FOREWORD

In our lead article, Professor Lawrence Ponoroff critically evaluates provisions of the Bankruptcy Reform Act of 1994, which amended section 522(f) of the Bankruptcy Code and redefined the circumstances under which debtors are permitted to avoid exemption impairing liens. After examining the history of lien avoidance, Ponoroff discusses the uncertainty surrounding the interpretation of section 522(f)'s requirement that a lien "impair" an exemption before avoidance is permitted. With the 1994 Amendments to the Bankruptcy Code, Congress took a "step forward" and answered this confusion by adopting subsection 522(f)(2), a simple mathematical formula for ascertaining when, and the extent to which, a lien will be deemed to impair an exemption. Ponoroff then argues that Congress simultaneously took a "step back" by succumbing to special interest groups opposed to lien avoidance and enacting section 522(f)(3), which, in part, purports to limit the avoidance of liens on Tools of the Trade Collateral. He demonstrates that, although a legitimate argument exists for treating Tools of the Trade Collateral differently in the context of lien avoidance, subsection 522(f)(3) is not only inconsistent with bankruptcy policy, but is also an unintelligible and unprincipled provision that courts have not been able to interpret with any consistency. He then recommends an interpretation of this subsection based as much as possible on sound bankruptcy policy, but concludes that the only sensible solution is to redraft the provision. Therefore, Professor Ponoroff proposes an alternative formulation of subsection 522(f)(3) that balances both the legitimate concerns of creditors and the consumer bankruptcy policy of providing a fresh start for debtors.

In our second article, Professor Steven Friedland offers a critical assessment of recent state legislation allowing for the civil commitment of known sexual predators. At the center of the piece is Friedland's analysis of the Supreme Court's *Kansas v. Hendricks* decision, upholding Kansas's regulatory scheme authorizing the commitment of individuals likely to engage in "predatory acts of sexual violence" as a result of either a "mental abnormality" or a "personality disorder." Friedland evaluates the majority's civil classification of the law, acceptance of new definitional minimums for civil commitment, and treatment of precedent and rules of statutory construction. The article

concludes that the Court decided *Kansas v. Hendricks* incorrectly, and that commitment statutes are not only misguided and inefficient in their implementation, but disingenuous in their attempt to treat committed individuals effectively. In a secondary analysis, the article explores the dangers that occur at the intersection of scientific rhetoric and law—dangers largely ignored in *Kansas v. Hendricks*—imploring the judiciary to take an affirmative definitional responsibility when introducing legal terms incorporating scientific terminology.

In our third article, Brannon Denning examines the oft-ignored Import-Export Clause of the U.S. Constitution as possible textual support for the Supreme Court's current atextual and ad hoc dormant Commerce Clause doctrine. Denning's article responds to a dissent written by Justice Clarence Thomas in a recent dormant Commerce Clause case, *Camps Newfound/Owatonna v. Harrison*, in which Thomas argued that, but for an erroneous Supreme Court ruling, the Import-Export Clause would have prevented the states from levying taxes on goods imported from their sister states. The premise of Thomas's argument is that the words "import" and "export," as originally understood at the time of the Framing, applied both to foreign commerce and commerce among the several states. Therefore, the Import-Export Clause's prohibition against the imposition of "imposts" and "duties" upon imports and exports not only prevented the states from levying taxes on foreign goods, but also on domestic goods exported from one state and imported into another. After parsing through the historical support for Thomas's position, Denning concludes that, although Thomas makes a strong historic case, his proposal to substitute current dormant Commerce Clause doctrine with doctrine based solely on the text of the Import-Export Clause ultimately produces more problems than it solves. However, Denning further concludes that Thomas's dissent provides important penumbral support for current doctrine, noting that prior claims of the doctrine's lack of foundation and history may have been overstated.

In our essay, Professor Strauss, continuing his contribution to the current lively debate on statutory interpretation, asserts that a static, textual approach in interpretation—one asserting that a statute's meaning is forever fixed by its text as it would have been understood when it was written—is inconsistent with the system of precedent in statutory interpretation in the United States, which stems from our common law heritage. Drawing

comparisons to civil law systems and textual opinions of the Supreme Court, Professor Strauss concludes that static textualism ignores the precedential quality of judicial decision and defeats the evolution of law through interaction between legislatures and judiciaries, which are defining characteristics of our common law system. Strauss originally presented the essay as a part of the 1998 John R. Coen Lecture Series at the University of Colorado School of Law. The Coen Lecture series is made possible by a gift from Adrian S. Coen in memory of her husband, a distinguished member of the Colorado Bar Association and an able public speaker. The income from the Coen Trust is used to invite lawyers, jurists, and scholars to the University of Colorado School of Law to speak for the purpose of "prompt[ing the] understanding of the functions and responsibilities of the legal profession in a democratic society."

Our first comment discusses the history and future of school impact fees in Colorado. The author explores the legal issues surrounding school impact fees and discusses the use of impact fees in other states, particularly Florida and California. The author then analyzes a Colorado Supreme Court decision, which held that Colorado counties lack statutory authority to impose school impact fees. The author also scrutinizes the legislation adopted by the Colorado General Assembly that prohibits school impact fees altogether. The author then considers the future of impact fees in Colorado, concluding that the General Assembly should adopt legislation recognizing school impact fees as a constitutional and effective means for the state's communities to meet the educational needs of their growing populations.

Our second comment examines the use of consumer survey evidence to prove trademark dilution under the Federal Trademark Dilution Act of 1995. This 1995 amendment to the Lanham Act signaled a significant change in federal trademark law by allowing owners of famous marks to pursue claims against a later party's use of the mark on dissimilar products. Although many courts applying the new act have relied on the controversial "likelihood of dilution" test, the author asserts that narrowly-crafted consumer survey evidence can provide a clearer, more precise basis for finding dilution. In this comment, the author first outlines the development of trademark dilution, from its implementation as a common law theory of harm to its recent codification as a federal cause of action. Next, the author discusses how courts have interpreted the Federal Trademark

Dilution Act of 1995. Within the context of this discussion, the author presents several issues and methodologies litigants must consider when compiling consumer surveys. Finally, the author includes examples of questions litigants may incorporate into such surveys.

Our final comment discusses merger termination provisions and their enforceability after the recent *Brazen v. Bell Atlantic Corp.* decision. The author explains that this topic is especially timely because mergers have become necessary not only for growth, but also for the survival of many companies in today's business world. The author describes the current merger-rich business environment, and the accompanying benefits and pitfalls for companies considering this option. In this context, the author analyzes the *Bell Atlantic* opinion, arguing that it is appropriate to apply its liquidated damages approach rather than the business judgment rule, the test that courts generally apply to merger decisions made by boards of directors. Further, the author discusses the decision's potential impact on future mergers. Finally, the author offers practical suggestions to counsel for drafting enforceable termination fee provisions.

THE EDITORS