

GREEN BAG ALMANAC

OF USEFUL AND INTERESTING
TIDBITS FOR LAWYERS

&

READER

OF EXEMPLARY LEGAL WRITING
FROM THE YEAR JUST PASSED

2019

EDITED BY

ROSS E. DAVIES & CATTLEYA M. CONCEPCION



BOOKS

FIVE RECOMMENDATIONS



Femi Cadmus[†] & Casandra Laskowski^{}*

Joseph Blocher & Darrell A.H. Miller
*The Positive Second Amendment:
Rights, Regulation and the Future of Heller*
(Cambridge University Press 2018)

Blocher and Miller provide a comprehensive overview of the landscape following the Supreme Court's Second Amendment decision in *District of Columbia v. Heller*, protecting an individual right to keep and bear arms. The authors note that post *Heller*, a wide divergence between constitutional doctrine and public debate persists. There continues to be a polarization between those who hold an absolutist view of the Second Amendment, an unwavering belief in the unfettered, unregulated right to bear arms and those holding an extreme view of regulation, with some even calling for the removal of the individual right to bear arms. The authors maintain that the Second Amendment is highly nuanced and does not fall into either one of these camps. Rather, there needs to be a positive interpretation, a debate

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that reflects an understanding and respect for constitutional doctrine and the substance and method of law.

Cyrus Farivar

Habeas Data: Privacy vs. the Rise of Surveillance Tech
(Melville House 2018)

Farivar travels the reader through the lives and conflicts that shaped Fourth Amendment jurisprudence. He begins with a behind-the-scenes look at the making of *Katz v. United States*, where a young Laurence Tribe doggedly yet persuasively changed Justice Potter Stewart and the Court's mind. This story sets the tone for a series of close calls, incremental changes, and unforeseen applications that have shaped the privacy landscape in our country. Apple fights against the FBI request to circumvent their encryption on the public stage. Ladar Levison, the founder of Lavabit, sits in his living room with his tiny dog Princess when FBI agents inform him that he must circumvent his email services encryption and hand him a national security letter preventing him from speaking to anyone, even with his attorney, about the request. And Daniel Rigmaiden, after being brushed off by the ACLU and EFF, uncovers law enforcement's covert, widespread, and unchecked use of cell site simulator technology called Stingrays. Though Farivar discusses the law, it is the people that stand out in his telling, both those who helped shape the law and those who are affected by it. He ends the book by spotlighting those individuals and communities advocating for change and implementing better policies, such as the city of Oakland, which formed a Privacy Advisory Commission charged with developing policies for any new surveillance technology that the city wants to adopt.

Paul Finkelman

Supreme Injustice: Slavery in the Nation's Highest Court
(Harvard University Press 2018)

Finkelman examines what he describes as the "slavery jurisprudence" of three supreme court justices, pre-antebellum, Chief Justices John Marshall and Roger B. Taney and Associate Justice Joseph Story. He posits that had they all taken a different approach that adhered to the nation's founding ideals of equality and liberty, that trajectory would have led to different outcomes, including freedom from slavery. Instead, the court, with very few exceptions, reinforced and strengthened the institution of slavery, upholding (never with support from Marshall, Taney, or Story) a few freedom claims. Marshall and Taney were lifelong slave owners, and while Story did not own

slaves, he abandoned his early anti-slavery principles, aligning with the court's pro-slavery stance. Finkelman reiterates that while the court's decision-making alone was not the basis for sectionalism or secession, it did provoke frustration and intolerance in the North for the court's pro-slavery status quo. The book delves into the backgrounds and motives of all three justices, starting with Marshall, Chief justice from 1801 to 1835, reiterating that he wrote almost every decision reinforcing slavery as an institution and debunking writings that state otherwise or were silent on the issue. Story had originally exhibited a hostility and abhorrence towards slavery but later took on a supportive role, concurring with Marshall on the court. The chapter on Taney, "Slavery's Great Justice", cites his harsh and racist decision in the *Dred Scott* case, referred to as an accurate depiction of the jurisprudence of the Taney court.

John B. Nann & Morris L. Cohen

The Yale Law School Guide to Research in American Legal History
(Yale University Press 2018)

The Yale Law School Guide to Research in American Legal History is special in that it fills a void in modern-day research guides tailored specifically to meet the needs of scholars and researchers of American Legal History. It addresses and accommodates the unique viewpoints and contexts of historians and lawyers. The guide begins with an examination of general bibliographic sources, including catalogs, bibliographies, and websites. Using a six-step approach to historical legal research (much of which simulates a general approach to legal research), the research journey is framed in time periods, starting with English foundations of American law (the common-law system), moving on to the colonial law, U.S. constitutional law in the 1780s, the early republic in the 1790s to 1870s, and concluding with the administrative state through the present day. Attention is also given to the development of a more sophisticated organization of research, which started at the end of the 19th century with codification by the federal government and collection of case law in reporter form by the West Publishing Company. A chapter on international law and civil law in the U.S. traces the development of international law at the founding, the exposure of the founders to the law of nations, classic writings of international law, sources of international law, and treaties. There are useful research examples provided at the end of every chapter which walk the researcher through scenarios with application of resources utilized to find information. A list of further readings, important sources mentioned in each chapter, and database resources serve as additional useful tools for the researcher.

Jill Norgren
Stories from Trailblazing Women Lawyers
(New York University Press 2018)

The ABA and American Bar Foundation's Women Trailblazers Project is a treasure trove of oral histories. With 96 current entries, it is difficult to decide where to begin, which is why this book is a great introduction. Norgren dives into that trove for us and weaves together the stories along a common timeline of experience (from childhood to practice). She highlights parallel experiences and unique struggles, such as racism, which she gives its own section in the first chapter. By combining stories this way, you get multiple perspectives of common events, like the infamous women's dinners hosted by Harvard Law School Dean Erwin Griswold. In one of my favorite stories, African American Attorney Constance Harvey is forced to purchase a new outfit because a judge, a renowned racist according to her, would not swear her in unless she changed her outfit because it looked as though she had come from a "honky tonk." Harvey proceeds to wear that same outfit every time she is in court before him. These moments help define the trailblazers in the collection. Limited by the structures of the time, each finds ways to push back against it in their way. Norgren also does additional research, expanding on these women's stories, making the book a welcome partner to the collection.



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From the Pittston (Pennsylvania) Gazette, Dec. 7, 1855, at 2.