George Mason Law Review

NEWSLETTER

Fall Newsletter **November 2011**

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

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In this Newsletter:

Note from the Editors

Catherine Schmierer
Editor-in-Chief
catherine.schmierer@gmail.com

Matthew R. McGuire
Executive Editor
mmcgui10@gmail.com

With the fall semester quickly coming to an end, the Law Review staff is hard at work on our nineteenth volume and would like to give our alumni an update on our many accomplishments this year. Highlights include moving into a new office in the fourth floor faculty suite in Hazel Hall, which has helped strengthen the Law Review's relationship with the faculty and uncover a number of exciting opportunities; welcoming our thirty-four new candidate members, who are currently working on the second drafts of their notes and comments; and wrapping up the fall issue of Volume 19, which shipped to subscribers earlier this month. In addition, we are hard at work preparing for many exciting events in the coming months, including the 15th Annual Antitrust Symposium focusing on antitrust issues in high-tech industries, and the annual Alumni Reception.

We hope you all have had a chance to check out our latest publications. We would also like to thank all the alumni for their continued support and, in particular, those who have been assisting our second-year candidate members as mentors on their note and comment topics.

As always, we would love to hear from you about any events, opportunities, or other news! Please feel free to contact us at any time.

Best,

Cat & Matt

Peter Cockrell Wins the Burton Foundation's Legal Writing Award

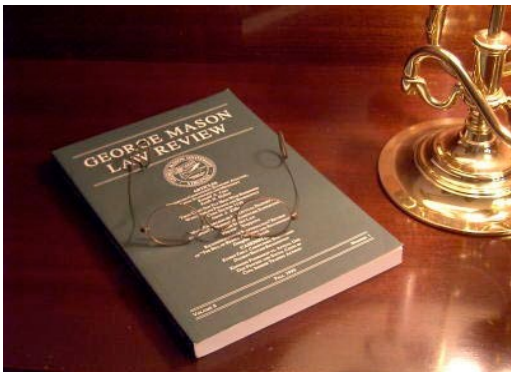
We would like to congratulate former *George Mason Law Review* member Peter Cockrell for winning the 2011 Distinguished Writing Award from the Burton Foundation for excellence in legal writing. The Burton Award is a national award given to law students who exhibit a high standard of clarity and effectiveness in their legal writing. Established in 1999, the Burton Awards program is run in association with the Library of Congress and its Law Library. Each year, law school deans and managing partners of the 1000 largest U.S. law firms nominate law students to receive the award. Of the students nominated, only fifteen are selected as recipients.

Mr. Cockrell received the award for his student comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*. Mr. Cockrell's comment analyzes the Helping Families Save Their Homes Act of 2009—the Act that attempts to reduce home foreclosures by providing a legal safe harbor for lenders who modify mortgage loans for borrowers. The comment examines the constitutionality of the Act, and concludes that the safe harbor provisions included in the legislation amount to regulatory takings, which violate the Fifth Amendment. The comment further concludes that, in light of federal cases that have addressed the Act, the Act does not effectively incentivize lenders to modify loans. To cure this failure, Mr. Cockrell's comment recommends reintroducing certain Bankruptcy Code amendments originally proposed in the Act that might better induce the changes sought by Congress.

Preview of the Fall Issue

The Law Review published an exciting set of articles slated for publication in its Fall Issue. The articles will be available online soon. The following is a preview of what to expect.

In *Reconciling* Chevron*,* Mead Corp.*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review of Administrative Action*, Michael P. Healy, the Willburt D. Ham Professor of Law at the University of Kentucky, proposes a logical framework for reconciling differing methods of interpretation courts use when reviewing an agency's legal determinations. The author explains that the Supreme Court's framework in *Chevron* and *Mead*, which called for courts to determine whether the agency or Congress is the source of the law being applied and reviewed in a case, has resulted in differing approaches among the lower courts. To reconcile and resolve the uncertainties which result from *Mead*'s interpretation of *Chevron*, Professor Healy proposes a three step analysis that incorporates the Supreme Court's analytical framework while also accounting for other cases that have addressed judicial review of an agency's legal determinations.



A Surprisingly Useful Requirement is written by Michael Risch, Associate Professor of Law at Villanova University School of Law, who has had previous articles published in the *Indiana Law Journal*, the *Brigham Young Law Journal*, the *Tennessee Law Review*, the *Harvard Journal of Law and Technology*, and the *Yale Law Journal Online*, among others. This article discusses the viability of the eligibility requirement in patent law that an invention display "utility." After reviewing the Patent Act and relevant patent law, the author finds that the requirement for "utility" is practically useless. Instead Professor Risch proposes a "usefulness" requirement, which would require evaluating an invention's practical and commercial usefulness and illustrates how this new requirement would interact with existing parts of the patent statute.

Credit Monitoring Damages in Cybersecurity Tort Litigation is written by Vincent R. Johnson, Professor of Law at St. Mary's University School of Law, and author of such books as *Legal Malpractice Law: Problems and Prevention*, *A Concise Restatement of the Law Governing Lawyers*, *Studies in American Tort Law*, *Mastering Torts: A Student's Guide to the Law of Torts* and *Advanced Tort Law: A Problem Approach*. This article addresses how victims of identity theft have recovered damages from credit monitoring companies in tort actions when the companies fail to adequately protect the victims. After analyzing precedent and considering possible analogies to medical monitoring damages, Professor Johnson argues that even though courts typically do not require credit card monitoring services to pay damages if they fail to protect a plaintiff's identity from being stolen, the cost of credit monitoring should often be recoverable in cybersecurity litigation.

In *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, Michael Helfand, Associate Professor of Law at Pepperdine University School of Law, analyzes how courts should apply the Establishment Clause to commercial conduct, such as bankruptcy proceedings. The author notes that courts have usually dealt with this issue by adopting one of two approaches: either courts have ignored the religious nature of the conduct and applied neutral principles to the case, or they have eschewed the Establishment Clause and overemphasized the religious nature of the conduct. Professor Helfand argues that courts should adopt a middle ground in which courts utilize expert witnesses and analyze the applicability of religious law because applying the Establishment Clause uniformly to all cases would stretch the clause beyond its purpose.

In *Repairing* Lochner*'s Reputation: An Adventure in Historical Revisionism*, Thomas A. Bowden, an Analyst at the Ayn Rand Institute, and author of *The Enemies of Christopher Columbus* and *The Abolition of Antitrust*, reviews *Rehabilitating Lochner*, a recent book authored by David Bernstein, Foundation Professor at the George Mason University School of Law. In *Rehabiliting Lochner*, Professor Bernstein defends the reputation of *Lochner v. New York*, in which the Supreme Court upheld an individual right to contract, from legal academics who have almost universally shunned the decision as a "politically motivated judicial coup." The author remarks that Bernstein intelligently avoids an all-out defense of *Lochner* for a more reasonable task of restoring *Lochner*'s reputation by explaining how the *Lochner* decision stemmed from a plausible constitutional interpretation of the Fourteenth Amendment's due process clause. Bowden explains that Professor Bernstein's well-researched argument methodically examines the historical basis for this interpretation as well as the reasons behind this case's chilled reception. The author concludes that Bernstein succeeds in his task, as "*Rehabilitating Lochner* belongs on the short list of works that effectively debunk myths clinging to important Supreme Court cases."

In Citizens United *v.* Central Hudson*: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Non-Political Advertisements*, Senior Articles Editor Lora Barnhart Driscoll addresses how courts have applied the First Amendment to the government regulation of advertisements. In *Central Hudson*, the Supreme Court adopted an

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"intermediate-scrutiny" test for evaluating restrictions on commercial speech. After analyzing the Supreme Court's recent decision in Citizens United and the commercial-speech doctrine, the author proposes that the Supreme Court replace the "intermediate-scrutiny" element with a "strict scrutiny" test. She supports this thesis by explaining how this test would better harmonize the current approach with the Supreme Court's approach in Citizens United and provide more consistent outcomes, all while acknowledging the importance of commercial speech in the modern marketplace.

In *Judicial Confusion and the Digital Drug Dog Sniff: Pragmatic Solutions Permitting Warrantless Hashing of Known Illegal Files*, Research Editor Robyn Burrows analyzes an apparent circuit split between the Seventh Circuit and the Ninth Circuit concerning the legality of hashing; a computer forensics process which can identify known illegal files based on a file's hash value, or digital fingerprint. The author finds that the apparent disagreement between the two circuits is not in fact a split, but instead rests on the Seventh Circuit's misunderstanding of the technology behind hashing. In order to prevent similar confusion, Burrows proposes three solutions which will convince less technologically savvy judges that warrantless hashing is not the equivalent of a general warrant but instead the digital equivalent of a drug-sniffing dog.

In *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, Senior Research Editor Paisley Bender analyzes the role that the collateral consequences rule does and should play in today's criminal justice system. The author explains that the current rule only requires that a criminal defendant be informed of the possible range of criminal punishment, which excludes all collateral and civil consequences, such as mandatory sex-offender registration or civil commitment. Bender then proposes that in order to ease due process concerns and align the minimum responsibilities of defense counsel with the duties of trial courts, the collateral consequences rule should be revised to include the most important and automatic consequences of a conviction regardless of whether they are a part of the formal sentence or a civil consequence.

Michael Mortorano Wins the Arthur E. Schmalz Write-On Award

The Law Review wishes to congratulate second-year Candidate Member Michael Mortorano for winning the 2011 Arthur E. Schmalz Award. At the conclusion of each year's Write-On Competition, the editors of the Law Review select the best entry to win the Schmalz Award. Mr. Mortorano's submission received the highest score among all of this year's entries.

Mr. Mortorano's comment, *The Fourth Amendment in a Footnote: How One Dissenting Justice Would Reinterpret the Fourth Amendment*, reviewed Justice Douglas' lengthy dissent in *United States v. Matlock* in order to offer an historical and textual critique of current Fourth Amendment precedent. Specifically, Mr. Mortorano examined Douglas's recounting of the Amendment's evolution through several revisions, concluding that if Douglas's analysis was correct, the Framers of the Constitution did not intend to create a "reasonableness" exception to the warrant requirement in third-party consent searches of the home. Ultimately, Mr. Mortorano argued that a rule-based warrant requirement bolstered, not supplanted, by reasonable police discretion would better inform individuals of their rights and better restrain law enforcement excesses.

When informed of the award, Mr. Mortorano expressed his appreciation and excitement: "I was completely thrilled and surprised. Considering the size of our class, I was just thrilled to get a spot on Law Review. Since then, it's been great to work with the group of candidate members and editors dedicated to their writing and to putting out a high-quality product."

Michael Mortorano

Arthur E. Schmalz served as editor-in-chief of the Law Review from 1992 to 1993. In 1992, the School of Law's administration sought to bring the Law Review under faculty supervision. In response, Schmalz and then-Student Bar Association President Christian Curtis, created the *George Mason Independent Law Review*. Due to the concerted efforts of Mr. Schmalz and Mr. Curtis, Dean Henry Manne recognized the need for a fully circulated publication with students as the sole editors and managers. Thus, the *George Mason Independent Law Review* became George Mason's official law review. Mr. Schmalz now works as a partner in the Litigation and Intellectual Property practice at Hunton & Williams in McLean, Virginia.

Sean Clerget Wins the Adrian S. Fisher Casenote Award


Sean Clerget

The Law Review congratulates Sean Clerget, winner of the 2011 Adrian S. Fisher Casenote Award. The Adrian S. Fisher Award honors the candidate member who writes the best student piece chosen for publication.

Mr. Clerget's comment, *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*, analyzes free exercise jurisprudence to develop a framework for resolving conflicts between cultural and religious practices, focusing on the ability of Muslim women to wear veils in court. Mr. Clerget examines how the passage of the Religious Freedom Restoration Act of 1993 (RFRA) following the Supreme Court's decision in *Employment Division v. Smith* solidified the views of judges and commentators that *Smith* only allowed for a rational basis test review of laws shown to be neutral and generally applicable, as opposed to requiring strict scrutiny review seen under prior free exercise precedent.

Mr. Clerget argues that the interplay between *Smith* and RFRA stymied the development of lower court precedent considering and elaborating the substance of the meaning of "neutral" and "generally applicable." Without RFRA, Mr. Clerget argues that the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah* might have altered views on the effectiveness of *Smith*'s test, as *Lukumi* provided a rigorous standard for determining what constitutes "neutral" and "generally applicable." *Lukumi* set forth a four prong inquiry into whether a law was "neutral" and "generally applicable." Mr. Clerget advocates adopting a fifth prong that examines legislative timing, which would make explicit the underlying theme and implicit analysis used throughout the majority's opinion in *Lukumi*.

To demonstrate the proper application of *Smith* as clarified in *Lukumi*, and supplemented with the timing prong, Mr. Clerget applies free exercise law to restrictions on Islamic veils worn by witnesses testifying in court. Evaluating discretionary and statutory restrictions, he concludes that strict scrutiny should apply to discretionary judicial action, and that laws passed in response to discretionary incidents fail the proposed test. However, in the context of testifying in a criminal case, the Confrontation Clause of the Sixth Amendment would require the veil to be removed, unless a court were willing to create a new exception analogous to those for child abuse victims articulated in *Craig*, which seems unlikely.

Mr. Clerget graduated from Wabash College in 2009 and will graduate from George Mason University School of Law in Spring 2012. After graduation, he will take the Virginia Bar exam and start work at Arent Fox LLP in Washington, DC.

Review of the Summer Issue

The Law Review successfully published its Summer Issue in August, highlighting the 14th Annual Symposium on Antitrust Law and featuring an exciting array of antitrust law articles and comments. The following is a synopsis of the issue; the full articles are now available online.

In *Symposium Conference Report: Horizontal Market Power: The Evolving Law and Economics of Mergers and Cartels,* Law Review Members Ashley Fry, Matthew R. McGuire, and Catherine Schmierer review the Law Review's 14th Annual Antitrust Symposium, recounting the speakers' remarks and the panel discussions.

In *Corporate Governance and Competition Policy*, Professor Spencer Weber Waller explores the lack of interaction between corporate governance law and antitrust law. Professor Waller argues that a more unified approach to improve the "collective blind spots" in these two types of business law would promote the interests of both shareholders and consumers in a more systematic and meaningful way. He proposes that the antitrust community invest in business theory to supplement economic expertise brought to bear on merger analysis, and that the corporate governance community increase their attention to the role of competitive and anticompetitive outcomes in formulating duties and responsibilities for corporate actors. Spencer Weber Waller is a Professor of Law at Loyola University Chicago School of Law and serves as the Faculty Director of the Institute for Consumer Antitrust Studies.

In *Paradise Is a Walled Garden? Trust, Antitrust, and User Dynamism*, Professor Salil K. Mehra proposes a market-friendly regulatory program for mass user-generated content and innovation, or "user dynamism," on dominant online platforms. In the first application of the social science model EVLN (exit-voice-loyalty-neglect) to issues involving network regulation, Professor Mehra explains that economic regulation of user dynamism is necessary because users are quality sensitive and participate as members of the community on both the supply and demand sides. Em-

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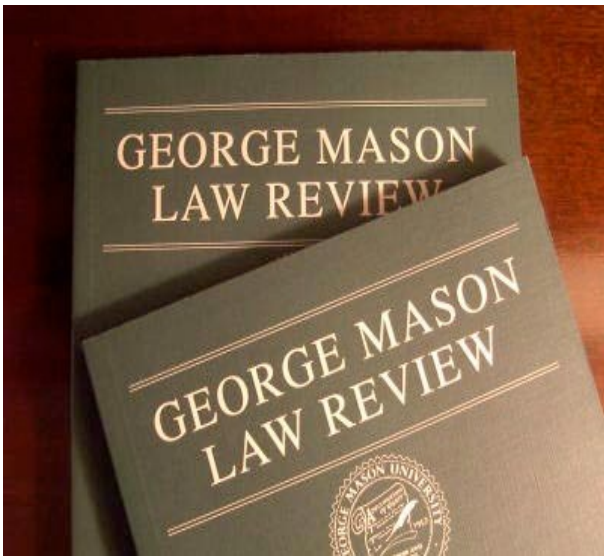
ploying the error-cost antitrust doctrine, Professor Mehra argues that user dynamism requires ex post regulatory intervention in order to enforce platform hosts' ex ante commitments to users. Salil K. Mehra is a Professor of Law at Temple University, James E. Beasley School of Law.

In *The Potential Role of Civil Antitrust Damage Analysis in Determining Financial Penalties in Criminal Antitrust Cases*, co-authors Robert Kneuper and James Langenfeld discuss the potential application of the economic damage analyses used in civil antitrust cases to determinations of the volume of commerce (VOC) affected by criminal antitrust violations. The authors examine the trade-offs between the use of the simpler approach suggested by the United States Sentencing Guidelines versus that of the complex, but more accurate, civil-style economic damage analyses. The authors conclude that the civil-style economic analyses are most appropriate when used in a criminal case where the potential VOC is relatively large, there is uncertainty as to the actual size of the VOC, and the economist has adequately reliable data to perform at least some damage estimation techniques effectively. Robert Kneuper is a Director and Principal at Navigant Economics LLC and an Adjunct Professor in the graduate economics program at Johns Hopkins University. James Langenfeld is a Managing Director at Navigant Economics LLC and an Adjunct Professor at Loyola University Chicago School of Law.

In *Towards Convergence: The Volume of "Affected" Commerce Under the U.S. Sentencing Guidelines and "Impact" Analysis Under the Clayton Act*, co-authors Julia Schiller, Ian Simmons, and Angela Thaler Wilks argue that criminal fines in cartel cases should be calculated in a manner similar to the monetary impact analysis used in civil antitrust cases because, as the policy stands, criminal punishment is disproportionate to the effects of the crimes. The authors posit that econometric analysis is no longer as complex and costly as it was in the past, and that an alignment between criminal and civil impact approaches will lead to a more just sentencing regime for criminal cartels. Julia Schiller is an associate in the Antitrust and Competition Practice Group at O'Melveny & Myers. Ian Simmons is a partner in the Antitrust and Competition Practice Group at O'Melveny & Meyers and was a speaker and moderator at the Law Review's 13th and 14th Annual Antitrust Symposiums. Angela Thaler Wilks is a counsel in the Antitrust and Competition Practice Group at O'Melveny & Myers.



The Summer Issue also includes comments by the Law Review's student authors. Featured in this issue is Articles Editor Sean Clerget's comment, *Timing is of the Essence: Revising the Neutral Law of General Applicability Standard and Applying It to Restrictions Against Religious Face Coverings Worn While Testifying in Court*. This comment is described in detail in the associated story about the 2011 Adrian S. Fisher Casenote Award.

In *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, Associate Editor James Kim analyzes how courts and federal agencies have interpreted the scope of the good cause exception to notice and comment rulemaking under the Administrative Procedure Act. He argues that the exception requires reform and better guidelines to produce more consistent interpretations. Finally, he recommends revisions to the language of the exception and modifications to its application in order to provide better guidance to courts and agencies regarding when use of the exception is warranted.

In *Enforcing Islamic* Mahr *Agreements: The American Judge's Interpretation Dilemma*, Senior Notes Editor and recipient of the 2010 Arthur E. Schmalz Write-On Award Chelsea A. Sizemore addresses the problems with judicial enforcement of Islamic *mahr* agreements, provisions within Islamic marriage contracts requiring that a husband give something of value to his wife, part of which will be deferred until the husband's death or the couple's divorce. Ms. Sizemore concludes that American courts should refrain from enforcing *mahr* agreements because the vague, boilerplate nature of the *mahr* causes courts to misinterpret the *mahr*'s provisions and to unconstitutionally entwine the state with religion.

Preview of the Judicial Engagement Conference and Survey

The Law Review recently accepted the exciting opportunity to partner on a conference addressing "judicial engagement" with the Institute for Justice, a libertarian public-interest law firm. The conference seeks to better define "judicial engagement" by bringing several well-known scholars together to present papers on the concept. It will take place at the George Mason University School of Law during the spring semester of 2012.

The Institute for Justice coined the phrase "judicial engagement" to counteract the term "judicial activism," which is used by many to criticize court opinions with which they disagree. The concept views the Judiciary as an equal branch of government to the Legislative and Executive branches whose role is to limit the power of the Federal Government. Many supporters of "judicial engagement" seek to eliminate legal frameworks, like the rational basis test, that defer to the judgment of other branches on constitutional questions. The Eleventh Circuit recently bolstered the profile of this phrase by using it in an opinion striking down the individual mandate contained in the controversial Affordable Care Act. The court explained that "[t]he Constitution requires judicial engagement, not judicial abdication."

In conjunction with the conference, the Law Review will also publish a Judicial Engagement Survey. This special fifth issue of Volume 19 will feature the papers presented at the conference. The issue will likely receive extraordinary attention from the legal community because it is set to be published amid review of the Affordable Care Act by the Supreme Court. The conference and survey offer the Law Review an exciting chance to raise its profile by presenting in-depth analyses of issues that will take a central role in the high-profile legal battles over health care reform.

15th Annual Antitrust Symposium Preview

The Law Review will be hosting its marquee event, the Annual Symposium on Antitrust Law, on Thursday, January 26, 2012. This is the 15th year that the Law Review will be hosting this exciting event. One of the major changes this year is the location. The Symposium will be taking place at the law school, utilizing the new space available in Founder's Hall. The on campus location will help increase the visibility of the Symposium among law students and faculty at George Mason and will provide alumni with an opportunity to see some of the great changes that have occurred on campus. Additionally, unlike in years past, this year's Symposium will be a full day event.

The Symposium will feature a wide variety of panels discussing important issues involving the intersection of antitrust law and high-tech industries. In addition to other topics, panelists will be discussing perspectives in high-tech antirust, high-tech mergers, search and online advertising, and social media. This year the Law Review will also be partnering for the first time with the Law & Economics Center at George Mason. This exciting partnership will allow the Symposium to feature some of the brightest minds and leaders in antitrust scholarship.

Katie Brown, the Law Review's Symposium Editor, has been working closely with Professors Josh Wright and Henry Butler to find experts in the emerging field of antitrust and high technology to serve as panelists and moderators. When asked to discuss this year's event, Ms. Brown said, "The Law Review is very excited to be partnering with the Law & Economics Center this year in hosting our 15th Annual Symposium. I'm certain that this partnership will raise the Symposium's profile and that the caliber of panelists and publications will be outstanding."

"The Law Review is very excited to be partnering with the Law & Economics Center this year in hosting our 15th Annual Symposium. I'm certain that this partnership will raise the Symposium's profile and that the caliber of panelists and publications will be outstanding."

- Katie Brown, Symposium Editor

Every year the Law Review dedicates one issue to the Symposium, highlighting some of the best scholarship in antitrust law. The Symposium issue, 19:4, will be published in summer 2012 and will be the first issue edited by the 2011-2012 board. The Symposium issue will feature a very strong collection of notes and comments on antitrust law written by some of the leaders in the field. The Law Review is extremely excited for the changes planned for its 15th Annual Symposium on Antitrust Law, and looks forward to seeing many of its alumni in attendance.

Preview of Special Spring Issue

For its Spring Issue, the Law Review will publish a collection of papers from the Association of American Law Schools (AALS) Property Law and Real Estate Transactions Section's joint program at the AALS 2012 Annual Meeting. Entitled "Rethinking Urban Development," the program will explore the spatial organization of urban areas as well as the financing of urban development after the Great Recession.

Along with an Introduction by George Mason University School of Law Professor Steven J. Eagle, the Law Review will feature six papers selected for presentation at the program. Here is a preview of the authors that are presenting at the program and will be published in 19:3.

Professor J. Peter Byrne of the Georgetown University Law Center will present his paper *The Past in Our Future* at the program. Numerous journals, including the *Harvard Journal of Law and Public Policy* and the *University of Colorado Law Review*, have published his work in the areas of property, land use, and constitutional law.

Daniel B. Rodriguez and David Schleicher will co-present their paper *The Location Market*. Professor Rodriguez is the Minerva House Drysdale Regents Chair in Law at the University of Texas School of Law. He has published over fifty articles and book chapters on law and regulation. Professor Schleicher is an Associate Professor of Law at George Mason University School of Law. His work on election law, urban development, and local government has appeared in numerous of law journals.

David Dana is the Stanford Clinton Sr. and Zylpha Kilbride Clinton Research Professor of Law at Northwestern University School of Law. Professor Dana will present his paper *Using LEED-ND to Lead The Way For Sustainable Urban Development*. He writes in the areas of environmental, property, and intellectual property law. He co-authored the book *Property: Takings*.

Gideon Kanner is presenting his paper *The Failure of Urban Revitalization Projects*. He recently retired, but remains a Professor Emeritus of Law at Loyola Law School Los Angeles. He is a distinguished condemnation and takings lawyer, who has argued several cases before the U.S. Supreme Court, including *Agins v. City of Tiburon*.

Jerome M. Organ and Julia P. Forrester will co-present their paper *Promising to be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common Interest Communities*. Professor Organ teaches law at the University of St. Thomas and works extensively in the areas of property and environmental law. Professor Forrester teaches at Southern Methodist University Dedman School of Law. She has written multiple articles, including a predatory lending article that won the John Minor Wisdom Award for Academic Excellence.

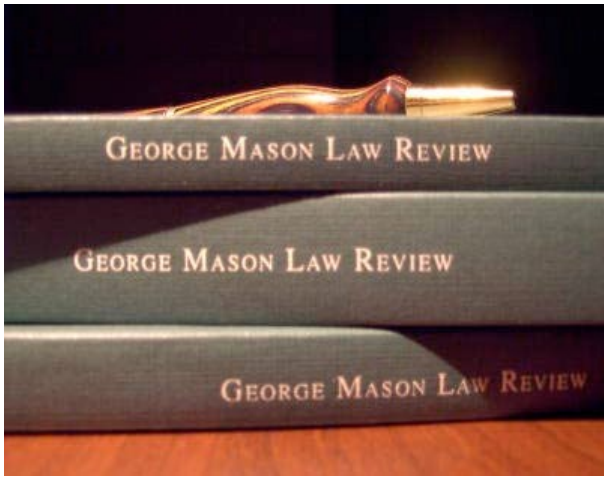
Peter W. Salsich Jr. will present his paper *Does America Need Public Housing*. Professor Salsich is the McDonnell Professor of Justice in American Society at Saint Louis University School of Law. He is a former chair of the American Bar Association's Commission on Homelessness and Poverty. He has written over thirty journal articles on housing law and land use regulation.

Upcoming Events

Antitrust Symposium
January 26, 2012

Alumni Reception
March 2012

Judicial Engagement Conference
Spring 2012



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