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Collapsing Suspect *Class* with Suspect *Classification*: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough ..... *Sonu Bedi* 301

While scholarly work often analyzes the nature and scope of the Court's tiers of scrutiny approach to enforcing equality, this Article examines the underlying theory of equal protection. This Article mounts a challenge to the theory of higher scrutiny, and, in particular, strict scrutiny. It seeks to analyze two questions: (1) What principles trigger heightened scrutiny? and (2) Why does the Court need to subject laws that discriminate on the basis of race to strict scrutiny? The first question concerns the underlying theory of equal protection doctrine: the "what" of higher scrutiny. Scholarly work that seeks to answer this question rightly distinguishes between principles of antidifferentiation and antisubordination, principles that underlie the Court's threshold decision to impose higher scrutiny. Yet this line of reasoning fails to realize that the Court endorses neither. By collapsing a suspect class analysis—a focus on anti-subordination—with a suspect classification one—a focus on anti-differentiation, the Court's jurisprudence perverts both. It points to an inconsistent theory of reviewing legislation. This is a novel critique of equal protection doctrine, one that has hitherto gone unnoticed.

The second question concerns the purpose or goal of strict scrutiny: the "why" of such scrutiny. Once we have decided that strict scrutiny is necessary, what is it meant to accomplish? Here this Article focuses only on the doctrine of strict scrutiny. Drawing from case law and John Ely's classic defense of judicial review, it argues that the answer to the "why" question is about either remedying democratic defects of representation or distinguishing between benign purposes on one hand and racist or nefarious ones on the other. If this is the why of strict scrutiny, it turns out to be

both too strict and not strict enough. While scholars rightly criticize the Court for failing to deploy strict scrutiny in certain cases, namely those where unconscious racism may be afoot, they do not home in on the cost in deploying it. This Article argues that strict scrutiny is too strict, because it invalidates a wide range of laws that seek to better the status of racial minorities. Framing Justice Harlan's dissent in Plessy v. Ferguson *(1896) in a novel light, it argues that a rational review analysis is sufficient to do the distinguishing work in cases where a law facially discriminates on the basis of race. This Article draws from the recent decision by the Ninth Circuit Court of Appeals in* Perry v. Brown *(9th Cir. 2012) invaliding Proposition 8, the California constitutional amendment defining marriage between a man and a woman, to buttress this claim of the sufficiency of a rational review analysis. After all, if such a review can invalidate legislation based on homophobia, mere hostility to gays and lesbians, it can invalidate legislation based on racism, mere hostility to racial minorities. This Article concludes that strict scrutiny, as it is currently understood, is too blunt an instrument. We must be careful in deploying it, precisely because it stands at the center of our dual commitments to democracy and judicial review.*

Textualism and Obstacle Preemption ..... *John David Ohlendorf* 369

Commentators, both on the bench and in the academy, have perceived an inconsistency between the Supreme Court's trend, in recent decades, towards an increasingly formalist approach to statutory interpretation and the Court's continued willingness to find state laws preempted as "obstacles to the accomplishment and execution of the full purposes and objectives of Congress"—so-called "obstacle preemption." This Article argues that by giving the meaning contextually implied in a statutory text ordinary, operative legal force, we can justify most of the current scope of obstacle preemption based solely on theoretical moves textualism already is committed to making.

The Article first sketches the history of both textualism and obstacle preemption, showing why the two doctrines seem so obviously to be in tension with one another. It

then introduces the field of linguistic pragmatics—the study of context's role in determining meaning—paying special attention to the theory of "scalar implicature," a framework that attempts to systematize our intuitions that we often say one thing but imply another. The Article then proceeds to apply this theory to the obstacle-preemption case law, contending that scalar implicature, property adjusted to the legal context, can justify the result in most obstacle preemption cases. Next, the Article argues that textualists are committed to accepting this justification of obstacle preemption because of two deep theoretical presuppositions of their theory. Finally, the Article closes by suggesting that this justification of obstacle preemption not only challenges widely shared assumptions about the inconsistency of textualism and one of the most common types of preemption; it also has the potential to reshape our understanding of both textualism and obstacle preemption.

Genetic Privacy & the Fourth Amendment:
Unregulated Surreptitious DNA Harvesting.....*Albert E. Scherr* 445

Genetic privacy and police practices have come to the fore in the criminal justice system. Case law and stories in the media document that police are surreptitiously harvesting the out-of-body DNA of putative suspects. Some sources even indicate that surreptitious data banking may also be in its infancy. Surreptitious harvesting of out-of-body DNA by the police is currently unregulated by the Fourth Amendment. The few courts that have addressed the issue find that the police are free to harvest DNA abandoned by a putative suspect in a public place. Little in the nascent surreptitious harvesting case law suggests that surreptitious data banking would be regulated either under current judicial conceptions of the Fourth Amendment.

The surreptitious harvesting courts have misapplied the Katz *reasonable-expectation-of-privacy test recently reaffirmed in* United States v. Jones *by the Supreme Court. They have taken a mistakenly narrow property-based approach to their analyses. Given the potential for future abuse of the freedom to collect anyone's out-of-body DNA without even a hunch, this Article proposes that the*

police do not need a search warrant or probable cause to seize an abandoned item in or on which cells and DNA exist. But they do need a search warrant supported by probable cause to enter the cell and harvest the DNA.

An interdisciplinary perspective on the physical, informational, and dignitary dimensions of genetic privacy suggests that an expectation of privacy in the kaleidoscope of identity that is in out-of-body DNA. Using linguistic theory on the use of metaphors, the Article also examines the use of DNA metaphors in popular culture as a reference point to explain a number of features of core identity in contrast to the superficiality of fingerprint metaphors. Popular culture's frequent uses of DNA as a reference point reverberate in a way that suggests that society does recognize as reasonable an expectation of privacy in DNA.

*Martin*izing Title I of the Americans with Disabilities Act.....*Nicole Buonocore Porter* 527

Prior to the ADA Amendments Act of 2008, relatively few cases proceeded past the initial inquiry of whether the plaintiff was covered by the ADA. Consequently, the scope of an employer's obligation to provide a reasonable accommodation to an individual with a disability remains under-developed and under-theorized. Now that the Amendments have made it easier for plaintiffs to prove that they have a disability under the ADA, we can expect to see more courts struggling with many difficult reasonable accommodation issues. The current case law is chaotic, providing little guidance to employers and courts in determining whether an accommodation is reasonable, and making it impossible to discern any unified principle to explain the chaotic results. This Article does just that. It identifies the scope of an employer's obligation to reasonably accommodate its employees by proposing a unified approach to the reasonable accommodation provision.

I am facilitated in this endeavor by relying on a case under Title III, the public accommodations Title of the ADA. In PGA Tour, Inc. v. Martin, *involving professional golfer Casey Martin's request to use a golf cart during the final rounds of the tournament, the Supreme Court held*

that the PGA Tour has to provide Casey Martin with a reasonable modification to its no-golf-carts rule because the modification did not "fundamentally alter" the nature of the public accommodation. This inquiry involved two questions: (1) whether the modification sought alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; and (2) whether it give an unfair advantage to the individual with the disability. Although an employer is not a golf tournament, the standard from Martin *can provide clarity to the vague "reasonableness" standard in Title I's reasonable accommodation provision. First, using the fundamental alteration standard, courts should determine whether the accommodation would "fundamentally alter" the nature of the employer–employee relationship. Second, when an accommodation places burdens on other employees, courts should determine if the accommodation causes an* unreasonable *burden by asking the analogous question from* Martin *of whether the accommodation would given an unfair advantage to the employee with a disability. Thus, although not a perfect fit,* Martin*izing Title I offers helpful structure for providing a coherent, unified approach to the reasonable accommodation provision under the ADA.*

NOTES

A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings ..... *Barclay Sutton Hendrix* 591

On April 4, 2011, the Department of Education's Office of Civil Rights issued a "Dear Colleague" letter regarding Title IX's applicability to sexual violence on college campuses. This letter was sent to every college or university receiving federal funding and instructed recipients on how to meet their legal obligations. Some of the most important changes in the letter pertained to how schools must conduct their grievance procedures in adjudicating sexual assault claims. First, the 2011 letter requires that schools use a preponderance of the evidence standard to determine the accused's guilty or innocence.

Second, the letter strongly discourages schools from allowing the parties personally to question or cross-examine each other during the proceedings. Third, if a school uses an appeals process, the letter requires this procedure be available for both the accused and the accuser, meaning the accused could face the same accusation in disciplinary proceedings twice. This Note first establishes that students facing charges in such campus disciplinary proceedings have a right to due process. The Note then argues that the latest OCR guidance for Title IX compliance does not afford accused students sufficient procedural due process protections. Lastly, this Note suggests that, given the significant liberty interests at stake in campus disciplinary proceedings involving sexual assault charges, due process requires that guilt be established by at least clear and convincing evidence, that accused students have an opportunity to question or cross-examine their accusers, and that accusers should not be allowed to appeal an unfavorable outcome.

War of the Words: Why False Statements Should be Guaranteed First Amendment Protection ..... *Virginia Rose Priddy* 623

In Haley v. State, *the Georgia Supreme Court upheld the conviction of Andrew Scott Haley for making a false statement. Haley created a username and posted videos to the Internet in which he claimed to have committed a series of murders, goading his audience to try to solve the "mysteries." Haley was convicted under a Georgia statute that proscribes the making of a false statement within the jurisdiction of an agency or department of state of Georgia. After discussing the historical legal and philosophical underpinnings of the First Amendment right to free speech, this Note argues that the Georgia statute is unconstitutionally overbroad. First, the speech prohibited by the Georgia law does not exhibit the same qualities as the other categories of speech that have historically been prohibited by the courts. Second, the language of the Georgia statute departs from the comparable federal statute, the Federal False Statements Act. This Note suggests several ways to cure the issues with the Georgia*

law, including reexamining the jurisdictional provision, adding a materiality requirement, and distinguishing between false and fraudulent statements. Finally, this Note offers a unique commentary on the future of the First Amendment right to free speech in the dynamic and burgeoning online environment.

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