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Articles

Podberesky, Hopwood, and *Adarand*: Implications for the Future of Race-Based Programs

Lino A. Graglia 287

Three recent decisions requiring strict scrutiny of race-based programs put the future of racially preferential "affirmative action" programs in doubt. In Podberesky, the Fourth Circuit disallowed race-based scholarship programs. In Hopwood, the Fifth Circuit rejected diversity and held that remedying past discrimination (narrowly defined) was the sole justification for race-based admissions. In Adarand, the Supreme Court required strict scrutiny of federal as well as state race-based programs.

The Unconventional Equal Protection Jurisprudence of Jury Selection

Joel H. Swift 295

This article traces the development of equal protection jurisprudence as it has been applied to one aspect of the criminal justice system, to wit, selection of juries. It demonstrates that the United States Supreme Court's approach has been inconsistent with conventional equal protection doctrine in two ways. Unlike conventional doctrine, which requires proof of subjective intent to discriminate to make out a prima facie case, the Court has found that the mere use of a jury selection process that has a proven statistically disparate negative impact on the selection of African-American jurors is sufficient to establish a prima facie violation of the Equal Protection Clause. The article further demonstrates that conventional "level of review" doctrine, including the requirement that government action may never be arbitrary, does not apply to jury selection, and has held that individuals other than those in protected groups may be removed from a jury without any rational basis for the decision.

Religious Tolerance and its Limits in Early America

George Dargo 341

This article posits that religious toleration in early America was rooted in practical considerations and the necessities of settlement. The British colonies in North America achieved an unparalleled degree of religious liberty. Even groups that were on the social margins of American life--e.g., Roman Catholics, Jews, African Americans--gained a measure of social recognition and religious toleration because they found a role or served certain necessary functions in a developing society. Native Americans were not similarly treated because they were never able to establish equivalent functional utility. Philosophical advocates of Religious Toleration and Freedom of Conscience--principally Roger Williams and John Locke--envisaged a regime of religious liberty that specifically included America's native peoples. But because religious toleration developed out of necessity rather than out of profound philosophical or ideological commitment, Colonial America did not achieve the standard or religious liberty that Williams and Locke would have applied particularly as this concerned Native Americans. Despite a growing scholarly literature on Native American history and culture, and, in particular, the increasing appreciation of the Native American spiritual legacy, native peoples continue to suffer the consequences of a continuing bias on issues of religious freedom. This bias is rooted in America's earliest historical experience.

The Conclusion That a Sinister Conspiracy of Foreign Origin Controls Organized Crime: The Influence of Nativism in the Kefauver Committee Investigation
David R. Wade 371
The Special Senate Committee to Investigate Organized Crime in Interstate Commerce began its work on May 10, 1950 and concluded with the submission of its final report on May 1, 1951. The function of the Committee was to fully study the extent to which organized crime makes use of the facilities of interstate commerce. Following hearings held in 14 cities and testimony from more than 600 witnesses, the Committee concluded that a sinister conspiracy of foreign origin controls organized crime. The Committee's hearings were the first Congressional Committee hearings televised live to a national audience. This Article examines the influence of nativism in the Committee's investigation, conclusions and recommendations. The Article starts by examining nativism as a sociological concept by tracing its notable historical significance in American culture. It then explores nativism as informing competing theories of organized crime aiding and abetting an acceptance of a foreign conspiracy model over a model emphasizing organized crime as a homegrown response to indigenous social and economic conditions. Lastly, the Article examines the influence of nativism in the Committee's investigative hearings, in their recommendations and in their use of television to incite nativist urges and spread nativist sentiment.

The Reality of *Curtiss-Wright*
Anthony Simones 411
In the 1936 case of United States v. Curtiss-Wright Export Corporation, the Supreme Court upheld an arms embargo imposed by Franklin Roosevelt upon the warring factions in the Chaco conflict. Although Congress authorized the embargo, the Court chose to rely on "the exclusive power of the president to act as sole organ of the federal government in the field of international relations." In the ensuing fifty years, commentators have consistently criticized Curtiss-Wright; in contrast, members of the Supreme Court have regularly looked to Curtiss-Wright as guiding precedent. This article examines the manner in which the Court has used Curtiss-Wright to sanction a pre-eminent president in the field of national security affairs. For decades, the Court relied upon the "sole organ" language of Curtiss-Wright to justify its view of a presidency which frequently transcended the separation of powers. Even in the wake of Vietnam, Watergate, and the congressional resurgence of the 1970s, the Court has looked to Curtiss-Wright to uphold bold and sometimes imaginative interpretations of the law which allowed the president's policy preferences to ultimately prevail.

The Case for Expanded Illinois Insurance Producer Duties
Michael Schag 433
In his article, the author argues that current industry practices and consumer expectations justify the expansion of the duties owed by insurance producers to their clients. Specifically, he proposes that courts should become more vigilant in holding producers accountable for failing to inquire broadly into the consumer's insurance needs and for failing to properly advise the consumer regarding pertinent coverage areas.

DNA Fingerprinting: The Failings of *Frye*
John McCabe 455
This article examines a line of precedent which has utilized the Frye standard to exclude forensic DNA evidence. An analysis of these cases provides support for the criticism that the Frye standard is subject to manipulation by those seeking to exclude evidence. Examining the scientific debate concerning the statistical interpretation of DNA evidence reveals that the Frye standard is a poor conceptual framework to evaluate an emerging forensic technique. The ambiguities of Frye allow the presentation of scientific controversy, which is inherent in any scientific advance, as constituting a lack of general acceptance. Furthermore, the adversarial nature of the Frye inquiry distorts the views of the scientific community.

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Comments

The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s

Katrina M. Kelly 483

As a growing number of attorneys seek and receive more media attention during trials, the days in which jurors judge a case's merits based solely on what they have heard in the courtroom are quickly fading. The author discusses the present state of Model Rules of Professional Conduct Rule 3.6, which regulates attorney speech, and examines the difficulties courts have faced in applying the provision. The solution to the attorney speech problem likely lies in a revised standard in which jurors are not required to completely leave their personal beliefs outside the jury room.

The Future of the Exclusionary Rule: An Alternative Analysis for the Adjudication of Individual Rights

Benjamin A. Swift 507

The benefits accrued through the use of computer and technological advances unfortunately sometimes infringe upon personal liberties. This comment examines the range and scope of the Exclusionary Rule in those instances when computer or technological errors supply improper evidence about individuals to police. The author focuses on the Supreme Court decision in United States v. Evans, and then places Evans in its context in criminal procedure jurisprudence.

Casenotes

Born to Lose: The Illinois "Baby Richard" Case--How Examining His Father's Pre-Birth Conduct Might Have Led to a Different Ending for Richard

Gerald W. Huston 543

This casenote examines the factual and legal circumstances surrounding the controversial "Baby Richard" case--a case in which the courts applied a "best interests" test, and in so doing, removed a child from the home of his adoptive parents to return the child to his birth parents. By drawing comparisons to practices in other jurisdictions, the author concludes that a thorough examination of the birth father's pre-birth conduct likely would have changed the court's decision.