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Foreword

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FOREWORD

In 1984, the *Vermont Law Review* published an article written by five leading land use scholars on the subject of remedies for excessive land use regulation, entitled, "The White River Junction Manifesto." As our lead Article in this issue, we present a sharp response to that article, entitled, "Thoughts on 'The White River Junction Manifesto': A Reply to the 'Gang of Five's' Views on Just Compensation for Regulatory Taking of Property." In their "Reply," attorney Michael M. Berger and Professor Gideon Kanner of Loyola Law School, Los Angeles, discuss Justice William Brennan's significant dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*. Justice Brennan's view that just compensation is the appropriate primary remedy for "regulatory takings"—i.e. takings accomplished through land use zoning—may soon become the majority view of the Court. This issue currently is before the Supreme Court in *McDonald, Sommer & Frates v. County of Yolo*, a California case argued on March 21, 1986.

We are also pleased to include a thoughtful Article by the Honorable Ruggero J. Aldisert, Presiding Judge of the Third Circuit of the United States Court of Appeals. In "The House of the Law," Judge Aldisert describes how legal theory, as represented by legal writing, has become seriously muddled by an explosion of new judicial and regulatory causes of action. Specifically, he criticizes the "promiscuous uttering of citations" that most opinions, briefs and—although he does not mention them—law reviews are known for. Judge Aldisert forcefully maintains that five "supereminent principles" still reside at the core of federal law and are traceable to several past legal systems. He makes an eloquent appeal for improved clarity, simplicity and conciseness in legal writing through the recognition of these core principles. Judge Aldisert presented these ideas to the students and faculty of Loyola Law School in February 1986.

In the third Article in this issue, "Tax Classifications of Trusts: The *Howard* Case and Other Current Developments," Professors Joseph V. Sliskovich of Loyola Law School, Los Angeles, and Stewart S. Karlinsky of the University of Southern California School of Accounting, describe the two key attributes necessary to render a trust liable for corporate tax: a business purpose and associates. If either attribute is missing, the trust will avoid classification as an association, taxable as a corporation. Thus, the classification of trusts seems to be one of the few areas in which the

preeminent maxim in tax theory is reversed: here, form takes precedence over substance.

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The Board is also quite pleased to include six student-written Comments and one Note in this issue.

The first Comment analyzes the significance and probable effectiveness of 18 U.S.C. § 924, which was amended as part of the recently enacted Comprehensive Crime Control Act of 1984 (CCCA). This federal legislation mandates that five or ten years be added to the sentence of all defendants convicted of carrying a firearm during a "crime of violence." The author finds that, due to ambiguous drafting which leaves room for needless judicial interpretation, the current section 924(c) will fail to achieve its goal of making sentencing more stringent and uniform. In response, the author proposes a rewriting of section 924(c) that would define more clearly the requirement of mandatory penalty enhancement for firearms use and thereby meet Congress' goal of determinate sentencing.

The author of the second Comment sets out the judicial, societal and congressional debate surrounding the civil RICO controversy. Since its enactment as a part of the Organized Crime Control Act in 1970, many commentators argue that the Racketeer Influenced and Corrupt Organization (RICO) Act—and, in particular, its treble damages civil remedy for fraud—has been more often used as a weapon against legitimate business than against Congress' explicit original target: organized crime. However, the United States Supreme Court effectively undermined judicial attempts to develop rules of statutory construction that curtail the use of RICO against legitimate business in its recent decision in *Sedima, S.P.L.R. v. Imrex, Co.* This Comment extensively recites the arguments of the many special interest groups that are pressing Congress to statutorily limit the civil use of RICO and then analyzes the three primary bills now before Congress that seek to curtail civil RICO. This author focuses on the benefits of the current, unexpected primary use of civil RICO to curtail fraud on a national level, and recommends that Congress avoid major alteration to the treble damages remedy for fraud. Instead, he urges Congress to promote the fairness of this valuable anti-fraud weapon by adopting a clearer definition of the term "pattern," and by narrowing the scope of vicarious employer liability in this field.

The third Comment describes and analyzes a novel alternative to the inadequate judicial and regulatory remedies currently available in tort cases. The author explains how two judges of the United States District

Court for the District of Kansas manipulated jury awards of punitive damages to encourage tortfeasors to right their wrongs. These federal judges conditioned the reduction of punitive awards on the defendants' removal of the injury causing devices—in essence, “bargaining” with the tortfeasors to achieve a more efficient remedy than could be achieved by the normal imposition of compensatory and punitive damages. The author establishes that this sort of remedial activism has a solid basis in the theories of remittitur and general equitable remedies, and forcefully asserts the advantages of properly tailored judicial bargaining. To this end, the author sets forth comprehensive guidelines for determining when bargaining with punitive damages is appropriate, and for the implementation of the bargain after it is reached.

In proffering another remedy alternative in tort actions, the author of the fourth Comment presents a cogent, economics oriented argument for government agencies assessing direct user charges against individuals and entities who negligently cause the need for emergency services. Economic efficiency and deterrence serve as the main rationale for user charges. Nonetheless, the Comment recognizes that there is no present legislation authorizing user charges as such, and that the judiciary—exemplified by three cases analyzed in depth—generally have been hostile to this revolutionary remedy. The author suggests that attorneys can overcome this hostility by focusing on nuisance and quasi-contract theories of recovery. Moreover, he proposes the judicial development of a new cause of action which would allow governments to recover damages when a defendant's negligent conduct requires excessive use of government service.

The fifth Comment provides a timely application of the developing judicial doctrine of good faith in pretrial settlements to sliding scale agreements. In these agreements, the settling defendant guarantees the plaintiff a minimum recovery in exchange for a release from liability should the plaintiff recover the guarantee amount or more in a judgment against the non-settling defendant or defendants. Because the settling defendant's liability would be zero should the judgment equal or exceed the guarantee amount, the author argues that these agreements violate the “reasonable range” good faith standard set forth by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*. In particular, the author urges the California Supreme Court to reverse three cases now pending before it on this issue, and suggests that all sliding scale agreements can only meet the reasonable range test by including a minimum contribution amount.

The author of the sixth Comment describes and criticizes the Cali-

ifornia Supreme Court's recent placement of substantive limitations on the California initiative process. The initiative has long been a distinctive, powerful and judicially unencumbered feature of California law-making. The author explains, however, how two recent California Supreme Court decisions—*Legislature v. Deukmejian*, involving a proposed reapportionment statute, and *AFL-CIO v. Eu*, involving a statute that would have required the California Legislature to petition Congress for a balanced budget constitutional amendment—represent the first instances in thirty-five years that a court removed validly qualified statewide initiative measures from the ballot. The author strongly argues that these cases can and should be narrowed to their facts, and that future courts should resurrect the previous judicial view that the initiative is “one of the most precious rights of our democratic process.”

The one Note included in this issue provides a thorough and far-reaching analysis of the constitutionality of dog sniffs for drugs without probable cause. The Note explains how the Second Circuit's recent decision of *United States v. Thomas* provides a logical and important limitation on the applicability of *United States v. Place*. The Supreme Court, in *Place*, held that dog sniffs of a suitcase in a public airport were not a search; however, the *Thomas* court held that a dog sniff of a private apartment was a search, requiring probable cause. The author also provides an historical and scientific analysis of the societal problem of drug trafficking and the use of the dog's sense of smell as a “scientific device” for improving narcotics detection. The author notes that while governments and law enforcement agencies have used dogs for centuries, the questionable reliability of a dog's ability to sniff for drugs invokes fourth amendment privacy protections that are not diminished even by the important societal interest in curbing drug use.

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In addition, we present Part Three of our volume-long Salute to the new architecture of Loyola Law School. We have included a photograph of another perspective of the new campus, accompanied by a description by architect Frank O. Gehry.

Board of Editors