

THE CORPORATE RIGHT TO SPEAK FREELY ABOUT MACHO FEDERALIST TENSIONS IN TIMES OF POLITICAL REPRESSION: WHAT EVERY VENUSIAN SHOULD KNOW

*Andrew I. Gavit**

The process of translating words across cultures often presents some challenges to the translator. Context of course is crucial and often can alter meaning. So to prepare for today's luncheon, I consulted the Mel Brooks and Carl Reiner German-English Dictionary and discovered that in the context of a luncheon tribute, "festschrift" is a synonym for "shtupfest," which means "roast."¹ In that spirit, I am happy to share with you some of my reflections on the impact Marty Redish has had on my career and professional life.

I arrived on the Northwestern campus in the late summer of 1978. Long sideburns, blow-drying, and disco were in, as was the color orange. Asteroids, Space Invaders, and later PacMan were the state-of-the-art rage in video games. *Annie Hall* won the Academy Award for best picture that year, and the year before, John Travolta had starred in *Saturday Night Fever*.

Yet although outside the law school's walls it was the 1970s, much of the faculty appeared to be in various stages of recovery from the 1960s. I recently saw Dan Polsby, now Dean at the George Mason University School of Law, and I am pleased to report that his personal recovery continues, although slowly.

Marty appeared to have skipped the '60s. He wore dark suits and drove a Buick (or was it an Oldsmobile?). For Marty, "fahrvergnügen" had nothing to do with the joy of driving a Volkswagen; it was all about a good law review placement. In 1978, he was on a roll as a junior faculty member, having recently published articles in the Michigan,² Texas,³ and

* Professor of Law, Howard University School of Law. B.A., Queens College of the City University of New York, 1978; J.D., Northwestern University School of Law, 1981. I was fortunate to serve as a research assistant to Professor Martin H. Redish from 1979–1980 and hope that his sense of humor is still firmly intact as he reads this "Tribute." Any errors are of course his responsibility.

¹ [Note to *Northwestern University Law Review* staff: fake citation; do not try to locate at Library of Congress.]

² Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).

³ Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977).

University of Chicago⁴ law reviews. Then the big kahuna finally came—with Carter Phillips, another former research assistant, he published his first article in the *Harvard Law Review*,⁵ followed a year later by yet another with Cornell.⁶ I still recall the impressive shelf in his office where he had neatly and discretely stacked 10,000 reprints, which he nonchalantly offered to random passersby.

Something of a cross between Marv Albert and Johnny Carson, Professor Redish entered the Civil Procedure classroom with a flourish, as if the *Tonight Show* band were playing its overture as he hopped up onto the platform at the head of the room. “Heeeeeerrrrre’s Marty!!” And assured that he had shared with us an especially insightful observation, one expected at any moment he might come unglued and shout out, “REDISH, from downtown; YES!” Ironically from today’s perspective, he seemed to be a “class” act who could enable class in others, although in an entirely nonsubstantive way.⁷

Marty’s teaching style and infectious enthusiasm presented some problems for me. I suffered from overexposure to television as a child, and some of his favorite phrases triggered random associations. For example, Marty seemed to be enamored with the word “tensions.” Having now passed through my thirties as well, I better understand what that might have been about—but as Steve Presser used to say, “I digress.”⁸

In my mind, “tensions” conjured an image of impressionist Frank Gorshin doing his imitation of Kirk Douglas as Spartacus proclaiming, “I’m feeling a lot of TENSIONS in the allocation of ROMAN POWER!!” Marty also liked the phrase “macho federalism,” which let loose images of Jay, Hamilton, and Madison striding through Brooklyn with John Travolta, shirts open, chest hair flaring, gold chains dangling.

Marty Redish, “*staying alive . . .*”

I startled him with a Bronx cheer from the rear of the room, shouting “OK.”

⁴ Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977).

⁵ Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

⁶ Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

⁷ Cf. MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009).

⁸ It was during this formative period that Professor Redish’s preoccupation with “tensions” appears to have led him to the subject of abstention. See MARTIN H. REDISH, *ABSTENTION: JUST FOR THE JEWS?* (1980). [Note to *Northwestern University Law Review* staff: fake citation; do not try to locate at Library of Congress.] Out of this early work grew his later theories about the relationship between abstention and balance of power. See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

He also taught us about the outmoded “Byrd balancing,”⁹ which now may be making an unexpected comeback,¹⁰ and I imagined holding cooing pigeons in both of my hands, standing erect like a scale of justice and weighing federal and state interests.

“Coooo, coooo.” That was pretty eerie.

Despite my occasional outbursts, Marty also proved to be an enthusiastic mentor and personal professional trainer. To my enduring gratification, he selected me as his research assistant for the summer of 1979. At the time, he was working on, you guessed it, “*Tensions in the Allocation of Judicial Power*.”¹¹ My big summer project was a detailed memorandum on *Illinois v. City of Milwaukee*.¹² Heavily and thoughtfully edited down to its very essence by the skilled hands of Marty Redish, my memo became my sentence in the book.¹³ He also thanked me in the preface, which I photocopied and mailed to the folks back home.¹⁴ Then he dropped the original preface from the second edition.¹⁵ Nevertheless, imagine my pride when, at the end of that summer, Marty—with characteristic and effusive warmth—shared his assessment of my summer’s work: “Well,” he said, “this worked out better than I thought it would.”

That fall I discovered that I was the law school’s then idea of affirmative action—I was from “the East.” Urged to interview with large New York law firms so the school could lay claim to a more expansive alumni network and eastern-grade donations, I of course sought out my mentor Marty Redish for advice. Again with that characteristic enthusiasm, he urged me to go for the gold!

“There’s nothing like the power, prestige, and sophistication of New York law practice,” he offered.

“But Marty,” I asked, “why did you walk away from it all?”

“Are you kidding,” he exclaimed, “it’s a jungle out there!!”

His cover now blown, we had our first conversation about the relative advantages of academic life, a conversation that later turned toward the virtues of adopting any casebook he had ever authored.¹⁶

⁹ *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

¹⁰ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

¹¹ MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1st ed. 1980). In the annual Law Review show, I, of course, portrayed Professor Redish . . . as a flasher. Hidden beneath my trench coat, however, was something far more precious than myself. At an opportune comic moment, I threw open my garment to reveal the cover of the book surrounded by tastefully selected and blinking Christmas lights.

¹² 406 U.S. 91 (1972).

¹³ REDISH, *supra* note 11, at 105–07.

¹⁴ *Id.* at vii.

¹⁵ MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* v (2d ed. 1990).

¹⁶ JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* (7th ed. 2006), available now at <http://www.amazon>.

As all professors and parents come to learn, however, it is our example that matters more than our words. And it is in his example that Marty taught me the most. Marty was unwavering in his commitment to his students, his teaching, and his scholarship. In the classroom, he never feared to show and share his love of the subject matter with his students. And when a student returned that enthusiasm in a boisterous and inappropriate manner with an unrestrained shout-out from the back of the room, he didn't use his position at the front to tamp it down. He laughed, even though, as we all know, there is no laughing in law school. In scholarship, he was meticulous, demanding of himself and his RAs. He taught me to follow the research wherever it leads instead of deciding the end point first and then bending your research to get there. And he taught me to do that regardless of how provocative the results may be; that's so often the point of the effort (also, it can get you good press). Finally, take pride in the successes of your students; their successes are ours, and, as already mentioned, it could even lead to more book adoptions (in rare cases).

Marty's example has also been important to me in more subtle ways, like the art of choosing a coauthor. Choose well your coauthors for their expertise and, of course, for their last name—which will appear beneath yours on the binding of your books on your office shelves, where you can gaze upon them at will . . . for hours.

“Redish-Sherry,” for example,¹⁷ sounds like a fine after-dinner drink, one that perhaps even a Martian could digest.¹⁸ Imagine our collective discomfort, however, if Marty had settled upon a coauthor named “Cheeks.” Marty, you will be happy to know that the coauthor of my next book is a professor named “First,” so when I glance at my bookshelf, I will see a row of “Gavil-First,” and I will remember your example.¹⁹ And when selecting a title for your law review articles, craft something that is seemingly profound, yet ultimately superficial, and strive for the best possible law review placement—knowing all the while that no one is likely ever to read it.

com/Constitutional-Law-Principles-Policy-Materials/dp/0820570338; RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, *CIVIL PROCEDURE: A MODERN APPROACH* (5th ed. 2009), available now at <http://www.amazon.com/Civil-Procedure-Approach-American-Casebooks/dp/0314184953>; MARTIN H. REDISH, SUZANNA SHERRY & JAMES E. PFANDER, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* (7th ed. 2012), available now at <http://www.amazon.com/Federal-Comments-Questions-American-Casebook/dp/0314204423>.

¹⁷ MARTIN H. REDISH & SUZANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* (6th ed. 2007). Now superseded by the more difficult to envision “Redish, Sherry & Pfander.” REDISH, *supra* note 16. Seriously, who would ever put “pfander” in their redish sherry?

¹⁸ See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769 (1992).

¹⁹ A shameless plug for ANDREW I. GAVIL & HARRY FIRST, *MICROSOFT AND THE GLOBALIZATION OF ANTITRUST LAW: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* (forthcoming 2013).

In closing, I would like to express my gratitude to Marty in two very particular ways. Consistent with the pleading requirements of the time, when I arrived at Northwestern I was at best a short and plain statement.²⁰ Thanks to you, I left readied for the changes that were to come—a bit more “plausible.”²¹ And second, even as I share this special day with you, I am indebted to you, Marty, as an example and mentor. For my remarks today, I have chosen a seemingly deep yet ultimately meaningless title: *The Corporate Right to Speak Freely About Macho Federalist Tensions in Times of Political Repression: What Every Venusian Should Know*. No one will ever read it. But thanks to you, I have secured an elite placement with my once colleagues at the *Northwestern University Law Review*. Thank you, Marty, and congratulations on forty years exceptionally well spent.

²⁰ See FED. R. CIV. P. 8(a)(2), as interpreted in *Conley v. Gibson*, 355 U.S. 41 (1957).

²¹ Now required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

