

AN  
**ALMANAC**

OF USEFUL AND ENTERTAINING TIDBITS FOR LAWYERS FOR THE YEAR TO COME

2011



**Excerpts**

*including*

Lists of works  
nominated and  
selected for inclusion  
in this year's Reader

AND  
**READER**

OF EXEMPLARY LEGAL WRITING FROM THE YEAR JUST PASSED

2010

*featuring Thomas Nast's*

**ILLUSTRATED ALMANACS (1871-1875)**

with an essay about "Thomas Nast's Crusading Legal Cartoons" by

RENEE LETTOW LERNER

*Presented by the Green Bag, with support from the George Mason University School of Law.*

# GREEN BAG READER

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ALMANAC

OF USEFUL AND ENTERTAINING TIDBITS FOR  
LAWYERS FOR THE YEAR TO COME

2011

— AND —

READER

OF EXEMPLARY LEGAL WRITING FROM THE  
YEAR JUST PASSED

2010

SELECTED BY THE  
LUMINARIES AND SAGES ON OUR BOARD OF ADVISERS

EDITED BY ROSS E. DAVIES



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# TABLES OF CONTENTS

|                           |   |
|---------------------------|---|
| Preface .....             | 1 |
| Recommended Reading ..... | 6 |

## READER OF EXEMPLARY LEGAL WRITING 2010

### ★ OPINIONS FOR THE COURT ★

|  |     |
|--|-----|
| FRANK H. EASTERBROOK<br><i>Bodum USA, Inc. v. La Cafetiere, Inc.</i> , 621 F.3d 624 (7th Cir. 2010)..... | 97  |
| JOHN GLEESON<br><i>U.S. v. Ovid</i> , 2010 WL 3940724 (E.D.N.Y.) .....                                   | 657 |
| JOHN L. KANE<br><i>United States v. Brownfield</i> , No. 08-cr-00452-JLK (D. Colo. 2009) .....           | 747 |
| KEVIN G. ROSS<br><i>State v. Wiggins</i> , 788 N.W.2d 509 (Minn. App. 2010) .....                        | 223 |

### ★ CONCURRENCES, DISSENTS, ETC. ★

|   |     |
|---|-----|
| ALEX KOZINSKI<br><i>U.S. v. Pineda-Moreno</i> , 617 F.3d 1120 (9th Cir. 2010) .....               | 499 |
| DIANE P. WOOD<br><i>Bodum USA, Inc. v. La Cafetiere, Inc.</i> , 621 F.3d 624 (7th Cir. 2010)..... | 179 |

### ★ BOOKS ★

|  |     |
|--|-----|
| JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH<br><i>History of the Common Law: The Development of Anglo-American<br/>Legal Institutions</i> (Wolters Kluwer 2009) ..... | 185 |
| MARTHA MINOW<br><i>In Brown's Wake</i> (Oxford University Press 2010) .....  | 463 |
| JACK RAKOVE<br><i>Revolutionaries: A New History of the Invention of America</i><br>(Houghton Mifflin Harcourt 2010) .....   | 629 |

GREEN BAG ALMANAC & READER 2011

★ SHORT ARTICLES ★

BARBARA BABCOCK

*Clara Shortridge Foltz*, in Roger K. Newman, ed., *The Yale Biographical Dictionary of American Law* (Yale University Press 2009) ..... 313

JUSTIN DRIVER

*Why Law Should Lead*, *The New Republic*, April 8, 2010 ..... 375

JEFFREY ROSEN

*Roberts versus Roberts: Just how radical is the chief justice?*,  
*The New Republic*, March 2, 2010 ..... 671

MARY WHISNER

*Enact Locally*, 102 *Law Library Journal* 497 (2010) ..... 679

★ LONG ARTICLES ★

ALBERT W. ALSCHULER

*Two Ways to Think About the Punishment of Corporations*, 46 *American Criminal Law Review* 1359 (2009) ..... 509

ALLEN D. BOYER

*Law's Architect*, 22 *Yale Journal of Law and the Humanities* 127 (2010) ..... 79

MARK R. KRAVITZ

*Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 *Journal of Appellate Practice and Process* 247 (2009) ..... 317

★ NEWS & EDITORIAL ★

WILLIAM W. BEDSWORTH

*No Questions Asked?*, *The Recorder*, Mar. 26, 2010 ..... 367

JEFFREY TOOBIN

*Without a Paddle*, *The New Yorker*, September 27, 2010 ..... 447

NINA TOTENBERG

*Martin Ginsburg's Legacy: Love of Justice (Ginsburg)*, Weekend Edition  
Saturday, NPR, July 2, 2010 ..... 57

## TABLES OF CONTENTS

### ★ MISCELLANY ★

HEATHER K. GERKEN

|   |     |
|---|-----|
| <i>Testimony Submitted to the U.S. Senate Committee on Rules and Administration, Feb. 2, 2010</i> ..... | 557 |
|---|-----|

TONY WEST ET AL.

|  |     |
|--|-----|
| <i>Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, Al-Aulaqi v. Obama, 2010 WL 4941958 (D.D.C. filed Sept. 25, 2010)</i> ..... | 769 |
|--|-----|

## ALMANAC OF USEFUL & ENTERTAINING TIDBITS

### LAST YEAR & THIS YEAR

|   |     |
|---|-----|
| Chronicles of Grammar, Usage & Writing, featuring<br>"Notable Books of 2010" and "The 20 Most Embarrassing<br>Grammatical Blunders in 2010 Law Reviews," by Bryan A. Garner ..... | 11  |
| The Year in Law, by Gregory F. Jacob .....  | 23  |
| A Term in the Life of the Supreme Court, by Tony Mauro .....  | 39  |
| A Year of Lowering the Bar, by Kevin Underhill .....  | 45  |
| The Year 2011   |     |
| January .....   | 55  |
| February .....  | 95  |
| March .....   | 183 |
| April .....   | 221 |
| May .....   | 315 |
| June .....  | 373 |
| July .....  | 461 |
| August .....  | 507 |
| September .....   | 555 |
| October .....   | 655 |
| November .....  | 677 |
| December .....  | 767 |

### THOMAS NAST'S ALMANACS

|   |     |
|---|-----|
| Nast's Illustrated Almanac for 1871, by Thomas Nast ..... | 106 |
| Nast's Illustrated Almanac for 1872, by Thomas Nast ..... | 230 |
| Nast's Illustrated Almanac for 1873, by Thomas Nast ..... | 388 |
| Nast's Illustrated Almanac for 1874, by Thomas Nast ..... | 570 |
| Nast's Illustrated Almanac for 1875, by Thomas Nast ..... | 690 |

# GREEN BAG ALMANAC & READER 2011

## THOMAS NAST FEATURES & TIDBITS

|   |               |
|---|---------------|
| Thomas Nast's Crusading Legal Cartoons, <i>by Renee Lettow Lerner</i> ..... | 59            |
| Caricatures, <i>by Thomas Nast</i> .....                                    | <i>passim</i> |
| The Great American Cartoonist.....  | 816           |
| The Thomas Nast Award .....   | 670           |
| Thomas Nast's Illustrated Almanacs, 1871-1875.....                          | 212           |

## OTHER TREASURES

|  |      |
|--|------|
| Top 10 Law School Home Pages of 2010,<br><i>by Jason Eiseman &amp; Roger V. Skalbeck</i> ..... | 339  |
| Sincere Respect, <i>by Elena Kagan</i> .....   | 38   |
| Judges Behaving Badly, <i>by Themselves</i> .....  | 494  |
| The Dipping Point: Law Review Circulation 2010 .....   | 547  |
| Justice Harlan as Seen by the Artist and Reporter.....   | 4    |
| Tasty Tax Day, May 8, 2010.....  | 372  |
| Illustrations & Credits.....   | 818  |
| Advertisements .....   | back |



*Self-portrait by Thomas Nast.*

# PREFACE

This is the sixth *Green Bag Almanac & Reader*. For a reminder of the reasons why the world needs our almanac and our reader, read the “Preface” to the 2006 edition. It is available on our web site ([www.greenbag.org](http://www.greenbag.org)).

Before getting to the usual description (of our selection process for the pieces of exemplary legal writing appearing in this edition) and catalog (of the mistakes we made in previous editions), I must point out a few amusing parallels or intersections in this year’s *Almanac & Reader*:

In his exemplary long article, *Two Ways to Think About the Punishment of Corporations*, Albert Alschuler brings the ancient English practice of “frankpledge” into his treatment of modern corporate criminal law. Conveniently, John Langbein, Renee Lettow Lerner, and Bruce P. Smith describe the original frankpledge system in their exemplary book, *History of the Common Law: The Development of Anglo-American Legal Institutions*.

Understanding the context of Diane P. Wood’s exemplary concurrence in *Bodum USA, Inc. v. La Cafetiere, Inc.* is surely made easier by its publication here in the company of Frank H. Easterbrook’s exemplary opinion for the court in the same case.

And readers of William W. Bedsworth’s exemplary editorial on oral argument, *No Questions Asked?*, will appreciate the opportunity to read more deeply on the subject in Mark R. Kravitz’s exemplary long article, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*.

I could go on, but space is at a premium in this swollen tome, by far our lengthiest *Almanac & Reader* so far. Perhaps frankpledges, coffee pots, and oral arguments are matters that just happened to be recently contemplated — and dealt with in print — by more than one exceptionally good legal writer. Or perhaps it is all just coincidence. Who knows? Not the *Green Bag*.

## OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2010” was, like past years’, not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

- (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who would know it when they saw it and bring it to our attention;
- (b) coordinate the winnowing of advisers’ favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our “Recommended Reading” list);



## GREEN BAG ALMANAC & READER 2011

(c) ballot our advisers to identify the cream of that already creamy crop; and then

(d) present the results to you in a useful and entertaining format — this book.

The nitty-gritty of our process for selecting exemplars is a simple but burdensome series of exercises:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belong in a collection of good legal writing. When they find worthy morsels, they send them to the *Green Bag*. “Good legal writing” is read broadly for our purposes. “Good” means whatever the advisers and the volume editor think it does. As one experienced scholar and public servant on our board put it, “there is good writing in the sense of what is being said and also in the sense of how it is being said.” Our advisers are looking for works that have something of each. “Legal” means anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” means ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organizes the advisers’ favorites into categories, and then sends a complete set to every adviser. Advisers’ names are not attached to the works they nominate. In other words, everything is anonymized. Advisers vote without knowing who nominated a piece. Similarly, their rankings are secret. No one but the volume editor ever sees individual advisers’ rankings or knows who voted in which categories. And the editor destroys all individualized records once the *Almanac* is in print.

Advisers are free to vote in as many categories — or as few — as they desire. That is, although there may be scores of nominated works in total, they are free to select the types of writing they want to evaluate. Almost all — but invariably not all — advisers vote in each category.

Step 3: The volume editor tallies the rankings and compiles the “Reader” portion of the *Almanac & Reader* based on the results, reserving, as editors tend to do, the right to add, subtract, and reorganize within reason. Nominated works not published in the book are listed in the “Recommended Reading” section.

Step 4: The advisers and the editor start all over again for next year’s edition — a process that has been underway since last Halloween (recall that our annual cycle for selection of exemplary legal writing begins and ends on October 31), with dozens of nominees already in the queue for the 2012 *Almanac*.

Despite the substantial work involved in this business, most of our advisers seem to enjoy participating. Those who don’t enjoy it appear to view it as some sort of professional duty. Either way, we’re glad to have them. But these are people with day jobs, other commitments, and minimum sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it doesn’t seem right to burden someone with a slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this time around. So the list of board members in this *Almanac & Reader* has changed since last year and will, we expect, con-

## PREFACE

tinue to change from year to year. The fact that people come and go from the board does not necessarily indicate anything about their ongoing commitment to the *Almanac & Reader*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

### HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here are the errors we are sure we made in the 2010 *Almanac & Reader*:

Front cover: “work o f Amy Bach” should be “work of Amy Bach”.

Page 99: “www..sabr.org” should be “www.sabr.org”.

Page 351: Rob James of San Francisco, CA, caught his own error (and ours) in *Field of Liens: Real Property Development in Baseball* — his article about the relocation of the Dodgers from Brooklyn to Los Angeles. In *Field of Liens*, the second sentence of footnote 22 (“On one of his preferred locations, at Flatbush and Atlantic, now stands the new Barclays Center basketball stadium designed by Frank Gehry.”) should read instead as follows:

On one of his preferred locations, at Flatbush and Atlantic, the new Barclays Center basketball stadium designed by Ellerbe Becket is being built.

And then there is this mystery, which might be a correction or might be a clarification or might be an obfuscation:

Page 288: We quoted the September 1907 issue of the original *Green Bag* as follows:

Justice Harlan of the U.S. Supreme Court, aged 74, made a home run and won the game in a baseball contest at the annual shad bake given by the Washington bar association at Marshall Hall, Md.

When Justice Harlan went to the bat the score was a tie, and the umpire had called two strikes and three balls. It was a critical and exciting moment. Justice Harlan smashed the sphere a wicked swat to deep center. He started around the bases, and his leg work was really marvelous. His sprinting qualities surprised and delighted the fans, who were wild with enthusiasm.

The ball went over the head of the center fielder and was lost in the tall grass. Before it was recovered Justice Harlan had reached the home plate, where he stood sipping a mint julep which had been prepared hurriedly for the agile Kentuckian as a reward for lining out a four-base hit.

# JUSTICE HARLAN AS SEEN BY THE ARTIST AND REPORTER



## PREFACE

Later, however, while rummaging in the John Marshall Harlan Papers in the Manuscript Division of the Library of Congress, we came across the following passage in a news clipping marked "Detroit News June 1908":

Some time ago a report was printed in the newspapers throughout the country that Justice Harlan had played a game of base ball in the nation's capital city and succeeded in pounding out a home run.

"I didn't make a home run," Justice Harlan corrected. "Why I simply held out my bat and touched the ball. I didn't run an inch."

The clipping also featured the cartoon reproduced on the facing page (look to your left). Note the balding, bunting ball-player in the lower-left corner captioned, "How Justice Harlan knocks a home run." Make of it what you will.

We will keep trying.

## IN OTHER BUSINESS

Our goals remain the same: to present a useful and entertaining, perhaps even inspiring, monthly dose of our stock in trade — good legal reasoning and reporting, well-written — with moderate amounts of the traditional almanac potpourri of useful and distracting information thrown in. Like the law itself, the 2010 exemplars republished in this volume are wide-ranging in subject, form, and style. This year most of the potpourri has to do with baseball; next year is an open field. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.



Finally, the *Green Bag* proffers the customary thanks to you, our readers. Your continuing kind remarks about the *Almanac & Reader* are inspiring. The *Green Bag* also thanks our Board of Advisers for nominating and selecting the works recognized here; the George Mason University School of Law and the George Mason Law & Economics Center for their continuing generous support of the *Green Bag*; Paul Haas for extraordinary librarianship; and Green Bag Fellows Rob Willey and Liz Heaps.

Ross E. Davies  
December 25, 2010

# RECOMMENDED READING

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked on the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

## OPINIONS FOR THE COURT

- Susan R. Bolton, *U.S. v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010)
- Consuelo M. Callahan, *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010)
- ★ Frank H. Easterbrook, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010)
- Terence Evans, *Mason v. Smithkline Beecham Corp.*, 596 F.3d 387 (7th Cir. 2010)
- ★ John Gleeson, *U.S. v. Ovid*, 2010 WL 3940724 (E.D.N.Y.)
- Patrick Higginbotham, *Pendergest-Holt v. Certain Underwriters at Lloyd's*, 600 F.3d 562 (5th Cir. 2010)
- ★ John Kane, *U.S. v. Brownfield*, No. 08-cr-00452-JLK (D. Colo. 2009)
- Lewis A. Kaplan, *U.S. v. Ghailani*, 2010 WL 2756546 (S.D.N.Y. 2010)
- Clay D. Land, *Rhodes v. MacDonald*, 670 F.Supp.2d 1363 (M.D. Ga. 2009)
- John T. Noonan, Jr., *Xilinx, Inc. v. C.I.R.*, 598 F.3d 1191 (9th Cir. 2010)
- ★ Kevin G. Ross, *State v. Wiggins*, 788 N.W.2d 509 (Minn. App. 2010)
- Leslie H. Southwick, *Clemons v. Department of Commerce*, 710 F.Supp.2d 570 (N.D. Miss. 2010)

## CONCURRENCES, DISSENTS, ETC.

- Michael Daly Hawkins, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010)
- Anthony M. Kennedy, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Protection*, 130 S.Ct. 2592 (2010)
- ★ Alex Kozinski, *U.S. v. Pineda-Moreno*, 617 F.3d 1120 (9th Cir. 2010)
- S. Jay Plager, *Enzo Biochem, Inc. v. Applera Corp.*, 605 F.3d 1347 (Fed. Cir. 2010)

## RECOMMENDED READING

- Richard A. Posner, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010)
- ★ Diane P. Wood, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010)
- John G. Roberts, Jr., *Robertson v. U.S. ex rel. Watson*, 130 S.Ct. 2184 (2010)
- John Paul Stevens, *McDonald v. Chicago*, 130 S.Ct. 3020 (2010)
- Clarence Thomas, *McDonald v. Chicago*, 130 S.Ct. 3020 (2010)
- J. Harvie Wilkinson III, *News & Observer Pub. Co. v. Raleigh-Durham Airport Auth.*, 612 F.3d 301 (4th Cir. 2010)

## BOOKS

- Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-blindness* (New Press 2010)
- Katherine Beckett & Steve Herbert, *Banished: The New Social Control in Urban America* (Oxford University Press 2009)
- Louis Begley, *Why the Dreyfus Affair Matters* (Yale University Press 2009)
- Linda Greenhouse & Reva B. Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* (Kaplan 2010)
- Alex Heard, *The Eyes of Willie McGee; a Tragedy of Race, Sex and Secrets in the Jim Crow South* (HarperCollins 2010)
- ★ John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Wolters Kluwer 2009)
- ★ Martha Minow, *In Brown's Wake* (Oxford University Press 2010)
- Michael Perino, *The Hellhound of Wall Street: How Ferdinand Pecora's Investigation of the Great Crash Forever Changed American Finance* (Penguin 2010)
- ★ Jack Rakove, *Revolutionaries: A New History of the Invention of America* (Houghton Mifflin Harcourt 2010)
- Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (W.W. Norton & Co. 2010)
- Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* (Houghton Mifflin Harcourt 2010)
- David A. Strauss, *The Living Constitution* (Oxford University Press 2010)

## SHORT ARTICLES

- ★ Barbara Babcock, *Clara Shortridge Foltz*, in Roger K. Newman, ed., *The Yale Biographical Dictionary of American Law* (Yale University Press 2009)
- Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Increases, Revenue Effects, Efficiency, and Income Inequality*, *Tax Notes*, July 12, 2010
- ★ Justin Driver, *Why Law Should Lead*, *The New Republic*, April 8, 2010
- John A.E. Pottow, *Government Involvement in Chrysler Bankruptcy: The Least-Worst Alternative?*, *Law Quadrangle* (Spring 2010)
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- Michael Traynor, *Charles Alan Wright*, in Roger K. Newman, ed., *The Yale Biographical Dictionary of American Law* (Yale University Press 2009)
- ★ Mary Whisner, *Enact Locally*, 102 *Law Library Journal* 497 (2010)
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## LONG ARTICLES

- ★ Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 *American Criminal Law Review* 1359 (2009)
- ★ Allen D. Boyer, *Law's Architect*, 22 *Yale Journal of Law and the Humanities* 127 (2010)
- Elizabeth A. Campbell & Tanya M. Marcum, *The Consequences of Unethical and Unprofessional Conduct*, 40 *Michigan Academician* 23 (2010)
- Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 *Harvard Law Review* 1817 (2010)
- Matthew Finkin, *Some Further Thoughts on the Usefulness of Comparativism in the Law of Employee Privacy*, 14 *Employee Rights and Employment Policy Journal* 11 (2010)
- Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 *Military Law Review* (2010)
- ★ Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 *Journal of Appellate Practice and Process* 247 (2009)

## RECOMMENDED READING

- Henry Monaghan, *Supremacy Clause Textualism*, 110 Columbia Law Review 731 (2010)
- Richard Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell Law Review 1105 (2010)
- Nick Rosenkranz, *The Subject of the Constitution*, 62 Stanford Law Review 1209 (2010)
- Brad Snyder, *Taking Great Cases: Lessons From the Rosenberg Case*, 63 Vanderbilt Law Review 885 (2010)
- J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practices of Rights in America*, 98 California Law Review 277 (2010)

## NEWS & EDITORIAL

- ★ William W. Bedsworth, *No Questions Asked?*, The Recorder, Mar. 26, 2010
- Ian Frazier, *Remembering Justice Stevens*, The New Yorker, May 17, 2010
- Linda Greenhouse, *A Judge and a Politician*, Opinionator, Dec. 31, 2009, <http://opinionator.blogs.nytimes.com/2009/12/31/a-judge-and-a-politician/#more-34857>
- Adam Liptak, *Stevens, the Only Protestant on the Supreme Court*, New York Times, April 9, 2010
- Mike Sacks, *It's Time to Watch the Justices' Real Life — on TV*, ABA Law Journal, [www.abajournal.com/news/article/its\\_time\\_to\\_watch\\_the\\_justices\\_real\\_life\\_on\\_real\\_tv/](http://www.abajournal.com/news/article/its_time_to_watch_the_justices_real_life_on_real_tv/)
- Geoffrey R. Stone, *Our Fill-in-the-Blank Constitution*, New York Times, April 14, 2010
- ★ Jeffrey Toobin, *Without a Paddle*, The New Yorker, September 27, 2010
- ★ Nina Totenberg, *Martin Ginsburg's Legacy: Love of Justice*, Weekend Edition Saturday, NPR, July 2, 2010

## MISCELLANY

- ★ Heather K. Gerken, *Testimony Submitted to the U.S. Senate Committee on Rules and Administration*, Feb. 2, 2010
- Aaron M. Ponce, *PETCO Animal Supplies Stores, Inc.'s Memorandum of Law in Support of Its Motion to Exclude Certain Expert Testimony and for Summary Judgment, Medtronic, Inc. v. PETCO Animal Supplies Stores, Inc.*, No. 09-363 (D. Minn. filed May 4, 2010)



## GREEN BAG ALMANAC & READER 2011

Frederick Seidel, *Charlie: In Memory of Charles P. Sifton (1935-2009)*, *The New York Review of Books*, Mar. 11, 2010

Harvey A. Silverglate et al., *Brief of Amici Curiae Foundation for Individual Rights in Education and Students for Liberty in Support of Petitioner, Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010) (filed Feb. 4, 2010)

Joseph M. Sokolowski et al., *Defendant's Memorandum in Support of Its Motion for Partial Summary Judgment, Ahle v. Veracity Research Co.*, No. 0:09-cv-00042 (D. Minn. filed May 13, 2010)

★ Tony West et al., *Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, Al-Aulaqi v. Obama*, 2010 WL 4941958 (D.D.C. filed Sept. 25, 2010)



NEW YORK IN A FEW YEARS FROM NOW  
(A prophecy of 1881)

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