enactment of comprehensive statutes than is the case in many parliamentary systems. These factors include a lack of party discipline and of executive control of the legislature that characterizes parliamentary systems.\(^{170}\) Indeed, a certain measure of statutory generality, and a failure to spell things out comprehensively, may be necessary in order to obtain agreement within the House and Senate, and among those two chambers and the President, especially in the frequent periods of divided government that were common in the last part of the twentieth century.\(^{171}\) On a different dimension, federal lawmakers are accustomed in our system to legislating against a background of common law rules and state law,\(^{172}\) rather than seeking to formulate statutory schemes that aspire to be a complete corpus juris. Additionally, legislative drafting in the United States tends to be less professional and centralized than is true in many other countries.\(^{173}\) "For all of these reasons, federal legislation is likely to be partial, un-integrated, reactive, and lacking in coherence."\(^{174}\)

Of course, the judicial-legislative relationship is dynamic,\(^{175}\) and it is at least possible that if federal judges insisted on exercising jurisdiction in every case that fell within the scope of a textual grant, Congress would be more careful at the outset to spell out, more precisely,

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169 Meltzer, Judicial Passivity, supra note 18, at 386.
174 Meltzer, Judicial Passivity, supra note 18, at 385.
175 See Sunstein & Vermeule, supra note 115, at 904–07.
just when it does and does not want jurisdiction to be exercised.\textsuperscript{176} Possible, yes, but not likely. As Judge Posner has observed more broadly about interpretive theories premised on their effects on legislative behavior:

There is no evidence that members of Congress, or their assistants who do the actual drafting, know [any supposed interpretive code that Congress uses when it writes statutes] or that if they know, they pay attention to it. . . . We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statutes on the improbable assumption that they do.\textsuperscript{177}

Many of the same observations apply to a different possible objection to Shapiro's argument—the objection that courts need not engage in the fine tuning that he advocates because Congress, if it is unhappy with the results, can always fix them. Indeed, the very institutional factors that make it difficult in the first instance to enact legislation in the United States—bicameralism and the need for presidential assent; the absence of strong party control; the scarcity of legislative time; and the existence of the many veto gates through which a bill must pass\textsuperscript{178}—equally frustrate the enactment of corrective legislation. Moreover, even in the unusual case in which Congress does respond to a judicial decision, all is not necessarily well, for the failure of courts to have made the correct decision in the first instance creates obvious interim problems all too easy to downplay.\textsuperscript{179}

These observations obviously reach beyond a robust judicial role in matters that are specifically jurisdictional. There may indeed be, as he suggested, particular reasons for an especially robust role with respect to jurisdictional matters, because of the courts' special expertise, because such matters "intimately affect the courts' relations with each other as well as with the other branches of government,"\textsuperscript{180} and because here, unlike some other areas, state law does not provide a useful resource in resolving specific issues that are not addressed by

\textsuperscript{176} See William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 782-833 (3d ed. 2001); Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 103-04 (2000).

\textsuperscript{177} Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 806 (1983).


\textsuperscript{179} See Meltzer, Judicial Passivity, supra note 18, at 395.

\textsuperscript{180} Shapiro, supra note 5, at 574.
statutory text. But I hope that the observations just offered are seen as reinforcing the thrust of Shapiro's argument and indeed as suggesting that its implications radiate more broadly.

Having said this, let me close with an observation with which I think Shapiro would agree. Judges obviously are not perfect. Individual judges inevitably will get things wrong (how much less fun to be a law professor were that not so). And the judiciary as a whole may get things wrong too. Indeed, I have already indicated (here taking a view from which Shapiro might dissent) that courts may have erred in trying to fine tune the reach of § 1331. But we must remind ourselves that if the choice is not one between judicial perfection and legislative shortcoming, neither is it one between legislative perfection and judicial shortcoming. It is between imperfect alternatives, and I think Shapiro's argument that a robust judicial role is to be preferred remains entirely convincing.

CONCLUSION

Nearly twenty years since its publication, Jurisdiction and Discretion remains a probing and sophisticated treatment of a vital and complex set of questions—questions at the intersection of federalism and separation of powers. The appropriate role of the federal courts in rounding out the contours of their subject matter jurisdiction—or, more broadly, in rounding out the contours of federal legislative enactments—remains a matter of enormous importance in the American legal system. No treatment of the problems that Shapiro addresses is, in my judgment, as rich, nuanced, or persuasive. That some of the current Justices have not fully accepted his message simply shows that even the best of teachers face challenges in gaining acceptance for their ideas, especially from self-confident and mature Supreme Court Justices with broad experience and strong views. But the issues that Shapiro discusses are enduring ones, and one who shares his faith in the force of reason may fairly hope that, over the long haul, the evident power of his analysis and prescriptions will fully carry the day.

181 See generally Hart & Wechsler, supra note 172, at 435–36 (discussing other contexts in which state law appropriately fills in the gaps in federal legislation).
182 For an elaboration, see Meltzer, Judicial Passivity, supra note 18 passim.