

☆ EXEMPLARY LEGAL WRITING 2015 ☆

• BOOKS •

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(SEE ALSO PAGES __, __, __, __, __, __, __, __, __)

EXEMPLARY LAW BOOKS OF 2015

FIVE RECOMMENDATIONS



Lee Epstein[†]

Stephen Breyer,
The Court and the World
(Knopf 2015)

Justice Breyer’s latest isn’t on my list because I’m fascinated by normative debates over the use of foreign materials in domestic constitutional law decisions. To the contrary. As with most debates over methods, these are too narrow or ideological for my taste. *The Court and the World* is here because it’s neither. Breyer’s chief point is that cases before his Court increasingly raise questions that, like it or not, force the Justices to confront “foreign realities.” Sometimes this is obvious (think national security), sometime it’s less so (commerce, the environment, jurisdiction) but either way Breyer suggests that plausible answers can come from looking across time, space, and place. Social scientists have been arguing as much for decades now, and judges will — must(?) — follow suit as

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they confront what is, according to Garoupa and Ginsburg (see below), a truism: “globalization has increased cross-border transactions and interaction” — the law not excepted.

Nuno Garoupa and Tom Ginsburg,
Judicial Reputation: A Comparative Theory
 (University of Chicago Press 2015)

Among political scientists who study judicial behavior, there has been little debate about “the” driver of judges’ choices: it’s ideology, stupid. As more scholars from law and the social sciences have entered the field that view is changing. Ideology continues to play a role in many accounts (see below, *Policy Making in an Independent Judiciary*) but scholars have posited other goals, motives, and preferences. Garoupa and Ginsburg bring reputation to the fore in several interesting — and non-obvious — ways. I’m especially taken with their discussion of the globalization of reputation. Although some judges think they can burnish their reputation by resisting legal developments elsewhere, they may be in the minority. The increasingly global implications of many cases have paved the way for something of a competition among judges and their “teams” for world-wide influence on law. Advancing in this game may require competitors to hone their reputations in some of the very ways that Breyer discusses, whether hobnobbing at conferences, teaching abroad, or citing or at least considering developments elsewhere.

Gunnar Grendstad, William R. Shaffer, and Eric Waltenburg,
Policy Making in an Independent Judiciary: The Norwegian Supreme Court
 (ECPR Press 2015)

Written by three political scientists, this is likely the first comprehensive, rigorous, dispassionate large-*n* study of the Norwegian Supreme Court (and, arguably, of any European high court). Among the many interesting findings, it turns out that who serves on the Court matters: Justices appointed by a social democratic government are more likely to side with parties claiming a public economic interest and those with a law degree from the University of Oslo, and so with social connections in the nation’s capitol, tend to vote with the government in civil cases. Had Grendstad et al., reached these conclusions about the U.S. Supreme Court, no one would have batted an eye. But the book caused a bit of a stir in Norway perhaps because legalistic thinking about the enterprise of judging is still pervasive in Europe. To the extent that realistic accounts of judicial behavior developed for U.S. judges can be adapted elsewhere, the jig maybe up. But we still need more evidence, and this book shows how to develop it for apex courts in Europe and beyond.

Richard A. Posner,
Divergent Paths: The Academy and the Judiciary
 (Harvard University Press 2016)

Judge Posner's latest is an entreaty to the legal academy: The judiciary needs your help! But to provide it, you should make some changes — in who you hire, in how they teach, and in what they research. This is the short of it but even this may be saying too much. As Paul Horwitz wrote, “reducing *Divergent Paths* to a dry précis gives no sense of the genuine intellectual treasures to be found in it.” Horwitz is exactly right. Even if you don't find Posner's plea especially compelling (I do), *Divergent Paths* is still worth reading for Posner's iconic, sometimes irreverent take on legal education and judging, from the “fetishism of words” in judicial opinions (“a superfluity of legal jargon, numbing detail, overstatement, superfluous footnotes, throat clearing, repetition . . .”), to the *Bluebook* (which should be “banished”), to courses on statutory interpretation (“I doubt [their] need. Interpretation is a natural human activity.”).

Michael A. Zilis,
*The Limits of Legitimacy: Dissenting Opinions, Media Coverage,
 and Public Responses to Supreme Court Decisions*
 (University of Michigan Press 2015)

Several interesting books on dissent have appeared in the last few years, though Urofsky's *Dissent and the Supreme Court* received the lions' share of attention. This is justifiable — it's a great book — but so is Zilis's. Plus they're related. Urofsky is interested in how dissents become part of the “constitutional dialogue” down the road; Zilis wants to know how they influence public dialogue and reactions in the here and now. Recognizing that most Americans don't read judicial opinions, Zilis's focus is on how journalists frame them. Using data drawn from case studies, experiments, and surveys, he shows that the media cites dissents — especially those with colorful or dramatic language — to highlight controversy. And when reporters “eschew[] deference for controversy,” as histrionic dissents can lead them to do, their stories depress public support for the Court's decisions. This finding is compatible with Urofsky's historical analysis of the occasional importance of dissents; it also fits with a growing social science literature showing a decline in Americans' support for the Court when they think it's a political and not legal body.