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Book Review

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brand owners and consumers, as well as how to prevent, detect, and prosecute gray market activity.

Well-organized and user-friendly, the book comprises five parts:

- 1) Introduction: The Gray Market
- 2) Prevention: Reducing the Gray Market Potential
- 3) Detection: Monitoring the Supply Chain
- 4) Reaction: Legal Strategies After Gray Market Discovery.

Part 1 offers an insightful view into the gray market with a clear explanation of its many nuances, including the harm gray market goods cause to brand owners, consumers, and governments. As he does throughout the book, Sugden effectively uses case law to demonstrate the many problems gray market goods pose for consumers and brand owners, including the disruption of a brand owner's supply chain, the loss of brand value and goodwill, health risks to consumers, and loss of tax revenues by local governments. His thoughtful analysis demonstrates an in-depth understanding of the importance of the relationship between a brand owner and its distribution channels and the far-reaching social and economic consequences of the disruption of that relationship by gray market goods. This includes the inability of a brand owner to recoup its research and development costs, lost jobs, increased warranty and service costs, loss of consumer good will, and loss of revenues for both the brand owner and its distributors and re-sellers.

Sugden devotes Parts 2 and 3 to a practical discussion of supply chain management, namely the prevention and detection of gray market goods. Sugden offers brand owners clear advice on troubleshooting supply chain vulnerabilities through education, selecting partners, implementing security procedures, and detecting gray market activity through a number of monitoring techniques and audits. Lawyers will benefit from his contract-drafting tips. The importance of anti-gray market provisions in distribution agreements is reinforced in Chapter 13, in which breach of contract is discussed as a theory of recovery in matters dealing with gray market goods.

In Part 4, Sugden provides an exhaustive treatment of gray market goods in the context of litigation. Topics include: litigation alternatives, such as the International Trade Commission; arbitration; preliminary remedies; e-discovery; theories of recovery and

liability; state gray market statutes; and approaches to gray market goods in jurisdictions outside the United States. Both litigators and transactional attorneys will appreciate the use of case law to aptly demonstrate the fact- and circuit-sensitive nature of these theories when applied in a gray market scenario.

Gray Markets is an invaluable resource for brand owners and their attorneys—and it will be for years to come. It provides readers a clear explanation of the effects of gray market goods on the global marketplace, and serves as a terrific reference when dealing with day-to-day supply chain management or evaluating a venue or theory of recovery in a gray market case.

Losing Twice: Harms of Indifference in the Supreme Court

by Emily M. Calhoun

192 pp.; \$39.95

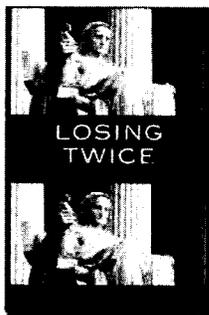
Oxford University Press, Inc., 2011

198 Madison Ave., New York, NY 10016

(800) 445-9714; www.oup.com

Reviewed by Derek Kiernan-Johnson

Derek Kiernan-Johnson is a legal writing professor at the University of Colorado in Boulder. He teaches legal writing, appellate advocacy, and judicial-opinion writing—(303) 492-5863, derek.kiernan-johnson@colorado.edu.



In *Losing Twice*, University of Colorado Law School Professor Emily Calhoun argues that the way judicial opinions are written can cause losing stakeholders to suffer additional, unnecessary harms. Given the topic, the book will be of interest to judges and others who write judicial opinions; however Professor Calhoun's intended audience is "ordinary citizens."

Calhoun's thesis is non-ideological. Debates about originalism, minimalism, and activism are refreshingly absent from her book. Instead, *Losing Twice* focuses on people—most narrowly the non-prevailing parties in Supreme Court constitutional-rights disputes, and broadly, an array of stakeholders affected negatively by court decisions. These stakeholders come to the court in good faith, with much at stake, making the judicial choice to rule against them "essentially [a] tragic choice."

Judicial opinions can be written in a way that honors losing stakeholders' status as citizens or that demeans them; that acknowledges their continuing role in constitutional democracy or that shuts them out; or that respectfully articulates their views on an issue or that trivializes those views. For Calhoun, properly honoring losing parties and positions in judicial opinions is more than just a nice thing for judges to do. Opinions that demean losing litigants, that ignore them (willfully or inadvertently), or that hide behind hyper-technical rationality or "the doctrine made me do it" rhetoric create real harms, not only to the immediate parties but also to judicial legitimacy and democracy.

Calhoun offers the judicial opinions for two abortion cases, *Roe v. Wade* and *Gonzales v. Carhart*, as examples of opinions causing

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harm. Although the outcome in the first case is viewed as a pro-choice victory and the outcome in the second a pro-life one, Calhoun argues that both opinions show an indifference to the constitutional stature and autonomy of women.

Held up as an example of a well-written opinion is retired Denver Judge Jeffrey Bayless's opinion in *Romer v. Evans*. According to Calhoun, Judge Bayless carefully laid out the arguments of each side and made a "special effort to address all citizen stakeholders," not just those identified in the parties' briefs. Judge Bayless also acknowledged the difficulty and impermanence of his decision and "put himself and his judgments about the legitimacy of the decision at the mercy of his audience."

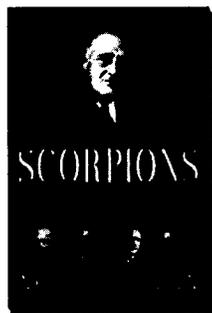
Calhoun's claims are not beyond critique. Given how seldom lawyers—let alone "ordinary citizens"—actually read judicial opinions (something Calhoun seems to acknowledge in her discussion of *Roe*), the composition of opinions may have little effect on our public knowledge of their meaning, or on how their language is paraphrased and summarized by the media or by other instant and historical intermediaries. Nevertheless, judges, lawyers, and armchair Supreme Court enthusiasts will find *Losing Twice* to be a thought-provoking read that sheds new light on famous constitutional law decisions and that may inform their own written expression.

Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices

by Noah Feldman
513 pp.; \$30
Twelve Hachette Book Group, 2010
237 Park Ave., New York, NY 10017
(800) 759-0190; www.hachettebookgroup.com

Reviewed by Richard C. Nehls

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In his book *Scorpions*, Harvard Law School Professor Noah Feldman enhances our understanding of how the U.S. Constitution is interpreted through a discussion of the lives and reasoning of four great justices at a turning point in the Supreme Court's and America's history. Justices Hugo Black, Felix Frankfurter, Robert Jackson, and William Douglas each developed and advocated his own philosophy of constitutional interpretation and, amaz-

ingly, those four philosophies remain dominant to this day. Lawyers and nonlawyers, especially American history buffs and those interested in the philosophy of law, will enjoy revisiting the events, issues, and reasoning of these four justices.

The first third of the book is a collective biography of the four justices up to the time President Franklin D. Roosevelt appointed them. The four justices had a number of things in common, the most important of which were their alliances with Roosevelt and their steadfast belief that the New Deal laws should be found con-

stitutional. None had substantial judicial experience before his appointment and, in contrast to the aristocratic Roosevelt, all came from humble beginnings. In addition, they were all extremely ambitious, even after their appointments to the Supreme Court. Nevertheless, they had diverse backgrounds.

Felix Frankfurter emigrated from Austria at age 12 and grew up in the Jewish ghetto in New York City. After graduating at the top of his class at Harvard Law School, he worked for the Taft and Wilson administrations and, thereafter, returned to Harvard as a law professor. His protégés from Harvard populated Roosevelt's inner circle, and Roosevelt frequently consulted with Frankfurter, even after Frankfurter's appointment to the Supreme Court.

Raised in rural Alabama, Hugo Black did not graduate from high school but studied for two years at the University of Alabama School of Law, which did not require a degree for entrance. He practiced trial law for twenty years in Birmingham. In 1923, he joined the Ku Klux Klan and, with its support, won a U.S. Senate seat in 1926. Black earned a reputation as a liberal populist largely by exposing the wrongdoing of the richest and most powerful men of the day through his aggressive use of the Senate's investigative powers.

Robert Jackson grew up in small town Frewsburg, New York. Unable to afford an undergraduate education, much less law school, he apprenticed with a lawyer in Jamestown, New York, but later attended Albany Law School for one year. He started his law career trying small cases before justices of the peace and eventually attained prominence in the local and national legal communities. In 1934, he joined the Roosevelt administration and rose through

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