Nothing can stop the George Mason Law Review’s annual antitrust symposium. Nothing. A winter snowstorm brought the entire region to a grinding halt on February 13. The federal government closed its offices. The public schools canceled classes. So did George Mason and all of the other area law schools. And still the symposium proceeded.

The mere fact that the symposium happened at all would qualify as a triumph, under the circumstances. To say this, though, and nothing more, would be wholly inadequate in light of what Symposium Editor Matthew Wheatley and his assistants accomplished. On a day when the roads were buried and even the city buses were idle, Matt and his team put on an event that drew the FTC chairwoman, three sitting commissioners, three former FTC chairmen, one prominent federal appellate judge in the form of the Hon. Douglas Ginsburg, and a capacity crowd of about 125 attendees.

The 2014 symposium exemplifies the best of the Law Review and highlights the 2013-2014 board’s efforts to expand the journal’s footprint in the legal and scholarly communities. Our Developments section, led by Emily Kornfeld and Nate Pettine, published a series of notable and timely pieces this year. Our partnership with the newly created Center for the Protection of Intellectual Property will soon yield a special issue featuring more than a dozen essays on hot topics in patent law. It won’t be long, too, before our revamped website is ready to launch.

A new Board of Editors is right now assuming leadership of the Law Review, and we hear tell that the new executives, Amy Josselyn and Tommy Cumberland, have big plans. We are proud to be turning the journal over to them, and we can’t wait to see what they do.

Alumni Spotlight: Josh Blackman

Josh Blackman
Graduated: May 2009
Articles Editor 2008-2009

Mr. Blackman is an Assistant Professor at the South Texas College of Law in Houston, Texas where he teaches Constitutional Law and Property. Previous to his teaching career, Mr. Blackman was a clerk for Judge Danny Boggs at the U.S. Court of Appeals for the Sixth Circuit and Judge Kim Gibson at the U.S. District Court for the Western District of Pennsylvania. Mr. Blackman has published extensively, both in book form and in article. He has authored Unprecedented: The Constitutional Challenge to Obamacare, Public Affairs Books (2013), which received praise from critics at the Wall Street Journal and Philadelphia Inquirer as well as many of his fellow law professors. He has also published articles on property and constitutional issues in many legal journals including the Harvard Journal of Law and Public Policy, Texas Law Review, and Georgetown Journal of Law and Public Policy.

Mr. Blackman was recently selected to Forbes Magazine’s “30 Under 30 in Law and Public Policy.” His legal blog, Josh Blackman’s Blog, was also chosen to be listed in the ABA’s Annual BLAWG List and mainly discusses issues concerning both the Constitution and the Supreme Court. Mr. Blackman also created Fanta-SCOTUS, which allows attorneys, law students, and other avid Supreme Court followers made predictions about all cases that the Supreme Court decided!
Law Review Hosts 17th Annual Symposium on Antitrust

On Thursday, February 13th, while a snowstorm shut down Washington, D.C., the show went on for The George Mason Law Review, as we hosted our 17th Annual Symposium on Antitrust Law at Le Meridien Arlington Hotel in Rosslyn. The Symposium, titled “The FTC: 100 Years of Antitrust and Competition Policy,” was presented in partnership with the George Mason Law & Economics Center and title sponsors Freshfields Bruckhaus Deringer, NERA Economic Consulting, as well as meal sponsors Kelley Drye & Warren LLP and Orrick, Herrington & Sutcliffe LLP.

The event featured keynote remarks by the Honorable Edith Ramirez, Chairwoman of the Federal Trade Commission, and despite the heavy snow brought together top scholars and practitioners to reflect on the FTC’s history and remark on its centennial. Over 120 lawyers, academics, and students attended the program, including members from state attorneys general offices, attorneys from the Federal Trade Commission, and several global antitrust officials. The event was also webcast live, with Commissioner Ohlhausen announcing a twitter handle for the event to enable webcast attendants to submit questions to the panelists.

The Symposium presented five panels of distinguished speakers and moderators from the field of antitrust law. The first panel, “Intellectual Property and Antitrust,” covered the Commission’s role in addressing anticompetitive effects of IP license arrangements. The second, “Mergers,” delved into the development of the joint DOJ and FTC 2010 Horizontal Merger Guidelines and their implementation. The keynote panel, the former chairmen’s panel, featured three former FTC Commissioners and Chairmen discussing their thoughts on their tenure at the FTC.

The third panel, “State and Professional Restraints” touched on the Commission’s role in addressing anticompetitive restraints instituted by these two entities. The final panel, “Section 5 Policy,” presented thoughts on whether the Commission should offer guidance on Section 5 policy and what that guidance should be.

Additional distinguished speakers and moderators included: The Honorable Douglas H. Ginsburg, Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Professor of Law, George Mason University School of Law; The Honorable Maureen K. Ohlhausen, Commissioner, Federal Trade Commission; The Honorable Julie Brill, Commissioner, Federal Trade Commission; The Honorable Joshua D. Wright, Commissioner, Federal Trade Commission; Jon Leibowitz, Partner, Davis Polk & Wardwell LLP; Timothy J. Muris, Of Counsel, Kirkland & Ellis LLP, George Mason University Foundation Professor, George Mason University School of Law; James C. Miller III, Senior Advisor to Husch Blackwell LLP.

For more information on this year’s Symposium, including videos of all panels from the event, please visit: www.georgemasonlawreview.org/symposium/2014-symposium/. If you enjoyed this year’s Symposium, want to learn more about antitrust law and the FTC’s 100 years of competition policy, or simply want to bolster your collection of legal scholarship, be sure to check out the George Mason Law Review’s Symposium issue, Volume 21, Issue 4. This issue will be published in summer 2014.
Review of Winter Issue

The Law Review successfully published its winter issue in December. The following is a synopsis of issue 21:2, and the full articles are now available online.

In Borne Back Ceaselessly Into the Past: Fisher v. University of Texas, The Freedmen’s Bureau Act, and The “Originalist” Meaning Of Color Blindness, Professor and Director of the Civil Rights Clinic, Aderson Bellegarde Francis of Howard University School of Law analyzes the idea that “race-consciousness” decisions are per se unconstitutional. At the end of the Civil War, the idea of the Constitution being color-blind was developed, and any race-conscious remedies that favored one race over another bred resentment, dependency and the idea of reverse discrimination. Francis argues that after 150 years this notion of color-blindness has remained consistent and is used as the answer to every race question. He states the doctrine is “tainted” because it was initially used for the purpose of preventing emancipated slaves from receiving special welfare and educational benefits previously denied to them. He uses Fisher, an affirmative action case, as a current example and looks to Civil Rights Act of 1875 and the Freedmen’s Bureau Act in which the idea of constitutional colorblindness was established.

Kimberly Brown, Associate Professor at University of Baltimore School of Law, discusses the government’s use of facial recognition technology (“FRT”) in Anonymity, Faceprints, and the Constitution. Her article attempts to reassess the Constitution’s relevance regarding surveillance through FRT and related technologies. She argues that anonymity should be a constitutional value as explicit in the Supreme Court’s Fourth Amendment jurisprudence. She uses her arguments to derive guidelines from First and Fourth Amendment law to deal with modern technology’s threat to the constitutional value of anonymity.

In A Theory of Civil Liability, Nathan B. Oman, Professor at William & Mary Law School, asks, “what is civil liability?” He discusses the two current camps of civil liability: contractual liability, liability as a duty, and tort liability, liability as a cost, but notes that neither of these properly relates the plaintiff and the defendant to each other. His article offers a third theory which argues that civil liability is a type of vulnerability to private aggression, by limiting the extent of both the defendant vulnerability and the plaintiff’s options. He argues that the law does not suppress private aggression, but instead that it limits and channels it.

In Gay Rights, Equal Protection, and The Classification-Framing Quandary, Peter Nicolas, a professor at the University of Washington School of Law, splits constitutional discrimination claims into three categories: 1) laws that are clearly discriminatory in that they are facially discriminatory by referring to a persons specific sexual orientation; 2) claims made against content-based laws that discriminate against conduct only when two people of the same sex perform that conduct together; and 3) cross-referenced same-sex conduct laws, which proved that some sort of benefit is only available to persons who satisfy a cross-referenced statute. Nicolas focuses on the latter two categories of laws and argues that although they raise complex framing issues, they should nonetheless be characterized as purposefully discriminatory on the bases of sex and sexual orientation sufficiently to adequately pass the discrimination threshold in order to get based equal protection basis.

In Section 1983 Causes of Action Under The Contracts Clause Of The Constitution, Research Editor James P. McMahon analyzes how the Section 1983 clause has developed over time and how it has related to the contract clause of the Constitution throughout. He argues that a party should be able to bring a Section 1983 action if their rights under the contract clause are violated. McMahon surveys a slew of Section 1983 Supreme Court Cases and then applies the Court’s reasoning to a circuit split over whether a violation of the contract clause can be brought as a Section 1983 claim.

In Form Over Fairness: How The Supreme Court’s Misreading Of The Federal Arbitration Act Has Left Consumers In A Lurch, Member Michelle L. Caton examines the FAA and argues that the misreading and expansion of the act has undercut the institution of consumer arbitration. She argues that the Court has strayed from the original intent and meaning of the statute and expanded it so the FAA impinges on consumer and state rights. The act has been especially misapplied to modern scenarios not envisioned by the act, such as cellular phone contracts, and the law needs to be reexamined and updated by Congress. In the interim, entities need to adopt procedural safeguards to protect consumer arbitration.

In The Applicability Of The Prior Restraint Doctrine To False Advertising Law, Associate Editor Corinne Stuart analyzes preliminary injunctions that are issued in false advertising cases. Stuart argues that in these cases, the prior restraint doctrine is implicated whenever the speech in the advertisement is found to be true and non-misleading at the final adjudication of the state. A defendant’s First Amendment free speech rights are infringed when preliminary injunctions are issued, particularly where the advertisement is found to be true. She compares the use of the prior restraint doctrine in defamation and copyright infringement cases to false advertising cases. She also looks to Winter v. Natural Resources Defense Council, Inc. and argues for the balancing of interests test used in the case to determine the use of prior restraint.

Become a Law Review Mentor!

Each year, a new crop of Law Review members begins the exciting, but challenging process of writing a note or comment. We are seeking YOUR support to assist members in this process. The time commitment is minimal. It includes:

- An initial discussion regarding topic selection
- Reviewing an outline of the note or comment
- Providing feedback on a draft prepared by the student
- You may choose (and we encourage) additional involvement beyond approving the topic and commenting on the outline and first draft, but we are mindful of your professional commitments

If you are interested in helping out or would like more information, please contact 2014-2015 Editor-in-Chief Amy Josselyn at eic@georgemasonlawreview.org and Notes Editor Claire Bourque at clairebourque@gmail.com Thank you in advance for your support!
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 in issue 20:3.

In Property Rights and Modern Energy, Professor Troy Rule of the University of Missouri School of Law analyzes several ways of adjusting property rights regimes in response to social or technological change and offers some general guidelines for adapting property law to the new energy innovations of the twenty-first century. Professor Rule proposes that laws which strategically protect particular property interests with “liability rules” rather than “property rules” can be a useful way to adjust property rights in energy-related resources without disregarding citizens’ existing rights in those resources.

In A Prospective Look at Property Rights and Environmental Regulation, Professor Steven Eagle of George Mason University School of Law considers the future interaction of environmental regulation and private property rights, with an emphasis on climate change issues. Professor Eagle concludes that environmental issues not satisfactorily resolved at the federal level will lead to more state and local regulation that impinges on traditional understandings of property and, given the uncertainty associated with detrimental environmental outcomes, and the trend towards more proactive sub-national land use controls, more micromanagement of property will result.

In Foreground Principles, Associate Professor Timothy Mulvaney of Texas Wesleyan University School of Law calls into question the Supreme Court’s preference under the Takings Clause that property interests are created by “background principles” of common law. Professor Mulvaney advocates de-emphasizing the background principles inquiry in favor of a contextual analysis that is centered on fairness and recognizes that background principles might not be sufficient to deal with modern problems. He concludes that such a mode of analysis seems particularly apt in instances where regulations adopt state-of-the-art policies technologically inconceivable when any potentially analogous background common law principle was originally declared, or when addressing issues about which modern science has shed significant new light.

In Duty and Break in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change, Professor Maxine Burkett of the William S. Richardson School of Law at the University of Hawaii addresses the important and challenging questions related to the nature and scope of the more expansive duty to which local governments now have to adhere in light of accelerated climate change. Professor Burkett considers the public policy arguments for introducing a legally cognizable duty where there has been none prior and removing immunity shields in instances where they clearly make communities more vulnerable. The article seeks to encourage local governments to prepare earnestly and aggressively for the inevitable and increasingly dangerous changes global warming presents.

In Psychics, Russian Roulette, and Data Security: The FTC’s Hidden Data Security Requirements, Professor Gerard M. Stegmaier of George Mason University explores fair notice doctrine in connection with the FTC’s unilateral decision to require reasonable data security measures for entities that are not specifically regulated under federal law. Professor Stegmaier posits that an unclear basis for the FTC’s authority in this area, in conjunction with ambiguous notice standards and scant authoritative guidance may result in inadequate notice of data security requirements to entities, thereby undermining a constitutional right to fair notice.

In his Comment, Contracting Into Religious Law: Anti-Sharia Enactments and the Free Exercise Clause, George Mason Law Review member Muhammad Elsayed analyzes the implications of anti-Sharia enactments for parties that incorporate religious laws into contracts and then seek to introduce extrinsic evidence regarding their intent. Concluding that laws restricting one religion or religion in general violate the Free Exercise Clause, Elsayed surveys the development of anti-Sharia enactments in the United States and analyzes their constitutionality under the Constitution’s Religion Clauses framework. Ultimately, Elsayed provides several proposed remedies to the constitutional problems that anti-Sharia enactments implicate and analyzes the limits on those remedies.

In his Note, What’s in a Name? Why Judicially-Named Grounds for Vacating Arbitral Awards Should Remain Available in Light of Hill Street, George Mason Law Review member Jack Jarrett discusses judicial review of arbitration agreements under the Federal Arbitration Act (“FAA”) in light of the Supreme Court’s 2008 decision in Hill Street Associates v. Mattel, Inc. After exploring the circuit split that gave rise to the Supreme Court’s decision in-depth, as well as the confusion that resulted from the opinion’s lingering ambiguity, Jarrett posits that the Supreme Court did not actually eliminate judicially-named grounds for vacatur of an arbitration agreement, but rather curtailed the private parties’ ability to choose their level of judicial review.

George Mason Law Review member Steven Lavender explores the development and application of the Noerr-Pennington doctrine of antitrust immunity in connection with the electricity industry’s increased deregulation in his Comment, Extending the Noerr-Pennington Doctrine to Regional Transmission Organization Petitioners on a Case by Case Basis. Lavender sets forth a three-step framework for applying Noerr-Pennington antitrust protections to those petitioning the privately owned entities that operate wholesale electricity markets (“RTOs”) and argues that increasing the doctrine’s application would likely result in more market participant suggestions for potentially beneficial changes to the RTOs as competition increases in the...
Alumni Reception Welcomes Former Law Review Members

The Law Review was pleased to welcome about ninety current members and alumni of the journal to our annual alumni reception on Thursday, February 27, 2014. Kirkland & Ellis generously hosted the gathering at its downtown DC office, giving Law Review members past and present the chance to network and discuss legal scholarship.

Dean Daniel Polsby gave opening remarks, updating attendees on GMUSL and the Law Review. Outgoing Editor-in-Chief Scott Brooks officially welcomed the 31 newly-inducted members of the journal to the gathering, and then alumna Arthur Schmalz presented awards to Christine Ganley. Christine received both the award for the top submission for the 2013 journal write-on, and the Adrian S. Fisher Award for the top student Comment of 2014 for her upcoming piece, entitled “Reevaluating the Common Law of Foreign Official Immunity: Ascertaining the Proper Role of the Executive.”

The Law Review thanks the alumni who attended for their ongoing interest in and support of the Law Review. We look forward to seeing many alumni at next year’s reception too. If you missed the invitation to this year’s reception, and are interested in attending in the future, please contact Christine Kennedy, Managing Editor of the Law Review at info@georgemasonlawreview.org to confirm your contact information.

Law Review Celebrates New Full Members

On February 7, 2014, 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 current and new Full Members for a great year.

Claire Bourque  
Bryan Cannon  
Christine Carter  
Thomas Cumberland  
Andrew DeMaio  
Tyler Dever  
Matthew Duescher  
Jessica Gallinaro  
Christine Ganley  
Brandon Gould  
Cameron Green  
Alex Heller  
Andrew Hoffman  
Amy Josselyn  
Christine Kennedy  
Nicholas Lawson  
Jesse Jacob McMurdo  
Heather Mims  
Dan Monahan  
David Moon  
Morgan Pankow  
Kristen Petrillo  
Drew Reitz  
Samantha Rocci  
Jana Seidl  
Daniel Smith  
Matthew Smith  
Corinne Stuart  
Alexandra Wolff  
Greg Yahr  
Nicole Zimbelman

A group of Full Members after being selected for publication in the George Mason Law Review.

Law Review Accomplishments

George Mason Law Review has had two major accomplishments in recent months.

Former George Mason Law Review Executive Editor Matthew R. McGuire and George Mason Law School alumna Elyse Dorsey were nominated for an Antitrust Writing Award for their essay, How the Google Consent Order Alters the Process and Outcomes of FRAND Bargaining, 20 GEO. MASON L. REV. 979 (2013). The Institute of Competition Law and the George Washington University Law School Competition Law Center annually recognize the best scholarship in antitrust and in law and economics through this Writing Award. McGuire and Dorsey’s essay analyzes the approaches taken by federal agencies toward fair, reasonable, and non-discriminatory (FRAND) patent negotiation.

In addition, Kelsey B. Wilbanks, former Notes Editor, was nominated for the 2014 Burton Award for Distinguished Legal Writing for her work on her Comment, The Challenges of 3D Printing to the Repair-Reconstruction Doctrine in Patent Law, 20 GEO. MASON L. REV. 1147 (2013). The Burton Award honors law students for clear, concise, and comprehensive legal writing.
Announcing Law Review’s 2014-2015 Board of Editors

On February 16, 2014, Law Review held an extensive interview process and chose the 2014-2015 Board of Editors. Congratulations to all those selected and best wishes for next year!

Editor-in-Chief: Amy Josselyn

Executive Editor: Tommy Cumberland

Managing Editor: Christine Kennedy

Production Editor: Alexa Wolff

Symposium Editor: Jana Seidl

Developments Editor: Drew Reitz

Senior Articles Editor: Christine Ganley

Articles Editor: Brandon Gould
Articles Editor: Jessica Gallinaro
Articles Editor: Daniel Smith

Senior Notes Editor: Cameron Green

Notes Editor: Claire Bourque
Notes Editor: Matthew Smith
Notes Editor: Greg Yahr

Senior Research Editor: Heather Mims

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Research Editor: Jesse Jacob McMurdo
Research Editor: Morgan Pankow

Associate Editor: Tyler Dever
Associate Editor: Alex Heller
Associate Editor: Andrew Hoffman
Associate Editor: Nicholas Lawson
Associate Editor: Kristen Petrillo
Associate Editor: Nicole Zimbelman
Publication Selection Announcement

Law Review is proud to congratulate the following student authors who have been selected for publication in the George Mason Law Review in 2014-2015:

1. **Claire Bourque**, Liability Only, Please – Hold the Damages: The Supreme Court’s New Order for Class Certification


3. **Andrew DeMaio**, Upping the Stakes to Win the War Against Somali Piracy: Justifications for a New Strategy Based on International Humanitarian Law

4. **Jessica Gallinaro**, Meet Your New Big Brother: Weighing the Privacy Implications of Physical Retail Stores Using Tracking Technology

5. **Christine Ganley**, Reevaluating the Common Law of Foreign Official Immunity: Ascertaining the Proper Role of the Executive (2013 Adrian S. Fisher Award, Best Student Note or Comment)

6. **Brandon Gould**, How the Countervailing Power of the Insurers Can Resolve the Tradeoff Between Market Power and Health Care Integration in Accountable Care Organizations

7. **Alex Heller**, Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital


9. **Jesse Jacob McMurdo**, All and Nothing: A Framework to Reconcile the Differences in Constitutional Rights Afforded to Foreign National Contractors Abroad

10. **David Moon**, Social Security Disability Determinations in Litigation: Unreliable or Underused?

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Special thanks to Christine Carter, Andrew DeMaio, Tyler Dever, Erin Hoffert, Kristen Petrillo, Jana Seidl, Matthew Smith, and Matthew Wheatley for volunteering to help in creating and publishing this newsletter!
Congratulations to the 2013-2014 Board of Editors for a Great Year!

2013-2014 Masthead

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