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Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"

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JUDGE-MADE ABSTENTION AND THE FASHIONABLE ART OF "DEMOCRACY BASHING"[1]

*Martin H. Redish**

I. INTRODUCTION: "DEMOCRACY AND ITS CRITICS"[2]

MODERN PUBLIC-LAW scholars tend generally to fall into one of two extreme camps: those who simultaneously fear and doubt the value of judicial review in virtually all conceivable instances,[3] and those who either ignore or reject the fundamental value of popular sovereignty, preferring what amounts to a Platonic government by judiciary.[4] Neither extreme, however, does justice to our unique governmental form. The former group of scholars has effectively ignored the adjective in the phrase, "constitutional democracy," while the latter group has all but ignored the noun. It is this second group upon whom I intend to focus in this article.[5]

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1. The phrase is taken from Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

2. The phrase is taken from R. DAHL, DEMOCRACY AND ITS CRITICS (1989).

3. *See, e.g.*, R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 2-3 (1989) (arguing "that one main enemy of the constitutional order . . . is the routinization of judicial power").

4. *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1579-80 (1988) [hereinafter Sunstein, *Republican Revial*] (defending republicanism, which "enthusiastically endorse[s] the use of constitutionalism as a check on popular majorities"). For further discussion, see generally Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U.L. REV. 761, 775-83 (1989) [hereinafter Redish, *Federal Common Law*] (critiquing the theories of "neo-republican" scholars).

5. My critique of those who urge an over-judicialization of the political process is in no way intended to imply agreement with those who decry virtually all judicial review as unduly anti-democratic. For my critique of the latter position, see generally Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. ____ (1990) (manuscript) [hereinafter Redish, *Political Consensus*] (reviewing R. NAGEL, *supra* note 3).

Political scientist Robert Dahl has written recently that

> [c]ritics [of democracy] are roughly of three kinds: those fundamentally opposed to democracy because, like Plato, they believe that while it may be possible it is inherently undesirable; those fundamentally opposed to democracy because, like Robert Michels, they believe that, while it might be desirable if it were possible, in actuality it is inherently impossible; and those sympathetic to democracy and wishing to maintain it but nonetheless critical of it in some important regard. The first two might be called adversarial critics, the third sympathetic critics.[6]

The modern "democracy bashers"[7] in the public-law area fall largely within the first category, and thus would be classified by Dahl as "adversarial critics." These scholars have challenged either the values[8] or the priorities[9] underlying majoritarianism. Some modern scholars, however, have fashioned dubious arguments suggesting the impossibility of ever ascertaining a true "popular will,"[10] and thus would seem to fall within Dahl's second category.

One could reasonably debate whether the vesting in the unrepresentative judiciary of almost unlimited power to hold

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6. R. DAHL, *supra* note 2, at 2.

7. *See* Kelman, *supra* note 1.

8. *See, e.g.*, Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75 (1990) ("[M]ajority rule is not normatively superior to other values. . . . Because majority rule is instrumental, it should not be regarded as superior to those values it serves."); Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1498-99 (1988) (footnote omitted):

> [Democracy] conjures with a term that rings of sovereign value, but too often does so without pausing to consider what that value is. Too often, indeed, the invocation of democracy in defense of judicial restraint signifies little more than *faute de mieux*; too often, it means merely that if a determination of law can only, at bottom, be a matter of acceding to someone's preferences, then the people should be ruled by the sum of their own preferences . . . rather than by the preferences of a few judges.

While Professor Michelman's description of the fundamental democratic premise is largely accurate, his puzzling use of the word "merely" implies an unwarranted trivialization of the principle of self-rule.

9. *See, e.g.*, Chemerinsky, *supra* note 8, at 74 (The "majoritarian paradigm . . . . relies upon faulty premises about the priority of democracy in the constitutional polity and the differences among the branches of government.").

10. *See, e.g.*, Sunstein, *Republican Revival*, *supra* note 4, at 1545-46 (footnote omitted) ("[A]ccurate aggregation of preferences through politics is unlikely to be accomplished in light of the conundrums in developing a social welfare function. . . . In any representative democracy, there is simply too much slippage between legislative outcomes and constituent desires.").

majoritarian action unconstitutional[11] would undermine our democratic tradition. Far more pernicious to the values of popular sovereignty, however, is the view that the judiciary should — either overtly or covertly — manipulate or ignore legislative intent on the sub-constitutional level of statutory construction.[12] The scholars who advocate the latter view would have the courts superimpose on legislation social-policy choices derived through methods external to the representational process, even when the choices actually made by the representational process do not violate the Constitution. These scholars defend this result either by attacking

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11. For the view that something approaching such power is desirable, see, *e.g.*, Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1731-32 (1984) (advocating, as a unitary theory of the Constitution, prohibition of the allocation of resources and opportunites based on the exercise of raw political power, an approach that, "in its most ambitious form, . . . would require a highly intrusive judicial role").

12. *See, e.g.*, Sunstein, *Republican Revival*, *supra* note 4, at 1581-85 (defending canons of statutory construction that promote deliberation in and reduce the "pathologies" and "malfunctions" of the legislative process, at the expense of "legislative intent in the particular case"); *cf.* Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1690 (1988) (suggesting that, under Sunstein's approach to statutory construction, "[t]he role of judicial interpretation . . . seems to be a form of republican monitoring. Judicial interpretation and judicial review are largely congruent if not identical. In both, courts police legislative activity to avoid anti-republican results.").

In his more recent work, Sunstein — while conceding that "the statutory text is the foundation for interpretation" — argues that "structure, purpose, intent, history, and 'reasonableness' [of the legislation] all play legitimate roles." Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503 (1989). He expressly rejects such "generally accepted understandings about statutory construction" as the postulates that "courts must always adhere to the original meaning of the statute, or the original intent of the enacting legislature," that "courts are or can be mere agents of the Congress," and that "statutory meaning is equivalent to legislative intent." *Id.* at 412.

This is neither the time nor the place to engage in a detailed response to Sunstein's analysis. For my critique of approaches to statutory construction that vest in the unrepresentative judiciary substantial authority to ignore legislative directives under the guise of statutory construction, see Redish, *Federal Common Law*, *supra* note 4, at 768-85. There I argue:

> [W]hen a constitutionally valid statute addresses a particular . . . matter, . . . a federal court must . . . determine the extent to which that statute actually resolves the issue. Situations will arise, certainly, in which a good-faith judicial effort to determine whether — and how — a statute resolves a specific question will be fruitless because of textual or historical ambiguity. 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. [American] political theory . . ., however, morally and logically dictates that judicial use of such a practice be the last resort — after the court has done all it reasonably can to ascertain whether the social policies and goals sought to be attained by the representative branches through enactment of specific legislation actually dictate a particular resolution of the question before the court.

Id. at 768-69.

the functional capacities of the legislative process[13] or by pointing to flaws in the attempt to attain public will through the means of representationalism.[14]

Though with only limited exception[15] they have not attempted to apply their theoretical insights to either the law of federal jurisdiction in general or to the doctrine of judge-made abstention in particular,[16] the "anti-democratic" theorists provide the only conceivably legitimate rationale for a sweeping judicial power to second-guess and ultimately ignore constitutionally valid policy choices of the majoritarian branches. For the doctrines of judge-made abstention, particularly in the exercise of the federal courts' civil rights jurisdiction,[17] effectively ignore the carefully structured pre-existing legislative network of substantive civil rights statutes, jurisdictional directives, and statutorily directed abstention. Thus, one can logically accept the abstention doctrines only if one first accepts the premises of those scholars who place little value on judicial adherence to majoritarian-based policy choices.

The remainder of this Article is divided into two sections. The first will critique the modern scholarly wave of "democracy bashing," underscoring the inconsistency between its logical extension — the recognition of judicial power to impose judicially fash-

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13. *See* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1530 (1987) ("Both public choice theory and institutional process theory suggest that the legislature acting alone will be subject to . . . biases . . . . [which] may be ameliorated by treating judges as representatives charged with interpreting statutes dynamically.").

14. *See supra* note 10 and accompanying text.

15. Recently, Professor Weinberg relied, in limited part, on some of these "anti-democractic" theories in her attempt to justify modern judicial disregard of the Rules of Decision Act, 28 U.S.C. § 1652 (1982). *See* Weinberg, *Federal Common Law*, 83 NW. U.L. REV. 805, 845-46 (1989) (relying on public choice theory as a basis for judicial power to fashion federal common law); *id.* at 816-18 (on why the Rules of Decision Act should be no obstacle to a legitimate federal common law); *see also* Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U.L. REV. 853 (1989) (criticizing Weinberg for dismissing the Rules of Decision Act); Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L. REV. 860 (1989) (responding to critique).

16. Some scholars have attempted to respond to my argument in Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984), that judge-made abstention is a violation of separation of powers. *See, e.g.*, Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (arguing that I am "far too grudging in [my] recognition of judicial discretion in matters of jurisdiction"); Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1099 (1985) (arguing that abstention is legitimate as "a kind of federal common law"). No scholar, however, has invoked civic republican or public choice analysis as part of such defense.

17. This jurisdiction is granted by 28 U.S.C. § 1343 (1982).

ioned, non-constitutionally based values on constitutionally valid legislation — and the fundamental democratic values underlying our system.[18] The second will consider and reject the alternative arguments employed to rationalize judge-made abstention with our basic democratic values.[19]

II. In Defense of Democratic Values

There is no small degree of irony in the fact that one must today defend basic democratic values, at the very time when much of the world, long deprived of democracy, is demonstrating how highly valued that form of government actually is. Those seeking democratic rule today are, of course, not seeking rule by a group of unaccountable Platonic judges, presumed to have a pipeline to a "common good" derived independently of the individual choice of the citizenry. Indeed, it is something akin to that very form of unaccountable government, supposedly possessing independent knowledge of the common good, that they are attempting to terminate.

American democracy is premised on what might be called the "representational" principle, which posits that, within constitutionally established boundaries, the representative branches of government may make policy decisions, free from judicial power to ignore or overrule them simply on grounds of social, political or moral disagreement. This principle flows from the fundamental values underlying democratic systems in general and the American system in particular: the right of the populace to have basic policy choices made by representatives whom it has chosen and whom it may replace if, on balance, their policy choices do not coincide with the wishes of a majority of the electorate. Under this principle, the unrepresentative federal judiciary may not fashion jurisdictional doctrines that ignore or undermine the policies embodied in constitutionally valid jurisdictional statues.

To be sure, our society has on occasion chosen to prescribe specific, substantive, normative principles of governmental behavior beyond the reach of simple majoritarian processes. At least as a general matter, however, our political theory focuses the legitimation inquiry primarily on the source of a societal policy decision, rather than on what that decision ultimately is. Of course, it

18. *See infra* notes 20-29 and accompanying text.
19. *See infra* notes 30-46 and accompanying text.

may be neither feasible nor advisable to expect individuals to have a direct say in every decision affecting their lives. But that is why a pragmatic, large-scale democracy must emphasize the notion of political accountability: the requirement that those who do make policy choices periodically present themselves to the populace for an accounting, so that the electorate may revoke their power if, on balance, their decisions have not been consistent with the populace's wishes. This fundamental notion of modern democratic theory was described by Alexander Meiklejohn, who wrote that "[g]overnments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers."[20] It is this notion that, as a definitional matter, characterizes any democratic system and distinguishes such systems from totalitarian forms of government.

Modern American scholars, however, employ a coterie of code words by which to attack the fundamental concept of representative government: "Public choice,"[21] "civic" or "liberal" republicanism,[22] and "practical reason"[23] are the most commonly employed. To be sure, these scholars often contend that they are merely attempting to *return* to the true democratic ideal, rather than abandon it.[24] They argue that powerful private interests too often gain control of the legislative process,[25] and, as a result, leg-

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20. A. MEIKLEJOHN, POLITICAL FREEDOM 9 (1960).

21. *E.g.*, Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276 (1988) [hereinafter Eskridge, *Politics Without Romance*] ("Public choice theory . . . analyzes the political process using principles of economics . . . .").

22. *E.g.*, Michelman, *supra* note 8, at 1494 ("the civic-republican strain in political thought"); Sunstein, *Republican Revival*, *supra* note 4, at 1541 ("[l]iberal republicanism"); *see infra* note 27.

23. *E.g.*, Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1616 (1987); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985) [hereinafter Sunstein, *Interest Groups*]; *see infra* note 27.

24. *See, e.g.*, Michelman, *supra* note 8, at 1495 (arguing that political freedom is enhanced by republicanism); Sunstein, *Interest Groups*, *supra* note 23, at 29 (arguing that the existing legislative process "allows powerful private organizations to block necessary government action" and that "the lawmaking process has been transformed into a series of accommodations among competing elites"). Professor Sunstein, however, fails to explain exactly how one is to determine that specific government actions are "necessary."

25. Sunstein, *Interest Groups*, *supra* note 23, at 29. *But see* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272 (1982) (arguing that "[c]ourts do not have the research tools that they would need to discover the motives behind legislation. Nor can they just presume the presence of an interest group somewhere behind the scenes.").

islation rarely reflects the true will of the electorate.[26] But while this may no doubt be true to a certain extent, it hardly makes sense to remedy the problem by putting a veto power in the hands of the federal judiciary — the only branch neither representative nor accountable in any meaningful respect. At the very least, a public truly unhappy with the decisions of its elected representatives has the power to vote them out of office, regardless of the resources or influence of the relevant private interest groups. The same, of course, cannot be said of the federal bench.

The clearest indication that many modern scholars are departing from the fundamental democratic norm comes in their suggestion that there exists one clearly defined "common good"[27] — presumably as they define it — and that there are normatively and socially "right" answers to many questions facing society.[28]

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26. *See, e.g.*, Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986) ("Too often the [legislative] process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve."); *see also* Eskridge, *Politics Without Romance*, *supra* note 21, at 277 ("Public choice theory indicates that the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends.").

27. *See, e.g.*, Sunstein, *Interest Groups*, *supra* note 23, at 31-32:

> The republican conception . . . assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good. . . . [T]his conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that "practical reason" can be used to settle social issues.

28. For the view that "the common good" is not so easy to ascertain, see, *e.g.*, R. DAHL, *supra* note 2, at 303. (Dahl argues that "in a pluralistic country with even a moderately complex society, that is, in any modern democratic country, it is difficult to specify 'the common good' precisely enough to guide collective decisions. All three terms — 'the,' 'common,' and 'good' — are problematical, to say the least." *Id.*

Dahl further contends:

> While general principles of distributive justice and common good need not be completely irrelevant, they cannot contribute much as constitutional (or constitutive) principles for a political order, particularly a large and complex order. . . . Civic dialogue is not a discussion among professional philosophers attentive to the fine points of an abstract and tightly reasoned argument. In civic discussion, precise principles from which conclusions may be rigorously drawn are far less important than the normative orientations embedded in the culture, which may be local and parochial, national, or transnational. These normative orientations themselves are usually rather open-ended. . . .
>
> The search for rationally justified moral criteria for determining justice or the general good, which has been so ardently pursued by so many moral philosophers, is likely to remain, for the most part, an intellectual exercise performed by and for a small group of intellectuals . . . .

Id. at 305-06.

By investing the unrepresentative judiciary with the authority to determine these "right" answers, however, these scholars would effectively establish jurists as the equivalent of Platonic-philosopher kings in total derogation of the process values of self-determination and popular sovereignty that are so central to the notion of democratic government.

The underlying normative assumptions of democracy's critics appear to be that there is no preeminent value in the principles of self-determination and political accountability and that one may instead derive "right" answers to non-constitutionally based[29] policy issues by means other than the choices of the representatives of the electorate. If one accepts these premises, the value of democracy naturally vanishes. I do not believe, however, that our system has in fact made such a value choice. Thus, unless and until we abandon the fundamental notion of rule by the people — and to do so would surely represent a departure from current world trends — we must reject the notion that there exist either a provable "common good" apart from the will of the people or truly "right" answers to social issues (at least when not based on a specific value derived from the Constitution) which may be imposed on the public.

III. VIEWING THE ABSTENTION DOCTRINES FROM THE PERSPECTIVE OF DEMOCRATIC THEORY

The most amazing aspect of judge-made abstention is that its leading judicial advocates[30] are those most closely associated with the theory of judicial restraint.[31] Of course, in one sense, absten-

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Similarly, for a description of the modern theory of "adversary democracy," which rejects the notion of a coherent concept of the "common good," see J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 17 (1983).

29. It is true, of course, that in a *constitutional* democracy specific moral choices have been removed from simple majoritarian control. *See generally* Redish, *Federal Common Law*, *supra* note 4 (arguing that all governmental policy decisions, except those prescribed by the Constitution, should be judged by how consistent they are with the principle of self-determination). Because, however, no one has ever contended that the abstention doctrines are in any sense constitutionally compelled, that point is irrelevant for present purposes. *See infra* note 39 and accompanying text.

30. For example, Chief Justice Rehnquist, writing for the majority in Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), expanded the *Younger* abstention doctrine when he held that the district court should have abstained from exercising jurisdiction over a suit to enjoin a state administrative proceeding. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 372-73 (2d ed. 1990).

31. *See, e.g.*, Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693

tion can be characterized as a form of "judicial restraint," because as a result of the doctrines' invocation the federal courts choose not to act. But such a characterization of the concept is far too narrow, because it fails to include the well-established principle that a judicial refusal to act, in the face of a constitutionally valid legislative directive to the contrary, constitutes the effective exercise of a judicial veto power over legislative action.[32] As such, it actually represents the height of undue judicial activism and therefore has no place in a democratic society.

It is difficult for me to comprehend how scholars could realistically suggest that recognition of the obligation to act when so directed by the legislature, that is, of what is really a form of judicial *humility* in the face of legislative directive, would somehow undermine the judiciary's performance of its vital countermajoritarian checking function.[33] I have consistently urged recognition of such judicial authority as a central tenet of American political theory.[34] But performance of such a function is both logically and practically irrelevant to issues that do not even arguably raise constitutional questions. In the highly unlikely event that the Supreme Court believes that the congressional vesting of jurisdiction in the federal courts to enforce the civil rights laws violates the Constitution, it should say so. Short of such a finding, however, the Court lacks the legitimate authority by which to ignore or overrule policy choices made by the representative branches of government.

One might reasonably ask whether there exist any legitimate justifications for judge-made abstention that are consistent — or at least reconcilable — with basic notions of democratic theory. The answer, quite simply, is "No." Congress' substantive civil

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(1976) (attacking the view that federal judges have any role to play in solving a social problem when the federal Constitution and statutes, expressing popular will, have not addressed the particular problem).

32. *Cf.* Testa v. Katt, 330 U.S. 386 (1947) (holding that the state courts have no authority to decline to enforce a federal statute over which they have jurisdiction).

33. *See, e.g.*, Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053, 1069 (1989-90) ("Although on the surface limitations on jurisdiction might not appear to be consistent with expanding counter-majoritarian rights, reasons of political capital . . . and legal consciousness . . . indicate that the limitations might serve the cause of protecting rights.").

34. *See, e.g.*, Redish, *Political Consensus*, *supra* note 5; Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. ____ (1990) (manuscript).

rights legislation vests in the individual statutory protection of his federal rights.[35] Moreover, by statutory grant of jurisdiction, Congress has directed the federal courts to enforce those substantive protections,[36] in large part because of congressional mistrust of state-court willingness to protect those rights.[37] Finally, Congress has established an intricate network of statutorily dictated federal judicial abstention in specific areas where Congress has decided it to be appropriate.[38] Yet without even purporting to rely on legislative text, policy, or history, the Supreme Court has chosen to fashion its own criteria for abstention, going well beyond anything already authorized by Congress, on grounds that directly contradict the policy decisions underlying the legislation in the first place.[39] This is judicial usurpation at its most indefensible extreme.

One could, I suppose, fashion an argument that such judicial action is not explicitly inconsistent with legislative directive, because nothing in the text of the civil rights statutes expressly *prohibits* the federal courts from abstaining in the exercise of their jurisdiction. But such an argument would represent the height of interpretational disingenuousness. In the specific instances in which Congress desired that the federal courts abstain, it so provided by statute.[40] One could hardly expect Congress to insert in

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35. *See, e.g.*, 42 U.S.C. § 1983 (1982):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

36. 28 U.S.C. § 1343(a)(3) (1982).

37. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 240 (1972) ("Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.").

38. *See* Anti-Injunction Statute, 28 U.S.C. § 2283 (1982) (providing, with three exceptions, that federal courts may not enjoin state-court proceedings); Tax Injunction Act, 28 U.S.C. § 1341 (1982) (prohibiting, in most circumstances, federal district court interference with state tax collection); Johnson Act, 28 U.S.C. § 1342 (1982) (prohibiting, under specified circumstances, federal district court interference with state orders affecting public utility rates).

39. Judge-made abstention is premised on the desire to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .'" Steffel v. Thompson, 415 U.S. 452, 460-61 (1974). Yet as *Mitchum* recognized, fear and mistrust of state courts gave rise to the congressional provision of federal jurisdiction to enforce civil rights in the first place. *See supra* note 37.

40. *See supra* note 38.

each civil rights statute a provision directing the federal courts "not to ignore, circumvent, or overrule this statute, short of a finding of unconstitutionality." The statutory text creates a substantive right and directs the federal courts to be open to those seeking redress for violation of that right. Other than by addition of the now-popular directive, "Read our lips," it is difficult to see how Congress could have made its goal clearer.

Another argument sometimes employed to rationalize the judicial authority to ignore legislative directives is the view that the judicial-legislative relationship is a form of joint "partnership." According to this view, Congress implicitly delegates to the courts authority to "modify" legislation when they deem necessary.[41] There have, to be sure, been instances of such delegated law-making power.[42] But one cannot reasonably assume the existence of such judicial authority as a *per se* matter. When Congress desires to delegate lawmaking to the courts, it usually employs broad statutory terminology capable of numerous equally legitimate constructions. I cannot believe, however, that one could reasonably rely on the "partnership" logic to authorize the federal courts to *repeal* Title VII of the 1964 Civil Rights Act[43] or section 1 of the Sherman Anti-Trust Act,[44] for example — at least if the values of representationalism and political accountability retain any force at all.[45]

CONCLUSION

It might be suggested that my reliance on neutral principles of democratic theory as a basis for criticizing judge-made abstention conveniently reaches a result that happens to be consistent with my own view of the merits of the issue. It would be impossible to deny the factual accuracy of such a suggestion, in the present context.[46] However, I have elsewhere applied the principles of democratic theory and interpretive analysis described here to at-

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41. *See, e.g.*, Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1048-49 (1989-90).

42. A classic example is section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1988). *See, e.g.*, P. AREEDA & D. TURNER, 2 ANTITRUST LAW ¶ 310a (1978) (on the Court's habit of interpreting the Sherman Act broadly).

43. 42 U.S.C. §§ 2000e to e-17 (1982).

44. 15 U.S.C. § 1 (1988).

45. *See supra* text accompanying note 20.

46. For my critique of the abstention doctrines on policy grounds, see M. REDISH, *supra* note 30, at 281-308, 337-73.

tack such pro-federal jurisdictional doctrines as the creation of federal common law,[47] the recognition of section 1983[48] as an "expressly authorized" exception to the Anti-Injunction Statute,[49] and the recognition of Supreme Court power to review non-final appeals from state courts.[50] The point, in other words, is that a democratic system cannot function if the majoritarian branches are allowed to reach only those constitutionally valid results that some external source finds pleasing. This fundamental notion of American democratic theory applies as much to the law of federal jurisdiction as to any area of statutory construction.

47. *See* Redish, *Federal Common Law*, *supra* note 4.

48. 42 U.S.C. § 1983 (1982).

49. *See* Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733-39 (1977).

50. *See* M. REDISH, *supra* note 30, at 254-60 (critique of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), which recognized exceptions to the final-judgment rule of 28 U.S.C. § 1257 (1988)).