

2012

## Ninth Annual Brigham-Kanner Property Rights Conference Program

William & Mary Law School

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# WILLIAM & MARY LAW SCHOOL

## NINTH ANNUAL BRIGHAM - KANNER PROPERTY RIGHTS CONFERENCE



AND PRESENTATION OF THE

2012 BRIGHAM-KANNER PRIZE TO  
JAMES E. KRIER  
UNIVERSITY OF MICHIGAN LAW SCHOOL

## OCTOBER 11-12, 2012

Sponsored by  
William & Mary Law School

THE BRIGHAM-KANNER

# PROPERTY RIGHTS

CONFERENCE

The Brigham-Kanner Property Rights Conference, Prize, and Journal are named in recognition of Toby Prince Brigham and Gideon Kanner for their lifetime contributions to private property rights and their efforts to advance the constitutional protection of property. The Brigham-Kanner Property Rights Conference began in 2004 at William & Mary Law School. The Conference is designed to bring together members of the bench, bar and academia to explore recent developments in the law that affect property rights. The Prize is awarded each year to an individual whose work affirms that property rights are fundamental to protecting individual liberty.

The *Brigham-Kanner Property Rights Conference Journal* was established in 2012 to provide a forum for scholarly debate on property rights issues. The *Journal* publishes papers presented at the annual conference with the goal of extending the debate to a wider audience. Through the *Journal*, the Property Rights Project will ensure that the proceedings of the Conference and any accompanying non-conference articles selected for publication are preserved and made available on its website for all interested parties. The *Journal* will be available in print and in electronic form through the Project's website, <http://law.wm.edu/academics/intellectuallife/researchcenters/property-rights-project/conference-journal/index.php>.



# SCHEDULE

## OF EVENTS

**Thursday, October 11, 2012**

- 6:30 pm**      **RECEPTION**  
President's Gallery, Wren Building  
*(please note the Wren Building has limited accessibility for people with physical disabilities)*
- 7:30 pm**      **DINNER AND PRESENTATION OF THE 2012 BRIGHAM-KANNER PRIZE**  
Great Hall, Wren Building

**Friday, October 12, 2012**

- 8:00 am**      **REGISTRATION AND CONTINENTAL BREAKFAST**
- 8:30 am – 9:45 am**      **PANEL 1: THE IMPACT OF A LEADING PROPERTY SCHOLAR**

This panel will examine the impact of the scholarship of James Krier on property jurisprudence. Discussion will include how his work has shaped thinking about property rights as well as the development of the institution of property.

### Panelists

Robert Ellickson, Walter E. Meyer  
Professor of Property and Urban Law,  
Yale Law School

Lee Anne Fennell, Max Pam Professor of  
Law and Herbert & Marjorie Fried  
Research Scholar, University of Chicago  
Law School

Thomas W. Merrill, Charles Evans  
Hughes Professor of Law, Columbia Law  
School

Carol Rose, Lohse Chair in Water and  
Natural Resources, University of Arizona  
College of Law; Gordon Bradford Tweedy  
Professor of Law and Organization,  
*Emerita*, Yale Law School

### Comments

James E. Krier, Earl Warren DeLano  
Professor of Law, University of Michigan  
Law School

### Moderator

Lynda L. Butler, Chancellor Professor &  
Director, William & Mary Property Rights  
Project, William & Mary Law School

- 9:45 a.m. – 11:00 a.m.**      **PANEL 2: THE JUDICIARY'S ROLE IN SHAPING CONSTITUTIONALLY PROTECTED PROPERTY**

This panel will analyze the role of the judiciary in shaping constitutionally protected property rights. In addition to discussing how the courts define the nature of takings issues and thus the content of takings jurisprudence, the panel will consider the concept of judicial takings.

### Panelists

Alan Ackerman, Ackerman Ackerman &  
Dynkowski, P.C., Bloomfield Hills,  
Michigan

Daniel B. Kelly, Associate Professor of  
Law & Robert & Marion Short Scholar,  
Notre Dame Law School

The Honorable LeRoy F. Millette, Jr.,  
Justice, Supreme Court of Virginia

Eduardo Moisés Peñalver, Professor of  
Law, Cornell Law School

**Moderator**

Joseph T. Waldo, Waldo & Lyle, P.C.,  
Norfolk, Virginia

**11:00 a.m. - NETWORKING BREAK**  
**11:15 a.m.**

**11:15 a.m. - PANEL 3: PROPERTY**  
**12:45 p.m. RIGHTS IN TIMES OF**  
**ECONOMIC CRISIS**

This panel will explore the role of property rights in times of serious economic crises. In addition to discussing whether fundamental property norms, including those grounded in the Constitution, contribute to economic crises, the panel will consider ways property rights might help to solve a crisis either on their own or at the instigation of government.

**Panelists**

James W. Ely, Jr., Milton R. Underwood  
Chair in Free Enterprise, Professor of  
Law, *Emeritus*, & Professor of History,  
*Emeritus*, Vanderbilt University

William Fischel, Professor of Economics  
& Robert C. 1925 & Hilda Hardy  
Professor of Legal Studies, Dartmouth  
College

Rachel D. Godsil, Eleanor Bontecou  
Professor of Law, Seton Hall University  
Law School

Eric Kades, Professor of Law, William &  
Mary Law School

Robert H. Thomas, Damon Key Leong  
Kupchak Hastert, Honolulu, Hawaii

**Moderator**

Lynda L. Butler, Chancellor Professor &  
Director, William & Mary Property Rights  
Project, William & Mary Law School

**12:45 p.m. - LUNCH**  
**1:30 p.m.**

**1:30 p.m. - PANEL 4:**  
**2:45 p.m. PROPERTY'S MORAL**  
**DIMENSION**

This panel will consider the extent to which property includes a moral authority or a moral sense of responsibility that might shape the development of property law, including constitutionally protected property.

**Panelists**

Gregory S. Alexander, A. Robert Noll  
Professor of Law, Cornell Law School

Eric R. Claeys, Professor of Law, George  
Mason University

Christopher Serkin, Professor of Law,  
Brooklyn Law School

Stewart E. Sterk, H. Bert and Ruth Mack  
Professor of Real Estate Law, Benjamin  
N. Cardozo School of Law

**Moderator**

Lynda L. Butler, Chancellor Professor &  
Director, William & Mary Property Rights  
Project, William & Mary Law School

**2:45 p.m. - NETWORKING BREAK**  
**3:00 p.m.**

**3:00 p.m. - ROUNDTABLE: HOW**  
**4:30 p.m. FUNDAMENTAL ARE**  
**PROPERTY RIGHTS?**

This roundtable will debate the significance of property rights as compared to other fundamental rights. Discussion will include the relationship between property rights and civil rights.

**Panelists**

Robert Ellickson, Walter E. Meyer  
Professor of Property and Urban Law,  
Yale Law School

James W. Ely, Jr., Milton R. Underwood  
Chair in Free Enterprise, Professor of  
Law, *Emeritus*, & Professor of History,  
*Emeritus*, Vanderbilt University

Mark F. (Thor) Hearne, II, Arent Fox  
LLP, Washington, D.C.

James E. Krier, Earl Warren DeLano  
Professor of Law, University of Michigan  
Law School

Richard E. Pipes, Frank B. Baird, Jr.,  
Professor of History, *Emeritus*, Harvard  
University

Carol Rose, Lohse Chair in Water and  
Natural Resources, University of Arizona  
College of Law; Gordon Bradford Tweedy  
Professor of Law and Organization,  
*Emerita*, Yale Law School

**Moderator**

Joseph T. Waldo, Waldo & Lyle, P.C.,  
Norfolk, Virginia

**4:30 p.m. – RECEPTION**

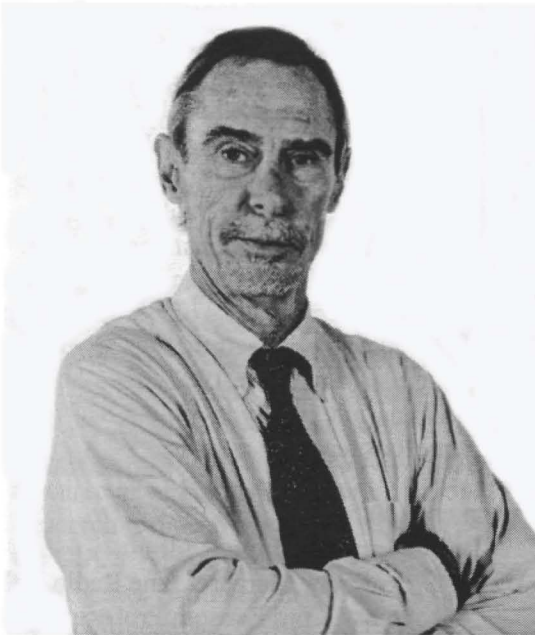
**5:30 p.m.**

# THE BRIGHAM-KANNER

## PROPERTY RIGHTS PRIZE

Every year during the Brigham-Kanner Property Rights Conference, the Property Rights Project presents the Brigham-Kanner Prize to an outstanding figure in the field. The Prize is named in recognition of Toby Prince Brigham and Gideon Kanner for their lifetime contributions to private property rights, their efforts to advance constitutional protections of property, and their accomplishments in preserving the important role that private property plays in protecting individual and civil rights. Toby Prince Brigham is a founding partner of Brigham Moore in Florida and has practiced eminent domain and property rights law for more than 40 years. Gideon Kanner is professor of law *emeritus* at Loyola Law School in Los Angeles and is currently Of Counsel at Manatt, Phelps & Phillips in California.

This year, the Brigham-Kanner Prize will be awarded to Professor James E. Krier for his outstanding contributions to the field of property rights scholarship.



### **James E. Krier**

James E. Krier, the Earl Warren DeLano Professor of Law, has been recognized for decades as a leading property scholar. He is known to many students and law faculty as the coauthor (with J. Dukeminier et al.) of the groundbreaking casebook *Property* (now in its 7th edition). He has taught courses on contracts, property, trusts and estates, behavioral law and economics, and pollution policy. His research interests are primarily in the fields of property and law and economics, and he is the author or coauthor of several books, including *Environmental Law and Policy*, *Pollution and Policy*, and *Property* (7th ed.). Professor Krier's most recent articles have been published in the *Harvard Law Review*, the *Supreme Court Economic Review*, the *UCLA Law Review*, and the *Cornell Law Review*. A professor of law at UCLA and Stanford before joining the Michigan Law faculty in 1983, he has been a visiting professor at Harvard Law School, Yeshiva University's Benjamin N.

Cardozo School of Law, and the University of Alabama Law School. He earned his BS with honors and his JD with highest honors from the University of Wisconsin, where he was articles editor of the *Wisconsin Law Review*. After graduation from law school, he served for one year as law clerk to the Hon. Roger J. Traynor, Chief Justice of the Supreme Court of California. He then practiced law for two years with Arnold & Porter in Washington, D.C.



# PAST RECIPIENTS

## OF THE BRIGHAM-KANNER PRIZE



**2004**

**Frank I. Michelman**

Frank I. Michelman is the Robert Walmsley University Professor, *Emeritus*, Harvard University, where he taught from 1963 to 2012. He is the author of *Brennan and Democracy* (1999), and has

published widely in the fields of constitutional law and theory, comparative constitutionalism, property law and theory, local government law, and general legal theory. Professor Michelman is a fellow of the American Academy of Arts and Sciences and a past President (1994-1995) of the American Society for Political and Legal Philosophy. He has served on the Committee of Directors for the annual Prague Conference on Philosophy and the Social Sciences, the Board of Directors of the United States Association of Constitutional Law, and the National Advisory Board of the American Constitution Society. In 2005, Professor Michelman was awarded the American Philosophical Society's Phillips Prize in Jurisprudence and, in 2004, the Brigham-Kanner Property Rights Prize.



**2005**

**Richard A. Epstein**

Professor Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law at the New York University School of Law. He is also the James Parker Hall

Distinguished Service Professor of Law and the Director of the Law and Economics Program at the University of Chicago Law School. He is an Adjunct Scholar at the Cato Institute, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, and a senior fellow at the University of Chicago Medical School's Center for Clinical Medical Ethics. He has written on a wide range of legal and interdisciplinary topics and is the author of numerous works including *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago Press 2003), *Simple Rules for a Complex World* (Harvard

University Press 1995), *Bargaining with the State* (Princeton University Press 1993) and *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985). He was inducted into the American Academy of Arts and Sciences in 1985.



**2006**

**James W. Ely, Jr.**

Emeritus Professor James W. Ely, Jr., was the Milton R. Underwood Chair in Free Enterprise, a professor of law, and a professor of history at Vanderbilt University. He has

written about a wide range of topics in legal history and is the author of numerous works including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3d ed. 2008), *American Legal History: Cases and Materials* (Oxford University Press, 3d ed. 2005) (with Kermit L. Hall and Paul Finkelman), *The Fuller Court: Justices, Rulings, and Legacy* (ABC-CLIO, 2003), and *Railroads and American Law* (University Press of Kansas, 2001). Ely served as assistant editor of the *American Journal of Legal History* from 1987 to 1989. Since joining the Vanderbilt faculty in 1979, he has also received numerous teaching awards.



**2007**

**Margaret Jane Radin**

Professor Margaret Jane Radin is the Henry King Ransom Professor of Law at the University of Michigan Law School. Prior to joining the

Michigan faculty in fall 2007, she was the William Benjamin Scott and Luna M. Scott Professor of Law, and director of Stanford Law School's Program in Law, Science and Technology at Stanford University. She also has been on the faculty of the University of Southern California Law Center and has been a visiting professor at UCLA and Harvard. Radin has published prolifically on property rights theory and institutions, commodification, intellectual property, and cyberlaw. Highlights of her property



scholarship appear in *Contested Commodities* (Harvard University Press 1996) and *Reinterpreting Property* (University of Chicago Press 1993). In 2012, she published her latest book, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press).



**2008**

**Robert C. Ellickson**

Professor Robert C. Ellickson is the Walter E. Meyer Professor of Property and Urban Law at Yale Law School. Prior to joining the Yale faculty in 1988, he was a

member of the law faculties at the University of Southern California and Stanford. Professor Ellickson's books include *The Household: Informal Order Around the Hearth* (2008), *Order Without Law: How Neighbors Settle Disputes* (1991), *Land Use Controls* (with Vicki L. Been) (3d ed. 2005), and *Perspectives on Property Law* (with Carol M. Rose and Bruce A. Ackerman) (3d ed. 2002). He is a fellow of the American Academy of Arts and Sciences and was President of the American Law and Economics Association in 2001.



**2009**

**Richard E. Pipes**

Richard E. Pipes is the Frank B. Baird, Jr., Professor of History, *Emeritus*, at Harvard University.

Among his appointments, he served as Director of Harvard University's Russian Research Center from 1968-1973, as Chairman of the CIA's "Team B" to review Strategic Intelligence Estimates in 1976, and as Director of East European and Soviet Affairs in President Ronald Reagan's National Security Council from 1981-1982. He was the recipient of the Brigham-Kanner Property Rights Prize in 2009 and the National Humanities Medal in 2007.



**2010**

**Carol M. Rose**

Professor Carol M. Rose is the Ashby Lohse Chair in Water and Natural Resources at the University of Arizona James E. Rogers College of Law. Prior to joining the faculty

at Arizona, Professor Rose was the Gordon

Bradford Tweedy Professor of Law and Organization at Yale University Law School. She holds degrees and honors from the University of Chicago (J.D.); Cornell University (Ph.D. History); University of Chicago (M.A.); and Antioch College (B.A.).



**2011**

**Justice Sandra Day O'Connor**

Justice Sandra Day O'Connor served as an associate justice of the Supreme Court from 1981 to 2006.

She became Chancellor of the College of William & Mary following her retirement from the judiciary. In May 2010, the William & Mary Law School faculty awarded her its highest honor, the Marshall-Wythe Medallion, in recognition of her exceptional accomplishments and leadership.

Following graduation from the Radford School, a private academy for girls, and Austin High in El Paso, Texas, Justice O'Connor continued her studies at Stanford University, where she earned a B.A. in Economics in 1950, graduating magna cum laude. Subsequently, she attended Stanford Law School, earning her LL.B. in 1952 and graduating third in her class after only two years. Along the way, she served on the Board of Editors for the Stanford Law Review and was a member of the prestigious Order of the Coif Legal society.

O'Connor served as an Arizona assistant attorney general from 1965 to 1969, when she was appointed to a vacancy in the Arizona Senate. In 1974, she ran successfully for trial judge, a position she held until she was appointed to the Arizona Court of Appeals in 1979. Eighteen months later, on July 7, 1981, President Ronald Reagan nominated her to the Supreme Court. In September 1981, Sandra Day O'Connor became the Court's 102nd justice and its first female member.

## PANELISTS AND MODERATORS

# BIOGRAPHIES



### Alan Ackerman

The managing partner of Michigan-based Ackerman Ackerman & Dynkowski P.C., Alan Ackerman received his B.A. and M.A. from Michigan State University, and his J.D. from the University of Michigan Law School. He has taught eminent domain law as an adjunct professor at the University of Detroit Law School since 1983, and now serves as an adjunct professor at Michigan State University College of Law.



### Gregory S. Alexander

Professor Gregory Alexander, a nationally renowned expert in property and trusts and estates, has taught at Cornell Law School since 1985. He received his J.D. from Northwestern University School of Law and began his teaching career at the University of Georgia School of Law.



### Lynda L. Butler

Chancellor Professor of Law and Director of the Brigham-Kanner Property Rights Project, Lynda Butler specializes in property rights and property law, land and water use, and environmental policy. She received her J.D. from the University of Virginia and her B.S. from the College of William & Mary. Prior to joining the faculty at William & Mary Law School, she practiced at Wilmer, Cutler & Pickering in Washington, D.C.



### Eric R. Claeys

Eric Claeys is a Professor of Law at the School of Law at George Mason University. He has also taught at Saint Louis University School of Law and the University of Chicago Law School. He received his A.B. from Princeton University and his J.D. from University of Southern California. Professor Claeys' scholarship focuses on the influence of classical liberal natural-rights thought on American property and tort law.



### Lee Anne Fennell

Lee Fennell received her J.D. *magna cum laude* from Georgetown University Law Center. Since 2007, she has been a professor at the University of Chicago Law School. She also taught at the University of Texas School of Law (2001-2004) and at the University of Illinois College of Law (2004-2007).



### William Fischel

William Fischel received his Ph.D. from Princeton University and B.A. from Amherst College. Since 1973, he has been a professor in the Dartmouth College Economics Department. His scholarly interest has been local government, and his current project is an update of his 1985 book, *THE ECONOMICS OF ZONING LAWS*.



### Rachel D. Godsil

Rachel D. Godsil is the Eleanor Bontecou Professor of Law at Seton Hall University Law School. She is currently pursuing research projects to address the role of land use mechanisms in neighborhood change. She is also the co-editor of *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* (Carolina Academic Press, 2005). She received her J.D. from the University of Michigan Law School and B.A. from the University of Wisconsin.



### Mark F. Hearne, II

Mark F. (Thor) Hearne is a partner with Arent Fox LLP in Washington, D.C. He received his J.D. from Washington University Law School and a B.A. from Washington University in St. Louis.



**Eric Kades**

The first director of the Brigham-Kanner Property Rights Project, Eric Kades has been a professor of law at William & Mary Law School since 2001. He earned a B.A. from Yale University and J.D. from Yale Law School. From 2008 to 2011, he served as Vice Dean of William & Mary Law School. His teaching and scholarly interests include property, law and economics, and inequality in social mobility. He currently is working on a book project entitled *The New Feudalism*.

**Honorable LeRoy F. Millette, Jr.**

LeRoy F. Millette is a 1974 graduate of William & Mary Law School. Justice Millette was appointed to the Virginia Supreme Court by Governor Tim Kaine in 2008 and subsequently elected to a twelve year term by the General Assembly in 2009. In 1990, he joined the General District Court and three years later was elevated to the Circuit Court of Prince William County. While serving on the Circuit Court, he presided over the capital murder trial of John Allen Muhammad, the Beltway Sniper, and the marital sexual assault trial of John Wayne Bobbitt in 1993. In 2007, he joined the Virginia Court of Appeals.

**Daniel B. Kelly**

Daniel B. Kelly is an Associate Professor of Law and the Robert and Marion Short Scholar at Notre Dame Law School. He received his B.A. *summa cum laude* from Notre Dame and his J.D. *cum laude* from Harvard Law School. His teaching and research interests include property, land use planning, and trusts and estates. His scholarly work has focused on the economic analysis of property, especially takings and spillovers.

**Eduardo Moisés Peñalver**

Eduardo Peñalver received his B.A. from Cornell University and his J.D. from Yale Law School. He joined the Cornell Law School faculty in 2006. His research interests focus on property and land use, as well as law and religion. His most recent book, *An Introduction to Property Theory* (co-authored with Gregory Alexander), was published by Cambridge University Press earlier this year.

**Thomas W. Merrill**

Thomas W. Merrill is Charles Evans Hughes Professor of Law at Columbia Law School. He received his J.D. *cum laude* from the University of Chicago Law School; B.A. from Grinnell College; and B.A. from Oxford University. Formerly he was a professor at Northwestern University (1981-2003), and of counsel (1981-2003) and associate (1979-1981) at Sidley Austin Brown & Wood. From 1987 to 1990 he served as deputy solicitor general in the Department of Justice, where he represented the United States before the U.S. Supreme Court.

**Christopher Serkin**

Christopher Serkin received his B.A. from Yale University and his J.D. from the University of Michigan Law School. He has been a visiting professor at the University of Pennsylvania, New York University, and the University of Chicago Law Schools. Prior to joining Brooklyn Law School, Professor Serkin spent two years at New York University School of Law as an acting assistant professor in its Lawyering Program. He also previously served as a litigation associate with the New York office of Davis Polk & Wardwell.



**Stewart E. Sterk**

Stewart Sterk is the H. Bert and Ruth Mack Professor of Real Estate Law at the Benjamin N. Cardozo School of Law. The winner of a number of teaching awards at Cardozo, Professor

Sterk has taught as a visiting professor at Columbia and the University of Pennsylvania law schools. He specializes in trusts and estates, property, copyright, conflict of laws, and land use regulation. He received his B.A. and J.D. from Columbia University.

**Robert H. Thomas**

Robert H. Thomas is a land use and appellate lawyer, and focuses on regulatory takings, eminent domain, water rights, and voting rights cases.

He received his LLM, with honors, from Columbia Law School where he was a Harlan Fiske Stone Scholar, and his J.D. from the University of Hawaii School of Law.

**Joseph T. Waldo**

The founder of the Brigham-Kanner Property Rights Conference, Joe Waldo has practiced law since graduating from William & Mary Law School. He obtained his B.A. from the University of North

Carolina at Chapel Hill. In 1998, he founded Waldo & Lyle, P.C., the only law firm in Virginia exclusively dedicated to representing property owners in eminent domain proceedings.

# WILLIAM & MARY

## LAW SCHOOL

Legal education began at William & Mary in 1779, at the urging of Thomas Jefferson. He was governor of Virginia at the time and a member of the College's Board of Visitors. Jefferson believed that aspiring members of the profession should be trained to be citizen lawyers — passionate legal advocates and honorable human beings. The College's Board created the first Chair of Law in the United States in that year, naming George Wythe as its first occupant. Students of Wythe included Thomas Jefferson, John Marshall, James Monroe, and Henry Clay. The growth of the law school was halted by the beginning of the Civil War in 1861. Sixty years later, the study of law was revived in a modern program that attracts students from all regions of the nation.

William & Mary Law School has hosted the Brigham-Kanner Property Rights Conference since 2004. In 2011 William & Mary co-sponsored the Conference with Tsinghua Law School in Beijing, China.

## THE COLLEGE OF

# WILLIAM & MARY

Chartered in 1693 by Queen Mary II and King William III of England, The College of William and Mary is the second oldest institution of higher learning in the country. The College's student body is just over 8,200 full-time (graduate and undergraduate) students with a 12 to 1 student/faculty ratio. *U.S. News and World Report: Best Colleges 2013* ranks the College sixth among all public universities in the country. Known as "the alma mater of a nation," William & Mary has educated three American presidents: Thomas Jefferson, James Monroe and John Tyler, and George Washington served as its first chancellor.

W. Taylor Reveley, III was sworn in as the 27th president of The College of William & Mary on September 5, 2008, after serving as interim president since February 2008. Before assuming his current post, he served as dean of William & Mary Law School for almost a decade, starting in August 1998. He is the John Stewart Bryan Professor of Jurisprudence.

