

## FEDERAL COURTS, STATE COURTS, AND THE CONSTITUTION: A REJOINDER TO PROFESSOR REDISH

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I greatly appreciate Professor Redish's writing such a gracious and thought-provoking response to my article. Because Professor Redish and I agree about so much, it was tempting to refrain from writing a rejoinder. Most importantly, we both believe that it is essential to have federal courts available to hear constitutional claims and that litigants raising constitutional claims should be able to choose whether to proceed in federal or state court.

However, although we come to similar conclusions and agree about many specifics, Professor Redish challenges several crucial points raised in my article. His criticisms also raise issues that are at the center of the on-going debate over the scope of federal court jurisdiction. In particular, his essay requires consideration of three questions: Do the institutional differences between federal and state courts establish the superiority of the federal judiciary for adjudicating constitutional issues? Is it possible to demonstrate that litigants with constitutional claims should be able to choose the forum without making assumptions about parity between federal and state courts? And, how much of the dispute concerning particular jurisdictional doctrines can be resolved by Professor Redish's separation of powers analysis?

Because of the significance of these issues—both to my initial paper and to the federal courts literature—a brief rejoinder to Professor Redish seems appropriate. I will re-

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spend, in order, to each of the three criticisms Professor Redish develops.<sup>1</sup>

### I. CAN INSTITUTIONAL ANALYSIS RESOLVE THE PARITY DEBATE?

I see a stalemate in the current debate over the scope of federal court jurisdiction. For at least a quarter of a century, the Supreme Court has based many of its decisions concerning federal court jurisdiction on assumptions about whether state courts are equal to federal courts in their ability to protect constitutional rights. One body of precedents has expanded access to the federal courts based on express declarations of federal court superiority, but another group of decisions has restricted jurisdiction based on explicit statements of parity between federal and state courts.<sup>2</sup> Scholars have debated the issue of parity—some attempt to prove parity and others deny its existence.<sup>3</sup>

I contend that this is a futile debate because ultimately proof of parity (or its absence) is an empirical question—is one court system superior to another at a particular task—for which an empirical measure and resolution is unlikely. Professor Redish argues that the parity debate can be resolved. He maintains that the institutional differences between state and federal courts undermine any claim of parity between them in the adjudication of constitutional rights. He writes that there is an “inescapable logical inference of non-parity on the basis of the obvious institutional differences between state and federal courts.”<sup>4</sup>

Specifically, Professor Redish argues that the insulation of federal judges, by virtue of their life tenure and salary assurance, makes them superior in constitutional litigation to state judges who, in forty-six states, face some form of electoral review. I do not wish to argue that these institutional differences are irrelevant or that state court judges are equal to federal court judges in constitutional litigation despite

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1. My rejoinder is directed only at the first half of Professor Redish's essay which focused on my article.

2. Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239-55 (1988).

3. *Id.* at 255-80.

4. Redish, *Judicial Parity, Litigant Choice and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

these differences. Quite the contrary, I share Professor Redish's intuition that the political insulation of the federal judiciary mandates its availability for constitutional litigation. However, how can it be proven whether these institutional differences actually matter? Those who proclaim that there is parity between federal courts and state courts maintain that the institutional differences do not affect decision-making.<sup>5</sup> Is there any way of denying their claim except by counter assertion; can one institution be demonstrated to be more correct than the other?

Professor Redish offers three arguments to support his contention that institutional differences between state and federal courts resolve the parity debate: a common sense argument, an argument from analogy, and an argument based on the structure of the Constitution. Unfortunately, none of Professor Redish's arguments establishes his claim that federal courts are superior for adjudicating constitutional cases. The primary problem with Professor Redish's analysis is that he seems to be comparing the insulation of the federal judiciary to a system where there is virtually no political insulation. But in all states, state court judges have some degree of insulation by virtue of features such as long terms,<sup>6</sup> a tradition of non-partisanship and strong support for incumbent judges,<sup>7</sup> and non-contested retention elections.<sup>8</sup> The key question is whether the difference between the degree of insulation provided to federal and to state judges in the current system matters in constitutional litigation. I believe

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5. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963); Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 230-31 (1983).

6. See Uelmen, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333, 347 (1988) (describing lengthy terms for judges in many states).

7. For example, from 1972-78, an average of 1.6% of the appellate judges were defeated in retention elections. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 223 (1980). A survey of twenty years of election data (from 1964-1984) found that in 1,864 judicial elections, only 22 judges were defeated (1.2%). Hall & Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 344 (1987) ("Only 22 defeats in 1,864 elections supports the conclusion that judges are insulated from the public."); see also *id.* at 347 ("[R]etention elections serve to insulate judges from popular control.").

8. Professor Uelmen notes that "[t]he use of 'yes-no' retention elections is the fastest growing method of judicial selection, currently utilized by sixteen states at the supreme court level." Uelmen, *supra* note 6, at 347.

that none of Professor Redish's arguments answers this question, that it ultimately cannot be answered except empirically, and that successful measurement is unlikely.

First, Professor Redish states that common sense supports his conclusion that the insulation of the federal judiciary makes it superior to the state judiciary. He writes that "[t]he absence of dispositive empirical data does not revoke common sense."<sup>9</sup> The problem with arguments based on common sense is that they only persuade those who share the same intuition; many justices and commentators have declared that they do not hold Professor Redish's belief.

Nor should the proponents of state court parity be dismissed as irrational or obviously misguided. The intuition that federal court judges are superior because of the guaranteed life tenure and protected salary is based on several unarticulated premises. Professor Redish's position rests, in part, on the assumptions that judicial elections are based on evaluations of how judges decide cases; that state court judges recognize this (or fear it) and are influenced in their decision-making by future electoral review; and that federal judges are not affected by the same public sentiments. Proponents of the parity position could challenge each of these assumptions. They could argue that voters usually are ignorant and apathetic in judicial elections.<sup>10</sup> Arguably then, judges rarely decide cases with an eye to electoral review and that, in any event, other factors—including the strong tradition defining the judicial role as one of independence and impartiality—negate the effects of possible public pressure.<sup>11</sup> Moreover, one might believe that federal judges are likely to be prey to the same pressures, either because they live in the community where they work or because of their desire to advance to a higher position.

I am not contending that Professor Redish is wrong in his intuition. Rather, the point is that his appeal to common

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9. Redish, *supra* note 4, at 338.

10. See P. DuBois, FROM BALLOT TO BENCH (1980) (describing voter ignorance and apathy in judicial elections); Hall & Aspin, *supra* note 7, at 347 (describing low voter turn-out and ignorance in judicial elections); Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23, 24 (1984) (summarizing literature of voter ignorance and apathy in judicial elections).

11. See, e.g., Solimine & Walker, *supra* note 5, at 248 (arguing that other influences in decision-making neutralize the effects of institutional differences).

sense is based on several assumptions that are debatable and that cannot be established simply by invoking shared experience or intuition.

Second, Professor Redish argues by analogy. He writes, “[i]magine, for a moment, that the Chicago Cubs announced that from this point forward, they would hire the umpires, unilaterally determine their salaries, and retain unreviewable discretion to fire them at any time. Can anyone imagine that we could trust a call at second base?”<sup>12</sup> After presenting a similar example involving an arbitrator, Professor Redish concludes, “[a]s absurd as these examples may seem, it is difficult to see how they are not directly analogous to state court adjudication of the constitutionality of state action.”<sup>13</sup>

If state governments possessed the power over state judiciaries that Professor Redish accords the Cubs in his analogy, he undoubtedly would be correct that state courts, like the umpires in his example, could not be trusted. But thankfully, state judges have more insulation—though usually less than federal judges—than the umpires or arbitrators in the hypotheticals. In Professor Redish’s example the Cubs had both the authority to hire and fire the umpires and to set their salaries. In most states, however, these functions are separated: often the Governor appoints the judges, the voters evaluate them in retention elections, and the legislature sets their salaries. This diffusion of authority provides more insulation than the umpires or arbitrators possess in Professor Redish’s examples.

Moreover, the analogy breaks down because it is clear that the umpires likely will be evaluated based on the number of times they rule in favor of the Cubs, but it is not at all clear how the voters will evaluate the judges. If the umpires knew that they would be evaluated only every several years and that more than 98 percent of them would be retained (the figure for the retention of judges over the past 20 years), would they still be regarded as impermissibly biased?<sup>14</sup>

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12. Redish *supra* note 4, at 333-34.

13. *Id.* at 334.

14. For studies documenting retention rates in excess of 98%, see Carbon, *supra* note 7, at 243 and Hall & Aspin, *supra* note 7, at 347.

I do not deny that electoral review of judges can compromise judicial independence.<sup>15</sup> Instead, I am simply arguing that Professor Redish's analogy does not establish his argument of federal court superiority because state court judges possess substantially more insulation than the judges and arbitrators in his examples.

Third, and I think most convincingly, Professor Redish advances a structural argument. He contends that the provision of life tenure and guaranteed salary in Article III is based on the assumption that these assurances matter. Professor Redish writes, "[a]s long as one concedes that Article III's protections of judicial independence are, purely as a policy matter, advisable and that serious harm would be caused in constitutional adjudication by their removal, one must necessarily concede that judges who have such protections are preferable to those who do not."<sup>16</sup> Because I, and hopefully most others, would strongly oppose repealing these protections in Article III, Professor Redish contends that this support for Article III proves that the institutional differences do matter.

Although I think that this is an excellent argument, I believe that the unwillingness to amend Article III does not establish the superiority of federal courts as Professor Redish assumes. There is a great reluctance to amend any part of the Constitution, absent a compelling argument, and there is not a compelling argument that the insulation provided in Article III is undesirable. The proponents of the parity position generally contend that the additional political insulation is irrelevant in decision-making, not that it is pernicious. Therefore, even though the advocates of parity would be reluctant to modify Article III, that does not mean that they agree with Professor Redish that the additional political insulation improves constitutional adjudication.

Furthermore, proponents of the parity position can respond that the issue in the parity debate is whether state courts are *today* equal to federal courts in their ability and

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15. See Chemerinsky, *Evaluating Judicial Candidates*, — S. CAL. L. REV. — (forthcoming 1988) (arguing for the elimination of judicial elections).

16. Redish, *supra* note 4, at 336.

willingness to protect constitutional rights.<sup>17</sup> The Framers' assumptions in drafting Article III do not answer this question. The Framers were reacting to the degree of political control exercised by the King of England over judges. But the Framers' motivation does not support the contention that the current difference in political insulation between federal and state court judges makes the former superior in constitutional adjudication.

Ultimately, I do not think that Professor Redish's institutional argument can resolve the parity debate. Some commentators, such as Professor Redish, believe that the institutional differences make the federal courts better suited for protecting constitutional rights; others believe that the institutional differences do not matter. The absence of empirical evidence leaves this debate stalemated.<sup>18</sup>

## II. CAN THE LITIGANT CHOICE PRINCIPLE AVOID THE PARITY QUESTION?

Professor Redish expressly agrees with my proposal that it would be desirable in most instances to allow litigants with constitutional cases to choose whether to proceed in state or federal court. But Professor Redish argues that my defense of the litigant choice principle does not resolve the parity debate, but instead itself assumes federal court superiority.

Here, I disagree with Professor Redish and maintain that the litigant choice principle can be defended without ever considering the issue of parity. Hopefully, many on both sides of the parity debate can accept the litigant choice principle as a basis for determining federal court jurisdic-

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17. See, e.g., Solimine & Walker, *supra* note 5, at 224-25 (arguing that past differences between federal and state courts are irrelevant to current evaluations and that parity now exists).

18. Professor Redish also argues that federal courts are superior to state courts because they deal with more constitutional cases. Redish, *supra* note 4, at 333. Again, I do not wish to deny this difference or argue that it is irrelevant. Rather, I simply want to point out that this difference does not establish the superiority of the federal courts. Professor Redish's argument is based on the assumption that a difference in the number of constitutional cases translates into a difference in the quality of decision-making. But is the quality of decision-making a function that increases linearly or geometrically with experience; or is it a function that levels off after a threshold is reached? If the latter, what is the threshold and how many state judges reach it as compared to the federal judiciary? Unless these questions can be answered, it seems that each side of the parity debate will be left with intuitive judgments and that any conflicts cannot be resolved.

tion. Professor Redish responded to each of the three arguments I advanced for the litigant choice principle.

First, allowing a litigant with a constitutional claim to choose whether to litigate it in federal or state court maximizes the opportunity for protecting constitutional rights. I argued that it was desirable to maximize the protection of constitutional rights and that litigants were in the best position to choose which court in a particular instance was most likely to do this.<sup>19</sup> Professor Redish denies neither of these points, but rather argues that my argument rests on an assumption that federal and state courts are not fungible; he writes that proponents of the parity position assert fungibility and thus would not accept my contention.<sup>20</sup>

However, a belief that federal and state courts are equal *overall* in protecting constitutional rights, does not deny that there are differences that might matter in particular instances. In other words, proponents of the parity position argue that generally state and federal courts are comparable in constitutional litigation; thus, there is no reason to systematically channel cases to federal courts. A proponent of the parity position need not—and I think cannot—believe that there are no differences between federal and state courts or that these differences always are irrelevant. Instead, a belief in parity requires only a conviction that state courts and federal courts are likely to be preferred in an approximately equal number of instances.

Without a doubt, there are differences between federal and state judges. Professor Redish identifies some of these, such as length of tenure, electoral accountability, nature of the caseload, and salary protections. Additionally, there may be differences in the gender and racial composition of the state and federal judiciaries in any given state. The ideologies of the judges and their views on particular issues also may vary between the federal and state courts in particular instances. The existence of these differences is a factual matter that I doubt any one challenges. The disagreement is whether, overall, these differences make federal courts superior to state courts. As explained above, this disagreement seems unresolvable without empirical evidence.

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19. Chemerinsky, *supra* note 2, at 302–10.

20. Redish, *supra* note 4, at 339–40.



I contend that the existence of differences between the federal and state courts, regardless of whether the federal courts are overall superior to the state courts, justifies the litigant choice principle. A litigant with a particular constitutional claim is in the best position to assess in a specific case whether the federal court or the state court in that area is more likely to rule in favor of the constitutional claim. The litigant choice approach is premised on the conclusions that: 1) there are differences between federal and state courts; 2) these differences might matter in particular constitutional litigation; and 3) allowing a person with a constitutional claim to choose the forum can maximize the protection of constitutional rights.<sup>21</sup> No judgment need be made as to whether in more instances federal courts or state courts would be better. As such, the litigant choice principle does not rest on any conclusions or beliefs about parity.

Second, the litigant choice principle is defended as enhancing litigants' autonomy. Professor Redish writes that he has a difficult time

discerning much that is valuable to an individual's self-development or self-worth in allowing her to choose between state and federal courts, any more than there would be in allowing her to choose which judge will write the opinion. Choice of forum is largely an esoteric strategic choice that the litigant will likely be unaware of, much less heavily involved with.<sup>22</sup>

But the fact that a person delegates decision-making to an expert does not deny that the choice may be important or that autonomy is served by allowing the person through an agent to make the selection. Although autonomy is not the only goal to be served in designing jurisdictional rules,

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21. Professor Redish says that the litigant choice principle would have the Court implicitly declaring that, "Some state judges are okay, but *these* state judges are losers." *Id.* at 340. I disagree; the Court would fashion jurisdictional rules to maximize allowing litigants with constitutional claims to choose the forum. The Court never would be in a position of making any statement of evaluation about any group of state or federal judges. The Court simply would leave it to the parties to choose, based on whatever criteria they wish to employ.

Nor is Professor Redish correct that the existence of appellate review neutralizes any differences between federal and state courts. *Id.* at 340. A litigant with a novel constitutional claim in a particular area might compare the state appeals and supreme court with the United States Supreme Court and the federal appeals court for the state and decide on the basis of past decisions in the area and ideological orientation which court is preferable.

22. *Id.* at 340-41.

where possible, it is desirable to allow people to make choices that can affect their lives. The autonomy argument assumes that in some instances the choice of forum can matter greatly in the outcome of the litigation. Autonomy is enhanced by allowing people, albeit through their attorneys, to make this choice. It is difficult to reconcile Professor Redish's assertion that choice of forum is no more than an "esoteric strategic choice" with his earlier arguments about the importance of the differences between federal and state courts.

Professor Redish also responds to the autonomy argument by suggesting that if there is parity between federal and state courts, the choice between them will have little practical significance since both can adequately protect constitutional claims. Again, however, one can refrain from taking any position on the question whether federal courts are overall superior to state courts in constitutional adjudication and still believe that there are differences between the courts that in a specific case might influence the outcome of the litigation. For example, one could believe that federal courts and state courts are often very different but that in an approximately equal number of instances state and federal courts would be preferable. The result would allow a belief both in parity and in the conclusion that the choice of forum can make a great difference.

Third, and finally, the litigant choice principle is defended as maximizing federalism.<sup>23</sup> Federalism is specifically defined as concurrent governance; that is, federalism is maximized by increasing the occasions for the federal government and the state governments to share authority. Professor Redish responds that the litigant choice principle might undermine federalism by increasing the likelihood of friction between the federal and state judiciaries.<sup>24</sup>

Professor Redish and I are using two different definitions of federalism: one is federalism as shared governance; the other is federalism as harmony. He does not deny that the litigant choice principle would maximize the former. I argue, at some length in another section of the paper, that

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23. Chemerinsky, *supra* note 2, at 308-10.

24. Redish, *supra* note 4, at 341-42.

the lessening of friction should not be the basis for fashioning jurisdictional rules.<sup>25</sup>

In sum, the litigant choice principle makes no assumption about parity—whether one believes that federal courts are superior in protecting constitutional rights, or that state courts are better, or that they are overall the same—one still can agree that a party asserting a constitutional right should be able to choose the forum. If one believes in federal court superiority, the litigant choice principle is desirable because it allows federal jurisdiction to be invoked. If one believes in parity, the litigant choice principle is desirable because it treats the federal and state courts symmetrically in virtually all instances.

### III. DOES SEPARATION OF POWERS ANALYSIS END THE PARITY DEBATE?

A few years ago, Professor Redish wrote a highly regarded and widely cited article<sup>26</sup> contending that the Supreme Court's abstention decisions violated principles of separation of powers. Professor Redish maintains that the separation of powers thesis resolves the parity debate and that I too quickly dismiss his separation of powers analysis.<sup>27</sup>

I agree with Professor Redish that the separation of powers approach makes the parity question unnecessary in evaluating many jurisdictional doctrines. The separation of powers position states that the federal courts should follow the jurisdictional choices made by Congress and should not refuse to exercise jurisdiction that is properly invoked. Accordingly, where federal statutes grant jurisdiction, federal courts should exercise it without consideration of issues such as parity.

My disagreement with Professor Redish here is relatively limited. I question whether separation of powers analysis ends the parity debate in all instances and also whether a commitment to separation of powers as the sole principle in defining federal jurisdiction is wise.

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25. Chemerinsky, *supra* note 2, at 280–89.

26. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

27. Redish, *supra* note 4, at 344–46.

Although I agree that separation of powers analysis resolves many jurisdictional questions—such as abstention, which Professor Redish focuses on—I dispute his assumption that it can be used to solve all jurisdictional issues. In many instances, the jurisdictional statutes are ambiguous, and the legislative history is silent or unclear. For example, the federal habeas corpus statutes do not address whether issues can be relitigated on habeas corpus that were fully and fairly litigated in state court.<sup>28</sup> Commentators vigorously disagree over whether Congress intended to permit such relitigation.<sup>29</sup> Separation of powers analysis—deference to Congress in defining federal court jurisdiction—cannot work where congressional intent is unknowable. The Supreme Court could ask Congress to provide clarification, but this would shift the parity debate to the legislature.<sup>30</sup> Alternatively, the Court could—and did—formulate rules for when issues may be relitigated on habeas corpus. The Court's decisions have been based on explicit assumptions about whether state courts can be trusted to adequately protect constitutional rights.<sup>31</sup>

In short, where congressional intent is uncertain concerning federal jurisdiction and the Court must make a choice in fashioning a jurisdictional doctrine, separation of powers analysis cannot resolve the matter. In these instances, the Court and commentators often have relied on assumptions about parity.

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28. 28 U.S.C. § 2254 (1982); *see* *Stone v. Powell*, 428 U.S. 465 (1976) (state prisoners may not relitigate fourth amendment exclusionary rule claims on habeas corpus); *Brown v. Allen*, 344 U.S. 443 (1953) (state prisoners may relitigate federal constitutional claims on habeas corpus).

29. Compare, for example, the positions of Professor Bator (a believer in parity) and Professor Peller (an opponent of parity) concerning Congress's intent. *See* Chemerinsky, *supra* note 2, at 293–94.

30. In my article, I argue that the separation of powers theory would simply shift the parity debate to the legislature. Professor Redish argues that this would only happen if Congress were to reconsider the jurisdictional statutes. Although Professor Redish's response is persuasive, the separation of powers approach would shift the parity focus to Congress in another sense as well: the inquiry would be whether Congress intended federal and state courts to be treated as equal in protecting federal constitutional rights. The difficulty would be the absence of congressional intent on this question in many (although certainly not all) instances. The Court would be in essentially the same place as now.

31. *See* *Stone v. Powell*, 428 U.S. at 493 n.35 (declaring state courts are equal to federal courts in their receptivity to federal constitutional claims); *Brown v. Allen*, 344 U.S. at 511 (declaring that state courts are hostile to federal rights).

Finally, although I find Professor Redish's separation of powers approach quite persuasive, I am hesitant to endorse it as the sole principle for defining federal court jurisdiction. What if Congress, concluding that there is parity between federal and state courts, decided that federal court jurisdiction is largely unnecessary and eliminated virtually all federal court jurisdiction in constitutional cases? The separation of powers approach would say that the Supreme Court must accept this conclusion of parity and the resulting restrictions on federal jurisdiction.

This result, however, illustrates a serious tension in Professor Redish's position. He argues that Article III of the Constitution is based on the assumption that life tenure and salary protections matter and that courts possessing these characteristics are superior to those that do not. Accordingly, it could be argued that jurisdictional rules, whether devised by Congress or the courts, must be consistent with this fundamental constitutional principle. As such, Congress's assumption of parity, and the elimination of federal jurisdiction based on it, conflicts with Professor Redish's interpretation of the core of Article III.

In other words, there is a tension between saying that the Constitution regards the federal courts as institutionally superior to the state courts and saying that Congress could make the opposite determination. The former position establishes a constitutional mandate for federal court jurisdiction; the latter permits its elimination. Phrased slightly differently, once one believes that there are constitutional limits on Congress's power over federal jurisdiction—I hold this position and I believe that one can use Professor Redish's institutional analysis to establish it—then there are principles even more important than separation of powers in defining federal court jurisdiction.

#### CONCLUSION

I believe that the most a scholar can hope for is to have his or her ideas taken seriously and to advance the dialogue in an area a bit further. I am deeply grateful to Professor Redish for his reply and hope that our exchange furthers the on-going debate over the scope of federal court jurisdiction. Although we use different means to arrive there, our shared

conclusion should be emphasized: the federal courts should be open to litigants presenting constitutional claims.