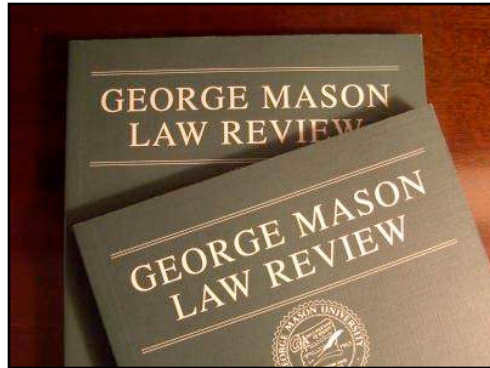


NEWSLETTER



Note from the Editors

Alyssa DaCunha
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Darren Weiss
 Executive Editor
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As we get closer to the end of another academic year, we would like to update you, our alumni, on what the Law Review has accomplished this year. Most importantly, we are on track to publish our fourth timely issue of legal scholarship this academic year. Volume 17 is shaping up to be our highest quality volume yet in terms of the authors and quality of article we are publishing. It is also going to be our longest volume to date, as the research and articles editors can attest. At the beginning of February, we held our 13th Annual Antitrust Symposium that produced some of the best scholarship we will publish in this volume. We recently completed our editor selection process and are in the process of transferring our knowledge and experiences to our successors. And we are thrilled to report that we are leaving the Law Review with a brand new, twenty-first century website (<http://georgemasonlawreview.org>) that will allow us to stay in touch with our alumni and the greater legal community better than ever.

As always, we would love to hear from you! Please feel free to visit us on the web or drop us a line any time.

Best,

Alyssa & Darren

SPECIAL THANKS

Many thanks to Taryn Elliott, Kyle Epting, Kieran Carter, Lindsey Champlin, Bret Lee, Kendal Smith, and Tony Tran for their assistance in compiling this newsletter.

In this Newsletter

Annual Alumni Reception

13th Annual Antitrust Symposium

Information on the Law Review Mentor Program

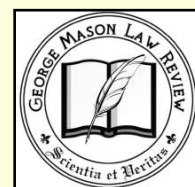
Review of the January Issue

Preview of the April Issue

Publication Announcement

Editor Announcement

Thank you to the 2009-2010 Board of Editors and Members



ANNUAL ALUMNI RECEPTION



On Thursday, January 28, 2010, the Law Review hosted its annual alumni reception at Arent Fox LLP. Attendance at the event surpassed that of the previous few years, and the Law Review editors and members enjoyed meeting the many alumni and other invited guests in attendance.

Dean Daniel Polsby offered remarks on George Mason’s increasingly competitive profile, and praised the Law Review for its hard work and many achievements over the past year.

In addition, Senior Notes Editor George Ingham explained the Law Review’s Write-On competition and introduced Arthur E. Schmalz (EIC ’93). Mr. Schmalz

then presented second-year member Anthony Peluso with the Arthur E. Schmalz Award for authoring the best Write-On entry.

Editor-in-Chief Alyssa DaCunha concluded the remarks by detailing the Law Review’s successes over the past year, including producing four successful issues, spearheading the alumni newsletter, and receiving numerous accolades from authors for the quality of the Law Review’s publication process. Alyssa also expressed the Law Review’s immense gratitude to all the Law Review alumni who assisted the second-year members in writing their Notes and Comments, and encouraged alumni to continue helping in the future.



CHECK US OUT ON THE WEB!

Visit our new website at <http://georgemasonlawreview.org>. From our website you can join our LinkedIn group or follow us on Twitter.

THE *GEORGE MASON LAW REVIEW* HOSTS ITS
13TH ANNUAL SYMPOSIUM ON ANTITRUST LAW

The Law Review held its 13th Annual Symposium on Antitrust Law on Thursday, February 4, 2010. The Symposium brought over one hundred professors, practitioners, and students together to discuss two hot issues in antitrust law: bundled goods and services, and certification of antitrust class action lawsuits. Empiris LLC and O'Melveny & Myers LLP co-sponsored the event, and it was held at the Willard Intercontinental Hotel in Washington, D.C. Laura O'Brien, the Symposium Editor, and Ashley Sprague, the Associate Symposium Editor, organized the event.

Numerous distinguished speakers attended and spoke at the Symposium. Judge Thomas F. Hogan of the United States District Court for the District of Columbia gave the keynote address. Judge Hogan discussed antitrust law from the judge's perspective, and offered suggestions to attorneys expecting to bring antitrust claims in federal court. The first panel evaluated bundling and share-based rebates in high-tech industries. The discussion covered a wide variety of economic theories that could be used to examine the competitive effect of packaged goods and services offered at a discount. The second panel engaged in a lively debate of class actions in the wake of *Monsanto*, *IPO*, and *Hydrogen Peroxide*. The panel covered the impact of those cases on defenses against class certifications as well as the application of Rule 23 requirements to common antitrust problems.

The feedback for the event was exceedingly positive. Interest from attendees in next year's Symposium is high, and the Law Review hopes to continue to build on the success of this event.

For more information, please see <http://www.georgemasonlawreview.org/symposium/>.



INFORMATION ON THE LAW REVIEW MENTOR PROGRAM
BE A MENTOR!

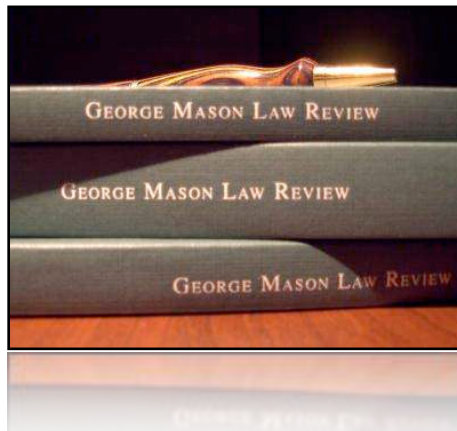
Each year, a new crop of Law Review members begins the exciting but challenging process of writing a Note or Comment. We are seeking YOUR support to assist members in this process.

The time commitment is minimal. It includes:

- 🕒 An initial discussion regarding topic selection
- 🕒 Reviewing an outline of the Note
- 🕒 Providing feedback on a draft prepared by the student

You may choose (and we encourage) additional involvement beyond approving the topic and commenting on the outline and first draft, but we are mindful of your professional commitments.

If you are interested in helping out or would like more information, please visit our website at <http://www.georgemasonlawreview.org/alumni/be-a-mentor/> or contact 2009-2010 Editor-in-Chief Alyssa DaCunha at eic@georgemasonlawreview.org. Thank you in advance for your support!



REVIEW OF THE JANUARY ISSUE

The Law Review has published an excellent selection of articles in its January issue. Here is a review of issue 17:2, now available online.

In *Rethinking Mistake and Nondisclosure in Contract Law*, Professor Jeffrey L. Harrison argues that the default rule of nondisclosure in contract law leads to inefficiency. Professor Harrison proposes an alternative “cost-minimizing” approach that allows for nondisclosure only when it advances social benefits..

In *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, attorney Roger Allan Ford argues that peremptory jury challenges can cause systematic changes in jury composition, leading to juries that are on average more likely to convict, as well as idiosyncratic changes that minimize ideological diversity among juries in particular cases. Mr. Ford thus recommends minimizing the influence of peremptory challenges on jury selection by decreasing the ratio of peremptory challenges in relation to effective venire size

In *Profiles in Terror: A Legal Framework for the Behavioral Profiling Paradigm*., attorneys Justin Florence and Robert Friedman, both Fellows at the Georgetown Center on National Security and the Law, contend that, as currently understood, behavioral profiling programs are constitutionally valid. They then suggest that the

executive branch is best suited for maintaining constitutional oversight for these programs.

In *Harm, Ambiguity, and the Regulation of Illegal Contracts*, Professor Adam B. Badawi critiques the non-enforcement remedy for illegal contracts, arguing that it often leads to both over- and underdeterrence. To alleviate these concerns, Professor Badawi proposes that before applying the non-enforcement remedy, courts should require parties to show harm and the absence of ambiguity.

In *The Scope of Employment Requirement of the Federal Tort Claims Act: The Impropriety and Implications of the Montez Decision, and the Superior Jurisdictional Prima Facie Approach*, Associate Notes Editor Erin Watkins argues that the Fifth Circuit incorrectly determined that the scope of employment requirement of the Federal Tort Claims Act should be decided on its merits. Ms. Watkins instead argues that the question is a jurisdictional issue.



In *Another Drink, Another Hour: Using Dram Shop Liability to Determine Employer Liability for Injuries Caused by Fatigued Commuting Employees*, Senior Notes Editor George W. Ingham draws on dram shop liability to formulate an analogous rule for sleep-deprived commuting employees. Mr. Ingham argues that employers should be held liable for injuries caused by fatigued employees only if the employer assigns the employee work while he or she is obviously fatigued or incapacitated.

PREVIEW OF THE APRIL
ISSUE

The Law Review's spring issue is slated for publication in April. Here is a preview of what to expect from 17:3.

In *Fiduciary Exemption For Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, Professor Robert J. Rhee recounts the details of the nearly failed Bank of America and Merrill Lynch merger, a deal with significant consequences for the 2008 financial crisis. For companies uniquely situated like Bank of America, Professor Rhee argues that there should be a fiduciary exemption for corporate decisions that avert or mitigate public crises. Professor Rhee finds support for this exemption in existing state statutory authority and from tort theories of public necessity.

In *"This Right Is Not Allowed by Governments That Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, Professor Nicholas J. Johnson, Clayton E. Cramer, and George A. Mocsary describe what the Second Amendment meant to a competent and reasonable English speaker when the Fourteenth Amendment was ratified. The authors argue that by 1868, the public understood the Second Amendment to protect an individual's right to bear arms as opposed to a collective, militia-centered right to be used as a defense against a tyrannical government.

In *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, Professor Mary Jane Angelo describes the perfect storm of government incentives, programs, and regulatory exemptions that together promote environmentally harmful farming practices in the United States. Professor Angelo proposes fundamental changes for the industrial farm, by amending relevant statutes to correct the incentives that lead to current unsustainable agricultural policies.



In *Partisans & Partisan Commissions*, economist Keith S. Brown and Professor Adam Candeub contribute empirical data to the debate over the constitutional standing and separation-of-powers issues for independent agencies. By reviewing FCC opinions and dissents issued from appointees of both parties, their study suggests that non-partisan concerns dominate independent agency decisionmaking.

In *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, Professor Eric Lane, Frederick A.O. Schwartz, and Emily Berman question the soundness of executive privilege as described in *United States v. Nixon*. The authors reveal how executive secrecy may

harm deliberations and aid in hiding impropriety and malfeasance. The authors argue that our system of checks and balances requires that the executive privilege yield to legitimate congressional inquiries such as for its legislative or oversight responsibilities.

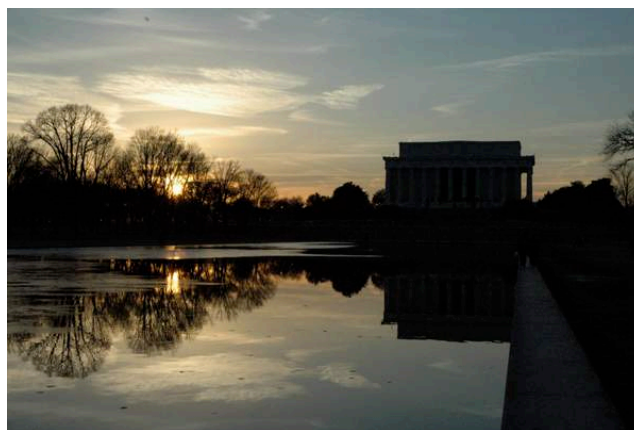
In *The Act-of-Production Privilege Post-Hubbell: United States v. Ponds and the Relevance of the "Reasonable Particularity" and "Foregone Conclusion" Doctrines to Current Fifth Amendment Jurisprudence*, Managing Editor Mark Cowen evaluates a criminal defendant's privilege to decline to produce incriminating documents. Mr. Cowen rejects the "reasonable particularity" and "foregone conclusion" doctrines because of difficult application and inequities to defendants. He argues courts should follow the approach of determining the degree that document production is "testimonial" within meaning of the Fifth Amendment.

In *X Misses The Spot: Fernandez v. Keisler and the (Mis)Appropriation of Brand X by the Board of Immigration Appeals*, Executive Editor Darren Weiss criticizes the degree of deference that federal courts must give to agency adjudications and especially to adjudications by the Board of Immigration Appeals. Mr. Weiss argues that the Board of Immigration Appeals should not be empowered to ignore otherwise binding federal precedent, given the Board's institutional flaws: it has a high reversal rate, it has an overwhelming case load, and it burdens alien petitioners with procedural disadvantages.

PUBLICATION SELECTION ANNOUNCEMENT

The Law Review congratulates its newly-selected student authors for 2010-2011:

1. **Peter Cockrell:** *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009* (2010 Adrian S. Fisher Award, Best Student Note)
2. **Lindsey Champlin:** *Should the Sherman Act Restrain State Power Under the Twenty-First Amendment? Why Federal Courts Should Abandon the Fourth Circuit's Balancing Test From TFWs v. Schaefer*
3. **Jeremy Graboyes:** *Now, Voyager: Deixis and the Temporal Pragmatics of Legislative Speech Acts*
4. **Anthony Peluso:** *A Distinction Without a Difference: How Callahan v. Millard County Drew an Unwarranted Line in the Sand of Fourth Amendment Jurisprudence*
5. **Ted Brown:** *Not a Tecom Party: There's "Very Little Likelihood" Geren v. Tecom Will Promote Sound Government Contracting Practices*
6. **Cattleya Concepcion:** *Beyond the Lens of Lenz: Looking to Protect Fair Use During the Safe Harbor Process Under the DMCA*
7. **Geoff Fehling:** *Verdugo, Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*
8. **Nathan Chubb:** *Merger Review: How "Serious Questions" in Preliminary Injunctions May Improve Antitrust Law*
9. **Kendal Smith:** *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern-Day Slavery*
10. **Joshua Cumby:** *The Sixth Amendment: Version 1.0 et seq—Commas, Clauses, and the Constitution.*



2010-2011 EDITOR SELECTION ANNOUNCEMENT



The Law Review congratulates its newly-selected editors for 2010-2011:

Editor-in-Chief: Geoffrey Fehling

Executive Editor: Anthony Peluso

Managing Editor: Bret Lee

Production Editor: Michael Manteuffel

Symposium Editor: Isaac Post

Senior Articles Editor: Lindsey Champlin

Articles Editor: Brendan Coffman

Articles Editor: Joshua Cumby

Articles Editor: Tony Tran

Senior Notes Editor: Michael D'Anello

Notes Editor: Mitchell Bashur

Notes Editor: Aaron Brotman

Notes Editor: Kendal Smith

Senior Research Editor: Cattleya Concepcion

Research Editor: Joseph Barrier

Research Editor: Nathan Chubb

Research Editor: Stephanie Cook

Congratulations again, and best wishes for a great year!

THANK YOU TO THE 2009-2010 BOARD OF EDITORS FOR A GREAT YEAR!

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THANK YOU TO THE 2009-2010 MEMBERS FOR A GREAT YEAR!

- | | | |
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