

William and Mary Law Review

Alumni Newsletter

Volume 50

2008-2009



The William & Mary School of Law is the oldest law school in the United States. Established in 1779, upon the appointment of George Wythe as the first professor of Law and Police, the Law School operated continuously until the beginning of the Civil War in 1861. During that time, William & Mary Law School educated some of the more prominent names in American history, such as Thomas Jefferson, John Marshall, James Monroe, and Henry Clay.

After remaining closed for some sixty years, the Law School re-opened in 1921, and has since become one of the top-ranked law schools in the United States.

The *William and Mary Law Review* is one of four law journals published by the students of William & Mary Law School. Each year, its members produce six issues of quality legal scholarship.

The Year in Review:

Volume 50 Editor-in-Chief Aaron Garrett

As I write this summary, there is only one more thing to do before Volume 50 is completely in the books—Managing Editor Emily Dodds, Executive Editor Jeff Palmore, and I need to conduct a final review of the printer's proof before they can go full speed ahead printing our sixth and final issue. In Volume 50, we published almost 2300 pages of scholarship, 42 articles and notes, and a symposium on the "Citizen Lawyer." Law Review members from the class of 2009 will enter the workforce in states all over the nation in private practice, government, and a few as judicial clerks. The only thing more exciting than knowing that Volume 50 is almost done is the opportunity I have had to work with the incoming editorial board of Volume 51. I am absolutely certain that the Law Review is in good hands.

In addition to publishing our journal in hard copy, the Law Review's digital transition is in full swing. We are developing a new website which should dramatically raise the Law Review's online visibility

by providing a way for the Law Review to showcase our publications in a faster, more accessible way. In conclusion, I'd like to thank every member of the Law Review for making my job an absolute delight to perform. Everyone's hard work made my job much easier than I ever imagined. I'd also like to thank all of the alumni for their support, and encourage you to donate to the Law Review if you are able. Finally, I'd like to send a special thank you to our fabulous administrative assistants, Beckie Pasipanki and Andrea Raines, for their superlative work this year. We truly could not do what we do without their dedication, flexibility, and delightful personalities.



Aaron C. Garrett



Jeff Palmore, Aaron Garrett, and Emily Dodds in the Law Review office.

Greetings Alumni!



Krysta Edwards

My name is Krysta Edwards, and I am honored to be the newest Editor-in-Chief of the William and Mary Law Review. Hailing from Texas, I graduated from Baylor University in 2007 with a Bachelor of Arts in Speech Communication and a minor in Sign Language Interpretation. From an early age, my parents cultivated in me a tremendous love for travel, foreign or domestic, prompting both a summer residence in Mongolia working at a home for orphaned teenage girls, as well as my 1300+ mile move to Williamsburg. Though I'm a Baylor Bear through and through, William & Mary Law School seemed to be just the right fit for me, and I've been glad to call Virginia my second home for these past two years.

Volume 51 is well underway, and I hope that each of you will have a chance to read the array of Articles and Notes that we will publish this year. I also would like to draw your attention to the Boundaries of Intellectual Property Symposium

issue, to be published in November 2009, which will feature prominent scholars in the intellectual property field.

To our newest alumni - the Editors and Senior Staff of Volume 50 - I would like to express my sincere appreciation for the way you have invested yourselves in the Law Review. Your hard work has manifested itself in an impressive volume of scholarship, and your guidance and friendship have been invaluable as we follow in your footsteps. We wish you the best in all your future endeavors.

The Volume 51 Editors and Staff are keenly aware that the bright future of the William and Mary Law Review is grounded in the solid foundation that our alumni have built. Through the years, your dedication, hard work, and intellectual contributions have made the Review a renowned journal of legal scholarship. We are committed to preserving that legacy.

Alumni Profile: *Robert Scott*

You can take Robert Scott out of Virginia, but you can't take Virginia out of Robert Scott. This former Editor-in-Chief's academic path has taken him from working as a silversmith in Colonial Williamsburg, to a professorial position at Columbia Law School, to an appointment to William & Mary's Board of Visitors. Professor Robert Scott has studied, taught, and published his way from Williamsburg to New York and back again.

Scott first came to Williamsburg to live with his older brother, who was a law student at William & Mary. During one of his summer breaks in college, visitors to Williamsburg might have found a colonial-garbed Scott working in the Colonial Williamsburg silversmith shop. Not destined to do 18th century metal work for long, Scott accepted a scholarship at Marshall Wythe and loved it from his very first day until his graduation in 1968.

At the time Scott became the Editor-in-Chief of the Law Review, the outgoing board selected the new Editor-in-Chief, and then the new Editor selected the remainder of his editorial board. Scott assembled his own dream team of a "great group of people" and had a terrific time. He led the Law Review in its first four-issue year, doubling the publication from its usual two issues.

Scott soon decided that "Law Professor" was the job for him. After receiving an S.J.D. from the University of Michigan in 1973, Scott returned to William & Mary to teach commercial law, property, bankruptcy, and contracts. His love of these topics was partly inspired by his own "legendary" contracts professor, Dean Dudley Woodbridge. Scott is now nationally recognized



Robert Scott

in the commercial law field, as a co-author of five books on contracts and commercial transactions, and a co-author with Professor Charles Goetz of six articles that have set the standard for economic analysis of contract law.

Scott left William & Mary in 1974 to teach at the University of Virginia. He served as Dean there from 1991 to 2001, improving the curriculum, renovating the law school there, and conducting the most successful fundraising campaign in any law school's history. After returning to his professorial

post, Scott received the David and Mary Harrison Distinguished Professorship in 2003, and the University of Virginia's highest honor, The Thomas Jefferson Award, in 2004.

Moving his academic career northward, Scott accepted an offer to teach at Columbia Law School in 2006, as the Alfred McCormack Professor of Law and Director of the Center on Contract and Economic Organization. He now lives in New York with his wife, who is also a law professor. Scott's daughter is a photographer and his son is a recent graduate of the University of Virginia Law School. Laughingly describing New York as "different" from Virginia, he enjoys his New York home. A member of the William & Mary Board of Visitors since 2008, Scott returns to Williamsburg periodically and will be giving this year's law school graduation address, sans colonial costume.

by: Jessie Coulter

A Message from our Faculty Advisor

TO ALL LAW REVIEW ALUMS NEAR AND FAR

Greetings from Williamsburg! We're having a great year at William and Mary. The Law Review continues to thrive and to enjoy a superlative reputation in both the legal academy and in the judiciary. It remains one of the most widely-cited law reviews in the nation.

The Law School thrives as well. We added two new faculty members this year. Larry Palmer is the Director of our new Health Policy and Law Initiative (a joint venture with Virginia Commonwealth University). Larry has had a long and distinguished career in legal academia; he spent 27 years at Cornell as a law professor, vice president, and vice provost, as well as four years at the University of Louisville. Tim Zick, whose speciality is constitutional law, joined us from St. John's School of Law. Tim recently published a new highly regarded book, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge University Press, 2009).

As for me, I have enjoyed serving as the Law Review Advisor for the past three years, but will be soon stepping down from that role as I become the Dean of the Law School on July 1. I am looking forward to serving the Law School in my new role. I hope that I'll have the opportunity to visit with many of you in the coming months and years.

Dave Douglas

The William and Mary Law Review continues to be well regarded by the legal academy and the judiciary. One recent law review ranking (compiled by Washington and Lee) has the Law Review at No. 20 (based on the number of citations to the Review in the legal literature and in judicial opinions).

THE TOP TWENTY LAW JOURNALS

(available at <http://lawlib.wlu.edu/LJ/index.aspx>)

- | | |
|--|--|
| 1. Harvard Law Review | 11. Texas Law Review |
| 2. The Yale Law Journal | 12. The University of Chicago Law Review |
| 3. Columbia Law Review | 13. UCLA Law Review |
| 4. Stanford Law Review | 14. Michigan Law Review |
| 5. New York University Law Review | 15. Northwestern University Law Review |
| 6. California Law Review | 16. Minnesota Law Review |
| 7. University of Pennsylvania Law Review | 17. Fordham Law Review |
| 8. The Georgetown Law Journal | 18. Vanderbilt Law Review |
| 9. Virginia Law Review | 19. Duke Law Journal |
| 10. Cornell Law Review | 20. <i>William and Mary Law Review</i> |

Student Accomplishments of Note

Every year, the accomplishments of the Law Review's members are quite impressive. From having notes published, to winning moot court and trial team competitions, to student leadership positions and volunteer activities, this year is no exception. Please join us as we celebrate just some of the many accomplishments of this year's Law Review members.

- Some of this year's members had notes and papers published in other journals:
 - Omid Safa's "In Search of Harmony: The Alternative Dispute Resolution Traditions of Talmudic, Islamic, and Chinese Law," was one of a handful of student papers selected for publication on the W&M Post-Conflict Justice Program Webpage.
 - Krista P. Hanvey had her note, *Long-Term "Imminent and Substantial" Endangerments: Why and How the EPA Should Reevaluate Long-Standing Settlement Agreements Entered Into Under CERCLA*, published in BNA's Toxics Law Reporter.
- Emily J. Dodds served as Vice-President of the American Constitution Society.
- Trevor S. Hall was the President of ADR Team.
- Michelle Jacobs, along with teammate Jessica Hass and Arpan Sura as witness, won First Place in the Gourley Trial Competition, a prestigious national competition sponsored by the Academy of Trial Lawyers of Allegheny County. The civil case competition takes place annually in Pittsburgh, Pennsylvania and features top competition from law schools throughout the Mid-Atlantic and Midwest regions. Additionally, Michelle won Best Overall Advocate.
- Lindsay Kaplan was a Student Admissions Ambassador; Tour-Guide Coordinator, and Vice President of Sports & Entertainment Law Society.
- John J. O'Kane and Arpan Sura were the Champions and won 4th Best Brief at the 2009 Tulane Mardi Gras Invitational Moot Court Tournament.
- John O'Kane, Brandon Harter and Arpan Sura took 2nd Place at the NYC Bar Association National Moot Court Tournament, Region IV.
- John O'Kane was Chief Justice of the William & Mary Moot Court Team, and won the Silver Cup, Awarded to the Best Oral Advocate in the Final Round at the NYC Bar Association National Moot Court Tournament, Region IV; 4th Best Oral Advocate, 2009 Tulane Mardi Gras Invitational.
- Rob Poggenklass served as president of the Student Hurricane Network, leading 20 W&M law students to New Orleans for a week over spring break to do volunteer legal work, community service and manual labor. They had a great time, too. He also serves as vice-president of the W&M Law ACLU, and held several workshops on restoring voting rights to disenfranchised ex-felons in Virginia. This summer he will intern at the California Appellate Project in San Francisco, a non-profit organization that handles about two-thirds of California's death penalty appeals. California has the largest population of death row inmates in the United States.

- Arpan Sura was on the National Moot Court Team, which took home the following team awards: Champion, Tulane Sports Law Competition (2009); Finalist, Nat'l Moot Court Competition, Region 14; Finalist, Nat'l Constitutional Law Competition (2008) and was on the National Trial Team, which took home the following team awards: Champion, Allegheny Trial Lawyers Competition (2009); Semifinalist, Puerto Rico Criminal Law Competition (2008); Finalist, ABA Labor and Employment Law Tournament (2007).
- Arpan Sura also won the following individual awards: First Place Oralist, Nat'l Constitutional Law Competition; (2008) Second Place Oralist, Tulane Sports Law Competition (2009).
- Dave Tyler also won the Best Advocate Award at the William Daniel National Trial Team Tournament, and was on the Quarterfinalist Team (of 36 teams) at National First Amendment Moot Court Tournament.

Additionally, a team composed of four Law Review members, Heather Stangle '09, Ken Abrams '09, David Tyler '09, and Hunter Allen '10, was named national champions at the William W. Daniel National Invitational Mock Trial Competition, sponsored by the Young Lawyers Division of the State Bar of Georgia on Nov. 21 through Nov. 23, 2008, in Atlanta. Additionally, Tyler was named the "Best Advocate" in the competition. The William W. Daniel National Invitational Mock Trial Competition is held annually and attracts teams from law schools across the country. Every summer, the Competition Committee sends hundreds of applications to ABA-accredited law schools. Only 18 schools are ultimately selected to compete in the competition, which is named in honor of the late Judge William W. Daniel of the Superior Court of Fulton County. Teams prepare both Prosecution and Defense cases for a criminal trial problem and have an opportunity to present arguments as attorneys and witnesses for both sides. Semi-final and final rounds are judged by superior court judges.



David Tyler, Hunter Allen, Heather Stangle and Ken Abrams win the William W. Daniel National Invitational Mock Trial Competition.

The Articles of Volume 50

This year the Volume 50 Articles Selection Committee joined the 21st century and finally switched over to electronic submissions. They ended up reviewing a total of 2,207 submissions (a 10 percent increase from last year!), and worked hard to narrow their massive review piles down to only 20 selections. The resulting articles covered topics ranging from multiple bias employment discrimination suits to an original empirical data set on patent cases at the International Trade Commission. They covered the practical—such as the emerging importance of material adverse change clauses in merger and acquisition agreements, as well as the more theoretical—for instance, an original constitutional analysis of the dormant commerce clause. After hundreds of hours of reading, the committee selected a volume of diverse authors and legal topics. Following are just a sample of Volume 50's extensive collection of articles.

Issue One: Michael S. Knoll, *The Taxation of Private Equity Carried Interests: Estimating the Revenue Effects of Taxing Profit Interests as Ordinary Income*. In response to the ongoing debate over the taxation of private equity firms, University of Pennsylvania Law Professor, Michael Knoll, has quantified the benefit private equity firms receive, and the revenue Congress has forgone, by the current tax treatment of carried interests. His original estimates of forgone revenue drew the attention of the Bloomberg News Service and Congressmen Charles Rangel in the summer of 2007 and will undoubtedly continue to serve as an aid in this taxation debate. His article posits that Congress could collect an additional two to three billion dollars a year should they elect to tax carried interests at ordinary tax rates.

Issue Two: Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*. Statutes of limitation impose all-or-nothing penalties. If a litigator waits until the last minute but meets the deadline, his client loses nothing. If a litigator misses the deadline by an hour, his client loses the entire claim. This is a doctrinal paradox. Extensively drawing from psychological literature, Judge Andrew Wistrich (E.D. Ca.) argues that statutes of limitation cause lawyers to procrastinate. They are insensitive to the fact that lawyers will wait until the last minute. Procrastination by attorneys, however, imposes significant costs on the entire legal system. How can we reduce litigation costs while eliminating the doctrinal paradox that statutes of limitation cause? Judge Wistrich introduces a graduated statute of limitation, where the value of the plaintiff's case will fractionally decrease for each day that the lawyer files late. The new system would give lawyers an incentive to file early; it would reduce stale evidence; it would resolve claims early and give defendants repose; and it would eliminate the need for courts to fashion post-hoc equitable rules that minimize the harshness of all-or-nothing rules. Citing established findings in behavioral psychology, Judge Wistrich argues that his incremental approach works because it accounts for the way people actually behave.

Issue Three: Clayton P. Gillette, *Can Public Debt Enhance Democracy?* A thought-provoking piece by one of the most prolific and respected academics in the field of public finance, this Article explores the notion that a government's creditors, through conditional lending and control of repayment obligations, may act as surrogates for voters in promoting socially optimal public policy. Evaluating real-life examples from the Fifteenth Century Casa de San Giorgio to the present, Gillette concludes that the validity of this notion is contextual: on matters relating to budgetary

expenditures, creditors may serve this purpose, sharing with voters a desire for fiscal responsibility; but on non-financial matters, such as ethics and allocation of powers, creditors have little interests, and voters must rely on their own vigilance. A version of this Article was presented at William and Mary law school's 2008 George Wythe Lecture.

Issue Four: James Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*. Volume 50's symposium issue was a discourse on the idea of the "citizen lawyer." The panel included Harvard's Mark Tushnet, Stanford's Lawrence Friedman, Yale's Robert Gordon, Duke's Paul Carrington, Texas's Sanford Levinson, and William & Mary's own Taylor Reveley and James Moliterno. Moliterno's *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, cautions lawyers entering public service. Moliterno argues that lawyers, who are instructed to place the needs and interests of their clients above all others, may have trouble divorcing themselves from those interests and placing the public good above all else. This is not to say that lawyers make bad public officials—perhaps they make the best—but lawyers at least should remain aware of this possible disadvantage when entering public service.

Issue Five: Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*. In this article, Kurt Lash disputes the accepted historical contention that the Supreme Court's now infamous *Chisholm v. Georgia* decision—in which a divided Court held that the Eleventh Amendment abrogated states' sovereign immunity and permitted private citizens to sue states in federal court—prompted Congress to create the Eleventh Amendment. Lash contends that the Eleventh Amendment instead reflected a background principle of strict construction that both permeated the Framers' constitutional creation and reflected the Framers' intended application of Article III. Because the Framers had never envisioned the possibility that Article III abrogated state sovereignty, Lash argues, *Chisholm* did not create a constitutional crisis, but represented a constitutional mistake. In passing the Eleventh Amendment, then, Congress reinstated the correct interpretation of Article III. As a normative matter, Lash thus contends that scholars must look beyond *Chisholm* to discern the Eleventh Amendment's precise meaning. In light of the background principle of strict construction, Lash also claims that an expansive view of state sovereignty is most consistent with the broad principles of enumerated federal power and retained rights that the Framers designed the Eleventh Amendment to protect.

Issue Six: Matthew J. Tokson, *The Content/Envelope Distinction in Internet Surveillance Law*. Matthew J. Tokson is a rising star in the legal scholarship community. He is currently a law clerk to the Honorable A. Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit and the 2009 Kauffman Innovation Fellow at the University of Chicago Law School. Both innovative and fascinating, this Article tackles the difficult question of how to distinguish between "content" and "envelope" information with regard to Internet communications. This distinction is significant because "content" and "envelope" information receive different levels of protection under constitutional and statutory law. Tokson's new legal framework could prove invaluable to jurists seeking to apply this old distinction to the new world of Internet communications.

Volume 50 and 51 Student Notes

We had many excellent note submissions by our students the last two years. Unfortunately, we were only able to select ten student notes per volume. We are very excited for the quality of scholarship the notes reflect and know that you will enjoy reading them. Below are the titles and authors of the notes for Volumes 50 and 51. You can find links to the full text of each Volume 50 note at the William & Mary Law Review website (www.wm.edu/law/publications/lawreview).

Congratulations to the following authors whose Notes were published in Volume 50 of the *William & Mary Law Review*:

Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*

Emily Jane Dodds, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What To Do About It*

Aaron C. Garrett, *New Theories of Guilt on Appeal in Virginia Criminal Cases*

Troy L. Gwartney, *Harmonizing the Exclusionary Rights of Patents with Compulsory Licensing*

David C. Holman, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*

Meghaan Cecilia McElroy, *Possession is Nine Tenths of the Law: But Who Really Owns a Church's Property in the Wake of a Religious Split Within a Hierarchical Church?*

Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and The Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*

Arpan A. Sura, *An End-Run Around the Takings Clause? The Law and Economics of Bivens Actions for Property Rights Abuse*

Angela J. Tang, *Taking Aim at Tiahrt*

David W. Tyler, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*

Congratulations to the following authors whose Notes have been selected for publication in Volume 51 of the *William & Mary Law Review*:

Jessie Coulter, *A Sea Change to Change the Sea: Stopping the Spread of the Pacific Garbage Patch with Small-Scale Environmental Legislation*

Krysta Edwards, *The Vote from Beyond the Grave*

Andrew Erwin, *Providing Protection and Preventing Abduction: Properly Balancing Parental Liberty and the Risk of Error with Government Interest in the Well-Being of Children in Complex Cases of Child Removal*

Noah Kuschel, *Firearm 'Use' Immunity: Why Police Officers Should Receive a Limited Exemption from 18 U.S.C. § 924(c)*

Anna Leist, *Voting with Their Feet and Dollars: The Role of Investors and the Influence of the Mutual Fund Market in Regulating Fees*

Colin McCarthy, *Paging Dr. Google: Personal Health Records and Patient Privacy*

Becky Roman, *Expanding Equitable Adoption: A Proposal to Correct the Inequity of Minority Exclusion from the Formal Adoption Process*

Andrew Szilagyi, *Blowing its Cover: How the Intelligence Identities Protection Act has Masqueraded as an Effective Law and why it must be Amended*

Scott Upright, *Suspicionless Border Seizures of Electronic Files: The Overexpansion of the Border Search Exception to the Fourth Amendment*

Chris Wilson, *Exclusive Federal Jurisdiction Over Patent-Based Malpractice Cases?: The Reach of Section 1338 After Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*

Spotlight on the 2008-2009 Symposium Issue

The Boundaries of Intellectual Property Law: A William and Mary Law Review Symposium

In February 2009, the William & Mary Law Review, in conjunction with the Institute of Bill of Rights Law, hosted its annual symposium. This year's topic was "The Boundaries of Intellectual Property Law" and drew numerous scholars in the field from all over the country. Lynda Butler, the Law School's Interim Dean and Chancellor Professor of Law, and Paul Marcus, Haynes Professor of Law and Kelly Professor of Teaching Excellence, kicked off the event by offering their opening remarks. The first session was led by Wendy J. Gordon (Boston University School of Law) and Jessica Litman (University of Michigan Law School), discussing "What We Talk About When We Talk About Boundaries."

Following the opening session were three panel discussions spread over two days, with numerous experts presenting their various views on "The Boundaries of Copyright and Trademark/Consumer Protection Law"; "The Boundaries of Patent Law"; and "Crossing Boundaries." These sessions examined the law's proper boundaries in the field of intellectual property. Although this topic and its accompanying questions have been the topic of debate in the past, there has not yet been an attempt to take a systemic, unifying approach to the question of boundaries in IP law. This symposium provided the opportunity for participants to do just that, yielding new scholarship that directly addresses the question of the proper goals of IP law and whether the scope of our current system aligns with those goals. Speakers included:

- Margo Bagley, University of Virginia School of Law
- Dan Burk, University of California at Irvine School of Law
- Graeme Dinwoodie, Chicago-Kent College of Law
- John Duffy, George Washington University Law School
- Brett Frischmann, Loyola University Chicago School of Law
- James Gibson, University of Richmond School of Law

- Wendy Gordon, Boston University School of Law
- Steven Hetcher, Vanderbilt University Law School
- Nicolas Jondet, University of Edinburgh
- Mark Lemley, Stanford Law School
- Jessica Litman, University of Michigan Law School
- Jason Mazzone, Brooklyn Law School
- Brett McDonnell, University of Minnesota Law School
- Mark McKenna, Notre Dame Law School
- Michael Meurer, Boston University School of Law
- Pamela Samuelson, Berkeley Law School
- Joshua D. Sarnoff, American University – Washington College of Law
- Rebecca Tushnet, Georgetown University Law Center
- Jane Winn, University of Washington

Papers from the Symposium will be published in the William & Mary Law Review, Volume 51. For more information on the Symposium, visit the Institute of Bill of Rights Law webpage at www.ibrl.org. There you will find a summary of the Symposium, as well as links to an article on the Symposium in BNA's Patent, Trademark & Copyright Journal, *Scholars Discuss IP Boundaries And Potential Reforms at Conference*, 77 PTCJ 369 (Feb. 13, 2009), and to Rebecca Tushnet's 43(B)log, discussing each presentation. Videos of the Introduction and Welcoming Remarks are available at <http://law.wm.edu/academics/intellectuallife/researchcenters/ibrl/video/index.php>. We hope you will take some time to learn more about this year's Symposium.

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