The Constitution Between Friends

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Book Reviews

The Constitution Between Friends


Reviewed by Neal Devins*

I. Introduction

In a recent survey, six out of ten respondents claimed that they view the Supreme Court as the ultimate constitutional arbiter.¹ Newspaper coverage of this survey simply noted that these six were "correct."²

Two years ago, then United States Attorney General Edwin Meese sparked controversy by arguing that Supreme Court decisions are not "binding on all persons and parts of government henceforth and forevermore."³ For New York Times columnist Anthony Lewis, this assertion was an invitation to anarchy.⁴

The reaction to the Meese speech and the reporting of the constitutional survey both reflect the view that Supreme Court interpretations control the Constitution's application. This perception, however, is overly parochial and ultimately shortsighted. Granted, disrespect for Court interpretations by the elected branches and the states is destabilizing and therefore to be avoided.⁵ But one cannot trace constitutional decision making solely to the efforts of nine individuals working in isola-

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‡ Hereinafter cited by page number only.
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2. Id.
Other parts of government both interpret the Constitution and influence the judiciary.

The above proposition is hardly novel. A long list of books and articles speak to nonjudicial constitutional decision making. A recent and worthwhile addition to this list is Louis Fisher's *Constitutional Dialogues: Interpretation as Political Process*.

II. The Character of Three-Branch Interpretation

Fisher proposes to show that constitutional law "is a process in which all three branches converge and interact ... [with] ... important contributions also coming from the states and the general public." Fisher succeeds admirably at this task, resting his case on hard evidence that falls into at least three categories.

First, Fisher notes that numerous powers lodged in the elected branches check judicial exegesis. These powers include the appointment and confirmation of judges, the regulation of federal court jurisdiction, and the allocation of judicial salaries and resources. Second, Fisher points out that the elected branches play a critical role in constitutional interpretation. Arguments before the Court are frequently those of the Solicitor General and congressional litigants. More significantly, the Court's use of threshold justiciability and political question barriers often gives the elected branches sole responsibility for ensuring that their own actions conform to constitutional norms. Finally, Fisher recognizes that the judiciary engages in constitutional dialogue by encouraging the elected branches to clarify judicial action through legislation or regulation.

In that commentators have discussed these various phenomena elsewhere, Fisher's book is not pathbreaking. What distinguishes this book is its thoroughness and evenhandedness. Fisher means to illuminate the current arrangement rather than argue the arrangement's propriety, success, or failure.

Fisher chronicles the various elements of his proof with the meticulousness of a forensic detective. His approach is to document the various powers that the elected branches possess to check judicial exegesis. Fisher identifies three key categories: appointment and confirmation of judges, regulation of federal court jurisdiction, and allocation of judicial salaries and resources. He also notes the critical role of the elected branches in constitutional interpretation, particularly through arguments before the Court and the Court's use of threshold justiciability and political question barriers.

In summary, Fisher's book is notable for its comprehensive and balanced examination of the role of the elected branches in constitutional decision making. It offers a valuable contribution to the ongoing debates about the appropriate role of nonjudicial actors in shaping constitutional law.
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lousness of a scientist testing a hypothesis. For example, he divides his chapter on threshold requirements into units on adverseness, advisory opinions, standing, mootness, ripeness, and political questions. Each unit makes the same point. “If the judiciary is unprepared or unwilling to decide an issue, mootness [as well as standing, adverseness, and other similar rules are] one avenue of escape.”15 “When the judiciary is ready to decide an issue, ‘mootness’ [as well as standing, adverseness, and other similar rules] will not stand in its way.”16 Furthermore, Fisher applies the same methodology of comparing and contrasting case facts and holdings in each unit. He then distills the accumulated evidence into his central thesis: that threshold requirements “ration scarce judicial resources . . . . Judges invoke [them] to promote the adversary system, preserve public support, avoid conflicts with other branches of government, and provide flexibility of action for the judiciary.”17

Although Fisher’s methodology lacks drama, it is effective and efficient. He constantly reinforces his central thesis with mini-units packed with salient information about three-branch interpretation. In addition to his discussion of threshold requirements, Fisher’s stockpile of topics includes non-article III courts; judicial appointments, removal, and compensation; lobbying by elected officials and interest groups in the courts, and lobbying by judges outside of the courts; the certiorari decision; the removal of federal court jurisdiction; court packing; federal-state court relations; the implementation of court orders; and court-invited constitutional interpretation by Congress. For those accustomed either to more deliberate explication or to more leisurely discussion of a subject, the book’s never-ending flow of information operates like the Chinese water torture. After a couple of chapters, you are ready to concede Fisher’s point. By book’s end, you have long passed the point of capitulating.18

Despite being fact-heavy, Constitutional Dialogues is far from boring. Although occasionally bogged down by unnecessary detail,19 the book is chock full of anecdotes that add life to Fisher’s explorations. The

15. P. 102.
16. P. 103.
17. P. 85.
18. An added virtue of this approach is that one can use Fisher’s book as a general reference. Indeed, the book functions magnificently as a reference. The chapters are organized around discrete subjects, and the index is complete and accessible. Moreover, the chapter units are well documented and clearly written. Fisher also provides excellent bibliographic information.
19. For example, the book details such topics as the Court’s caseload burden and bureaucratic rules governing Supreme Court procedures. See generally pp. 162-99 (chapter on Supreme Court decision making). The book also devotes a chapter to the evolution of judicial review, a concern only tangentially related to constitutional dialogues. See pp. 44-84.
author places decisions such as *Ex parte McCardle*, 20 *Buck v. Bell*, 21 and the *Steel Seizure Case* 22 in their social contexts. He provides an historical backdrop to efforts by the Justices to lobby Congress, 23 discusses examples of how politics plays a role in case assignments, 24 and charts the rise of legislators' attempts to advance their policy arguments. 25 Indeed, Fisher is remarkably adept at enlivening both well-known topics with little-known facts and well-known subjects with little-known topics. 26

Fisher's use of case studies to substantiate the book's central arguments also invigorates *Constitutional Dialogues*. Standing out among these tales are Fisher's descriptions of the legislative reactions to fourth amendment case law and the Supreme Court's rejection of the legislative veto in *INS v. Chadha*. 27

The *Chadha* discussion highlights the need for Supreme Court sensitivity to political realities. Characterizing the legislative veto as a "classic quid pro quo" between legislature and executive, 28 Fisher finds it predictable that the executive and legislative branches would breach and circumvent the holding in *Chadha*. After describing some of the post-*Chadha* arrangements between agencies and their oversight committees, 29 Fisher concludes that "[n]either branch wants the static model of separated powers offered by the Court. The inevitable result is a record of noncompliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before." 30

Fisher's discussion of fourth amendment issues exemplifies how Congress and the Court can work in concert to develop constitutional standards. 31 The Court has recognized explicitly that its fourth amend-

20. 73 U.S. (6 Wall.) 318 (1867) (discussed at pp. 218-19).
23. See pp. 122-23 (detailing letters sent in 1793 by Supreme Court Justices to Congress about the physical hardships of riding circuit).
24. See p. 175 (describing assignment of a Texas "white primary" case from Justice Frankfurter, a Vienna-born Jew, to Justice Reed, a Kentucky Democrat).
25. See pp. 30-36.
28. P. 224. Under the legislative veto, agencies were able to act in the absence of legislation and Congress was able to disapprove of such action without sending legislation to the President.
30. P. 228.
31. See generally pp. 255-70.
ment decisions "do[] not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure."32 Consequently, Congress passed legislation to prohibit the third-party searches of newspapers33 that the Court upheld in the Stanford Daily case.34 Although describing the evolution of this bill as an "intricate dance" between Congress and the courts, Fisher concludes that "Congress performed the identical task attempted by the Court—balancing the Fourth Amendment against other interests—and reached a strikingly different conclusion."35

The Congressional responses to Chadha and Stanford Daily both demonstrate the critical role played by nonjudicial actors in defining the Constitution. By combining studies such as these with other anecdotal information, Fisher succeeds both in holding the reader's interest and in amassing a large body of information revealing the political sensibilities of the judiciary and the constitutional responsibilities of the elected branches.

III. The Consequences of Three-Branch Interpretation

Fisher's detail work is not extraneous to the debate over the appropriate role of the elected branches in constitutional interpretation. Because legislative and executive action influence constitutional decision making, caution should guide those who support the abdication of interpretive responsibilities by the elected branches. Heat should be put on—not taken off—all parties engaging in constitutional dialogues. To do otherwise would promote irresponsible constitutional interpretation.

Scholarship in this area generally focuses either on the institutional competence of the branches or on the propriety of nonjudicial constitutional interpretation.36 Commentators pay little attention to the more

35. P. 257.
mundane concerns of assessing the quality of nonjudicial interpretations or offering proposals for improving dialogues between the three branches. Correlatively, scholars give little play to political considerations that may well influence judicial action. To be sure, there are exceptions. Paul Brest has recently written both about the consequences of our faulty assumption “that only the Court is authorized to decide, or is capable of deciding, constitutional questions” and about Congress’s power—based on an evaluation of its performance—to oppose Court interpretations. Walter Murphy and others have prepared a casebook that deals in large part with the question, “Who may authoritatively interpret the Constitution?” Overall, however, scholars consider the Constitution to be the courts’ possession.

Fisher’s chronicling of three-branch interpretation debunks this perception. Fisher’s work, however, is not without its shortcomings. First, if Fisher had used more extensive case studies, Constitutional Dialogues might have offered a richer understanding of three-branch interpretation. Second, Fisher pays insufficient attention to the quality of nonjudicial interpretation and fails to offer suggestions for its improvement.

Detailed case studies provide the best device for understanding how the elected branches and the states engage in constitutional dialogues with the Supreme Court. They help to place judicial and nonjudicial action in context by focusing attention on the nature of the dialogue between branches and levels of government. Constitutional Dialogues purposefully avoids this approach. Fisher’s concern is the reality, not the operation, of three-branch interpretation. The author drives home this


37. But see Brest, Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 GA. L. REV. 57, 82-101 (1986) (discussing examples of legislation and concluding that Congress has no tradition of constitutional deliberation and no procedures for routinely reviewing the constitutionality of legislation); Fisher, Constitutional Interpretation by Members of Congress, 63 N.C.L. REV. 707, 731-34 (1985) (reviewing legislation that Congress passed only after concluding, with good reason, that it would be constitutional); Milka, How Well Does Congress Support and Defend the Constitution?, 61 N.C.L. REV. 387, 387 (1983) (discussing legislation and concluding that Congress does not thoroughly review the constitutionality of legislation it passes).


40. Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175, 175 (1986). In Brest’s view, “judicial exclusivity” is problematic both because some issues never come before courts and because courts—when they do consider constitutional issues—often defer to the legislature’s judgment. Id. at 181.

41. Brest, supra note 37, at 103-05.

42. See W. MURPHY, J. FLEMING & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETA­TION 183-204 (1986).
central concern through a collage of snapshot portrayals of nonjudicial interpretation.

This technique, however, does not detail fully the complexity and pervasiveness of these dialogues. Volleys between the elected branches and the courts cannot be summarized neatly in two or three pages, for such exchanges often take place in many phases. For example, on the issue of tax exemptions for discriminatory private schools, the three branches exchanged legislation, judicial opinions, and administrative proposals for four successive years.43 The state, executive, and legislative responses to Roe v. Wade are even more striking. Congress has repeatedly tackled the abortion issue. On the one hand, it has rejected efforts to define life at conception44 and to curtail federal court jurisdiction in this area.45 On the other hand, it has accepted restrictions on federal abortion funding46 and has funded pro-life counseling programs.47 The executive branch likewise has been extremely active in its attempts to regulate abortion. It has participated in numerous lawsuits in this area48 and has made Planned Parenthood and other abortion-related activities the frequent subject of regulation.49 Finally, a vigorous dialogue has emerged between state legislatures and the federal courts. The legislatures constantly enact, review, and modify laws governing such areas as pre-abortion counseling, waiting periods, and juvenile and spousal

43. See Devins, Regulation of Government Agencies Through Limitations Riders, 1987 DUKE L.J. 456, 488-99. This controversy centered on statutory—not constitutional—interpretation. Yet the dynamic interplay between all three branches is at least as significant in the statutory context as it is with constitutional issues. Indeed, Fisher's thesis would apply with equal force to a study of statutory interpretation. Fisher recognizes this phenomenon. Pp. 206-09. For a provocative exploration into whether public attitudes should shape statutory construction, see Eskridge, Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987).


46. See Devins, supra note 43, at 466-68, 485-87.

47. See Bowen v. Kendrick, 108 S. Ct. 2562, 2566-67 (1988) (upholding constitutionality of statute that provided grants to religious and other institutions that furnished counseling on adolescent premarital sexual relations and did not promote abortion).

48. See, e.g., American College of Obstetricians v. Thornburgh, 473 U.S. 931, 931 (1985) (mem.) (denying Acting Solicitor General's motion for leave to participate in oral argument with respect to the constitutionality of a Pennsylvania statute regulating abortions); Reproductive Health Servs. v. Freeman, 614 F.2d 585, 586 n.21 (8th Cir. 1980) (noting that Department of Health, Education and Welfare's amicus brief before district court cited United States Attorney General opinion letter stating that abortion was not recognized medical treatment, pursuant to the Hyde Amendment, for victims of rape or incest).

49. See, e.g., 53 Fed. Reg. 2844 (1988) (to be codified at 42 C.F.R. § 59.89(1)) (providing that family planning projects receiving certain federal funds cannot provide abortion referrals or "provide counseling concerning the use of abortion as a method of family planning").
rights.\textsuperscript{50} Full-blown case studies would have provided the best look at these constitutional dialogues.

Furthermore, an assessment of nonjudicial interpretation also would have improved \textit{Constitutional Dialogues}. Fisher tells us that “if we count the times that Congress has been ‘wrong’ about the Constitution and compare those lapses with the occasions when the Court has been ‘wrong’ by its own later admissions, the results make a compelling case for legislative confidence and judicial modesty.”\textsuperscript{51} Aside from noting one occasion on which Congress responded more quickly to ill-considered legislation than the Court responded to an ill-considered decision,\textsuperscript{52} Fisher provides little authority to back up this claim. Moreover, Fisher offers neither assessment nor review of the quality of state and executive interpretations.

This omission is unfortunate. Once convinced that Fisher’s depiction of three-branch interpretation is accurate, the reader hungers for both some qualitative analysis and a prognosis for the future. In light of widespread doubts over nonjudicial competence, the need for such an assessment is acute. Recent articles by Judge Abner Mikva and Dean Paul Brest have contended that legislative debate “does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts.”\textsuperscript{53} Mere assertions of legislative competence do not adequately dispel these concerns.

The inclusion of an extended case study and an assessment of nonjudicial interpretation would have improved this fine book. These omissions, moreover, are surprising. Fisher’s recent scholarship (portions of which he incorporates into the book) includes both a case study of legislative-judicial dialogues on the fourth amendment\textsuperscript{54} and a positive assessment of constitutional interpretation by Congress.\textsuperscript{55}

\textbf{IV. The Supreme Court’s Promotion of Three-Branch Interpretation}

The role played by nonjudicial interpretations in the shaping of constitutional law tells only part of the story. \textit{Constitutional Dialogues} also

\begin{enumerate}
\item See generally L. Tribe, \textit{American Constitutional Law} § 15-10 (2d ed. 1988) (surveying governmental regulation of a person’s decision about procreation).
\item P. 274.
\item P. 274.
\item Mikva, \textit{supra} note 37, at 587; see also Brest, \textit{supra} note 37, at 82-101 (concluding that Congress has no tradition of constitutional deliberation and no procedures for routinely reviewing the constitutionality of legislation).
\item Fisher, \textit{supra} note 37. This article considers both institutional competence and actual performance. See id. at 717-43.
\end{enumerate}
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acknowledges that Supreme Court rulings play a fundamental role in three-branch interpretation. Fisher's text reflects the importance of the Supreme Court's role in sections concerning fourth and fifth amendment rights, threshold requirements, Younger abstention, and Congress's power to enforce the reconstruction amendments. In each of these areas, Fisher shows that the Court polices itself when deciding issues of concern to the elected branches and the states. For the most part, these analyses do not implicate substantive doctrine. Fisher focuses instead on jurisdictional authority.56

One could extend this analysis, for these concerns pervade all constitutional decision making. Judicial review, threshold requirements, commerce, separation of powers, due process, and equality all fundamentally concern the existence and scope of federal judicial authority as it relates to the prerogatives of the elected branches and the states.

Consider the equality guarantee. Traditional equal protection review of social and economic legislation preserves legislative supremacy. Williams v. Lee Optical Co.57 and Railway Express Agency v. New York58 reveal the Court's willingness to impute legitimating rationales to seemingly arbitrary classifications. Minnesota v. Clover Leaf Creamery Co.59 and United States Railroad Retirement Board v. Fritz60 emphasize that the Court will overlook incorrect legislative fact-finding and suspect legislative purposes provided the legislature's stated rationale is legitimate. Discussion of these cases raises—in Judge Posner's words—the question of whether "[t]he real 'justification' for most legislation is simply that it is the product of the constitutionally created political process of our society."61


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56. Congressional enforcement of the Civil War amendments and fourth and fifth amendment rights are substantive concerns. Fisher's treatment of these matters, however, emphasizes procedural aspects. With respect to civil rights enforcement, Fisher's principle concern is the Supreme Court's recognition that "[f]actfinding [in this area] was a legislative, not a judicial responsibility." P. 270. On fourth and fifth amendment matters, Fisher seeks to demonstrate the truth of Henry Monaghan's assertion that "what appears to be constitutional interpretation by the courts is sometimes 'a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.'" P. 269 (quoting Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2-3 (1975)).

60. 449 U.S. 166 (1980).
Living Center\textsuperscript{63} show the Court's reluctance over the past decade to extend the list of suspect classifications. An underlying concern of these decisions—especially in light of the Court's willingness to contort rational basis review in egregious cases\textsuperscript{64}—is the preservation of legislative prerogatives. The Court's treatment of racial and sexual discrimination allegations, to which heightened scrutiny applies, is equally striking. The predominant discriminatory motive requirement\textsuperscript{65} and the difficulty of making such a showing\textsuperscript{66} reveal a strong preference for upholding legislative judgments.

Finally, the power of Congress and the states to remedy discrimination shows the Court's desire to validate legislative action. Cases interpreting section 5 of the fourteenth amendment consider Congress's power and capacity supreme. As the Court stated in \textit{Fullilove v. Klutznick}, \textsuperscript{67} "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Affirmative action cases such as \textit{Wygant v. Jackson Board of Education}\textsuperscript{68} recognize that the state may voluntarily remedy discrimination without garnering evidence comparable to that which a court would need to order race-conscious action.

Equality jurisprudence reveals how substantive doctrine can further an understanding of the role played by the elected branches and the states in constitutional doctrine. Greater recognition of the concerns underlying the Court's support of legislative preferences would have strengthened Fisher's arguments. At the same time, Fisher's basic criticism remains true. The role played by other parts of government in constitutional interpretation cannot be understood solely through case law.

\textsuperscript{63} 473 U.S. 432 (1985).

\textsuperscript{64} In \textit{Cleburne Living Center}, for example, the Court, after holding that the mentally retarded are not a suspect class, closely scrutinized a zoning ordinance that adversely affected the mentally retarded. \textit{See id.} at 453-68 (Marshall, J., concurring) (demonstrating the Court's misapplication of the rational basis standard).

\textsuperscript{65} \textit{See Washington v. Davis}, 426 U.S. 229, 239-40 (1976) (upholding police screening test under equal protection challenge because of employer's lack of intent to discriminate despite test's disproportionate racial impact).

\textsuperscript{66} \textit{See McCleskey v. Kemp}, 107 S. Ct. 1756, 1763-70 (1987) (rejecting petitioner's argument that study showing black defendants sentenced to death with greater frequency than white defendants proved discriminatory motive); \textit{Personnel Adm'r v. Feeny}, 442 U.S. 256, 257-80 (1979) (holding that state hiring preference for veterans was not intentionally discriminatory against women even though 98% of veterans were men).

\textsuperscript{67} 448 U.S. 448, 483 (1980).

V. Conclusion

Constitutional Dialogues makes a convincing argument for the inclusion of non-case materials in the basic constitutional law class. Nonjudicial interpretation and influence on interpretation are simply too important to be excluded. Constitutional law casebooks, however, pay scant attention to three-branch interpretation. Bemoaning this shortsightedness, Fisher argues that "there is no comprehensive course on constitutional law in any meaningful sense in American law schools." 69

Fisher is quite correct that "[a] purely technical approach to the law misses the constant, creative interplay between the judiciary and the political system." 71 Limiting a course to a handful of substantive areas such as judicial review, separation of powers, equality, and speech does not permit a systematic study of the workings of the Court as an institution. Although a professor can combat this limitation by considering either a decision's social context or the relationship between doctrinal inconsistencies and social realities, one can extend a course only so far beyond case moorings.

More significantly, Fisher perceives that law professors' geocentric understandings of the Constitution will yield an inaccurate portrayal of constitutional decision making. Although law professors might do a better job than Fisher suspects, the case method does not promote Fisher's view of three-branch interpretation.

Professors should not limit courses in constitutional law and other subjects to cases and related doctrinal commentary. Other disciplines can contribute substantially to legal education. As Douglas Laycock recently observed, "if history, political theory, economics, literary criticism, or Mayan glyphs are important to a course, we need not be limited to the information we can tuck into notes on the cases." 72 For Laycock, replacing substantial case materials with expository text on related subjects would accommodate this concern. 73 This methodology would enable students to study both cases and related activities of the elected branches. Granted, doctrinal headings would still define the exploration, but such an approach would allay Fisher's basic concerns. Whether this approach would work well in law students' first year, when the develop-
ment of case-analysis skills is crucial, is another question. Yet legal educators can and should take some steps in this direction.\textsuperscript{74}

The simple truth, as Fisher puts it, is that "[c]ourt decisions are entitled to respect, not adoration."\textsuperscript{75} \textit{Constitutional Dialogues}' forthright presentation of nonjudicial influences and interpretations lays an excellent groundwork for expanding our understanding of constitutional interpretations. It is an excellent primer for those involved in constitutional dialogues—namely, everyone.

\textsuperscript{74} At the least, professors can use selections from works such as \textit{Constitutional Dialogues} to supplement the judicial authority unit of the basic constitutional law class. I have done this, and—as best I can tell—my students appreciate Fisher's broadening perspective.

\textsuperscript{75} P. 279.
What Appeals to the Court


Reviewed by Alvin B. Rubin*

Moot court judges grade advocates. Court of appeals judges decide cases. The difference is vast. As Lawrence M. Friedman wrote, “There are many brilliant lawyers who argue magnificently in front of the Supreme Court. They mostly lose. The Justices are stubborn and intelligent.”

Experienced judges and lawyers know, however, that the skill of an advocate sometimes does determine a decision. In order to have even a chance to influence a court, an advocate must first follow the rules of appellate jurisdiction and practice. Only then can forensic skill play its part. The utility of a book by an experienced appellate advocate that not only details the procedure to be followed but also instructs on effective presentation is therefore obvious.

Many lawyers view appellate advocacy as their clients do. When preparing a brief, belying its name, they write a lengthy exegesis, finally abridging it to meet the fifty-page maximum limit. Their oral argument is courtroom oratory better adapted to the ears of a jury. Professor Michael Tigar instructs just as Piero Calamandrei observes in his Eulogy of Judges:

What constitutes a great lawyer? He is a man who helps the judge reach a just decision and helps his client present his case.

Such a lawyer speaks no more than is necessary; he writes clearly and to the point; he does not encumber the courtroom with his personality. He does not bore the judges with his prolixity nor raise their suspicions with his subtlety. For all practical purposes, then, he is the opposite of that type whom many laymen consider the great lawyer.²

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‡ Hereinafter cited by page, section, or chapter number only.
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1. Friedman, Justices in Black and White, N.Y. Times, June 24, 1984, § 7 (Book Review Section), at 18, col. 1 (reviewing L. Baker, Brandeis and Frankfurter: A Dual Biography (1984)).
Tigar gained most of his appellate experience before becoming a full-time law professor, but he has continued to brief and argue cases during his teaching career. In most of his cases, a federal court appoints him to serve as counsel pro bono. Tigar uses some of these cases as grist for a seminar on federal appellate advocacy, and his law students assist in preparing the cases. He takes on other cases as retained counsel. *Federal Appeals: Jurisdiction and Practice* is a distillation of what Tigar has learned in two decades of appellate advocacy.

Other lawyers have treated us in recent years to a spate of similar volumes. Professor Tigar’s contribution is not only the latest but also one of the most useful for the lawyer who takes or defends an appeal in a federal court of appeals.

Although the opening chapter of Tigar’s book deals with “The Art, Science, and Tactics of Appellate Advocacy,” he devotes most of the remaining text to reviewing appellate court rules and providing how-to-do-it instruction. He discusses with accuracy and clarity appealable orders, extraordinary writs, where to appeal, whether to take an appeal, and proceedings in district court, tax court, and before agencies. Tigar then reviews the handling of the record in the court of appeals, motion practice, the various briefs, oral argument, the courts’ decisional process, and finally, rehearings.

Much of this discussion is elementary but, like other fundamentals, indispensable. Specialists in appellate advocacy are rare. Of the relatively few lawyers who ever appear in a federal appeals court, only a small percentage handle even one appellate case a year. A very few, most of them assistant U.S. attorneys, appear more frequently. No one can be expert in the details of something done only occasionally. A guidebook is therefore invaluable not only to the beginner, but also to those with limited appellate experience.

Tigar’s chapter on writing briefs includes hints about organizing its text, using a notebook to assemble material (“the notebook theory,” as he calls it), and using a word processor. These suggestions are useful, for they are practical. The ultimate test, however, is the quality of the prod-

5. Chs. 7-11.
6. Ch. 9.
Appeals

uct in a lawyer's attempt to fashion an argument that will lead a court to the result the advocate seeks.

Tigar writes, "[A]n appellate brief is often a win or lose document." It therefore may seem to some readers that Tigar stresses the brief too much. Not so. The importance of an effective, well-prepared brief cannot be overemphasized. As Tigar notes, judges read the briefs before they hear counsel; indeed, almost every federal appellate judge does so conscientiously, for a judge's lack of preparation quickly becomes evident to the other members of a panel, if not to counsel. Those few judges who have not turned the pages of the briefs will have bench memos from law clerks, who will have read them. It is inevitable, therefore, that prior to oral argument the judges will have formed some impression about the merits of the appeal and the cogency of the arguments, even though most judges maintain open minds on the final result. Furthermore, a few days or months after oral argument, when judges begin to prepare opinions, most turn once again to the briefs. As Justice Thurgood Marshall wrote:

Regardless of the panel you get, the questions you get, or the answers you give, I maintain it is the brief that does the final job, if for no other reason than that opinions are often written several weeks and sometimes months after argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers the judge has only the briefs and the law books. At that time your brief is your only spokesman.

Rule 28 of the Federal Rules of Appellate Procedure requires a lawyer to begin his brief with a table of contents followed by a statement of the issues presented for review. The latter should give the court a clear and self-explanatory resume of the issues raised on appeal. Instead, as Tigar notes, "[T]oo many brief writers fall into one of two errors: (1) they reproduce the headings from the body of the brief; or (2) they state the issue in terms so general as to be useless." Others make a third and equally common error: they state the issue so narrowly that its meaning is obscure to anyone who is not already familiar with the case. I therefore have often read an appellant's statement of the issues without having any clear idea of what the real issues are or how they arose. A statement of issues should tell the court exactly what the appeal is about. The question "Did the trial court err in holding that the 180-day period for filing a Title VII suit is not subject to waiver or estoppel?" tells me

7. P. 224.
10. Fed. R. App. P. 28; see also sec. 9.08 (arguing that advocates should write very specific statements of issues presented).
11. P. 239.
exactly what the issue is. "Did the trial court err in its instruction on the elements of the crime of using the mails to defraud?" does not. The latter question does not tell me what the court charged or why that charge allegedly was deficient.

Next comes a "statement of the case," including a "statement of the facts relevant to the issues presented for review." As my late colleague Albert Tate, Jr. once wrote, "The statement of facts is regarded by many advocates and judges as the most important part of the brief." Tigar correctly notes that the statement of the case is the "most difficult part of the brief to craft," and, in my experience, the statement of facts is also the weakest part of most briefs. The factual account should be narrative and in chronological order, with ample citations to the parts of the record that support the account. As Tigar notes, "The statement must be coherent, in the sense that the narrative flows from beginning to end." He further emphasizes that "the advocate must seek the thematic unity and clarity that characterize a good opening statement." It must be "both accurate and filled with helpful citations to the record." With all of this I agree, and add that the statement of facts should distinguish clearly what is undisputed from what is contradicted. It should not be a partisan view of what the evidence might mean if construed wholly favorably in every respect to the counsel's position.

The good advocate will ask a nonlawyer spouse or friend to read not only the statement of issues and the statement of the case but also the entire brief to see if it is clear and comprehensible. If an intelligent nonlawyer does not understand the issues, a sentence in the brief, or the significance of an argument, a judge likewise may fail to comprehend.

In discussing brief writing and the preparation of an appendix or record excerpts, Tigar states that before oral argument, the full record is "available to the judges and their law clerks. Few judges take the time to read it, and most do not even have their law clerks do so . . . ." I emphasize that judges and law clerks rarely take the time to read the record before oral argument. The record is filed in the clerk of court's office. After argument, as Tigar points out, the opinion is assigned to a judge. The clerk of court sends the record to that judge's chambers. Af-
ter the judge prepares a proposed opinion, the other panel members usually read only that opinion. If they agree with the proposed opinion, they concur. A panel member will ordinarily ask the writing judge to send the record to her chambers only if, after reading the draft, she has a different view of what the record may contain and how the case should be decided. The moral, of course, is that the briefs and record summary must tell the judges all that counsel wishes them to know before they hear oral argument and before they reach at least a tentative decision.

Tigar’s discussion of the next step, preparing for oral argument, 19 is particularly helpful. Although he states that “the final step [in preparation] is to practice the argument,” 20 I would stress further that rehearsal is indispensable and ought to be universal. The best rehearsal is before a panel of three lawyers who have read the briefs and who can serve as a moot court. John P. Frank, a distinguished advocate, 21 once told me that his firm presents no case to any appellate court, state or federal, until it has been thus argued in the office. “Is that time donated?” I asked. “Of course not,” he answered. “It’s billed to the client. That’s just as important as time spent writing the brief.” “What,” I inquired, “about pro bono cases?” He replied, “We do the same thing, because it’s an integral part of any preparation.”

The lawyer who does not have three fellow lawyers who will participate will find it almost as valuable to argue before a spouse or a friend. It is useful in either event to record the practice argument with a video-camera and review it.

Although Tigar apparently intended his work to be a basic guide rather than a commentary, I would have welcomed a broader examination of the federal appellate process containing more analysis, commentary, and criticism. The rules about what constitutes an appealable order create a continuing problem, and uncertainty about when a litigant may take an appeal causes repeated litigation and unnecessary expense. 22 The rule about the time within which a party must file an appeal is apparently clear, but it may create a trap for counsel. 23 I would welcome sugges-

19. Ch. 10.
21. Mr. Frank served as a law clerk to Justice Hugo Black and taught at Yale Law School. For more than 30 years, he has practiced in Phoenix, Arizona, as a partner in a major law firm. He is a member of the Council of the American Law Institute and has been active in the American Bar Association.
23. See, e.g., Alcom Elec. Exch., Inc. v. Burgess, 849 F.2d 964, 966 (5th Cir. 1988) (involving counsel who filed notice of appeal before a final issue was resolved and failed to file further notice); Harcon Barge, Inc. v. D & G Boat Rentals, 784 F.2d 665, 667 (5th Cir. 1986) (en banc) (involving counsel who failed to file further notice of appeal after opposing party moved to amend judgment).
tions for changes in the statutes, rules, and decisions on these and other problematic subjects.

A supplement, containing citations to later decisions and amplifying comments in the book, is already being prepared. Even in the matter of appellate procedure, developments come apace. The careful advocate will not only read the supplement but will continue research to discover even later decisions.

I have mentioned some areas in which Tigar's excellent book might have been even better. My final measure of it, however, is this: I wish that every lawyer who ever expects to participate in an appeal to the Fifth Circuit would read a copy and then, when the time comes to prepare for an appeal, would reread it and use it as a guide. The lawyer would benefit by reducing the possibility of harmful error or embarrassment and by enhancing his chances of success. And we judges also would benefit, for the better the advocates, the easier the judges' task and the better the resulting opinion. Good advocates help judges to make better decisions.