## William & Mary Law Review

Alumni Newsletter

## The Year in Review

by Mark Cramer, Volume 57 Editor-in-Chief

This spring marks the end of another successful year for the William & Mary Law Review. The Volume 57 editorial board and staff proudly published 34 articles—12 of which resulted from our 2015 Symposium, "Plea Bargaining Regulation: The Next Criminal Procedure Frontier"—and 10 notes. Together, this scholarship totals 2,365 pages.

Our journal owes its continued success to the contributions of each member of our board and staff, but four members deserve specific recognition. Carrie Miller, our Managing Editor, developed and oversaw our publication process, and she has been the perfect partner in running the journal. Our Executive Editor, Pete Rechter, chaired the 2015 Joint Journal Committee, managed the journal's budget, and planned our social events including our recent Banquet, our First Annual Oyster Roast, and our victorious showing at the Joint Journal Celebration. Led by our Senior Articles Editor, Graham Bryant, the Articles Selection Committee reviewed approximately 2,100 submissions, ultimately filling Volume 57 with scholarship that we hope to be as influential as it is interesting and diverse. Finally, Liz Berry, our Senior Notes Editor, successfully oversaw our Notes Selection Committee as well as the 2L note writing process.

Volume 57 owes special thanks to a few other individuals and organizations as well. Our administrative assistants, Julie Pasipanki and Lynn Murray, continue to work tirelessly on behalf of the journal. The Institute of Bill of Rights Law continues to support the Law Review in cohosting our annual Symposium: this past February, twelve of the nation's leading constitutional law and federal

courts scholars participated in our latest Symposium, entitled "Judicial Supremacy v. Departmentalism." Volume 58 will publish the scholarship resulting from this event, and the journal owes many thanks to Prof. Grove for organizing it along with Katie Ashley, our Symposium Editor.

Looking ahead to Volume 58, a few points deserve mention. Prof. Zick, the journal's long-time Faculty Advisor, will be stepping down as he goes on sabbatical to prepare his next book. His counsel has been invaluable. In his place, Prof. Oman will serve as our incoming Faculty Advisor, and we look forward to working with him for many years to come.

Additionally, the Law Review sets out on an exciting new endeavor: the launch of our online supplement, the William & Mary Law Review Online. This supplement offers a faster publication process and greater format flexibility than our traditional print volumes while maintaining the integrity of our editing process. I am excited to pass this new online supplement as well as the journal itself to Will Fletcher, the incoming Editor-in-Chief. I look forward to the journal's continued success with Will at the helm and have complete confidence in the Volume 58 board and staff. Finally, I would like to express my sincere gratitude for and admiration of the staff and board of Volume 57. It has been a pleasure and privilege to serve as Editor-in-Chief, and it has been an honor to work with such brilliant, loyal, and dedicated people. Thank you for your commitment to making Volume 57 a resounding success.



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

## The Year Ahead

by William Fletcher, Volume 58 Editor-in-Chief



Greetings from the staff and board of Volume 58! My name is William Fletcher. I am honored to serve as the incoming Editor-in-Chief of the William & Mary Law Review and am eager to build on our distinguished tradition of publishing innovative, influential legal scholarship.

The Volume 58 publication process is well underway, and we have selected Articles and Notes that will continue our legacy of excellence. Our upcoming Issue 5, for example, will include Articles from the Law Review's 2016 Symposium entitled "Judicial Supremacy v. Departmentalism," which featured many of our nation's leading constitutional law professors describing the theories and politics of interpretive control as well as judicial review of competing constitutional claims and institu-

tional incentives. Additionally, Volume 58, building on the ideas and foundations set in place by the Volume 57 Editorial Board, is launching the William & Mary Law Review Online, an online supplement to the Law Review focusing on responsive pieces to the print journal and shorter, timely essays of original scholarship. I would like to give a special and sincere thank you to Mark Cramer and the Volume 57 Editorial Board for their selfless leadership, sound guidance, and steadfast dedication to the Law Review over the past year. They produced an exceptional volume and have been incredibly generous in devoting so much time and thought to training the Volume 58 Editorial Board. We have benefitted immensely from their knowledge and experience, and I wish them all the best. As the Volume 58 Board finishes transitioning into our new roles, I want to express how grateful I am both for the honor of leading the Law Review in the upcoming year as well as for the opportunity to work with and learn from such a talented, thoughtful team. I'm looking forward to another great year.

## The Nation's Top Law Journals

The William & Mary Law Review continues to be well regarded by the legal academy and the judiciary. The most recent ranking of law journals, compiled by Washington & Lee University, places the Law Review as the twenty-second ranked journal based on number of citations to the Law Review in legal scholarship and judicial opinions.

- 1. Stanford Law Review
- 2. Harvard Law Review
- 3. University of Pennsylvania Law Review
- 4. Columbia Law Review
- 4. Yale Law Journal
- 6. The Georgetown Law Journal
- 7. UCLA Law Review
- 8. Michigan Law Review
- 9. Minnesota Law Review

- 10. California Law Review
- 11. Cornell Law Review
- 12. Virginia Law Review
- 13. Duke Law Journal
- 14. Texas Law Review
- 15. Iowa Law Review
- 16. New York University Law Review
- 17. Northwestern University Law Review
- 18. Supreme Court Review

- 19. Fordham Law Review
- 20. Notre Dame Law Review
- 21. Vanderbilt Law Review
- 22. William & Mary Law Review
- 23. The University of Chicago Law Review
- 24. Boston University Law Review
- 25. Boston College Law Review

## Alumni Profile: Robert R. Kaplan

## William & Mary Law School Class of 1972

By Lauren Weisman, Volume 58 Communications Editor

Our alumni are proof that a William & Mary legal education is the cornerstone of a long, rewarding career in nearly any field. Notable alum Robert Kaplan of the class of 1972 credits his success in business and in law to the learning he did as W&M law student and as an Articles Editor of Volume 13 of the William & Mary Law Review.

Dedicated to the Tribe, Mr. Kaplan completed both his undergraduate and legal educations at William & Mary. After earning his J.D., he kept his talents local and began practicing law at Hirschler, Fleischer, Weinberg, Cox & Allen in Richmond, Virginia. In 1978, he made partner and headed the firm's municipal finance, mergers & acquisitions and securities law practice. Mr. Kaplan's love for "deals" would soon take him to great entrepreneurial heights.

In 1988, motivated by curiosity and the support of his wife, Mr. Kaplan left the practice of law to co-found Carter Kaplan & Co., an investment and merchant bank headquartered in Richmond, with his largest client. Kaplan headed the firm's corporate investment banking practice while also pursuing a municipal underwriting practice. Mr. Kaplan looks back fondly on his choice to "step out" of traditional legal practice. He feels satisfied that he will not have to wonder what taking such a business risk might have yielded.

Mr. Kaplan continued to blaze a trail beyond traditional legal practice when he cofounded and served as Managing Director of Columbia Naples Capital, a leveraged buy-out sponsor firm.

In 2001, Mr. Kaplan left Columbia Naples Capital to co-found North American Propane, Inc., which was a holding company for

an approximately \$125 million run rate, residential and commercial energy distribution business that operated in the New England and Mid-Atlantic markets. Presently, Mr. Kaplan focuses his legal practices on capital markets and general business representation, mergers & acquisitions, and municipal finance at Kaplan, Voekler, Cunningham & Frank in Richmond.

Mr. Kaplan attributes much of his career success to the writing skills he honed on the

William & Mary Law Review. He describes his time on the Law Review as "critical in refining [my] writing skills" and claims that his experience on the journal has served him well ever since. Mr. Kaplan regards a legal education as a "great grounding" from which to grow in business because it emphasizes analytical thinking. He believes that three or four years of legal practice is the perfect way to "set the nail" for success.

Mr. Kaplan loves spending time with his five (soon to be six) grandchildren. He equates baseball to life and is a die-hard Cubs fan. In his free time, Mr. Kaplan likes to hunt, fish, cook,

## Judicial Supremacy v. Departmentalism

The 2015-2016 William & Mary Law Review Symposium

n Friday, February 19 and Saturday, February 20, 2016, fourteen of the country's most prominent Constitutional Law scholars convened at William & Mary Law School for the 2015-2016 William & Mary Law Review Symposium: "Judicial Supremacy v. Departmentalism." Among those in attendance was Dean Erwin Chemerinsky of the University of California, Irvine School of Law and author of what is perhaps the most widely read treatise on constitutional law. The symposium discussed the two primary models for evaluating the role each branch of the federal government has in interpreting the Constitution. The first, judicial supremacy, holds that the Supreme Court "speaks the last word" on the meaning of the Constitution and that all other branches are bound by its

interpretations. The second, departmentalism, holds that all branches of the federal government are co-equal in their ability to discern the meaning of the Constitution and are not necessarily bound by the determinations of the other branches. Professor Tara Grove of the William & Mary Law School helped choose the topic for this year's symposium, and together with Kathryn Ashley, the William & Mary Law Review Symposium Editor, arranged for these incredible scholars to gather together to discuss this important subject. The Law School's Institute of the Bill of Rights Law cosponsored the event. All of the papers from the Symposium will be published in Volume 58 of the William & Mary Law Review.

## William & Mary Law Review Symposium co-hosted with the Institute of the Bill of Rights Law

#### **PARTICIPANTS**

Theories of Interpretive Control

**ALLISON ORR LARSEN**, William & Mary Law School **ERWIN CHEMERINSKY**, University of California, Irvine School of Law

**SAIKRISHNA PRAKASH**, University of Virginia School of Law **KEVIN WALSH**, University of Richmond School of Law

Judicial Review of Competing Constitutional Claims

**TIMOTHY ZICK**, William & Mary Law School **REBECCA BROWN**, University of Southern California Gould
School of Law

**ERIN DELANEY**, Northwestern University Pritzker School of Law

Institutional Incentives

SANFORD LEVINSON, University of Texas School of Law NEAL DEVINS, William & Mary Law School MARK GRABER, University of Maryland Francis King Carey School of Law

The Politics of Interpretive Control

TARA GROVE, William & Mary Law School
CORINNA LAIN, University of Richmond School of Law
FREDERICK SCHAUER, University of Virginia School of Law
KEITH WHITTINGTON, Princeton University

## The Articles of Volume 57

By Graham Bryant, Volume 57 Senior Articles Editor

 $\mathbf{7}$  olume 57 was anexcellent other year for the Articles Selection Committee of the William & Mary Law Review. The total number of submissions to the Review continued grow, with over 2,100 articles, essays, and book reviews submitted for publication consideration. As always, determining



which twenty or so articles to publish out of these many excellent submissions is a herculean task, but one the ASC handled admirably. Each initial reviewer read roughly 300 original submissions, not counting the ones we reviewed as a committee. Each article averages around 25,000 words, so that means each reviewer read the equivalent of 7,500,000 words during the selection process, again not counting materials we read for committee review. We remained selective, extending publication offers to only 3 percent of submissions, and the twenty-one scholarly works we ultimately published were well worth the immense effort that always goes into the selection process. My deepest thanks go out to the six Lead Articles Editors who devoted so much of their second half of law school to Volume 57, and also to Mark, whose role on the ASC was invaluable.

William & Mary Law Review, ranked twenty-second among all legal publications, continues to be a powerhouse of legal academia, and a survey of some of the works published in Volume 57 only reinforces that reputation. Martin Redish, writing with

Matthew Heins, is publishing Premodern Constitutionalism, contrarian piece countering modern constitutional realists, departmentalists, and popular constitutionalists by arguing that those theories are attacks on American constitutionalism itself. the intellectual property realm, Mark

Lemley and Mark McKenna advocate in their article, Scope, for a consolidated process for determining the scope of IP rights rather than the current separation of infringement and validity. Robert Cooter and David DePianto address the perennial problem of how to calculate the value of a human life and advocate for a new standard in the requlatory and tort contexts in Community Versus Market Values of Life. In Neutral Principles and Some Campaign Finance Problems, John McGinnis analyzes the Roberts Court's campaign finance jurisprudence and argues that the consistent majority in those cases tend to follow neutral principles applicable across First Amendment contexts, while the dissenters seek to carve out exceptions to the First Amendment specific to the campaign finance area. Finally, in keeping with the Review's role as a general interest law journal, Deborah Gordon explored an emerging issue in the trusts and estates field in Forfeiting Trust, in which she explores the implications of estate planning attorneys applying no-contest or forfeiture clauses, most commonly seen in wills, to trust instruments.

### The Articles of Volume 57

#### ISSUE 1 (OCTOBER 2015)

David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702

Marc Jonathan Blitz, James Grimsley, Stephen E. Henderson, and Joseph Thai, Regulating Drones Under the First and Fourth Amendments

David Kamin, Basing Budget Baselines

Samir D. Parikh, A New Fulcrum Point for City Survival

#### ISSUE 2 (NOVEMBER 2015)

Allan Erbsen, Personal Jurisdiction Based on the Local Effects of Intentional Misconduct

Deborah S. Gordon, Forfeiting Trust

Paul B Miller & Andrew S. Gold, Fiduciary Governance

Michael E. Waterstone, The Costs of Easy Victory

#### ISSUE 3 (FEBRUARY 2016)

Robert Cooter & David DePianto, Community Versus Market Values of Life

Paul T. Crane, Charging on the Margin

John O. McGinnis, Neutral Principles and Some Campaign Finance Problems

Mila Sohoni, The Administrative Constitution in Exile

#### ISSUE 4 (MARCH 2016)

William & Mary Law Review Symposium: "Plea Bargaining Regulation: The Next Criminal Procedure Frontier"

Stephanos Bibas, Designing Plea Bargaining From the Ground Up: Accuracy and Fairness Without Trials as Backstops

Josh Bowers, Plea Bargaining's Baselines

Carol A. Brook, Hon. Justice Bruno Fiannaca, Hon. Judge David Harvey, Paul Marcus, Jenny McEwan, and Hon. Justice Renee Pomerance, A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States

Darryl K. Brown, Judicial Power to Regulate Plea Bargaining

I. Bennett Capers, The Prosecutor's Turn

Gabriel J. Chin, Pleading Guilty Without Client Consent

Donald A. Dripps, Guilt, Innocence, and Due Process of Plea Bargaining

Roger A. Fairfax, Jr., Thinking Outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process

Brandon L. Garrett, Why Plea Bargains Are Not Confessions

Jenny Roberts & Ronald F. Wright, Training for Bargaining

Christopher Slobogin, Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism

Jenia I. Turner, Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons

#### **ISSUE 5 (APRIL 2016)**

Derek W. Black, Taking Teacher Quality Seriously

Joshua B. Fischman & Tonja Jacobi, The Second Dimension of the Supreme Court

Vicki C. Jackson, Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy

Anthony Niblett & Albert H. Yoon, Friendly Precedent

Martin H. Redish & Matthew Heins, Premodern Constitutionalism

#### ISSUE 6 (MAY 2016)

Andrew Coan, Implementing Enumeration

Lee Epstein, Some Thoughts on the Study of Judicial Behavior

Sean J. Griffith, Corporate Governance in an Era of Compliance

Jonathan Hafetz, A Problem of Standards?: Another Perspective on Secret Law

Mark A. Lemley & Mark P. McKenna, Scope

### The Notes of Volume 57

**E**ach year, students submit many excellent notes for consideration by the Notes Selection Committee for publication in the *William & Mary Law Review*. Congratulations to the following authors whose notes were published in Volume 57 of the *William & Mary Law Review*.

**Jacob Derr**, Measuring Monopsony: Using the Antitrust Toolbox to Protect Market Competition and Help the Television Consumer

**Carrie Miller**, Parting the Dark Money Sea: Exposing Politically Active Tax-Exempt Groups Through FEC-IRS Hybrid Enforcement

Connor Baer, Drugs for the Indigent: A Proposal to Revise the 340B Drug Pricing Program

**Cameron Ginder**, NCAA and the Rule of Reason: Analyzing Improved Education Quality as a Procompetitive Justification

**Justin Pierce**, Shifting Data Breach Liability: A Congressional Approach

**Liz Rademacher**, The Beginning of the End: Using Ohio's Plan to Eliminate Juvenile Solitary Confinement as a Model for Statutory Elimination of Juvenile Solitary Confinement

**Melissa Fussell**, Dead Men Bring No Claims: How Takings Claims Can Provide Redress for Victims of Real Property Theft during Dixie's Holocaust

**Matthew Jewitt**, Encouraging Transportation-Oriented Development in the United States: A Case for Utilizing "Earned-as-of-Location" Credits to Promote Strategic Economic Development

John Sanders, A Tiny Fish with a Big Problem: Natives, Elvers, and the Maine Indian Claims Settlement Act of 1980

### The Notes of Volume 58

A further congratulations is owed to each of the following authors whose notes were selected for publication in Volume 58 of the William & Mary Law Review by the incoming Notes Selection Committee.

Will Fletcher, Taxing Streaming Media: Using Access & Consumption to Create a Plan for Taxing the Cloud

Lila Jividen, Personal Enough for Protection: The Fifth Amendment & Single-Member LLCs

T.J. Keefe, Leave & Marriage: The Flawed Progress of Paternity Leave in the U.S. Military

Chelsea King, Forcing Players to Walk the Plank: Why EULAs Improperly Control Mictrotransactions in Video Games

**Andrew Pecoraro**, Testing the Limits of Obergefell: Do Statutes Banning Incestuous Marriage Violate the Fundamental Right to Marry?

**John Satira**, Determining Deception: The Varying Viability of State Consumer Protection Claims Against Sexual Orientation Change Efforts

Janet Smith, When the Perfect is the Enemy of the Good: Teva v. Sandoz & Indefiniteness as an Invalidity Defense

**Trevor Vincent**, Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment with Transferable Development Rights

**Jennifer West**, The Rule of Reason as a Framework for Applying the FTC Unfairness Test in Data Security Cases

Steven Young, Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Privilege

## Student Accomplishments of Note

#### **ENGAGEMENTS AND WEDDINGS**

**Kevin G. Bender** (3L) and Sarah Frances Corneliussen (M.Ed. '11) are engaged to be married on June 11, 2016.

**Claire Hunter** (2L) and **Justin Lashley** (2L) are engaged to be married in July 2016.

**Emily Olivier Kesler** (2L) married Tyler Kesler in New Orleans on June 6, 2015.

**Stephen Matous** (3L) and Cait Seargent are engaged to be married on October 8, 2016.

#### PUBLICATIONS AND WRITING COMPETITIONS

**Mark Cramer's** (3L) article National Security Letters and Corporate Boards won first place in the American Bar Association Business Law Section's Mendes Herschman Writing Competition.

**Jacob Derr's** (3L) article Widening the Playing Field: The Comcast-Time Warner Cable Merger and Regulating New Competition will be published in the Cornell Policy Review.

#### TRIAL TEAM

**Katie Chounet** (3L) was a quarterfinalist at the Capitol City Challenge.

**Tasha Thompson** (2L) was a regional semi-finalist at the National Trial Competition.

**Jennifer West** (2L) was a semifinalist at the 2016 John L. Costello National Criminal Law Trial Advocacy Competition.

#### **MOOT COURT**

**Tasha Thompson** (2L) wan Best Brief at the Global Antitrust Institute Invitational Moot Court Competition and was an octofinalist at the Evan A. Evans Constitutional Law Moot Court Competition.

#### **ALTERNATIVE DISPUTE RESOLUTION TEAM**

**Justin Pierce** (3L) placed second and was named Best Oral Advocate at the Nascar Negotiation Competition.

#### TEACHING ASSISTANTSHIPS AND LEGAL PRACTICE FELLOWSHIPS

**Kevin G. Bender** (3L) was a teaching assistant for Criminal Law for 2015-2016.

**Katie Chounet** (3L) was a Legal Practice fellow for 2015-2016.

**Jacob Derr** (3L) was a teaching assistant for Constitutional Law in 2015-2016.

**Melissa Fussell** (3L) was a teaching assistant for Torts for 2015-2016.

**Andrew Pecoraro** (2L) was a Legal Practice fellow for 2015-2016.

**Elizabeth Rademacher** (3L) was a teaching assistant for Torts for 2015-2016.

**Abigail Snider** (3L) was a Legal Practice fellow for Advanced Civil Practice for 2015-2016.

**Tasha Thompson** (2L) was a teaching assistant for Trots for 2015-2016 and will continue to serve as a teaching assistant for Torts in 2016-2017.

**Amber Will** (3L) was a teaching assistant for Criminal Law for 2015-2016.

#### **OTHER**

**Kathryn Ashley** (3L) served as Secretary of the Student Bar Association for 2015-2016.

Mark Cramer (3L), Lenny Simmons (3L), Lauren Stocks-Smith (3L), and Kathleen Zaratzian (3L) served as Honor Council members for 2015-2016.

**Katie Chounet** (3L) was a 2016 Ewell Award recipient and was featured on Tipping the Scales's Top Law Students list for 2015-2016.

**Claire Hunter** (2L) served as Deputy Chairman of the Honor Council for 2015-2016.

**Carrie Mattingly** (2L) was elected as a 3L Student Bar Association representative for 2016-2017.

**Tasha Thompson** (2L) will serve as Lt. Governor for Membership for the ABA Fourth Circuit Law Student Division.

## Class Notes: 3L Destinations

#### Kevin G. Bender

McGuire Woods, LLP Richmond, Virginia

#### Liz Berry

Skadden, Arps, Meagher & Flom, LLP Washington, D.C.

#### **Graham Bryant**

Hon. Glen A. Huff, Chief Judge Court of Appeals of Virginia

#### **Katie Chounet**

Postal Service Office of General Counsel, Employment and Labor Law Section Washington, D.C.

#### Lacey Coppage

U.S. Government Accountability Office Washington, D.C.

#### **Brianna Cornelius**

Latham & Watkins, LLP San Diego, California

#### **Mark Cramer**

Richards, Layton & Finger, LLP Wilmington, Delaware

#### **Bria Cunningham**

Davis, Polk & Wardwell, LLP New York City, New York

#### Jacob Derr

K&L Gates, LLP Washington, D.C.

#### Melissa Fussell

Hon Rebecca Beach Smith, Chief Judge Eastern District of Virginia

Hon. Judge Presnell

Middle District of Florida

#### **Cameron Ginder**

Hon. Judge Michael S. Kanne U.S. Court of Appeals for the Seventh Circuit

#### **Matthew Jewitt**

White & Case, LLP New York City, New York

#### **Stephen Matous**

Paul Hastings, LLP New York City, New York

#### **Kristin Poole**

Woods Rogers, PLC Roanoke, Virginia

#### Elizabeth Rademacher

Davis & Harman, LLP Washington, D.C.

#### Peter Rechter

Hon. Judge A. Richard Caputo Middle District of Pennsylvania Covington & Burling, LLP

### John Sanders

Washington, D.C.

Seward & Kissel, LLP Washington, D.C.

#### Walter Schuster

Hon. Judge Joseph F. Leeson, Jr. Eastern District of Pennsylvanja

Blank Rome, LLP Philadelphia, Pennsylvania

#### Lauren Stocks-Smith

Venable, LLP Washington, D.C.

#### **Jack Wilson**

Fish & Richardson, LLP Washington, D.C.



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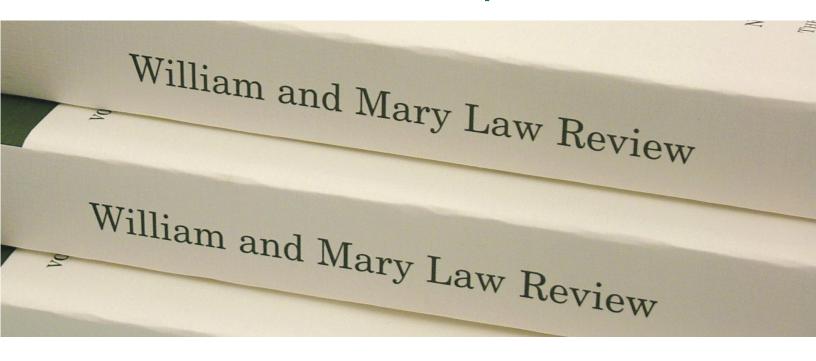
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