

FOREWORD

In our lead article, David J. Goldstone observes that public and private forums have long occupied a special position in civic life. The explosive growth of cyberspace forums, which host nearly every form of discourse and human interaction, compels a careful review of the legal doctrine applied to this complex arena. Professor Goldstone introduces the topic with an analysis of the first-litigated cases addressing rights of access to cyber forums, the *Cyber Promotions* cases. Although the *Cyber Promotions* courts rejected claims for rights of access to private forums asserted by commercial speakers, the rulings do not preclude a right of access claim from succeeding under federal constitutional law, or alternative legal doctrines, in public or private forums. Professor Goldstone examines federal constitutional law, state law, antitrust doctrines, common carrier doctrines, and public policy rationales that might support a right of access to cyber forums. Professor Goldstone predicts that courts will be influenced by the nature of the speech seeking protection. He also argues that results under these doctrines will vary depending on the particular characteristics of a given cyber forum and the forum's role in public discourse. He urges litigants, courts, and legislators to be sensitive to the unique attributes of cyber forums before blindly applying traditional legal taxonomy to cyber forums. Therefore, he recommends a cautious and strategic approach to the development of the law in this area, whether it is through legislation aimed at correcting market failures in cyberspace or through carefully selected test cases.

In our second article, Professor Larry T. Garvin evaluates critically the doctrine of adequate assurance of performance, a relative novelty in commercial law. Professor Garvin argues that, despite the doctrine's generally favorable recognition, the rationales set forth on behalf of adequate assurance are for the most part wrong or irrelevant. He further shows that standard economic analysis reveals the right to assurance as a sort of contract modification akin to duress. To address these shortcomings in the doctrine of adequate assurance, Professor Garvin draws on the insights of recent developments in cognitive psychology. Applying these developments to adequate assurance, Professor Garvin concludes that systematic and stubborn errors

in how we evaluate and perceive risk render the right to adequate assurance potentially useful, and that these cognitive lessons can and should guide courts in defining the bounds of adequate assurance.

In our third article, Gerard N. Magliocca suggests a reformulation of the adjudicatory role of juries which advances the current debate regarding the nullification right. His article outlines the theory of dualist democracy articulated by Professor Bruce Ackerman and notes that the institution of the criminal jury, although unexplored by dualism, may provide a critical role in signaling the transition into periods of constitutional politics which lies at the heart of that theory. Placing his examination of juries within the context of dualism, he reveals the intent of the Framers of our Republic that juries be endowed with the power to decide on questions of law as well as questions of fact in certain circumstances implicating profound constitutional questions. His analysis traces the important cases in which the Court has respected and then curtailed the right of the jury to speak to issues of law. Mr. Magliocca explains that such a restriction of the jury's lawmaking role grew inevitably out of a logical desire of the Court to ensure consistent and predictable application of the law. He reveals, however, that seen through the perspective of the dualism theory, the role of juries envisioned by the Framers proved unworkable only because the system lacked the formal structure necessary to identify periods of higher lawmaking and trigger the jury's unique adjudicatory charge. His article concludes with a proposal for a structural solution, in the form of a "constitutional demurrer," whereby the jury's lawmaking function would formally be restricted to issues of constitutional significance, thus restoring the jury's original signaling role.

In our first comment, the author examines newspaper vending machine regulation in the context of the First Amendment public forum doctrine. The author begins by noting that newspaper boxes line the street corners of many cities raising complaints about public safety and aesthetics, yet regulations addressing these concerns have been successfully challenged by publishers on First Amendment grounds. The author explores this caselaw providing a summary of the legal standards applied to newspaper box regulations. Although many municipalities now hesitate to enact any form of regulation, the author explores

two novel solutions to the problem. The author concludes that these solutions are viable and should be considered because they encourage cooperation with the private sector and appear to satisfy the public forum doctrine.

In our second comment, the author addresses one of the major objectives of the Telecommunications Act of 1996: the introduction of competition into the local telephone markets. To foster competition, the Act calls for good faith negotiation of interconnection agreements between all local phone service providers, including current monopolies and newcomers to the local markets. The author examines the legislative history of the Act and the Federal Communication Commission's subsequent rulemaking to show that the meaning of "good faith" negotiations under the Act is ambiguous. He then explores the doctrine of good faith as it has been applied in the realms of American labor and contract law in order to suggest future directions for courts interpreting the Act's good faith clause. He concludes that the precedents developed in these fields will provide future courts with an appropriate and well-established framework for interpreting the good faith clause under the Telecommunications Act of 1996.

This issue's casenote examines the recent Supreme Court decision in *Holly Farms Corp. v. NLRB*, and the significance of the Court's deferral to the NLRB's interpretation of the agricultural exemption to the National Labor Relations Act ("NLRA"). In particular, the author contends that the majority rightly examined the legislative history of the NLRA to determine that the language of the agricultural exemption was ambiguous. The author argues that this examination was particularly warranted in a case such as *Holly Farms*, where the legislative history of the agricultural exemption indicated that Congress intended to charge the NLRB with defining its scope. Since the statute was passed before the *Chevron* doctrine, which requires that an agency's statute be ambiguous before a court defers to the agency's reasonable interpretation, the author concludes that *Holly Farms* provides an example of why legislative history should not be ignored during a *Chevron* review.

THE EDITORS