



# George Mason Law Review

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## NEWSLETTER

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Spring Newsletter

April 2011

George Mason Law Review  
3301 Fairfax Drive  
Arlington, VA 22201  
(703) 375-9529  
info@georgemasonlawreview.org

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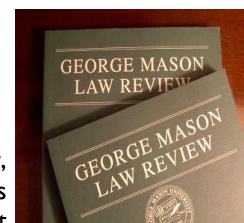
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### Notes from the Editors

Geoffrey Fehling  
Editor-in-Chief  
gfehling@gmu.edu

Anthony Peluso  
Executive Editor  
apeluso@gmu.edu



As we approach the conclusion of yet another academic year, we would like to update you, our alumni, on the Law Review's accomplishments this year. First and foremost, we are on track to meet our goal of publishing a fourth timely issue of legal scholarship. We are very pleased with both the high quality of the articles and the caliber of the authors that we have published in Volume 18, which is shaping up to be one of the finest volumes yet. In early February, we held our 14th Annual Antitrust Symposium, which was a great success and well received by the Washington, D.C. antitrust community. We also recently completed our editor selection process for the Volume 19 Board of Editors, and we are currently working through the transition process and imparting knowledge and advice to our successors. We always appreciate hearing from our alumni, so please feel free to drop by the website (<http://georgemasonlawreview.org>) or contact us at any time.

Best,  
Geoff & Tony

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### Law Review's Offices Moved into Hazel Hall

The Law Review has now officially moved its offices from the Truland Building into Hazel Hall. Conveniently located on the fourth floor of Hazel Hall, the new office overlooks the third floor grade boards and sits directly above the records office. The office suite consists of five rooms and features double monitor workstations, a large conference room ideal for meetings and group study, and a highly functional lounge with a kitchenette. Additionally, the suite is equipped with printers and other office supplies.

The office move was a part of a larger rearrangement of student organizations and law school groups moving into new space created by the completion of the new Founder's Hall building. The move took place in early February 2011 over two separate days, and a number of candidate members volunteered their time to pack boxes, label furniture, and set up the workstations. Overall, the move went smoothly and the new office is now operational.

Currently, the Law Review is sharing part of the office suite with the service member's legal clinic, but it is expected a wall is to be installed between the suites soon. Members of the Law Review have already begun to take advantage of the new office, appreciating the convenience of its new location. As Geoffrey Fehling, (EIC 2010-11) notes, "The new office space is much more conducive to studying and fosters a greater sense of community because it is located within the Law School building, rather than having a separate office space in Truland." We invite all of our alumni returning to the school to drop by and visit our new offices!

## Review of the Winter Issue

The Law Review successfully published its winter issue in December. The following is a synopsis of issue 18:2, and the full articles are now available online.

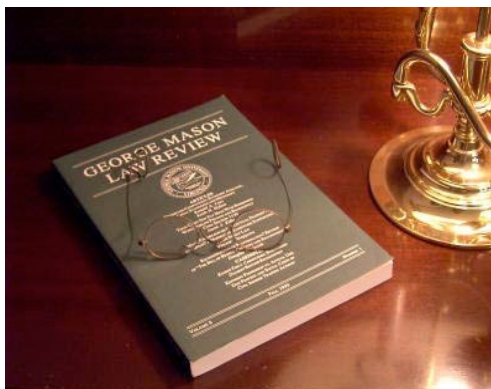
In *Commercial Law's Complexity*, Professor David Frisch of the University of Richmond School of Law identifies several sources of uncertainty in both the Uniform Commercial Code and individuals' biases and information costs that lead to inefficiency in commercial transactions. He proposes simplifying the UCC and both warranty and tort regimes to improve the predictability of commercial transactions.

In *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, Scott R. Bauries, Assistant Professor at the University of Kentucky College of Law, explores provisions in state constitutions that, at first glance, do not clearly correlate to any element of the federal Constitution. Focusing on the right to education, Professor Bauries demonstrates that such state constitutional provisions actually accord with the approach that federal courts have taken to positive rights.

In *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, Jamelle C. Sharpe, Assistant Professor at the University of Illinois College of Law, considers the roles of both federal courts and Congress in preemption law. He argues that neither Congress nor the courts can act alone to make effective policy in preemption law and instead advocates that the courts, Congress, and administrative agencies each

contribute their particular strengths in a shared approach to policymaking.

In *Games and Other Uncopyrightable Systems*, Bruce E. Boyden, Assistant Professor at Marquette University Law School, meticulously parses the copyright statute and considers early twentieth-century case law to explain for the first time why games are not copyrightable property.



In *Verdugo Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, Editor-in-Chief Geoffrey Fehling explores the Self Incrimination Clause of the Fifth Amendment. He asserts that the Ninth Circuit's expansion of Fifth Amendment protections in *Stoot v. City of Everett* is improper and that courts evaluating whether a plaintiff can recover in a § 1983 action alleging violations of the privilege against

self-incrimination should not generally expand the right to recover outside of the use of an incriminating statement at trial.

In *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, Research Editor Nathan Chubb examines the difference between the merger standard for preliminary injunctions used by the Federal Trade Commission and the Antitrust Division of the Department of Justice. He argues that the superior standard for increased merger enforcement is the FTC's "serious questions" standard, which should be adopted by both agencies.

## Become a Law Review Mentor!

Each year, a new crop of Law Review members begin 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 and includes:

- An initial discussion regarding topic selection
- Reviewing an outline of the student author's Note or Comment
- Providing feedback on a draft prepared by the student author
- 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 2011-2012 Editor-in-Chief Catherine Schmierer at [eic@georgemasonlawreview.org](mailto:eic@georgemasonlawreview.org). Thank you in advance for your support!

## Law Review Hosts 14th Annual Symposium on Antitrust

The Law Review held its 14th Annual Symposium on Antitrust Law on Wednesday, February 9, 2011. The Symposium brought over one hundred professors, practitioners, and students together to discuss the hot issue of horizontal market power, with a focus on the evolving law and economics of mergers and cartels. Navigant Economics and O'Melveny & Myers LLP co-sponsored the event, which was held at the Willard Intercontinental Hotel in Washington, D.C. Isaac Post (Symposium Editor 2010-11) and Bryan Andersen (Associate Editor 2010-11) organized the event.

The Symposium featured many distinguished speakers and attendees. Federal Trade Commissioner J. Thomas Rosch delivered the keynote address on "Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission." Commissioner Rosch's address highlighted topics ranging from behavioral economics to the differing roles of the FTC and the DOJ in enforcing antitrust laws. Next, the first panel evaluated "The Impact of the 2010 Horizontal Merger Guidelines on the Litigation of

Merger Cases." The exciting debate considered the shift in Horizontal Guidelines in evaluating competitive effects over market definition. The panelists also discussed how the Guideline's step-by-step merger analysis provides new emphasis on diversion and upward pricing pressure analysis and also its impact on the Government's burden of proof in suing to oppose a merger. The second panel's engaging discussion addressed "Current Trends in Criminal Cartel Enforcement." The panel's lively debate covered the converging and diverging interests of company counsel and individual counsel, the "volume of commerce" analysis under the post-*Booker* U.S. Sentencing Guidelines, and the applicability of an economic damages analysis as a measurement of "volume of commerce."

The feedback for the event was exceptionally positive. The Virginia Mandatory Continuing Legal Education Board approved the Symposium for 2.5 hours of CLE credit. Attendees are enthusiastic about next year's Symposium, 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/>.



*Panelists at the Law Review's Antitrust Symposium*



*From left to right, Symposium Editor Isaac Post, FTC Commissioner J. Thomas Rosch, and Editor-in-Chief Geoffrey Fehling*

## Preview of the Spring Issue

The Law Review's spring issue is slated for publication in April. Here is a preview of what to expect from issue 18:3.

In *Similarly Situated*, Associate Professor Giovanna Shay argues that "similarly situated" analysis is a restatement of the central principles of equal protection rather than a requirement for equal protection review. When understood and applied appropriately, Professor Shay asserts that "similarly situated" analysis is equivalent to "rational basis with bite" or intermediate scrutiny. Professor Shay concludes that if the tiered analysis is abandoned, there is a role for the "similarly situated" analysis to play in a unified approach to equal protection.

In *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to Duenas-Alvarez*, Federal Appellate Public Defender Doug Keller documents a circuit split regarding the "categorical approach" to federal interpretation of prior convictions and contends that most courts have misread the Supreme Court's decision in *Gonzalez v. Duenas-Alvarez*, the genesis of the split. Mr. Keller concludes that this misreading has caused a flood of wrongly decided cases, mainly in the Fifth and Ninth Circuits where immigration cases are commonly heard.

In *Quirky Constitutional Provisions Matter: The Tonnage Clause, Polar Tankers, and State Taxation of Commerce*, Professor Erik M. Jensen argues that the Tonnage Clause is not only an important clause, but an

intellectually interesting one as well. Professor Jensen supports his argument by analyzing the Supreme Court's recent decision in *Polar Tankers, Inc. v. City of Valdez* and by examining several issues unrelated to the recent litigation but relevant to interpreting the clause, including the meaning of "tonnage," the clause's purposes, and the meaning of "duty."

In *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, Notes Editor Kendal Nicole Smith explores the use of RICO in curtailing human trafficking enterprises in the United States. Ms. Smith posits that RICO will help facilitate trafficking prosecutions by acting as a beneficial prosecutorial supplement, which will prioritize the safety and vulnerability of victims while simultaneously offering valuable prosecutorial tools like stricter penalties, a broader conspiracy provision, and greater prosecutorial discretion.

In *The Sixth Amendment: Version 1.0 et seq.—Commas, Clauses, and the Constitution*, Articles Editor Joshua Counts Cumby reviews several extant and uniquely punctuated versions of the Sixth Amendment, as well as collects and compares quotations of the Sixth Amendment in various Supreme Court cases. Concluding that commas in the Sixth Amendment have yet to play a significant interpretive role in Supreme Court decisions, Mr. Cumby considers possible outcomes of a close, comma-dependent construction of the Sixth Amendment.

## Law Review Celebrates New Full Members

On February 11, 2011, the Law Review celebrated the successful completion of the Candidate Members' written Notes or Comments of publishable quality over the fall semester and formally welcomed them as Full Members. Congratulations to all of our new Full Members for wrapping up a great year!

Lora Barnhart  
Paisly Bender  
Catherine M. Brown  
Erik Burggraf  
Robyn Burrows  
Joshua Chamberlain  
Sean Clerget  
Mark DiGiovanni  
Angela Diveley  
Alissa Dutrow

Stephen Foster  
Adam C. Fowles  
Ashley Fry  
Emily Harp  
Kalynn Hughes  
Carly Humphrey  
James Kim  
Alysa Kociuruba  
Matthew Long

Genevieve McCarthy  
Matthew McGuire  
Linda America Santiago  
Catherine Schmierer  
Meredith Schramm-  
Strosser  
Zach Shoup  
Chelsea Sizemore  
Stacey Sklaver  
Raymond B. Sperry



New Full Members celebrate in style atop of the Virginia Square Building.



## Alumni Reception Welcomes Former Law Review Members

On March 10, 2011, the Law Review hosted its annual alumni reception at Latham & Watkins LLP. Despite the rain, many came to the event, and the new Board of Editors enjoyed meeting generations of Law Review alumni.

GMU Law Dean Daniel Polsby spoke briefly about the success of the Law Review and commended the outgoing Board for its hard work and dedication to the journal. In addition, outgoing Notes Editor Kendal Smith commented on the success of this year's First-Year Write-On Competition and introduced Arthur E. Schmalz (Editor-in-Chief 1993-94). The Law Review was honored to have Mr. Schmalz present Chelsea Sizemore (Senior Notes Editor 2011-12) with the Arthur E. Schmalz Award for submitting the top Write-On entry.

Next, outgoing Editor-in-Chief Geoffrey Fehling discussed the accomplishments of the Law Review this past year, including publishing four quality issues on time. Incoming Editor-in-Chief Catherine Schmierer then expressed gratitude to the outgoing board, applauded alumni support, and noted that mentoring candidate members throughout the Note process is a great way to stay connected to the Law Review.



*From left to right, Law Review Members Geoffrey Fehling, Lindsey Champlin, Joshua Cumby, Tony Tran, and Kendal Smith*



*From left to right, Law Review Members Kalynn Hughes, Catherine Schmierer, and Kendal Smith*



*Arthur E. Schmalz presents Chelsea Sizemore with the Schmalz Award for the best Write-On Entry.*

## Announcing the Law Review's 2011-2012 Board of Editors

On February 20, 2011, the George Mason Law Review held an extensive interview process and chose the 2011-2012 Board of Editors. Congratulations to all those selected, and best wishes for next year!

**Editor-in-Chief: Catherine Schmierer**

**Executive Editor: Matthew McGuire**

**Managing Editor: Kalynn Hughes**

**Production Editor: Mark DiGiovanni**

**Symposium Editor: Catherine Brown**

**Senior Articles Editor: Lora Barnhart**

**Articles Editor: Sean Clerget**

**Articles Editor: Angela Diveley**

**Articles Editor: Stacey Sklaver**

**Senior Notes Editor: Chelsea Sizemore**

**Notes Editor: Alissa Dutrow**

**Notes Editor: Emily Harp**

**Notes Editor: Matthew Long**

**Senior Research Editor: Paisly Bender**

**Research Editor: Robyn Burrows**

**Research Editor: Joshua Chamberlain**

**Research Editor: Meredith Schramm-Strosser**

**Associate Notes Editor: Stephen Foster**

**Associate Research Editor: James Kim**

**Associate Research Editor: Carly Humphrey**



Catherine Schmierer  
2011-2012  
Editor-in-Chief

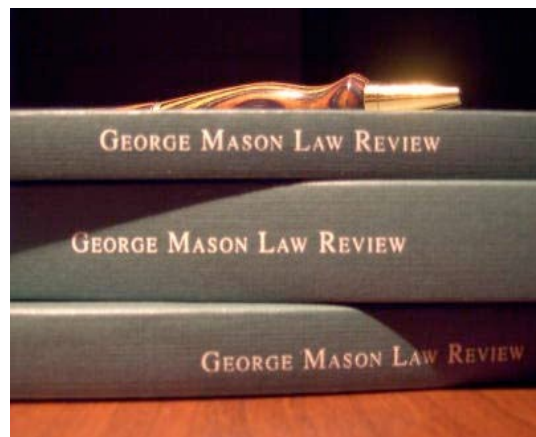


Matthew McGuire  
2011-2012  
Executive Editor

## Publication Selection Announcement

The George Mason Law Review is proud to congratulate the following student authors who have been selected for publication in upcoming issues of the Law Review:

1. **Sean Clerget:** *Timing is of the Essence: Reviving the Neutral Law of General Applicability Standard and Applying it to Restrictions Against Religious Face Coverings Worn While Testifying in Court* (2011 Adrian S. Fisher Award, Best Student Note or Comment)
2. **James Kim:** *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*
3. **Chelsea A. Sizemore:** *Enforcing Islamic Mahr Agreements: The American Judge's Interpretational Dilemma*
4. **Lora E. Barnhart:** *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Non-Political Advertisements*
5. **Robyn Burrows:** *Judicial Confusion and the Digital Drug Dog Sniff: Pragmatic Solutions Permitting Warrantless Hashing of Known Illegal Files*
6. **Paisly Bender:** *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*
7. **Matthew McGuire:** *(Mis)Understanding "Undue Discrimination:" FERC's Attempt to Encourage Transmission Infrastructure Investment by Protecting Independent Transmission Companies*
8. **Mark F. DiGiovanni:** *Weeding Out a New Theory of Insider Trading Liability and Cultivating an Heirloom Variety: A Proposed Response to SEC v. Dorozhko*
9. **Carly Humphrey:** *Keep Recording: Why On-Duty Police Officers Do Not Have a Protected Expectation of Privacy Under Maryland's State Wiretap Act*
10. **Genevieve McCarthy:** *A Short-lived Benchmark: How the Supreme Court Deviated from Brown v. Board Long Before Parents Involved*



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Special thanks to **Bryan Andersen, Jessica Farace, Lora Barnhart, Ashley Fry, Kalynn Hughes, and James Kim** for their help in creating and publishing this newsletter!

## Congratulations to the 2010-2011 Board of Editors for a Great Year!

### 2010-2011 Board of Editors

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Geoffrey B. Fehling

**Executive Editor**

Anthony D. Peluso

**Managing Editor**

Bret Lee

**Production Editor**

Michael Manteuffel

**Symposium Editor**

Isaac Post

**Senior Articles Editor**

Lindsey Champlin

**Senior Notes Editor**

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**Senior Research Editor**

Cattleya Concepcion

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Kendal Smith

**Research Editors**

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Nathan Chubb  
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**Associate Editors**

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Mitchell Calhoun  
Kieran Carter  
Jessica Farace

