



The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

“The first task of a President after taking the oath of office,” observed Professor Edward S. Corwin long ago, “is to create ‘an administration’; that is to say, a more or less integrated body of officials through whom he can act.”¹ Corwin’s statement in turn can be read as merely a paraphrase of Chief Justice (and former President) Taft’s earlier insistence that the “vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”² Both Corwin and Taft stated a truth often overlooked on Election Day by voters who, understandably perhaps, are singularly focused on the task at hand: casting a ballot for the nominee of one party or another. Yet, in reality, voters are choosing far more than a President and Vice President, for any incoming President will both sooner and later make an indeterminate number of appointments over the course of even a single term. Coupled with the new chief executive’s personality, values, objectives, and the events that happen on his watch, it is these personnel selections that lend a distinct cast or color to each administration,

distinguishing it from both those that came before and from those that will follow.

In light of the unique nature of the Presidency—the office was, after all, an American invention, one without true parallel elsewhere—the significance of the appointing power in the larger scheme of the political system was realized practically at the outset. “It should never be forgotten, insisted Justice Joseph Story in his **Commentaries** on the Constitution “that in a republican government offices are established and are to be filled, not to gratify private interests and private attachments; not as a means of corrupt influence or individual profit; but for purposes of the highest public good; to give dignity, strength, purity, and energy to the administration of the laws.”³ Furthermore, as legal scholar and Story contemporary William Rawle of Pennsylvania believed, the appointment process revealed as much about the person who made the appointment as about the one who received it. “A proper selection and appointment of subordinate officers is one of the strongest marks of a powerful mind.”⁴ Similarly, in his biography of George Washington, Chief Justice John Marshall placed considerable emphasis on the care with which the first

President constructed “his cabinet council” where “[i]n its composition, public opinion as well as intrinsic worth had been consulted, and a high degree of character had been combined with real talent.”⁵

Yet Washington learned first-hand that the appointing power, shared with the Senate, included the judiciary as well, a responsibility he took very seriously. Indeed, it was one of his first major concerns as President: who would sit on the Supreme Court of the United States? “Impressed with a conviction that the true administration of justice is the firmest pillar of good government,” he wrote soon-to-be Attorney General Edmund Randolph in 1789, “I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system.” Under the Articles of Confederation, which the recently ratified Constitution had replaced, there had been no national judiciary. The Court’s role in the new political system was therefore unclear, but Washington realized the impact the Court might have in the young Republic. This required, he told Randolph, “the selection of the fittest characters to expound the laws and dispense justice . . .”⁶ As he selected the six Justices Congress had authorized in the Judiciary Act of 1789, Washington also made sure that each section of the nation was represented and that the six were strong supporters of the new Constitution, leading Marshall later to affirm that in his choices for “high judicial offices” the first President had been “guided by the same principles”⁷ that drove his selections for the Cabinet.

Thus in electing a President, voters are choosing someone who will not only construct an administration, but one who will ensconce on the federal Bench some initially unknown number of judges, most of whom will still be sitting long after the more numerous executive branch appointees have departed. Yet, while Presidents in the most recent years may have made approximately the same number of *non-judicial* appoint-

ments, in a four- or eight-year period, the same may not, of course, be said for *judicial* appointments. The constitutional mandate of service “during good Behavior”⁸ combines with personal choice, infirmities, and operation of the actuarial tables to produce judicial tenure that is highly indeterminate. There is an element present of what can only be called randomness. Measured solely by numbers, therefore, Presidents have had sharply varying impacts on the judiciary, most especially on the Supreme Court. This element of chance in operation has hardly assured an equality of opportunity across administrations, as the table below illustrates.

PRESIDENTS WHO APPOINTED FOUR OR MORE JUSTICES

Washington	10	Cleveland	4
F. Roosevelt	9*	B. Harrison	4
Taft	6*	Harding	4
Jackson	5	Truman	4
Lincoln	5	Nixon	4
Eisenhower	5	Reagan	4*
Grant	4		

*This number includes elevation of a sitting Associate Justice to the Chief Justiceship, so the number of “new faces” on the Bench is actually one less than indicated for Presidents Taft, F. Roosevelt, and Reagan.

Yet if some Presidents were bountifully blessed with vacancies, four others for varying reasons endured a drought and made no appointments to the High Court. William Henry Harrison died shortly after his inauguration, and Zachary Taylor died barely sixteen months into his term. Congress made sure that Andrew Johnson placed no one on the Court during his partial term, first by refusing to act on the Tennessean’s sole nomination of Attorney General Henry Stanberry, second, by eliminating the seat Stanberry would have filled, and third, by further reducing the Bench roster to eight.⁹ Jimmy Carter remains today the only individual to finish a full single term Presidency completely devoid of an opening

on the Bench, although George W. Bush would have shared that distinction had Senator John Kerry managed to harvest an additional nineteen electoral votes in 2004.

Beyond the sheer number of seats filled, a President's impact on the Supreme Court, as well as the lower federal courts, is also a function of how long any one appointee serves. "The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them,"¹⁰ observed one leading opinion journal more than seven decades ago after President Franklin D. Roosevelt nominated Professor Felix Frankfurter to fill the opening occasioned by the death of Justice Benjamin N. Cardozo. Indeed, along with decisions that the Court renders during a President's term, the number of appointment opportunities that arise and the length of service of those who are in fact appointed are the major variables any President encounters with respect to the Bench. This is in fact the picture that emerges from past administrations. Thus, to place the variables in perspective, a simple "appointment-tenure index" can be fashioned consisting of the sum of the years of service for the Supreme Court appointees of a particular President. The greater the number of appointees combined with a lengthy tenure for each produces a high index score. A smaller number of appointees and/or a number of appointees with abbreviated tenures yield a lower index score. For former Presidents whose appointees are no longer on the Bench, the index would be fixed. For a President whose appointees are still sitting, the index would increase with time, and so on. While any number of factors combines to shape any *single* Justice's influence among her or his colleagues, and hence on the Court as a whole, it seems reasonable to suggest that the higher a President's index, the greater that individual President's *potential* impact on the Court has been.

The table below shows the appointment tenure index for Presidents from Harry Tru-

man (1945–1953) to Barack Obama 2009—), at the approximate midpoint of the forty-fourth President's administration. For William Rehnquist, who received appointments from two Presidents, his years as Associate Justice are counted for President Richard Nixon, and his years as Chief Justice are counted for President Ronald Reagan. Appointees of Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama continue to serve on the Court.

President	Number of Appointments	Index
Truman	4	45
Eisenhower	5	94
Kennedy	2	34
Johnson	2	28
Nixon	4	72
Ford	1	35
Carter	0	0
Reagan	4	96
Bush (GHW)	2	41
Clinton	2	39
Bush (GW)	2	15
Obama	2	7

Yet, whether one looks at the judicial selections of the earliest or relatively contemporary Presidents, all have had a major impact on the shaping of the American political system, a reality reflected in recent books about the Supreme Court.

Aside from Supreme Court appointments themselves, one singular Presidential staffing decision that is integral to the work of the High Court is the identity of the person who is Solicitor General of the United States. This person fills what is surely one of the most important, yet least visible, and, probably, least understood positions in American government.

Performing tasks originally the sole responsibility of the Attorney General and,

later, outside counsel from 1789 until creation of the post in 1870, the Solicitor General has been called “the highest government official who acts primarily as a lawyer and who can devote his time to studying the legal problems which come before him.”¹¹ Among other duties, the Solicitor General sets the appellate agenda for the federal government by deciding which cases the national government should appeal from lower courts and, once the Supreme Court has granted review in a case in which the United States is a party, handles the government’s business at the High Court by representing it as counsel. In the assessment of one scholar, “It’s the most sophisticated, disciplined kind of law, a constant intellectual engagement.”¹² Or as former Solicitor General Rex Lee¹³ described his office in a lecture in October 1985:

it has the world’s most interesting cases and is, on balance, the world’s most attractive place to practice law. It is not a very big firm. Presently it has about twenty lawyers, and at times it has had only one. It has always had high-quality lawyers; probably no other firm anywhere has as much talent, lawyer for lawyer. It is unlike other good firms, however, in its high rate of attrition; most of its lawyers leave after about two to five years in the office. This law firm is highly specialized. It does only appellate work; its lawyers appear in only one court—the Supreme Court; and they have only one client.¹⁴

In this capacity as lawyer at the Supreme Court for the United States, the Solicitor General has long been regarded as having an impact going beyond that of merely being an attorney who appears frequently before the Justices.

Understandably, therefore, the work of this official with the High Court has been the subject of scholarly investigation¹⁵ that has

now been substantially enriched by publication of **The Solicitor General and the United States Supreme Court** by political scientists Ryan C. Black and Ryan J. Owens, of Michigan State University and the University of Wisconsin, respectively.¹⁶ Lest there be any doubt, the authors lay out at the beginning of their compact and readable inquiry at least four reasons why the work of the Solicitor General merits study. The first is tied directly to what the Supreme Court does in terms of the impact annually of its decisions on all Americans. Clearly, if a single frequent litigant has any effect on what the Court does, then prudence alone dictates scrutiny of that litigant’s behavior. Second, it is through the “SG’s office that presidents interact with the Supreme Court Simply put to understand executive-judicial relations, one needs to understand the intermediary—the OSG [Office of the Solicitor General].” Third, “if the SG could influence the Court, presidents might circumvent Congress and use the OSG to make policy.” Thus, to the degree that a President is successful in pursuing policy objectives thorough the Solicitor General, then that office “becomes crucial to understand in a separation-of-powers context.” Finally, the Solicitor General’s office “employs highly skilled lawyers who often go on to become Supreme Court justices themselves.”¹⁷ The authors note that the Court’s present membership includes not only one former Solicitor General (Justice Kagan), but that Justice Alito served as assistant to Solicitor General Rex Lee in the 1980s, during President Reagan’s first term, and that Chief Justice Roberts was principal deputy solicitor general from 1989 until 1993 in the administration of President George H. W. Bush. Moreover, prior to Justice Kagan, no fewer than four Solicitors General became an Associate Justice or Chief Justice: William Howard Taft (1890–1892), Stanley Reed (1935–1938), Robert H. Jackson (1938–1940), and Thurgood Marshall (1965–1967).

At the outset, Black and Owens make clear that their volume seeks to answer “one central question: does the OSG influence the Supreme Court?”¹⁸ Of course, even to pose the question in that way seems startling in that presumably most people who are familiar with the judicial process in the United States would assume that the answer is plainly in the affirmative. Indeed, the four reasons the authors offer as justification for public interest in the work of the Solicitor General would appear already to assume such influence. Moreover, by the authors’ own recounting, “[w]e know that the OSG wins an astonishing number of its Supreme Court cases. . . . We know that when the OSG participates as an *amicus curiae*, the side it supports usually wins. . . . We even know that the Court may be more likely to borrow language from the OSG’s brief than from briefs filed by all the other litigants. . . .” Yet, Black and Owens admit that success “does not necessarily imply influence” in that the success rate may stem from reasons apart from what the Solicitor General does as might happen if the Justices were ideologically disposed to accept the OSG’s position even before that position had been communicated to the Bench. Instead, to conclude the presence of influence the authors posit that “one must examine judicial behavior *but for* the presence of the SG.”¹⁹ In short, the operative question becomes one of determining whether and how often the Court takes a position it would not have reached without the presence of input from the Solicitor General. If investigation yields a recurring pattern, one can then infer influence. The book thus puts to the test a claim made several decades ago by Solicitor General Erwin Griswold²⁰ that “I think a strong solicitor general can have very considerable influence on the Court.”²¹

Accordingly, in pursuing the task before them the authors make clear along the way their research design. It employs what they label a “mixed-methods” approach that includes “archival data, large-*n* quantitative analysis, and cutting edge empirical meth-

ods.”²² Happily, the non-specialist reader need not be proficient with the various statistical devices put to work in the book in order to appreciate what Black and Owens have impressively made so accessible. And, indeed, their findings demonstrate the SG’s influence in each aspect of the Court’s work.

First, at the agenda-setting or certiorari-granting stage, “justices who agree and disagree with the SG accept his recommendation . . . and this is in cases where the justice desires an outcome other than what the OG recommends.”²³ Second, at the decision stage, the presence of the SG in cases appeared to make a significant difference as compared to very similar cases where the SG was not a participant. That is, the “Court is more likely to side with the OSG versus an attorney who never worked in the office and is more likely to side with the OSG versus an otherwise identical attorney who once worked in the OSG.”²⁴ One suspects that part of the success in convincing the Court to accept the OSG’s recommendation on cases to decide flows from judicious caution in not asking for too much too frequently. This was the point of one acting Solicitor General in the 1950s who wrote “It is hoped and believed—although no one who has not been on the Court can be sure—that the Court will realize that the Solicitor General will not assert that an issue is of general importance unless it is—and that confidence in the Solicitor General’s attempt to adhere to the Court’s own standards will cause the Court to grant more government petitions.”²⁵

Third, in terms of the impact of the OSG on the literal content of Court opinions, the influence is also noticeable. Although the “Court on average borrows more language from winning briefs than from losing briefs, this dynamic does not apply when the OSG loses and a non-OSG lawyer wins. . . .” In such situations, the “Court is just as likely to borrow from a losing OSG brief as it is from a winning non-OSG brief. Simply put, the Court turns to the OSG’s briefs much more than to

briefs filed by otherwise identical non-OSG actors in otherwise identical cases.”²⁶

Finally, the authors examine the relationship between the work of the Solicitor General and the Court’s treatment of precedent in its opinions, in the “presence of a recommendation by the OSG to its treatment of precedent with no such OSG recommendation.” As at the other stages, the impact of the SG was felt. “We observed a significant increase in the probability that the Court would positively and negatively interpret precedent, simply because the OSG asked it to do so. To be sure, these figures rise and fall depending on other characteristics such as the mode of participation—but not by much.”²⁷

There remains, however one further question that Black and Owens reserve briefly for the last chapter. If the record demonstrates the influence of the OSG, what accounts for that influence? Here the authors believe that the “data are less clear, but they do seem to line up behind one theory: that OSG success comes from its objectivity and professionalism.”²⁸ This pair of factors they select above other credible candidates such as “attorney experience, the separation of powers, attorney quality, ideology, and strategic selection,” all of which “fell by the wayside.”²⁹ While this plausible response to their final and more fundamental question is not subjected to the same rigorous examination that characterizes the remainder of the book, it is consistent with the views of others such as Rex Lee, who, while Solicitor General, observed that “there is a widely held and probably substantially accurate impression that the Solicitor General’s office provides the Court with advocacy that is more objective, dispassionate, competent, helpful, and respectful of the Court as an institution than is true of Supreme Court practitioners as a whole. In return, the office enjoys a stature and credibility unmatched by other lawyers. Of the tens of thousands of officers of the Supreme Court, this office stands alone. In the great majority of instances these two roles—officer of the Court and

advocate for a client—are not only mutually compatible, but mutually enhancing.”³⁰ One suspects, therefore, that some of the success of the office is a judicious exercise of self-restraint on the part of the Solicitor General. As Lee noted in response to a student’s question in 1985, one of the first things someone in his position must learn is “how to count to five.”³¹ Or as he commented in an interview with National Public Radio, “It is very damaging to the administration’s position to make arguments before the Supreme Court that are not likely to succeed.” On some matters, “it’s simply a question of ‘Do you want to blow the bugle, or do you want to win the war?’”³²

From the days of Benjamin H. Bristow, the first Solicitor General, to the present, every occupant of that office has confronted legal questions arising from what has been a defining characteristic of American government since the founding: federalism. Although many consider judicial review to be America’s unique contribution to political science, it is federalism that may continue to be of equal influence on other nations and of unending importance at home, even as it remains a subject more likely to elicit yawns than excitement when first introduced to a classroom of undergraduates. The term refers to a way of sharing political power among different governments with respect to *which* government may legitimately act with respect to *which* subjects and concerns. In other words, which level or entity is allowed to decide and to do what? Particularly in the American context, federalism is a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities. In practice, determining who may act in turn favors those individuals and/or groups who are most influential in those governments, a reality that might well affect, although not necessarily determine, whether one supports action or control by national authority, on the one hand, or a state or even a local authority, on the

other. Determining the level of government that may properly act, after all, may sometimes decide what policies are adopted and implemented or not. In short, questions about federalism are inescapably questions that are about power.

The fact remains that Americans in 1787 did something remarkable, as they struck out into virtually uncharted political territory. “Federalism was our Nation’s own discovery,” Justice Anthony Kennedy has insisted. “The Framers split the atom of sovereignty. . . . The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”³³ A federal arrangement is thus vastly different from a unitary scheme in that, under the latter, the central government is not only supreme, but regional and local governments typically operate under the complete dictates of the central power. Even a moment’s reflection illustrates how widely and deeply federalism permeates the political system today, with fifty functioning separate political units.

The reasons for the adoption of such an arrangement were both historical and rational. During the revolutionary period, the states regarded themselves as independent sovereignties. With little of their power over internal affairs being surrendered to the Continental Congress under Articles of Confederation, local patriotism then had to yield at the Constitutional Convention in the face of the demonstrated inability of the Confederation to cope with the problems confronting the new nation. The situation thus dictated compromise between the advocates of a strong central government and supporters of state autonomy. The result was an arrangement that conveniently fit into James Madison’s basic requirement, reflecting his purpose, as stated in **The Federalist, No. 51**, to so contrive “the interior structure of the

government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” Alexander Hamilton, in **The Federalist, No. 23**, had already listed four chief purposes to be served by union: common defense, public peace, regulation of commerce, and foreign relations. Yet general agreement that these objectives required some more unified government meant that meeting these objectives would require some decisions about allocating responsibility. As was inevitable, the formal distribution of powers between the national government and the states proved to be a subject of diverse interpretations. The fault line along which supporters and opponents of the Constitution divided in 1787–1788 carried over into debates within the new government over how national authority would be construed. Echoes of this verbal combat reverberate today, as illustrated by two recent volumes. Both leave no doubt about the ongoing importance of federalism in the life of the nation.

Combining a partly historical perspective with examples drawn from timely issues such as environmental, public health, and land use regulations is **Federalism and the Tug of War Within**,³⁴ by Erin Ryan, who taught in the law school at the College of William and Mary when the book appeared and who later joined the law faculty at Lewis & Clark. It is no mere coincidence that her title suggests conflict because the division of political power in the United States has invited struggles from the beginning. Her comprehensive (and hefty) study—it tops out at just below 400 pages—argues that federalism “is best understood not just in terms of the conflict between states’ rights and federal power, or the debate over judicial constraints and political process, or even the dueling claims over original intent—but instead through the inevitable conflicts that play out among federalism’s core principles.” Attempting to provide “a new conceptual

vocabulary for wrestling with these old dilemmas,” the book “traces federalism’s internal tug of war through history and into the present” and proposes “a series of innovations to bring judicial, legislative, and executive efforts to manage it into more fully theorized focus.”³⁵

After focusing on the basic question of who gets to act, she hones it to the even more fundamental matter of who gets to decide whether it will be the state or federal government that acts. Furthermore, will this be a determination made by the political process or the judicial process? By elected representatives and the executive branch, or by unelected federal judges? That question in turn becomes more complex when one remembers that the Constitution mandates not only a vertical division of power between the national government and the states but also a horizontal division of power for the former among three separate branches, a division that is variously replicated across the fifty states as embedded in state laws and constitutions.

For Ryan, the constitutional ambiguity that makes answering these questions so difficult leads to the next question, often overlooked in the federalism discourse: which federalism? By that question, she refers “to which theoretical model of federalism [one uses] in interpreting textual ambiguity[.]” Because “the Constitution mandates but incompletely describes American dual sovereignty,” a decision maker faces a situation where boundary issues are left open for interpretation and so “must employ some kind of theory—a philosophy about how federalism should operate—in order to fill in these gaps. Yet constitutional interpreters can choose from more than one theoretical model of federalism in doing so, just as the Supreme Court has done over the centuries in which its jurisprudence has swung back and forth in answering similar questions at various times.”³⁶

Asking the question “which federalism” of course leads to a wealth of possible

answers. One standard reference, for example, highlights and defines no fewer than seven models or ways of thinking about federalism, ranging from dual federalism and horizontal and vertical federalism, to marble cake, cooperative, and creative federalism.³⁷ The roles, strengths and weaknesses of most of these engage Ryan’s attention to one degree or the other.

From the various models the book explores, she acknowledges that it is the dual federalism model “that has predominated at various points in American history, especially during the first half” with, of course, prominent outcroppings in the years on either side of the beginning of the twentieth century.³⁸ In Supreme Court history this constitutional conception is often closely identified with the jurisprudence of Chief Justice Roger B. Taney, for whom the Constitution was a compact resting on the action of sovereign states, not stemming from an ordinance of the people. The national government and the states therefore faced each other as equals across a precise constitutional line defining their respective jurisdictions. This concept of nation-state equality in the Marshall era had been the basis of Virginia’s anarchical arguments in *Cohens v. Virginia*.³⁹

Recognizing its anarchic implications, Taney and like-minded jurists of his time moved forward on the basic creed of nation-state equality. Within the powers reserved by the Tenth Amendment, the states were sovereign, but final authority to determine the scope of state powers rested with the national judiciary, an arbitrator standing aloof from the sovereign pretensions of both nation and states. Taney wrote in *Ableman v. Booth*:

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights

by the general government, . . . So long . . . as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forum of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.⁴⁰

Perhaps one of the clearest and most succinct summaries of this view appeared some years after Taney's death in an opinion for the Court by Justice Samuel Nelson in *Collector v. Day*:

The general government, and the States, although both exist within the same territorial limits are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States. . . . [I]n respect to the reserved powers, the State is as sovereign and independent as the general government.⁴¹

This theory of federal equilibrium or dual sovereignty of course did not arise on its own but was a reaction and in juxtaposition to a theory of national supremacy federalism asserted by Chief Justice John Marshall in a series of opinions during his long tenure as Chief Justice between 1801 and 1835. Marshall's understanding of American federalism—a view to which Ryan alludes⁴²—is built on the proposition that the central government and states confront each other not as equals but in the relationship of superior and subordinate. If an exercise of one of Congress's enumerated powers, for instance,

was legitimate, the fact that its exercise encroached on the states' traditional authority was of no significance. Moreover, the Court's duty was not to preserve state sovereignty but to protect national power against state encroachments. The Court was to function then not as an umpire but as an agent of national authority. Accordingly, the checks on Congress were to be political, not judicial. For Marshall, the principal danger of the federal system lay in erosive state action. Effective political limitations, such as a Senate then elected by state legislators, existed against national efforts to impinge on state power, but only the Supreme Court could peacefully restrain state action that might infringe upon and perhaps eventually cripple the authority of the central government.

Despite the apparent triumph of Marshall's views after the 1930s, Ryan shows how dual federalist thinking has undergone something akin to a revival recently among state autonomy advocates called "Tenters" as well as among Tea Party adherents and particularly in the "new federalism" identified closely in the near past with the views of Justice and then Chief Justice William Rehnquist. For the author, these approaches "tend to subordinate pragmatic concerns to the maintenance or formalistic boundaries between distinct reservoirs of state and federal power. Judicially enforceable constraints police regulatory activity to discourage trespass by either side—even in contexts where the boundary is difficult to locate, or where both sides hold simultaneously legitimate regulatory interests." For these reasons, she argues that the dualist model can lead both to regulatory confusion "and in the worst cases, chill needed interjurisdictional problem solving"⁴³ and threatening "resolution of our most pressing societal problems."⁴⁴

In place of such traditional ways of looking at federalism—ways that she believes are inadequate—Ryan proposes what she labels "balanced federalism."⁴⁵ She explains

that this approach “mediates the tensions within federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of the three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing.”⁴⁶ At the heart of what she proposes—and key to its successful application—is agreement among decision makers on the values inherent in federalism. Aside from answering the “why federalism” question in the context of history alone, she lays out a quartet of contemporary merits that American federalism embodies. These include (1) “the checks and balances that protect individuals against sovereign overreaching or abdication, (2) transparent and accountable governance that enable meaningful democratic participation at all levels, (3) protection for local autonomy and innovation that enables the laboratory of ideas, and (4) the ability to harness interjurisdictional synergy between the unique capacities that local and national governments offer for coping with the different parts of interjurisdictional problems.” Yet she acknowledges that “those values are suspended in tension with one another, fueling a perpetual tug of war within federalism itself.”⁴⁷ Good results are then achieved from prioritizing among these values in the context of individual conflicts and cases. And the prioritizing is the product of balancing.

Anticipating the criticism that, in constitutional adjudication at least, balancing “invites lazy and sloppy judicial reasoning,”⁴⁸ she nonetheless insists that “balancing is a legitimate methodology in at least some constitutional circumstances, and many concede it is inevitable. Federalism is one of those circumstances in both respects . . . because there is no alternative but to reckon with the tug of war within. The federalism values that pull in directions of checks and balances, localism, accountability, and problem solving are not always well-aligned, and for that

reason trade-offs are inevitable.” Balancing is therefore acceptable, she believes, “because the trade-offs are better made in careful considerations under a guided jurisprudential standard than under a categorical rule that arbitrarily establishes the trade-off in every instance.”⁴⁹

For her balanced federalism approach, Ryan acknowledges that she drew scholarly inspiration from the commencement address that Justice David Souter delivered at Harvard University on May 30, 2010, about a year after he retired from the High Bench following some nineteen years of service. Perhaps Souter’s main point on that occasion in explaining the work of a Justice was that constitutional judging requires more than merely reading the text of the document. And from his remarks she highlights a few passages—reprinted below in italics—on which she particularly relied.

“The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time,” Souter declared. He continued:

Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. . . . [T]he Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because *its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once. . . . The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.*⁵⁰

For Ryan, Souter's statements provide "naked insight into the role of all interpreters asked to make sense of the competing principles that the Constitution simultaneously endorses without clarification."⁵¹ Some will recall that this had been Chief Justice Marshall's point in *Gibbons v. Ogden* when he wrote that the Constitution was "one of enumeration, and not of definition."⁵² For contemporary jurists, Ryan recaps that "there is no instruction manual for managing conflicts and omissions." Rather, their task "is to identify the competing claims, evaluate their merits, and ascertain how to prioritize among them in factual context."⁵³

A second recent book on federalism is **The U.S. Supreme Court and the New Federalism** by political scientists Christopher P. Banks and John C. Blakeman.⁵⁴ The former teaches at Kent State University and the latter at The University of Wisconsin-Stevens Point. While Ryan's contribution is notable for its prescription, the Banks and Blakeman volume is distinguished by its analysis and description. Moreover, as the subtitle—**From the Rehnquist to the Roberts Court**—indicates, their contribution focuses on a specific recent period in American constitutional history. Moreover, it is a period made all the more interesting not only because *Chief Justice* William H. Rehnquist had first come to the Court as *Justice* Rehnquist, but because the mentee succeeded the mentor in that Chief Justice John G. Roberts, Jr., had clerked for then Justice Rehnquist in 1980–1981. In addition, the six Terms of the Roberts Court that their study encompasses comprise a discrete period for examination in that, aside from the change in Chief Justices, there were also the departures of Justices O'Connor, Souter, and Stevens and the arrivals of Justices Alito, Sotomayor, and Kagan, thus marking a significant change in personnel in contrast with the last eleven years of the Rehnquist Court, when the Court's membership was nearly historically static.

Most especially, however, the Rehnquist Court and the Roberts Court (to date) are worthy topics for study not only because of the political and policy significance of federalism, as Ryan's book makes clear, but because of what has happened to federalism in the constitutional context during the past several decades. And it is the development of what is sometimes called the new federalism during those years that has attracted much scholarly attention, as anyone who has studied or taught about the Supreme Court will attest. New federalism has attracted attention because of its apparent contrast with much of what had come before. The fact is that in certain major respects there has been a changed constitutional reality.

Beginning with the New Deal in the 1930s and particularly with the "revolution" of 1937 and continuing into and through enactment of Great Society programs in the 1960s, values of state autonomy seemed as out of fashion as those of national and congressional ascendancy seemed to be thoroughly in vogue. Studying or writing about court decisions limiting congressional power in favor of state power typically meant turning to the past, not to the present. Federalism-oriented discussions seemed uninteresting because they seemed inconsequential. Whether with respect to federal judicial oversight of state criminal justice policies or of questions of representation in legislative districting cases, or doubts about the reach of the congressional commerce power, concerns expressed by individuals such as Justice John Marshall Harlan were typically heard only in the minority. As Harlan reminded an audience in 1963:

Our federal system, though born of the necessity of achieving union, has proved to be a bulwark of freedom as well. We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it

would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have Federalism as we know it in this federal system is of course difficult to operate, demanding political genius of the highest order. It requires accommodations being made that may often seem irksome or inefficient. But out of that very necessity usually come pragmatic solutions of more lasting value than those emanating from the pens of the best of theoretical planners. Unless we are prepared to consider the diversified development of the United States as having run its course and to envisage the future of the country largely as that of a welfare society, we will do well to keep what has been called ‘the delicate balance of federal-state relations’ in good working order.⁵⁵

Against this backdrop, the Court’s 1976 decision in *National League of Cities v. Usery* therefore came as a surprise when five Justices led by Rehnquist held that Congress could not extend the minimum wage and maximum hours provisions of the Fair Labor Standards Act to employees of states and their political subdivisions. To do so was to regulate “the states as states.” There were “limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce. . . [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”⁵⁶

Yet this outcropping of state autonomy was itself short-lived when *National League of Cities* was overruled nine years later in

Garcia v. San Antonio Metropolitan Transit Authority.⁵⁷ Reaffirmed was a view of the Tenth Amendment in which constitutional limits on Congress are structural, not substantive—that states must find their protection from congressional regulation through the national political process and not through the courts. New federalism then reappeared in 1995 when the Court in *United States v. Lopez* struck down the Gun Free School Zones Act in the first invalidation of an act of Congress on commerce clause grounds since 1936. As Chief Justice Rehnquist explained for the majority of five, it was the Court’s duty to draw the line between what could properly be the subject of national regulation and what could not. Echoing ideas expressed approximately a century earlier by Chief Justice Melville Fuller,⁵⁸ Rehnquist insisted that “the Constitution requires a distinction between what is truly national and what is truly local.”⁵⁹ When *United States v. Morrison*⁶⁰ invalidated a provision of the Violence against Women Act in 2000, also in a 5–4 vote, it became apparent that the old struggle between dual federalism and the principles of national supremacy had been renewed in earnest.

It is this unfolding story that Banks and Blakeman present in their comprehensive study that seeks, with the aid of a series of helpful charts and tables, to put into perspective every federalism-related decision, including those turning on the Eleventh Amendment and preemption of the Rehnquist Court and the Roberts Court through the October 2011 Term. (Preemption cases arise because of the Supremacy Clause of Article VI and are those where the outcome turns on whether a legitimate exercise of national authority supersedes or takes precedence over any arguably conflicting action by a state government). A “Postscript”⁶¹ examines the Roberts Court’s opinions in a pair of recent decisions with important federalism issues: *Arizona v. United States*⁶² and *National Federation of Independent Business v. Sebelius*.⁶³

Productively, the authors position their analysis within the larger context of the Court's historic role as a player in defining how federalism has worked in practice since practically the beginning of government under the Constitution. They begin with the belief that the Supreme Court's "legal policy is profoundly shaped by judicial conflict from within the Court, as well as by ideological considerations and exogenous forces that ultimately strike a workable balance between the forces of centralization and state-centered conceptualizations of sovereignty." More specifically, the authors examine not only the federalism of the Rehnquist Court but investigate whether "the Roberts Court is assuming a different kind of jurisprudence or institutional role than the Rehnquist Court did in superintending federalism litigation."⁶⁴

Alongside fulfilling the book's ambitious research objective and design, the authors turn to the recent past as the basis for looking into the future and hazard several predictions. First, just as did the Rehnquist Court, the current Bench will "continue to address preemption disputes with a view toward refining the principles of preemption doctrine within the larger context of federal-state relations."⁶⁵ That is, they see preemption cases as useful vehicles for developing a more comprehensive vision of federalism in the constitutional order. Second, within the preemption category of cases, they detect a "relatively new ideological divide" that "has as much to do with the rival economic philosophies within the Court . . . as it does with traditional judicial conflicts over statutory interpretation and the proper role of the federal government."⁶⁶ Third, the authors conclude that the Roberts Court will "chip away at the political safeguards approach to federalism defined in the divisive *Garcia* decision" illustrating that the Roberts Court "is, to a degree, mirroring the Rehnquist Court," making sure that "Congress itself respects those safeguards, especially by making its intent to regulate state functions

clear and unmistakable."⁶⁷ Fourth, the Roberts Court "remains internally divided over federalism" just as was the Rehnquist Court, with a typical voting dynamic of 4–4 with one Justice "serving as a swing vote."⁶⁸ This voting division the authors find unsurprising given the stark partisanship that has pervaded Congress in recent years. "The extent to which exigencies external to the Court, such as the brutish polarization in Congress affect the disagreements among the justices is unknown but cannot be discounted" even though Banks and Blakeman also say that most federalism cases seem to be decided "without ideology being the driving factor." Still, the result is a situation where the Court has difficulty speaking "with one collective voice."⁶⁹ Finally, there is the political climate outside the Court, which is not only largely beyond the Justices' control but which in large measure will probably shape the policies to be enacted that in turn will spawn the cases that will land on the Court's docket for possible decision.

As almost any federalism case illustrates, the Justices routinely do far more than merely announce the outcome of the litigation in terms of who wins and who loses. Rather, in what amounts to a pronouncement to the nation, they perform a teaching function by explaining the decision through an opinion, whether for the majority or a plurality, or by way of a dissent or concurrence. But members of the Court have also long expressed themselves off the Bench as well through books, articles, addresses and, more recently, interviews. Many members of the Court have hardly seemed infected with what Justice Frankfurter once termed "judicial lockjaw."⁷⁰ Not only did Chief Justice Marshall devote ample space in his acclaimed biography of George Washington⁷¹ to a presentation of the Federalist theory of the union, but even took to the newspapers to defend anonymously his opinion in *McCulloch v. Maryland*.⁷² Not long after Marshall's self-protective foray, Justices Story and Baldwin expounded their

theories of the Constitution in their respective sets of commentaries.⁷³ The breadth of tolerance was such that Justice John McLean maintained his seat on the Court while running perennial campaigns for the presidential nomination on the National Republican, Free Soil, and Republican party tickets, while also making known his views on a variety of subjects through letters in newspapers and going so far as to condemn publicly the conduct of the Mexican War by the Polk administration. A year later, he even expressed his views in a similar fashion on the power of Congress to legislate on the status of slavery in the territories. The pattern continued variously through the following decades so that by the 1960s Justice William O. Douglas had joined the ranks of the most outspoken Justices in Court history, lecturing widely and authoring a series of books and articles dealing with constitutional government, civil liberties, the Supreme Court, travel, and ecology,⁷⁴ a prodigious output perhaps rivaled chiefly in degree if not in kind only by Justice David J. Brewer, whose literary and oratorical exertions were concentrated around the turn of the twentieth century.

In its contemporary manifestations, the practice continues unabated, tempered usually by the general refusal to discuss openly specific matters of public law and intra-Court decision-making, especially when the former are or very likely will come before the Court for decision. Certainly any notion that today Justices and other federal Judges should maintain absolute silence off the bench is historically insupportable. The question rather becomes one of balance between what is unexceptionable and what is not, and sometimes the boundary can be fuzzy. There are the competing values of the demonstrable need for the appearance of judicial fair-mindedness and moderation on the one hand, and the individual judge's right to address matters of national concern on the other. Alongside these cautions, the reality of a long-running record of off-the-bench commentary on a wide range

of subjects has been so plentiful, rich, colorful, and sometimes stimulating that a half century ago it attracted the attention of political scientist Alan F. Westin, who compiled and edited a collection of some of these off-Bench writings and addresses that he entitled **An Autobiography of the Supreme Court**.⁷⁵ More recently, political scientist David M. O'Brien of the University of Virginia looked at the same genre, gave it a more specialized focus, and produced a collection entitled **Judges on Judging**,⁷⁶ the first edition of which appeared in 1997. Happily there is now a fourth edition.

Apparently compiled mainly for students interested in the judicial process, the volume is nonetheless serviceable to novice and seasoned scholar and practitioner alike and of particular value to anyone desiring to read about what judges do as described not by outsiders but by judges themselves, as the subtitle—**Views from the Bench**—promises. Moreover, perhaps to avert any confusion that the “bench” at hand is of the judicial and not the athletic⁷⁷ variety, O'Brien's introduction tellingly points to the common observation that most Americans know very little about the Supreme Court and the other federal courts—much less in fact than they do about Congress—yet hold the judiciary in much higher regard. This anomaly once led former member of Congress and later U.S. Court of Appeals judge Abner J. Mikva to comment, “I hate to think we're only beloved in ignorance.”⁷⁸ The humor nonetheless points to the book's objective of making “accessible justices' and judges' thinking about judicial activism and restraint, rival approaches to constitutional interpretation, and the judicial role in the political process.” With a balanced selection of entries, the volume seems constructed, as O'Brien explains, “to contribute to the ongoing debate about off-the-bench commentaries and to encourage readers to think about the qualities of judges—their temperaments, characters, judicial philosophies, and political views—as well as the role

of courts in American politics.”⁷⁹ As such, **Judges on Judging** is what might be described as a self-replenishing book in that the selections O’Brien has included do not represent a canon whose contents are locked or closed.⁸⁰ Given the broad topics covered, one may safely predict that judges, including probably some of whom have yet to be heard from, will not only continue to speak and write about what they do, but perhaps continue to do so in occasionally uncommon ways. Yet, when circumstances call for a new edition, one hopes that it include an index, a truly essential feature that would make O’Brien’s book noticeably more functional and convenient to use.

Organizationally, the new edition adheres closely to the structure of its predecessors. The book’s thirty-four entries represent the work of thirty-one judges. Of the thirty-one, seventeen are current or former members of the United States Supreme Court. With the exception of one state appellate judge,⁸¹ the remaining authors are or were judges on one of the United States’ district courts or one of the United States’ courts of appeals. To lend additional coherency to the volume, O’Brien has grouped the selections into four parts including (1) Judicial Review and American Politics: Historical and Political Perspectives; (2) The Dynamics of the Judicial Process; (3) The Judiciary and the Constitution; and, injecting a federalism component, (4) Our Dual Constitutional System: The Bill of Rights and the States. Readers will find both some well-known pieces and some that may be new for many. In the former category there are entries such as Oliver Wendell Holmes’s “The Path of the Law” published while the future U. S. Justice was still sitting on the Supreme Court of Massachusetts, and Justice Hugo L. Black’s signature discourse “The Bill of Rights.” Among the latter are former Justice Souter’s Harvard commencement address referenced above in connection with Professor Ryan’s book, and Justice Clarence Thomas’s lecture

on “Judging” that he delivered at the University of Kansas School of Law.

Collectively, the contents of this edition of **Judges on Judging**, as did its predecessors, should continue to provide insight into the judicial process. Moreover, the book may have the added benefit of continuing a conversation on the propriety of, and limits to, various types of off-the-bench commentary, and the relationship of that to what Harlan Fiske Stone once termed, in the context of a bar association speech, the “judicial instinct of self-preservation.”⁸² Yet even without that eventuality, certainly O’Brien’s book, as well as the other three surveyed here, demonstrate the High Court’s continuing prominence in scholarly literature.

THE BOOKS SURVEYED IN THIS
ARTICLE ARE LISTED
ALPHABETICALLY BY AUTHOR
BELOW:

BANKS, CHRISTOPHER P., AND JOHN C. BLAKEMAN. **The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Courts.** (Lanham, MD: Rowman & Littlefield, 2012). Pp. xiii, 348. ISBN: 978-0-7425-3504-6, cloth.

BLACK, RYAN C. AND RYAN J. OWENS. **The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions.** (New York: Cambridge University Press, 2012). Pp. ix, 181. ISBN: 978-1-107-01529-6, cloth.

O’BRIEN, DAVID M., ED. **Judges on Judging: Views from the Bench.** (Los Angeles: Sage, 4th ed., 2012). Pp. x, 680. ISBN: 978-1-4522-2782-2, paper.

RYAN, ERIN. **Federalism and the Tug of War Within.** (New York: Oxford University Press, 2011). Pp. xxix, 398. ISBN: 978-0-19973-7987, cloth.

ENDNOTES

¹ Edward S. Corwin, **The President, Office and Powers** (4th ed., 1957), 69.

² *Myers v. United States*, 272 U. S. 52, 117 (1926).

³ Joseph Story, **Commentaries on the Constitution of the United States** (2d ed., 1851), vol. 2, 330.

⁴ Quoted in *id.*

⁵ John Marshall, **The Life of George Washington** (2d rev. ed., 1848), vol. 2, 169. Although many in the Founding generation were classically educated, one may safely assume that the social life of members of Washington's "cabinet council" did not mirror fifth-century Athens entirely. See Ann Steiner, "Private and Public: Links between Symposion and Syssition in Fifth Century Athens," 21 *Classical Antiquity* 347 (2002).

⁶ Quoted in Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 2, 31.

⁷ John Marshall, **The Life of George Washington**, 169.

⁸ U.S. Constitution, Art. III, Section 1.

⁹ Stanberry would have filled the seat vacated by the death of Justice John Catron. The elimination of the Catron seat reduced the Court's roster from ten to nine, and the additional adjustment cut it from nine to eight. The roster was fixed at nine in 1969, after Johnson's departure, and it has remained at nine ever since.

¹⁰ Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.

¹¹ Robert L. Stern, The Solicitor General and Administrative Agency Litigation, 46 *American Bar Association Journal* 154, 156 (1960).

¹² Quoted in Linda Greenhouse, "Justice," *New York Times*, June 2, 1989, p. A-11.

¹³ Named to the position by President Ronald Reagan in 1981, General Lee served until 1985.

¹⁴ Rex E. Lee, "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 51. General Lee's lecture was the first in a series of eight presentations designated "The John Marshall Lectures on the Constitution, the Supreme Court and the Justices," presented on the campus of Franklin & Marshall College between October 1985 and February 1989 with primary funding from the National Endowment for the Humanities.

¹⁵ Book-length studies include Lincoln Caplan, **The Tenth Justice** (1987) and Richard L. Pacelle, Jr., **Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation** (2003).

¹⁶ Ryan C. Black and Ryan J. Owens, **The Solicitor General and the United States Supreme Court** (2012), hereafter cited as Black and Owens.

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 5-6.

²⁰ General Griswold, named to the post by President Lyndon Johnson, served from 1967 until 1973.

²¹ Quoted in Rebecka Mae Salokar, **The Solicitor General** (1992), 98.

²² Black and Owens, 9.

²³ *Id.* at 135.

²⁴ *Id.*

²⁵ Robert L. Stern, "The Solicitor General and Administrative Agency Litigation," 156.

²⁶ Black and Owens, 136.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Rex Lee, "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court," 59.

³¹ D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices**, 22.

³² Quoted in *id.*

³³ *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 838 (1995), Kennedy, J., concurring.

³⁴ Erin Ryan, **Federalism and the Tug of War within** (2011), hereafter cited as Ryan.

³⁵ *Id.* at xi.

³⁶ *Id.* at xiii-xiv.

³⁷ Jack C. Plano and Milton Greenberg, **The American Political Dictionary** (10th ed., 1997), 40.

³⁸ Ryan, 3.

³⁹ 19 U.S. (6 Wheaton) 264 (1821). In *Cohens*, Chief Justice Marshall refuted the argument that, in all cases "arising" in their courts, state judges had final authority to interpret the Constitution and the U.S. laws and treaties made under its authority. Instead, because the people had surrendered portions of state sovereignty to the national government, the Supremacy Clause and the principle of judicial review required that final decisions on federal constitutional issues in state courts be made only by the Supreme Court. Otherwise a "hydra" in government would result with the Constitution having different meanings from state to state.

⁴⁰ 62 U.S. (21 Howard) 506, 521 (1859).

⁴¹ 78 U.S. (11 Wallace) 113, 124 (1871).

⁴² Ryan, 71-73.

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 368.

⁴⁵ *Id.* at 181.

⁴⁶ *Id.* at xi-xii.

⁴⁷ *Id.* at 369.

⁴⁸ *Id.* at 207.

⁴⁹ *Id.* at 208.

⁵⁰ Text of Justice David Souter's speech: Harvard Commencement Remarks (as delivered), May 30, 2010. The italicized words in the excerpt here are those that Ryan both quotes and italicizes. Ryan, 11-12. Souter's address is available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> (last accessed May 31, 2013).

⁵¹ Ryan, at 13.

⁵² 22 U. S. (9 Wheaton) 1, 189.

⁵³ Ryan, at 12.

⁵⁴ Christopher P. Banks and John C. Blakeman, **The U. S. Supreme Court and the New Federalism** (2012), hereafter cited as Banks and Blakeman.

⁵⁵ John M. Harlan, "Thoughts at a Dedication: Keeping the Judicial Function in Balance," 49 *American Bar Association Journal*, 943, 944 (1963). See also J. Harvie Wilkinson, III, "Justice John M. Harlan and the Values of Federalism," 57 *University of Virginia Law Review*, 1185 (1971). Wilkinson's article was published shortly after Justice Harlan's death.

⁵⁶ *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976).

⁵⁷ 469 U. S. 528 (1985).

⁵⁸ See Fuller's opinion for the Court in *U. S. v. E. C. Knight Co.*, 156 U. S. 1 (1895), and his dissent in *Champion v. Ames*, 188 U. S. 321 (1903).

⁵⁹ 514 U. S. 549, 568 (1995).

⁶⁰ 529 U. S. 528 (2000).

⁶¹ See Banks and Blakeman at 313-321.

⁶² 183 L. Ed. 2d 351 (2012).

⁶³ 183 L. Ed. 2d 450 (2012).

⁶⁴ Banks and Blakeman, 9.

⁶⁵ *Id.* at 298.

⁶⁶ *Id.* at 298-299. By economic philosophies, the authors have in mind opinions about how little or how much government should regulate business.

⁶⁷ *Id.* at 299.

⁶⁸ *Id.*

⁶⁹ *Id.* at 300.

⁷⁰ Felix Frankfurter, "Personal Ambitions of Judges: Should a Judge 'Think Beyond the Judicial'?" 34 *American Bar Association Journal* 656, 658 (1948). Aside from using the "lockjaw" phrase, Justice Frankfurter turned to a sports metaphor in his address: "Even Justices of the Supreme Court need not be wholly tongue-

tied and may venture a few general observations about general themes that do not touch even remotely the strange parade of cases that come, or may come, before that extraordinary tribunal. One has thoughts about the game even if one sits upon the top most seat of the bleachers and can view it only faintly". *Id.*

⁷¹ See note 5.

⁷² 17 U. S. (4 Wheaton) 316 (1819). See Gerald Gunther, ed., **John Marshall's Defense of McCulloch v. Maryland** (1969).

⁷³ See note 3 and Henry Baldwin, **A General View of the Origin and Nature of the Constitution and Government of the United States** (1837).

⁷⁴ Perhaps Douglas's most extreme published thoughts are found in his polemical **Points of Rebellion** (1970).

⁷⁵ The book was published by Macmillan in 1963 and contains entries from the Jay Court into the Warren Court. Professor Westin, perhaps best known for jumpstarting the modern study of privacy law, taught at Columbia University for a number of years and died in early 2013.

⁷⁶ David M. O'Brien, **Judges on Judging** (2013), hereafter cited as O'Brien.

⁷⁷ O'Brien's book is therefore not to be likened to Alan Williams's **Walkon: Life from the End of the Bench** (2006).

⁷⁸ O'Brien, 2.

⁷⁹ *Id.* at 8-9.

⁸⁰ While O'Brien has included a lecture from 1988 by Justice Scalia, perhaps the next edition could feature an excerpt from **Reading Law: The Interpretation of Legal Texts** (2012), which Justice Scalia co-authored with Bryan A. Garner.

⁸¹ Justice Holmes is counted with the former members of the U.S. Supreme Court.

⁸² Harlan F. Stone, "Fifty Years' Work of the United States Supreme Court," 14 *American Bar Association Journal* 428, 428 (1928).