

## Summer 2000 2d Series • Volume 3 • Number 4

Suppose we pass a lot of laws. Do we get praised? Certainly not. We then get denounced by everybody for being a "Meddlesome Congress" and for being a "Busybody Congress." Is it not so?

But suppose we take warning from that experience. Suppose that in our succeeding session we pass only a few laws. Are we any better off? Certainly not. Then everybody ... denounces us for being an "Incompetent Congress" and a "Do-Nothing Congress."

We have no escape – absolutely none. We have no chance – just absolutely no chance. The only way for a Congressman to be happy is to realize that he has no chance.

Speaker Nicholas Longworth (R. 1925–1931) quoted by Speaker Tip O'Neill (D. 1977–1987) in *The New Federalist Papers* 108-09 (1988)





Ross E. Davies Editor-in-Chief

David M. Gossett & Montgomery N. Kosma Executive Editors

Senior Editors Suzanne Garment Thomas B. Nachbar

Daniel G. Currell Susan M. Davies Thomas H. Dupree, Jr. Contributing Editors Britton B. Guerrina James C. Ho Melanie James

David B. Salmons Keith Sharfman Edward N. Siskel

Student Editors STEVE ENGEL SUSAN KEARNS

Robert C. Berring A. Morgan Cloud David P. Currie Richard A. Epstein Board of Advisors Leonard Garment Mary Ann Glendon R.H. Helmholz Philip B. Heymann Dennis J. Hutchinson

Henry P. Monaghan A.W.B. Simpson Kate Stith-Cabranes William W. Van Alstyne

The Green Bag, Second Series, is published quarterly. © 2000 The Green Bag, Inc., an Ohio nonprofit corporation. ISSN No. 1095-5216. Thanks to Gibson, Dunn & Crutcher LLP, Mayer, Brown & Platt, and Shea & Gardner.

SUBSCRIPTIONS: One year (four issues) costs \$35. Email subscriptions@greenbag.org or see back cover. For single- and back-issues, call William S. Hein & Co. at (800) 828-7572.

EDITORIAL POLICY: We publish authors' ideas in their own words. We fix typos and other mistakes, and make minor changes to adjust to *Green Bag* format. Additional suggestions are just that.

AUTHOR NOTES: We write them. We will note authors' gratitude to research assistants. Colleagues who make major contributions should share the byline. Colleagues who are helpful in small ways should be recognized in something printed by Hallmark, not the *Green Bag*.

SUBMISSIONS: We welcome anything that is short, clear, interesting, and law-related. For those who prefer rules to standards, that means no more than 5,000 words and 0 to 50 footnotes (which count against your 5,000). We like poetry, anecdotes, cartoons, and other miscellany. Please send submissions to editors@greenbag.org. We will consider hardcopy in cases of hardship. Letters are welcome, and subject to the same standards.

DEADLINES: August 1 for the Autumn issue; November 1 for Winter; February 1 for Spring; May 1 for Summer.

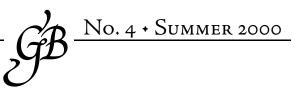
DEALING WITH AUTHORITY: Citations should be accurate and unobtrusive. Authors may use any form they like; we edit only to keep footnotes from looking like goulash. Familiar sources need no citation.

COPYRIGHT: If no copyright notice appears in an author note, the *Green Bag* holds the copyright. You may duplicate such items for classroom use, provided (1) copies are distributed at or below cost of reproduction; (2) the author and the *Green Bag* are identified; (3) proper copyright notice is affixed to each copy; and (4) the *Green Bag* is notified. Other duplication, electronic or otherwise, is prohibited without advance written permission. If a copyright notice appears, permission requests must be sent to the author.

Exceptions: Maybe.

NOTE: The Green Bag is pleased to report that this issue was slightly delayed by the arrival of Oliver Montgomery Kosma on July 9, 2000, 8 lbs. 2 oz.

CORRESPONDENCE: Green Bag, 6600 Barnaby Street NW, Washington, DC 20015. Telephone: (202) 775-3007. Email: editors@greenbag.org. Web: www.greenbag.org. 🛱 2D SERIES + VOL. 3



# Contents

EX Ante

- 347 De-precedenting Roe
- 348 Early Disability Protection
- 348 A Convenient Pocket Size
- 350 Silicon Founders & Digital Justices
- 350 In Memoriam

## Articles

- 353 Waste & the Dormant Commerce Clause A Reply Jonathan H. Adler
- 363 Waste & the Dormant Commerce Clause A Reprise Richard A. Epstein
- 369 Under Deconstruction International Criminal Law in a Postmodern World Diane Marie Amann
- 375 The Tax of Physics, the Physics of Tax Stephen Cohen
- 381 A Midsummer Night's Dream The Legal Issues David P. Currie
- 389 How Agencies Rule Their Turf or, The Real Limits on Agency Power Abner Mikva
- 393 In Defense of the DELETE Key James M. Rosenbaum
- 397 Economics ⊕ Real People Cass R. Sunstein

#### Contents



405 Judge Dave ⊕ the Rainbow People, Part IV David B. Sentelle

Dialogue

417 Legal Education, Today ⊕ Tomorrow John Sexton

From the Bag'

425 Flaws in Paradise THE LOYALTY OATH AT THE UNIVERSITY OF CALIFORNIA Brainerd Currie with introduction & notes by David P. Currie

435 The Law School Observer Brian Leiter

## **Reviews**

437 Still Preying on Strategic Reputation Models of Predation Јонм R. Lott, Jr.

Are Predatory Commitments Credible? Who Should the Courts Believe?

Peter H. Huang

### 447 Francis Bacon Takes on the Ghouls

The "First Principles" of Religious Freedom

John Witte, Jr. Religion and the American Constitutional Experiment: Essential Rights and Liberties

Richard W. Garnett



457 Rank

Mark Lemley

 Intimations of Contemporary Law & Politics in the Early Œuvre of Robert A. Zimmerman THE DYLAN CODE
Steven Lubet & Alex J. Lubet