

*University of Maine  
School of Law*

**MAINE  
LAW REVIEW**

Volume 66, Number 1, 2013

**MAINE**  
UNIVERSITY OF MAINE SCHOOL OF LAW  
**LAW**

COPYRIGHT NOTICE

Copyright © 2013 by the University of Maine School of Law, 246 Deering Avenue, Portland, Maine 04102.

The Maine Law Review is published semi-annually by the students of the University of Maine School of Law. It is printed by Western Newspaper Publishing Company, Inc., of Indianapolis, Indiana, and mailed periodicals postage paid.

Subscriptions are for the entire volume and are payable in advance. Domestic: \$35.00 (regular); \$60.00 (sponsor); \$110.00 (patron); or \$160.00 (benefactor). Foreign: \$39.00 (overseas); \$39.00 (Canadian). Please inform the Managing Editor of the Law Review promptly of any change of address.

Information concerning back issues is available by writing to William S. Hein & Co., Inc., Hein Building, 1285 Main Street, Buffalo, New York 14209, or by calling 1-800-828-7571. Microfilm copies may be ordered from either William S. Hein & Co., Inc., or University Microfilm, Ann Arbor, Michigan 48106.

Unless a claim of non-receipt of Law Review issues is made within six months of the mailing date, the University of Maine School of Law cannot be responsible for supplying those issues without charge.

Unsolicited manuscripts for publication are always welcomed but not will be returned.

Address business communications to: Editor-in-Chief, Maine Law Review, University of Maine School of Law, 246 Deering Avenue, Portland, Maine 04102.

The University of Maine School of Law is an administrative unit of the University of Southern Maine.

# MAINE LAW REVIEW

Volume 66 — 2013-2014

*Editor-In-Chief*  
AMY K. OLFENE

*Executive Editor*  
RACHEL WHITE

*Managing Editor*  
ADAM QUINLAN

*Head Case Note &  
Comment Editor*  
RYAN ALMY

*Symposium Editor*  
SARA A. MURPHY

*Articles Editors*  
KEVIN DECKER  
DAVID FAHERTY  
STEPHEN SEGAL

*Production Editor*  
ANNA POLKO

*Case Note &  
Comment Editors*  
CHRISTOPHER HARMON  
ELIZABETH VALENTINE

*Technical Editor*  
MEGHAN MYERS

*Research Editors*  
EMILY GAESKY  
ASHLEY JANOTTA

## *Staff*

SAMUEL BALDWIN  
PARDIS DELIJANI  
JOSEPH GOUSSE  
JULIANA O'BRIEN  
ARI SOLOTOFF

XI CHEN  
BRANDON FARMER  
DEREK JONES  
LAURA SHAW  
KATHLEEN TAYLOR

CAITLIN CLARK  
ELIZABETH FRAZIER  
MIKALA NOE  
AUSTIN SMITH  
BENJAMIN WAHRER

*Faculty Advisor*  
PROFESSOR DAVE OWEN

## BOARD OF TRUSTEES OF THE UNIVERSITY OF MAINE

SAMUEL W. COLLINS, <i>Chair</i>	5 Heritage Road, Caribou, Maine
GREGORY G. JOHNSON, <i>Vice Chair</i>	60 Shore Road, Harpswell, Maine
KURT W. ADAMS	First Wind LLC, 129 Middle St., Portland, Maine
ELEANOR M. BAKER	Baker, Newman & Noyes, P.O. Box 507, 280 Fore Street, Portland, Maine
JAMES R. ERWIN	Pierce Atwood, LLP, Merrill's Wharf, 254 Commercial Street, Portland, Maine
NORMAN L. FOURNIER	2002 Aroostook Road, Wallagrass, Maine
MARK R. GARDNER	Sappi Fine Paper North America, 255 State Street, 4 <sup>th</sup> Floor, Boston, Massachusetts
TYLER C. HADYNYIAK	108 Quebec Street, Farmington, Maine
M. MICHELLE HOOD	Eastern Maine Healthcare Systems, 43 Whiting Hill Road, Brewer, Maine
MARJORIE MURRAY MEDD	P.O. Box 126, Norway, Maine
KEVIN P. MCCARTHY	Unum Group, 2211 Congress Street, Portland, Maine
PAUL J. MITCHELL	GHM Insurance Agency, 51 Main Street, Waterville, Maine
VICTORIA M. MURPHY	Pan Atlantic SMS Group, 6 City Center Suite 200, Portland, Maine
BONNIE D. NEWSOM	950 Main Road, Eddington, Maine
JAMES E. RIER, JR.	Commissioner of Education, State House Station #23, Augusta, Maine
KARL W. TURNER	16 Town Landing Road, Cumberland, Maine

## ADMINISTRATION OF THE SCHOOL OF LAW

JAMES H. PAGE, *Chancellor University of Maine System*  
B.A., University of Maine at Fort Kent; M.Phil., University of St. Andrews, Scotland; Ph.D.,  
Massachusetts Institute of Technology.

THEODORA J. KALIKOW, *President, University of Southern Maine*  
A.B., Wellesley College; Sc.M., Massachusetts Institute of Technology; Ph.D., Boston University.

MICHAEL R. STEVENSON, *Provost & Vice President for Academic Affairs, University of Southern Maine*  
B.A., Purdue University; M.S., Purdue University; Doctorate, Purdue University.

PETER R. PITEGOFF, *Dean & Professor, University of Maine School of Law*  
B.A., Brown University; J.D., New York University.

RITA S. HEIMES, *Associate Dean for Academic Affairs; Director, Center for Law and Innovation*  
B.A., University of Iowa; J.D., Drake University Law School.

DAVE OWEN, *Professor of Law; Interim Associate Dean for Research*  
A.B., Amherst College; J.D., University of California, Berkeley School of Law (Boalt Hall).

## FACULTY OF THE SCHOOL OF LAW 2013-2014

LEONARD AGNETA, *Director, Maine Patent Program, Adjunct Clinical Professor of Law*  
B.S.M.T., University of New Mexico; J.D., University of New Mexico School of Law.

ANGELA C. AREY, *Associate Legal Writing Professor*  
B.A., American University; J.D., University of Maine School of Law.

DMITRY BAM, *Associate Professor of Law*  
B.S., Syracuse University; B.A., Syracuse University; J.D., Stanford Law School.

E. JAMES BURKE, *Clinical Professor of Law*  
B.A., Bates College; J.D., Western New England College School of Law.

DAVID P. CLUCHEY, *Professor of Law*  
A.B., Yale University; M.A., State University of New York at Albany; J.D., Harvard University.

CHRISTINE D. DAVIK, *Professor of Law*  
B.A., University of Illinois; J.D., University of Illinois School of Law.

ORLANDO E. DELOGU, *Emeritus Professor of Law*  
B.S., University of Utah; M.S., J.D., University of Wisconsin.

JAMES FRIEDMAN, *Professor of Law*  
A.B., Brown University; J.D., University of Chicago.

MALICK GHACHEM, *Associate Professor of Law*  
B.A., Harvard University; J.D., Harvard University; Ph.D., Stanford University.

COLLEEN A. KHOURY, *Emerita Professor of Law*  
B.A., Colby College; J.D., Illinois Institute of Technology/Chicago-Kent College of Law.

NINA KOHN, *Visiting Professor of Law*  
B.A., Princeton University; J.D., Harvard University.

LOIS R. LUPICA, *Professor of Law*  
B.S., Cornell University; J.D., Boston University.

JEFFREY A. MAINE, *Professor of Law*  
B.B.A., M.B.A., Florida Atlantic University; J.D., Stetson University; LL.M., University of Florida.

CHARLES H. NORCHI *Professor of Law, Director, Center for Oceans & Coastal Law, Director LL.M. Program*  
A.B., Harvard University; J.D., Case Western Reserve University School of Law; J.S.D., LL.M., Yale Law School.

CHRISTOPHER NORTHROP, *Clinical Professor of Law*  
B.A., Grinnell College; J.D., University of North Carolina School of Law.

MARTIN A. ROGOFF, *Professor of Law*  
B.A., Cornell University; M.A., University of California at Berkeley; LL.B., Yale University.

SARAH SCHINDLER, *Associate Professor of Law*  
A.B., University of Georgia, J.D., University of Georgia School of Law.

DEIRDRE M. SMITH, *Director, Cumberland Legal Aid Clinic and Professor of Law*  
B.A., University of Pennsylvania; J.D., University of Maine School of Law.

JEFFREY THALER, *Visiting Professor, University of Maine*  
B.A., Williams College; J.D., Yale Law School.

NANCY WANDERER, *Legal Writing Professor*  
B.A., Wellesley College; M.A., George Washington University; J.D., University of Maine School of Law.

THOMAS M. WARD, *Professor of Law*  
B.A., University of Pennsylvania; LL.B., University of Notre Dame; LL.M., University of Illinois.

ANNA R. WELCH, *Libra Visiting Professor of Law*  
B.A., B.S., University of Colorado, Boulder; J.D., American University Washington College of Law.

JENNIFER B. WRIGGINS, *Sumner T. Bernstein Professor of Law*  
B.A., Yale University; J.D., Harvard University.

MELVYN ZARR, *Professor of Law*  
A.B., Clark University; LL.B., Harvard University.

DONALD ZILLMAN, *Professor of Law*  
B.S., University of Wisconsin; J.D., University of Wisconsin; LL.M., University of Virginia.

#### ADMINISTRATIVE STAFF

SHERRY L. ABBOTT, *Associate Dean for Student Services.*

BRENDA BERRY, *Registrar.*

ALISON BEYEA, *Director, Office of Admissions.*

TINA CLAYPOOLE, *Financial Manager, Finance and Administration.*

DESTINY COOK, *Administrative Specialist, Office of Admissions.*

MICHELENE DECROW, *Director, Technology Department.*

HEIDI GAGE, *Administrative Specialist, Faculty.*

JENNIFER HEBERT, *Administrative Support Supervisor, Student Services.*

DEBORAH LORENZEN, *Administrative Specialist, Advancement and External Affairs.*

KATHRYN MASTERS, *Administrative Specialist, Center for Law & Innovation, Maine Patent Program.*

TREVOR MAXWELL, *Director of Communications & Grant Development.*

LEXIE MORAS, *Identity and Events Manager.*

ANGELA MORGAN, *Administrative Specialist, Cumberland Legal Aid Clinic.*

KAREN MURPHY, *Administrative Manager, Cumberland Legal Aid Clinic.*

KAYLA RAMSAY, *Administrative Specialist, Dean's Office.*

RACHEL REEVES, *Senior Advisor for Career & Professional Development.*

MARY ROY, *Assistant Director of Advancement and External Affairs.*

FRANCES DEE SMITH, *Administrative Specialist, Faculty and Registrar.*

CAROL TAYLOR, *Accounting Specialist, Finance and Administration.*

VENDEAN VAFIADES, *Director, Advancement and External Affairs.*

DEREK VAN VOLKENBURGH, *Director, Career Services.*

NICOLE VINAL, *Assistant Dean for Finance and Administration.*

TARA WHEELER, *Administrative Specialist, Career Services.*

KERRY WYLER, *Technology Coordinator, Technology Department.*

## LAW LIBRARY STAFF

VICTORIA DURANT, *Law Library Assistant, Technical Services/Government Documents.*

CHRISTINE HEPLER, *Interim Director, Garbrecht Law Library.*

SHERRY MCCALL, *Law Library Assistant, ILL/Circulation.*

SHANNON O'CONNOR, *Law Library Assistant, Cataloguing.*

SUZANNE P. PARENT, *Collection Development Law Librarian.*

MAUREEN QUINLAN, *Reference/Government Documents Law Librarian.*

STEPHEN SALHANY, *Serials/Catalog Law Librarian.*

GREGORY STOWE, *Law Library Assistant, Circulation.*

JULIE WELCH, *Reference Law Librarian.*

LYNN WILCOX, *Assistant Law Librarian, Technical Services.*

BENEFACTORS (\$160 AND ABOVE LEVEL)

Berman & Simmons	Lewiston
Drummond, Woodsum & MacMahon	Portland
Kelly, Rimmel & Zimmerman	Portland
Lambert, Coffin, Rudman & Hochman	Portland
Paul H. Mills	Farmington
Preti Flaherty Beliveau & Pachios LLP	Portland
Petrucelli, Martin & Haddow	Portland
Severson, Hand & Nelson	Houlton
James Tierney	Lisbon Falls
Verrill Dana	Portland
Ira J. Waldman	Los Angeles, CA
Hon. Daniel E. Wathen	Augusta

PATRONS (\$110 LEVEL)

Curtis, Thaxter, Stevens, Broder & Micoleau	Portland
Hon. Howard H. Dana, Jr.	Portland
Hardings Law Offices	Presque Isle
Hon. Vincent L. McKusick	Portland
Monaghan Leahy	Portland
Roberts & Shirley Law Offices	Springvale
Hon. Herbert T. Silsby II	Ellsworth
Thompson & Bowie	Portland

SPONSORS (\$60 LEVEL)

Hon. Donald Alexander	Portland
Hon. Susan W. Calkins	Portland
Philip M. Coffin, III	Portland
Hon. Thomas E. Delahanty, II	Portland
Hon. Wayne Douglas	Springvale
Dryer, Goodall, & Federle	Augusta
David J. Evans	Washington D.C.
N. Paul Gauvreau	Lewiston
Nicholas M. Gess	Washington D.C.
Ward I. Graffam	Portland
Gross, Minsky & Mogul	Bangor
Linnell, Choate & Webber	Auburn
McEachern & Thornhill	Kittery
McTeague Higbee	Topsham
Wright & Mills	Skowhegan
Murray, Plumb & Murray	Portland
Nelson-Reade Law Office, P.C.	Portland
Law Offices of Charles Nickerson	Sanford
Susan E. Peck	Portland
Phillips, Olore, Dunlavey & York	Presque Isle
Roberts & Shirley Law Offices	Springvale
Schwartz & Schwartz	Portland
David P. Silk	Portland
Solman & Hunter	Caribou
Trafton & Matzen	Auburn
Vafiades, Broutas & Kominsky	Bangor
Hon. John A. Woodcock, Jr.	Bangor
Linnell, Choate & Webber	Auburn





# CONTENTS

## ARTICLES

- DEATH, TAXES, AND PROPERTY (RIGHTS): NOZICK, LIBERTARIANISM, AND THE ESTATE TAX  
*Jennifer Bird-Pollan* ..... 1
- THE MAGIC MIRROR OF “ORIGINAL MEANING”: RECENT APPROACHES TO THE FOURTEENTH AMENDMENT  
*Bret Boyce*..... 29
- THE STATE RESPONSE TO *HAZELWOOD V. KUHLMIEER*  
*Tyler J. Buller* ..... 89
- TEACHING THE SMARTPHONE GENERATION: HOW COGNITIVE SCIENCE CAN IMPROVE LEARNING IN LAW SCHOOL  
*Shailini Jandial George* ..... 163
- ELECTION SLAPPS: EFFECTIVE AT SUPPRESSING POLITICAL PARTICIPATION AND GIVING ANTI-SLAPP STATUTES THE SLIP  
*Leah McGowan Kelly* ..... 191

## BOOK REVIEW

- MORE THAN A RAMBLE: A LAW STUDENT’S REVIEW OF HUGH G. E. MACMAHON’S *PROGRESS, STABILITY, AND THE STRUGGLE FOR EQUALITY: A RAMBLE THROUGH THE EARLY YEARS OF MAINE LAW, 1820-1920*  
*Christopher Harmon*..... 223

## COMMENTS

- ALLOCATING POWER: TOWARD A NEW FEDERALISM BALANCE FOR ELECTRICITY TRANSMISSION SITING  
*Kevin Decker* ..... 229
- THE POST-*CRAWFORD* RISE IN VOTER ID LAWS: A SOLUTION STILL IN SEARCH OF A PROBLEM  
*David M. Faherty* ..... 269
- OF ASTHMA AND ASHTRAYS: EXAMINING THE RIGHTS OF AND EXPLORING WAYS TO PROTECT MAINE TENANTS LIVING IN MULTI-UNIT RENTAL HOUSING WHO ARE INVOLUNTARILY EXPOSED TO SECONDHAND TOBACCO SMOKE IN THEIR HOMES  
*Amy K. Olfene*..... 291

*CASE NOTES*

PERSONAL JURISDICTION IN THE DATA AGE: *MACDERMID V. DEITER'S*  
ADAPTATION OF *INTERNATIONAL SHOE* AMIDST SUPREME COURT  
UNCERTAINTY  
*Ryan Almy*..... 327

*FUHRMANN V. STAPLES OFFICE SUPERSTORE EAST, INC.:* A SPLIT IN THE LAW  
COURT AS TO THE DEFINITION OF “EMPLOYER” DEMONSTRATES THE NEED  
FOR LEGISLATIVE ACTION TO AMEND THE MAINE HUMAN RIGHTS ACT IN  
ORDER TO PROTECT MAINE EMPLOYEES  
*Stephen B. Segal* ..... 345