

EXEMPLARY LEGAL WRITING 2016

• BOOKS •

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FIVE RECOMMENDATIONS



Lee Epstein[†]

Michael J. Graetz & Linda Greenhouse
The Burger Court and the Rise of Judicial Right
(Simon & Schuster 2016)

Toward the end of the Burger Court years, Justice Lewis Powell declared, “There has been no conservative counterrevolution” in his Court — and commentators seem to agree. The tamely titled *The Burger Court: The Counter-Revolution that Wasn’t* is the most prominent volume about the era. Not so fast, say Graetz and Greenhouse. True, the Burger Court didn’t overrule *Miranda* and *Mapp*; it only eviscerated them. And true, the Burger Court established the fundamental right to abortion — but then allowed the government to place many burdens on it. Along the way, the Burger justices paved the wave for *Citizens United* in *First National Bank of Boston v. Bellotti*, protected commercial speech, required proof of an actual pur-

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pose to discriminate, rewind Warren Court decisions favoring unions against business, and on and on. The counter-revolution that wasn't, well, was. Even if you aren't convinced by Graetz and Greenhouse's thesis, *The Burger Court* is a great read: all the (well-told) behind-the-scenes stories, and all the reminders of things past — including a Court whose key players didn't all come from the federal appellate bench or receive law degrees from Harvard or Yale but did serve in the military, win political elections, play professional sports, and even “flirt” with journalism.

Nancy Maveety
Picking Judges
(Transaction Publishers 2016)

Speaking of Linda Greenhouse: Five years ago she contributed an excellent volume on the U.S. Supreme Court to Oxford's *Very Short Introduction* series (not just short but very small too!: 7x4); I recommend it regularly. Maveety's book is in the same vein. It too is concise; and it too is a book I'll recommend. But not because I like how the press framed it: as a “presidential briefing book” designed to offer strategic advice to presidents confronted with obstructionist senators. That's a little hokey. The book's strength rather lies in Maveety's ability to boil down and analyze the vast literature on the appointment of federal judges. Well showing off that skill is Chapter 1, where Maveety charts the history of appointments, delineating various mileposts along the way. Those who think “the confirmation mess” started with Bork will be surprised to learn of the truly vicious battles of earlier eras; and those who treat Bork as the culmination of a trend long in the making are also in for some surprises — notably the huge structural break his nomination caused.

Ryan C. Black, Ryan J. Owens,
Justin Wedeking & Patrick C. Wohlfarth
U.S. Supreme Court Opinions and their Audiences
(Cambridge University Press 2016)

To many legal academics, political scientists are simpletons. We reduce vast swaths of law to little more than dichotomies: the court affirmed or reversed, the judge voted in the liberal or conservative direction, the business party won or lost, and on and on. I plead guilty as charged. But the authors of this book: not so much. Rather than focus on the usual bottom line of opinions, they study opinion content. The central idea is that Supreme Court justices write more (or less) clear opinions to boost support

for their decisions. Not all lawyers will like Black et al.'s approach and measures, but most will appreciate their effort to take a systematic look at the Court's major work products. As for my colleagues in political science: *U.S. Supreme Court Opinions* is a great start; it's just the kind of original thinking our corner of the discipline so desperately needs.

Susan B. Haire & Laura P. Moyer
*Diversity Matters: Judicial Policy Making
in the U.S. Court of Appeals*
(University of Virginia Press 2016)

Yet another exception to the political-scientists-as-simpletons rule — though not in the first few chapters. There the material is kinda standard fare in my field: Are black judges more likely to find for plaintiffs in cases of race-based employment discrimination, and are female judges more plaintiff-friendly in gender discrimination litigation? (Yes and yes.) But from there the book lives up to its title, taking some interesting turns. We learn that opinions written by female judges are more likely to seek a “middle ground” and that the more diverse the panel, the more thorough the deliberative process. There are circuit effects too — for example, the larger the fraction of female judges, the lower the dissent rate (perhaps reflecting their taste for middle ground). Some of the findings seem predictable; some unexpected. Either way, *Diversity Matters* pushes us to think beyond the simple vote dichotomies that have long ruled empirical work in this field.

Yuhua Wang
Tying the Autocrat's Hands
(Cambridge University Press 2016)

I believe in the power of graphs, and the one on page 2 is a good example of why. On the horizontal axis is a measure of the degree of democracy in 157 countries; the vertical axis shows rule-of-law scores for each country. If you can visualize that, you'd probably think that the relationship between the two is linear: the higher the level of democracy, the stronger the rule of law. You'd be wrong. Yes, the rule of law tends to be stronger in democracies but in some authoritarian regimes it's strong too and in others, weaker. In other words, this simple graph raises great questions: Why do some authoritarian leaders advance the rule of law, and how do they do it without losing power? Focusing on China (though with implications for many authoritarian regimes), Wang's answer centers on the interest of rulers in “tying their hands” in the commercial context. Somewhere the late great

Doug North and the noted political scientist Barry Weingast are smiling. Drawing on evidence from 17th century England, they made a version of this argument years ago. It's apparently held up quite well.