



# THE GREEN BAG

AN ENTERTAINING JOURNAL OF LAW

---

SECOND SERIES • VOLUME 15, NUMBER 3 • SPRING 2012

---

ESTABLISHED 1889 • RE-ESTABLISHED 1997

---

*The New Republic* has posted an interesting essay by Richard Posner criticizing Justice Scalia's opinion in *DC v. Heller*. According to Posner, *Heller* "is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology." . . . Posner is ridiculously wrong, of course: The fundamental truth of constitutional law is that Justices who agree with me are divining the true Constitution, while the rest are political hacks twisting the document to suit their policy preferences. Thus, my side is always principled.

Orin Kerr

*Posner on Heller: Is It All Politics?,  
Volkh Conspiracy, [www.volkh.com](http://www.volkh.com),  
August 13, 2008 (with tongue in  
cheek, obviously)*

# THE GREEN BAG

AN ENTERTAINING JOURNAL OF LAW

---

Ross E. Davies  
*Editor-in-Chief*

David M. Gossett  
*Executive Editor*

*Senior Editor*

Gregory F. Jacob

*Contributing Editors*

Susan M. Davies

Curtis E. Gannon

Anna Ivey

Thomas B. Nachbar


*Board of Advisers*

Robert C. Berring  
A. Morgan Cloud  
Richard A. Epstein  
Samuel Estreicher  
Leonard Garment  
Suzanne Garment

Bryan A. Garner  
Mary Ann Glendon  
R.H. Helmholz  
Philip B. Heymann  
Dennis J. Hutchinson

Montgomery N. Kosma  
Henry P. Monaghan  
James M. Rosenbaum  
Suzanna Sherry  
Kate Stith  
William Van Alstyne

---

Copyright © 2012 by The Green Bag, Inc., except where otherwise indicated and for original U.S. governmental works. ISSN 1095-5216. "The Green Bag" and the  are our registered trademarks. Thanks to Mayer Brown LLP.

**SUBSCRIPTIONS.** Subscribe at [www.greenbag.org](http://www.greenbag.org) or use the form at the back of this issue. Call (800) 828-7571 for back issues. Claims must be filed at [subscriptions@greenbag.org](mailto:subscriptions@greenbag.org) by 11/21/12. A subscription to the *Green Bag* buys you one copy of each issue of the journal for the duration of your order. Everything else we make is either a gift we may or may not bestow on some of our subscribers and other people and institutions or a product that must be acquired separately.

**EDITORIAL POLICY.** We publish authors' ideas in their own words. We fix typos and mistakes and make minor changes to produce an attractive, grammatical, readable journal.

**AUTHOR NOTES.** Gratitude to RAs is nice. Colleagues who make major contributions should share the byline. Recognize those who help in small ways with something printed by Hallmark, not the *Bag*.

**SUBMISSIONS.** Send them to [editors@greenbag.org](mailto:editors@greenbag.org). We welcome anything interesting, law-related, well-written, and short (no more than 5,000 words, including no more than 50 footnotes).

**DEALING WITH AUTHORITY.** Citations should be accurate and unobtrusive. Authors may use any form they like. We edit only to keep footnotes from looking like goulash.

**COPYRIGHT.** If a copyright notice appears in an author note, get permission to copy from the holder. We hold all other copyrights. You may copy for classroom use items to which the *Green Bag* holds the copyright if you: (1) distribute them at or below the cost of reproduction; (2) identify the author and the *Green Bag*; (3) affix a proper copyright notice to each copy; and (4) tell us. All other copying requires advance written permission.

**CORRESPONDENCE.** Please write to The Green Bag, Inc., 6600 Barnaby Street NW, Washington, DC 20015, visit [www.greenbag.org](http://www.greenbag.org), or email [editors@greenbag.org](mailto:editors@greenbag.org).

# CONTENTS

---

SECOND SERIES • VOLUME 15, NUMBER 3 • SPRING 2012

---

## EX ANTE

<i>Our Mistakes</i> .....	233
<i>The Best and the Bobbliest: Robert C. Berring</i> .....	234

## TO THE BAG

James J. Duane .....	235
<i>Heading in the Right Direction</i>	
George A. Heitczman .....	237
<i>Vested Interest</i>	
George W. Liebmann .....	238
<i>The Brandeis Brief, Revisited</i>	

## ARTICLES

Curtis E.A. Karnow .....	243
<i>Similarity in Legal Analysis &amp; the Post-Literate Blitz</i>	
Pierre N. Leval .....	257
<i>Remarks on Henry Friendly on the Award of the Henry Friendly Medal to Justice Sandra Day O'Connor</i>	
James Oldham .....	263
<i>Only Eleven Shillings: Abusing Public Justice in England in the Late Eighteenth Century (Part 2 of 2)</i>	

## Contents

David Roe.....	275
<i>Little Labs Lost: An Invisible Success Story</i>	
Laurence H. Silberman.....	291
<i>The Development of "Final Offer Selection"</i>	

## FROM THE BAG

Ross E. Davies.....	303
<i>The Pastiche Prosecutor: A Speculative Introduction to Mr. District Attorney</i>	
Unknown.....	307
<i>Smashing the Taxicab Racket</i>	

## REVIEW

Cedric Merlin Powell.....	341
<i>Identity, Liberal Individualism, and the Neutral Allure of Post-Blackness</i>	
<i>Touré, Who's Afraid of Post-Blackness? What It Means to be Black Now (Free Press 2011)</i>	

## EX POST

John L. Kane, Jr.....	357
<i>The Inmate</i>	
Alice B. Richards .....	359
<i>Studying for an Evidence Final on a Cold Winter's Night</i>	
<i>Acknowledgments, Credits &amp; Featured Books .....</i>	363