FOREWORD

In our lead article, Professor Richard Delgado and Jean Stefancic examine the history of racial mistreatment of citizens of color in Colorado. Beginning with various incidents of racial brutality during the nineteenth century and proceeding into the present, Delgado and Stefancic reveal that Colorado is not nearly the egalitarian paradise that many suppose it to be. The authors write their article in light of recent attacks against affirmative action in higher education, as a result of which the "diversity rationale" that courts earlier had used to support race-based admissions policies may no longer be constitutional. Recognizing this potential limitation, Delgado and Stefancic offer remediation—making amends for past sins—as an alternate basis for upholding race-conscious programs in institutions of higher learning. Specifically, the authors argue that the history of racial discrimination in states such as Colorado provides sufficient justification for adjusting admissions and hiring practices so as to place members of affected minority groups in the *status quo ante*, the position they would have been in had the discrimination not occurred.

In our second article, Justice Penny White explores the use of comparative proportionality review in capital sentencing. In response to the Supreme Court's 1972 *Furman v. Georgia* decision, in which the Court held that states were applying the death penalty arbitrarily and unconstitutionally, most states adopted comparative proportionality review, either by statute or by judicial decision, as part of their death penalty schemes. In 1984, however, after the Court's holding in *Pulley v. Harris* that proportionality review is not demanded by the Constitution, many of those states repealed their statutory proportionality provisions or discontinued their judicially adopted practice of comparative review. Justice White contends that, in the absence of comparative proportionality review, state courts are without any effective internal mechanism to assure that the death penalty is not applied arbitrarily. She further critiques the *Pulley* holding by revealing the Court's willingness to conduct comparative review in cases challenging the taking of property, specifically in the punitive damages and excessive fines contexts. Justice White concludes that state appellate court judges have an

obligation to conduct comparative proportionality review of death sentences in order to ensure that capital punishment remains a viable constitutional punishment and is not imposed as randomly as a lightning strike.

In our third article, Professors Raymond Hogler and Steven Shulman offer a critical assessment of state "right to work" laws, which forbid union security or "closed shop" clauses in labor agreements. The authors examine Colorado's unique Labor Peace Act—a "modified right to work" law—which allows union security clauses in labor agreements only if they are first approved by a supermajority of voters in a separate state election. Professors Hogler and Shulman attack the law on several grounds and conclude that the Colorado General Assembly should repeal the supermajority election provisions dealing with union security. After analyzing Congress's rationale for removing similar election provisions from the Taft-Hartley Act in 1951, the authors present Colorado labor election data from the previous twenty years to support their conclusion that Colorado's supermajority election provisions are superfluous and serve merely to stifle majority will. On a more general level, the authors critically examine the traditional justifications for right to work laws: promotion of individual free choice and realization of greater economic well-being. They contend that these justifications are flawed, and that union security provisions are consistent with contractual freedom. They further contend that the empirical evidence supporting right to work laws is largely inconclusive. At best, it demonstrates a small increase in job growth; but it has no clear impact on standards of living. In light of the lack of support for right to work laws, the desire for union security, the benefit of unionism, and the administrative burden of the existing labor election system, Professors Hogler and Shulman conclude by proposing the amendment of Colorado's Labor Peace Act to make Colorado a full union security state.

In our essay, Professor Gene Nichol examines the Supreme Court's recent *Printz v. United States* decision, offering it as an illustration of the abuses frequently visited on "originalism" as a mode of constitutional decision making. Specifically, Nichol characterizes Justice Antonin Scalia's *Printz* opinion as an example of how advocates of originalism often apply the theory in inconsistent and self-contradictory ways to avoid "undesirable" judicial results. Although originalism typically

decries reliance on anything other than the strict text of the Constitution and the history accompanying its drafting and ratification, Nichol contends that Scalia discards both of these elements in *Printz* to produce a decision more suited to his political preferences. Nichol concludes that, at a minimum, Scalia should acknowledge the inconsistencies in his opinions and become more tolerant of his colleagues on the Court when they commit similar transgressions against their chosen modes of judicial inquiry.

In our casenote, the author discusses the impact of federal drug enforcement policy on the relationship between physicians and their patients. The author specifically explores California's Compassionate Use Act of 1996, which decriminalized the possession of small amounts of marijuana for patients suffering from serious, debilitating illnesses. Commonly referred to as Proposition 215, California voters passed the measure in response to the growing public recognition of the benefits of medical marijuana use and in an effort to relieve doctors' burdens of having to choose between their ethical duty to inform and care for their patients and their legal duty to obey the laws of the United States. In response, as part of its continuing "war on drugs," the federal government vowed to prosecute physicians who recommend the medical use of marijuana to their patients as well as those patients caught using marijuana as medicine. The casenote examines one recent effort by doctors and patients in California to enjoin the government from prosecuting them under federal law. The author argues that government threats to prosecute physicians who recommend medical marijuana will damage physician-patient relationships significantly and hinder the delivery of effective medical treatment.

Our first comment examines the ethical, legal, and practical issues surrounding the compensation of human organ providers. The author explains that the United States currently has an organ procurement system that relies solely on altruistic donations, which has failed to obtain a sufficient number of organs to remedy America's transplantable-organ shortage. After examining several non-compensatory organ donation systems, the author contends that these procurement systems are not realistic alternatives to America's current altruistic system. The author then explores three alternate procurement systems, each of which would compensate donors

for their organs: the *inter vivos* sales and procurement system, the futures market system, and the death benefits system. She concludes that the death benefits system is the most viable organ procurement system for implementation in the United States, because it could overcome many of the common ethical and practical objections to compensating organ providers, and would procure a sufficient number of organs to remedy America's shortage.

Our final comment responds to a recent article proposing that sports moves, such as a baseball pitch or basketball slam dunk, be placed under the ambit of patent protection. The author first explores the political and substantive underpinnings of patent law, concluding that only the most unique and revolutionary sports moves would be patentable under the Patent Act. However, the author asserts that pragmatic considerations, including patent enforcement, infringement remedies, ownership rights disputes, and league regulations, weigh heavily against extending patent protection to sports moves. The author concludes that the better mechanism to protect athletes' financial security lies in well-established doctrines of contract law, especially in the context of professional team sports.

THE EDITORS