

## FOREWORD

The papers that comprise the main articles in this issue were first presented on October 4, 1996, at the Ira C. Rothgerber, Jr. Conference on Constitutional Law sponsored by the Byron R. White Center for American Constitutional Study. The conference was entitled "Gay Rights and the Courts: The Amendment 2 Controversy." In the first conference article, Timothy Tymkovich examines the history of the legal battle that developed around Amendment 2. Mr. Tymkovich suggests that none of the three theories used by the courts to strike down Amendment 2 comported with the Amendment's history, and he argues that the State's purposes offered in support of the Amendment were sufficient to survive rational basis analysis.

In our second conference article, Professor Larry Alexander analyzes the Amendment 2 decision, *Romer v. Evans*, under the standards that courts apply to equal protection cases. Professor Alexander locates the appropriate place for Amendment 2 on the spectrum of equal protection cases through an examination of public discrimination against gays, the role of Amendment 2's status as a constitutional amendment in contrast to ordinary legislation, and standards of review.

Professor Ann Laquer Estin, in our third conference article, considers family law issues in the wake of Amendment 2 and the Supreme Court's decision in *Romer v. Evans*. Professor Estin links and contrasts the family law issues raised by the Hawaii Supreme Court's ruling on same-sex marriage in *Baehr v. Lewin* with the political process issues raised by *Romer v. Evans*. In conclusion, she suggests that these two family rights decisions are important landmarks in the post-*Bowers v. Hardwick* legal landscape.

In our fourth conference article, Professor Thomas C. Grey questions the continued validity of *Bowers v. Hardwick* in the wake of *Romer v. Evans*. As Justice Scalia's dissent in *Romer* suggests, the two cases are difficult to reconcile. Professor Grey presents three commonly offered arguments that attempt to square *Bowers* and *Romer*. None, he concludes, is persuasive. *Bowers*, therefore, remains authoritative only to the extent that it is limited to its facts.

Professor Lynn A. Baker, in our fifth conference article, finds that there are “missing pages” in *Romer*: first, the Court failed to acknowledge the dissent’s argument that the logic of *Bowers v. Hardwick* requires that Amendment 2 be affirmed, and second, both the majority and dissent failed to examine the implications of Colorado’s near-plenary power over its political subdivisions for the constitutionality of Amendment 2. Professor Baker concludes that the *Romer* majority reached the correct decision, but for reasons that it failed to articulate fully.

In our sixth conference article, Professor Lino A. Graglia considers the implications of *Romer v. Evans* for the Supreme Court’s review of legislation that conflicts with the personal views of its Justices. According to Professor Graglia, Colorado’s Amendment 2 released individuals and institutions from restrictions on their freedom of choice. The effect of Amendment 2 was merely to deny homosexuals special protections under the law. Professor Graglia concludes that the *Romer* Court struck down Amendment 2 because it offended liberal elite views regarding homosexuality, and that *Romer* is but one in a succession of decisions wherein the Court has thwarted democratic enactments of the popular will to accomplish its own personal agenda.

Professor Janet E. Halley, in the final conference article, identifies important gaps between the *Romer* majority’s decision and the Court’s holding in *Bowers v. Hardwick*, and between *Romer*’s interpretation of Amendment 2 and its ultimate holding that Amendment 2 fails rational basis review. Professor Halley notes that a number of legal scholars have already attempted to repair these gaps and to suggest what the *Romer* Court truly intended its decision to mean. Instead of filling these gaps, however, Professor Halley considers their operation as silences and concludes that they illuminate important meanings of *Romer*.

In this issue’s article, Professor Mark Loewenstein observes that many corporate law statutes attempt to serve conflicting policy goals. On the one hand, states compete with other states to attract business promoters by including enabling provisions in their corporate codes that provide promoters with flexibility. On the other hand, many state legislatures attempt to protect shareholders through mandatory provisions, which limit promoters’ flexibility. Professor Loewenstein argues that the tension between enabling and mandatory provisions in state corporate codes frustrates either policy from being served effectively. Professor Loewenstein proposes a bifurcated corporate code as a

solution to this dilemma. The code would allow for a corporate form with mandatory provisions to provide traditional protections to shareholders. It would also allow for various alternatives to the corporate form that would contain purely enabling provisions.

In our first Comment, the author examines the constitutionality of dog sniff searches in public schools in the wake of the United States Supreme Court's decision, *Vernonia School District 47J v. Acton*. The author first considers how various courts have ruled upon the constitutionality of dog sniff searches under the Fourth Amendment. Then, the author questions whether *Vernonia's* approval of suspicionless drug testing of student athletes under the Fourth Amendment means that school administrators may randomly search entire student populations. The author concludes that while suspicionless dog sniff searches of students' lockers should survive constitutional scrutiny, dog sniff searches of students' persons would likely fail.

In our second Comment, the author uses the recent United States Supreme Court decision of *Tome v. United States* to expose the Federal Rules of Evidence as inadequate at dealing with the special circumstances of child witnesses in sexual abuse cases. The Court in *Tome* held that Rule 801(d)(1)(B) should be interpreted to include a pre-motive requirement. Thus, under Rule 801(d)(1)(B) and *Tome*, the defense must attempt to impeach a witness before the prosecution can offer out-of-court statements to rehabilitate the witness's testimony. Further, those out-of-court rehabilitative statements must satisfy *Tome's* pre-motive requirement. The author discusses how these requirements may keep valuable, probative, and reliable hearsay evidence out of court in sexual abuse cases. Finally, the author proposes a tender years exception to the hearsay rule modeled after the Colorado tender years statute.

The issue closes with a Comment in which the author examines federalism in light of two recent United States Supreme Court opinions: *U.S. Term Limits, Inc. v. Thornton* and *United States v. Lopez*. The author first traces the history of federalism, beginning with the enactment of the Tenth Amendment. The author next analyzes the Court's application of the Tenth Amendment in *U.S. Term Limits* and *Lopez*, and the strong reaction these decisions elicited from the legal community. After exploring the potential ramifications of the decisions, the author concludes that, while the revival of the Tenth Amendment may

cause a slight shift in the balance of federal and state power, these decisions will have little effect on the current regulatory state.

## THE EDITORS