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EMERGING ISSUES IN EQUAL PROTECTION JURISPRUDENCE

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To set the stage for this symposium on emerging issues in equal protection, this article introduces the reader to the historic cultural and philosophical origins of the notion of equality in western civilization, the antebellum state jurisprudence on equal protection under law, and the evolution of the meaning and use of the equal protection clause from the passage of the Fourteenth Amendment to the present.

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Equality of Opportunity in the Regulatory Age: Why Yesterday’s Rationality Review Isn’t Enough
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When entrenched business interests, or any other faction, uses government to prevent competition and protect their own profits, they engage in precisely the behavior that the Equal Protection Clause was intended to prohibit: preferring one group over another on some basis other than individual merit. Because of this, the author argues that courts should employ a skeptical scrutiny to the inequalities caused or
The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting

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Under Richmond v. J.A. Croson, if a government agency has participated in the systemic exclusion of contractors on the basis of race, the agency has a compelling interest in remedying that discrimination by favoring contractors whose owners belong to the previously excluded race. This remedial defense of racial preferences is the standard notion of affirmative action in public contracting. Of great interest to the government institutions employing racial preferences, however, is whether any non-remedial objectives—separate and distinct from remedying discrimination—may be relied upon to justify the use of racial classifications in public contracting and what goals in particular are compelling enough to satisfy strict scrutiny. In limited contexts, courts have held that the non-remedial goals of racial diversity and fulfilling the operational needs of government can be compelling reasons to depart from racial neutrality. Municipalities may now consider arguing that such compelling goals can justify racial preferences in public contracting. However, such racial preferences must also be narrowly tailored. The non-remedial goals of creating vital economic development and enhancing public legitimacy may also justify the limited and flexible use of racial preferences in carefully defined circumstances.

If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans

Sherry Hutt .......................................................... 527

The Fourteenth Amendment should apply to Native Americans in the same manner that it is applied to other groups within the United States. In practice, that has not been the case. The body of Indian Law has developed around a “special” treatment for Indians that is actually less than equal in effect. Such disparity is particularly evident in the treatment by the courts of the cultural property of Native Americans. The premise of the article is that if Native Americans were afforded equal protection for their cultural property rights then remedial laws would not be necessary. To illustrate the disparity of treatment, the article contrasts the historical treatment of Geronimo with the property rights of victims of Nazi era confiscation of property, protection for rap musicians in their intellectual property, and the protocols for victims in an airline disaster.

What Could American Indian Law Possibly Have to Do with the Issue of Gay-Marriage Recognition?: Definitional Jurisprudence, Equal Protection and Full Faith and Credit

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Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years

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In Grutter v. Bollinget, the Supreme Court recently upheld the use of race in academic admissions programs while apparently setting a twenty-five year time limit on its use. The Court's opinion creates a paradox as the reasoning allowing race to be used in admissions programs contradicts a time limit for such programs. The Court found achieving a diverse student body to be a compelling state interest justifying race-conscious admissions programs. The benefits of diversities that the Court mentioned (better race relations, better learning outcomes, better professionals and better leaders) will still exist in twenty-five years, thus, the apparent time limit seems incorrect. Furthermore, the Court incorrectly concludes equal protection's purpose was to provide colorblindness and equal protection's norm is to provide colorblindness. Equal protection law is actually designed to protect minorities and provide colorblindness and throughout history race-conscious laws have constantly been utilized, thus, race-consciousness and not colorblindness is the historical norm. Finally, the Court concludes the remedial effect of race-conscious programs will determine their fate, although remedying past discrimination was not a compelling interest justifying the admissions programs and a consensus exists that racial equality will not exist in twenty-five years.

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Arctic National Wildlife Refuge Oil: Canadian and Gwich’in Indian Legal Responses to 1002 Area Development

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The Arctic National Wildlife Refuge in Alaska contains an area commonly referred to as the 1002 area. This area contains millions of barrels of oil but is currently protected from oil development by Congress. Many groups support opening the 1002 area for development, including the state of Alaska and the Bush administration. Those opposing any potential oil development include the Canadian government and the Gwich’in Indians. Were Congress to open the 1002 area for development, Canada and the Gwich’in would probably take legal action to prevent potential harms associated with the drilling. Both Canada and the Gwich’in are concerned primarily with the negative effects oil development could have on the Porcupine Caribou herd, which the Gwich’in subsist on. Canada’s legal responses could include a suit against any oil companies and/or the United States government for direct environmental harm occurring in Canada as a result of the drilling.
This suit could be brought using the Trial Smelter arbitration as precedent. Canada's second suit could be against the United States for damages stemming from America's violation of an existing bilateral treaty by permitting drilling. The Gwich'in could sue the oil companies under traditional environmental tort law for any environmental damages to the 1002 area and the Porcupine Caribou herd that result from the drilling. The Gwich'in could also negotiate or arbitrate with the United States government regarding environmental damages under the Trail Smelter precedent, but only if the Gwich'in are recognized as a sovereign nation.

The 1851 Shipowners' Limitation of Liability Act: Should the Courts Deliver the Final Blow?

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This comment identifies the 1851 Shipowners' Limitation of Liability Act as an enduring problem within federal maritime law and suggests that the courts may be able to exercise their powers of judicial review to strike it down. The Act was initially adopted at a time when American shipowners were in dire need of protection from potentially ruinous lawsuits. The Act, although hastily drawn, was imperative to the growth of the fledgling American shipping industry. By the end of the nineteenth century, however, numerous forms of liability insurance had been created and America saw the advent of the corporate form. These creations gave shipowners layers of protection never before seen and made the Act no longer necessary to effectuate its' original purpose. The Act, however, has endured the years, and although many have called for its outright repeal, the legislature has remained stagnant in their duty to do so.

As it stands today, the Act does little more than to frustrate the needs of the victims harmed by the negligence of corporate shipowners. The purposes of the Act have long ceased to exist and it is now time to abandon the Act. This comment explains that the Act is unconstitutional and may be struck down by the courts on equal protection and due process grounds. Along the way, cases are cited to illuminate the horrendous effects the Act has had on the victims of marine accidents and the injustice that is inherent in this abhorrent Act.
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