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Foreword

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FOREWORD

Defense procurement fraud has traditionally impaired the relationship between government and the defense industry. In recent years, reports of inflated prices charged by defense providers have garnered national headlines. In our lead Article, Attorney Steven D. Overly presents a critical discussion concerning the government's growing campaign to combat excessive pricing claims submitted by defense contractors. The author examines the numerous penalties, both civil and criminal, available to ensure accuracy in the submission of cost or pricing data. While criticizing the criminalization of the public contracting process, the author advises public contractors that submitting to the government all factual data relating to contract negotiations is the best way to avoid liability for fraudulent pricing claims.

Disputes between the securities industry and its public customers implicate three statutory regimes: the Securities Act of 1933, the Securities Exchange Act of 1934, and, insofar as it has been employed in securities litigation, the Racketeer Influenced and Corrupt Organizations Act. Our second Article, authored by Attorney Michael A. Lindsay, addresses issues that arise when a statute creates a cause of action and provides a specific judicial remedy, yet private parties contractually agree to resolve disputes, including controversies based on the provisions of those statutes, in a private forum. The Federal Arbitration Act provides that a written predispute arbitration agreement shall be valid and enforceable. However, in the securities context, some courts have held predispute agreements invalid by finding an implied exception to the Federal Arbitration Act for rights based on federal statutes, particularly on statutes that the courts believe are designed to implement some important public policy. Mr. Lindsay proposes that predispute agreements to arbitrate securities controversies that involve broker/dealers and their customers should be enforced in accordance with the Federal Arbitration Act. Such enforcement, the author explains, will not diminish the private securities plaintiff's ability to obtain justice, nor will the policies underlying the statutory schemes be undermined.

Many state statutes provide that a child born to a married couple is presumed to be the legitimate child of the husband, even though the husband may not be the biological father. The biological father is denied the right to rebut this presumption of legitimacy by proving that the mother's husband is not the biological father, even though the presumed

(legal) father, the mother and sometimes the child have been given this precise right. The primary policies that underlie these statutes are the preservation of family integrity and fiscal efficiency for the state. Professor Ann Minnick Wheeler examines these policy justifications and concludes that, although they had validity many years ago, they are not viable today. Analyzing the issues from a constitutional perspective, Professor Wheeler concludes that the Constitution protects a biological father's right to develop a relationship with his child by rebutting the presumption of legitimacy. A denial of this right, Professor Wheeler argues, violates the due process and equal protection clauses of the fourteenth amendment.

Our final Article discusses the demise of women's banks—banks established by women to address the credit needs of women. Authors Ken Anderson and Page Mailliard suggest that because of bank deregulation, the passage of the Equal Opportunity Act, and the flawed logic of the women's banks' target market strategy, the success of women's banks as a marketplace solution to the problem of gender discrimination in access to credit was severely undermined. As a result, the authors conclude that the solution to gender discrimination in access to credit must come from stricter banking regulations, rather than marketplace solutions like women's banks.

Issue three also includes eight student written selections.

Our first student Comment examines fiduciary principles as they relate to the banking industry. The author critically analyzes two recent California appellate court decisions, *Commercial Cotton Co. v. United California Bank* and *Barrett v. Bank of America*, which extended fiduciary principles to the ordinary bank-depositor and bank-borrower relationships. The author concludes that these courts misapplied case law and improperly imposed fiduciary obligations upon banks in relationships which have traditionally been considered debtor-creditor. The author proposes a two-part test for determining when a fiduciary relationship exists between banks and its customers.

The second student piece presented in this issue examines *Farmers Insurance Exchange v. Adams*, a recent California case addressing the problems raised by the existence of two conflicting standards for determining coverage under an all-risk homeowners' policy where multiple perils combine to produce a loss. In *Adams*, the insurer sought to have coverage of the insured's claims determined under the efficient proximate cause theory. The court of appeal rejected the insurer's request stating that insureds may also be able to prove coverage under the second, much broader standard, the concurrent cause theory. This Note examines the

history of these two conflicting coverage standards, as well as the effect of the court's failure to clearly define the scope of their application. The author examines a recent decision limiting the applicability of the concurrent cause standard and offers a suggestion aimed at preventing insurance coverage disputes in the future.

The second major assault on cigarette companies in the past quarter century has generated a theory of recovery new to cigarette litigation. Plaintiffs claim that cigarette companies have caused injury by failing to adequately warn of the hazards of smoking. Defendant companies argue that Congress preempted these failure-to-warn claims by enacting federal labeling legislation. Though several federal courts have addressed the issue, they have reached conflicting decisions. Our third student selection considers preemption as it applies to common-law tort claims against cigarette companies for failure to adequately warn of the hazards associated with smoking. The author discusses the preemption doctrine generally, outlines the twenty-two year legislative history of the Federal Cigarette Labeling and Advertising Act, and sets forth the analysis which several courts have applied to decide whether plaintiffs' failure-to-warn claims are preempted. Following a critique of existing law, the author proposes a test which courts might apply to determine congressional intent. The author concludes that congressional purpose, language and debate, taken as a whole, are sufficient evidence from which to infer that Congress did not intend to preempt common-law causes of action.

In *Cleburne v. Cleburne Living Centers*, a local zoning ordinance requiring a home for mentally retarded persons to obtain a special use permit was challenged under the equal protection clause of the fourteenth amendment. The United States Supreme Court, while striking down the statute as applied to the mentally retarded, made several troubling determinations concerning critical issues. First, the Court held that mentally retarded individuals are not a "suspect" or "quasi-suspect" class. Second, the Court, while claiming to employ a "rational basis" test, utilized a standard that closely resembled the more heightened test generally afforded "quasi-suspect" classifications. This Note criticizes the majority's approach, emphasizing in particular the implications of the Court's unexplained departure from precedent in the equal protection area. The author asserts that the Court's new test will not only create further confusion and inconsistencies in the application of the equal protection clause, but also may seriously threaten future application of the close scrutiny presently applied to legislation affecting "suspect" and "quasi-suspect" classes. The author then advocates an approach that is more consistent with prior equal protection cases, provides the flexibility

necessary in the equal protection area and, most importantly, requires the Court to more clearly articulate its reasoning in each case.

Our third Comment questions whether electricity and electrical utility transmission facilities should be governed by strict liability. After reconciling existing electric utility case law, the author traces the evolution of strict liability in California. Since electricity fulfills strict liability's analytical prerequisites, and because strict liability policy justifications would not be offended, electricity could be held to be a product subject to strict liability. Although an extension of strict liability to transmission facilities is analytically possible, the author concludes that such an extension would be practically unwise and, moreover, inconsistent with the policies motivating strict liability.

Last summer, the United States Supreme Court addressed the constitutionality of a Georgia statute criminalizing consensual adult sodomy occurring in the home. In a decision carrying wide implications for the right to privacy, the Supreme Court held that the statute was constitutional as applied to homosexuals. Analyzing the majority opinion in *Bowers v. Hardwick*, this Note criticizes the foundation upon which the Court rested its decision. The author notes particularly that certain factors considered by the majority, such as the statute's long history and its moral/religious motivations, were insufficient to justify constitutional validation of the sodomy statute. More importantly, the author criticizes the majority's conclusion that the statute did not violate the petitioners right to privacy and argues that constitutional protections should be extended to consensual adult sodomy when the behavior occurs in the privacy of the home.

Our seventh student piece focuses on the constitutional rights of student journalists in California's public high schools. During the 1970's, federal and California courts first began to recognize that students possess free expression and press rights protected by the first amendment to the United States Constitution. In a bold move to codify these newly recognized rights, the California Legislature enacted section 48907 of the California Education Code—the Students' Bill of Rights. Section 48907 protects student expression in general; however, it authorizes prior restraint of student expression which school officials deem to be "obscene," "libelous," or otherwise inappropriate. The author contends that while the California Legislature has taken a commendable step in legislating student press freedom, the constitutional infirmities in section 48907 render the statute a dangerous license for impermissible administrative censorship of student expression. The author proffers a method of analysis for courts to employ in addressing the constitutionality of section

48907 and also proposes an amendment to section 48907 which would bring the statute within constitutional bounds.

The California Legislature's timely response to the disorderly and often contradictory development of trade secrets law, by the codification of the Uniform Trade Secrets Act, is the topic of our final student selection. This Comment critiques the statute in relationship to its common law development and the competing interests influencing the California Legislature during the statute's formation. While championing the strict and simple language of the statute, the author concludes that the statute will not be properly or fairly applied unless courts, in their analyses, balance the interests recognized by the California Legislature.

Issue three concludes with a review of the book "The Case for Animal Rights." In reviewing Tom Regan's book, Attorney Steven Zak contends that Regan only partially succeeded in fulfilling his aim to "lay the philosophical foundation of the animal rights movement." While recognizing the valuable contribution Regan's book makes to the animal rights dialogue, Zak contends that Regan's view that "all subjects of a life . . . must have their inherent value respected" stumbles over utilitarian principles and offers a confusing "miniride" analysis which is never fully developed.