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Berta Esperanza Hernandez-Truyol

VIRTUAL EQUALITY AS CONSTITUTIONAL REALITY: AN INTRODUCTION

BERTA ESPERANZA HERNÁNDEZ-TRUYOL*

"Liberty finds no refuge in a jurisprudence of doubt."[1]

Equality is, to be sure, an elusive concept. More often than not, we find it much easier to describe what is unequal (we know it when we see it) than affirmatively to explain equality. This definitional dilemma rises to new heights when courts, in exercising their interpretive legal functions, have to provide all persons the *equal* protection of the laws."[2]

Over the course of American history and jurisprudence, the Supreme Court itself has a checkered past when it comes to judicial application of rights to equality. In the beginning, there was slavery—the quintessence of *un*equality—and the consequent denial of human status to an entire race of people forcibly brought to this country.[3] Subsequently, equal protection was born (at least on paper) in the Civil War Amendments[4] which purported to confer to freed slaves their constitutional rights as United States citizens and as persons, including the *equal* protection of the laws. *Plessy v. Ferguson*[5] effectively relegated this equality right to second-class citizenship by declaring the constitutionality of the separate

* Professor of Law, St. John's University School of Law. Many thanks to my research assistant Alison Nicole Stewart ('96) for her invaluable work. I also want to thank the editors and staff of the *St. John's Journal of Legal Commentary* for asking me to write the introduction to this very interesting Civil Rights Symposium. I have known many of the members since their 1L days and it is a great pleasure to see such commitment and dedication to protecting human rights.

1 *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

2 U.S. CONST. amend. XIV, § 1.

3 The importation of slaves was not prohibited until 1808 and the institution of slavery was not outlawed until Abraham Lincoln's Emancipation Proclamation in 1863.

4 U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . . "); U.S. CONST. amend. XIV ("All persons born or naturalized in the United States . . . are citizens of the United States . . . . "); U.S. CONST. amend. XV ("The rights of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude.").

5 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 400 (1954). The Court rejected a 14th Amendment challenge to segregation, or "Jim Crow" laws. *Id.*

but equal doctrine. Today, the Court continues to grapple with (and balk at) the challenges of defining and securing real equality for at least some of those who ostensibly comprise "We the people."[6]

The Supreme Court is not alone in its attempts to ascertain the meaning of true or "real" equality. For example, Professor Carrie Menkel-Meadow suggests that there are three different approaches to constitutional equality: neutral equality, special treatment and recognizing/accommodating differences.[7] Neutral equality is encapsulated in the legal phrase, "treating similarly-situated people similarly."[8] However, such a formulation does not always yield neutral results. As Catherine MacKinnon points out, in the context of gender where men and women are often posited as dissimilar, "sex equality thus becomes a contradiction in terms, something of an oxymoron . . . ."[9] Other feminist scholars have struggled with the issues and conflicts associated with legal, social and practical definitions of equality, resulting in what Professor Mary Becker describes as formal equality (*i.e.*, neutral equality) and three alternative strands: Catherine MacKinnon's dominance approach, which focuses on women's subordination (women's *un*equality); Robin West's hedonic theory which proposes that women aim for greater subjective well-being; and Margaret Radin's pragmatic view that women should use whatever approach works.[10] The very fact that one concept—equality—can result in a multiplicity of strands, approaches and definitions, creates more than the appearance that a "jurisprudence of doubt" might well be in the making.

Any consideration of "what is equality?" must incorporate the realization that the various definitions indicate, and are in fact predicated upon, factors that may be inimical to the very notion of equality, *e.g.*, cultural bias and prejudice. One of the central problems evident in any of these analytical constructs is that equality requires a comparative context that posits the question

[6] U.S. CONST. pmbl.

[7] Carrie Meckel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 46 (1987).

[8] *Brown*, 347 U.S. at 495.

[9] CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 33 (Harvard University Press 1987).

[10] Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 STETSON L. REV. 701, 701-04 (1994).

"equal to what?" Such contextualized inquiry presumes a normative model as a comparison to which all else is evaluated and valued. By definition, the normative model becomes the signpost for normalcy and results in those people and paradigms fitting the model being *more* equal than those others who deviate from the established norm. Such reliance on the primacy of normativity is particularly troubling when the framework for equality jurisprudence is a society as diverse as the United States.

Our heterogeneity is something in which we pride ourselves. Yet that very diversity often places us at odds with each other, particularly during tough economic times. With diminishing resources, the enrichment that our diversity brings cedes to a zero sum game approach. At such times, for instance, the hiring of a "diverse" candidate is equated to the *exclusion* of his/her mainstream counterpart/competitor. Diversity becomes oppositionality. The "norm" becomes the measure of qualifications, and "difference" becomes a symbol of the lack thereof.

The role of normativity is of particular importance in legal analysis because traditional legal thought—purportedly objective, rational and neutral—is constructed around the aspirational, normal (but really mythical) "reasonable man." This "reasonable man" was made in the image of the heroic "founding fathers" and resulted in a skewed model of what the standard is/should be. This model of normalcy is gendered (male); racialized (white); ethnicized (Western European/Anglo); classed (formally educated and propertied); sexualized (heterosexual); religious-based (Judeo-Christian); and ability-defined (physically and mentally). Each of the indicia of normativity is part of a rite of passage for the "reasonable man" and his progeny. Each of an individual's divergent traits represents a deviation from the norm, a degree of separation from the aspirational model, a mark of a deficiency or defect. Such deviation from the norm is both a symptom of inequality and its justification.

This static model is anathema to a heterogeneous, democratic and ever-changing society. Thus, it is not surprising that the unprincipled normative intransigence of this model and its concomitant social/cultural/political inertia (of rest, not motion) has been subject to serious challenge. An exciting proliferation of outsider

jurisprudence—critical race theory,[11] feminist theory,[12] and most recently critical race feminism[13]—has taken issue with the traditional concept of "normal." These critiques expose the myth of neutrality, rationality and objectivity in the law. They refute the propriety of the application of the traditional, exclusionary normative model as the fitting basis to test equality in the law. The critiques urge the recognition that subjectivities—social, cultural, political, educational, technological, economic, ethnic, sexual, gender, and race factors—are essential to ascertaining and establishing the rule of law. Instead of being wedded to an inalterable, established (narrow) model, legal norms should be fluid and malleable to accommodate the needs and demands of our constantly evolving society.

Notwithstanding the eloquence, forcefulness and persuasiveness of these voices and the stories they tell, a scrutiny of recent Supreme Court decisions as represented in this Symposium reveals that the critiques of normativity have had no impact on our highest level decision-makers. To the contrary, it appears that such interesting descriptions of "color-blindness" for society and law, "reverse discrimination" for what is just basic discrimination, and "illegal aliens" for undocumented foreigners, are modern proxies for "neutrality," "rationality," and "objectivity." The Supreme Court appears beholden to a *status quo* set in the Federalist Papers, "founding fathers," pre-Civil War era. While claiming judicial restraint, the Court is being quite activist[14] and is now more than ever committed to jurisprudential stasis (and perhaps even reactionism).

As Professor Frank Askin indicates in *Two Visions of Justice*, several justices on the present bench "exalt . . . 'judicial restraint' and . . . demonize . . . 'judicial activism'"[15] as pretext to refrain from exercising flexibility in crafting often necessary and just relief. Yet, a study of the Court's decisions reveals the very activism

[11] *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 *passim* (1993).

[12] *See* Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 *passim* (1991).

[13] RICHARD DELGADO, CRITICAL RACE THEORY: THE CUTTING EDGE pt. IX (Temple University Philadelphia 1995).

[14] Frank Askin, *Two Visions of Justice: Federal Courts at a Crossroads*, 11 ST. JOHN'S J. LEGAL COMMENT. 63, 63 (1995).

[15] *Id.*

that the Court purports to eschew. Hiding behind the mask of restraint, the Court halts constitutional history, overlooks post-Civil War constitutional amendments and ignores Warren era precedent[16]—precedent that sought to *forbid* states from depriving "any person of life, liberty or property, without due process of law; nor deny to any person . . . the equal protection of the laws."[17] By abrogating its obligation to "be the guardian of fundamental rights" the Court is failing the people whose rights it is charged to protect.

One of the models the Court selects to promote equality is itself proof of the non-neutrality of its perspective and of its failure to recognize the need for flexibility to accommodate change. In *Desegregating an Ideal*, Mark S. Davies reveals the absence of point-of-view-lessness of Supreme Court decisions by detailing the Court's acceptance of the "suburban neighborhood school" model as the aspirational educational norm.[18] The endorsement of this paradigm is an approbation of the preference for communities which are "demographically homogeneous, particularly in matters of race and income."[19] Certainly, such a pre-*Brown v. Board of Education* model is but a reflection of the larger design of that mythical "reasonable man." *Plus a change . . . .*[20]

As the articles included in this volume plainly show, the considerations of equality cover a broad spectrum of concerns. Division of power issues, such as federalism[21] have a potentially great impact on the development of law and the enunciation of rights (to equality) in our society. History confirms the potency of federal

[16] *Id.* at 66 ("Thomas writes as though constitutional history ended in 1789, and the constitutional revolution of 1865 never occurred . . . . ").

[17] U.S. CONST. amend. XIV.

[18] Mark S. Davies, *Desegregating an Ideal: Neighborhood Schools, Urban School Systems and* Missouri v. Jenkins, 11 ST. JOHN'S J. LEGAL COMMENT. 89, 91 (1995). The author analyzes three recent desegregation decisions to show how any reference to an "ideal public school" refers to one in the suburbs. *Id.*

[19] *Id.* at 91. The author cites to Justice O'Connor's description of "white flight" as the result of "natural, if unfortunate, demographic forces." Missouri v. Jenkins, 115 S. Ct. 2038, 2060 (1995).

[20] Or so the French proverb goes, "the more things change, the more they stay the same."

[21] *See, e.g.,* Frank J. Macchiarola, *State and Local Government Power and the 1994-1995 Term of the United States Supreme Court*, 11 ST. JOHN'S J. LEGAL COMMENT. 19, 31 (1995). Significantly, Dean Macchiarola notes that while the Supreme Court failed to endorse state sovereignty in the case of term limits, he points to Justice Thomas' strong dissent to signal the expansive view of state power that some justices hold. *Id.* This pro-states' rights view is confirmed in the Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2525 (1995). In *Rosenberger*, for the first time in history, the Court approved direct funding of religious activities by an arm of the state government. *Id.*

power through the Commerce Clause, especially as used in the early days of civil rights jurisprudence.[22] Yet the invalidation of the Gun Free School Zones Act of 1990 as an unconstitutional exercise of congressional authority in *United States v. López*,[23] is a signpost for a reversal in that trend. The *López* Court, much as the *Two Visions of Justice* piece fears, seems to halt or turn back constitutional (Commerce Clause) history by relying on Federalist Paper 45's statement that the enumerated powers of the federal government are "few and defined," thus prohibiting national action with respect to what we can all agree is a national tragedy: guns in schools. Again, in the guise of "restraint" the Court exercised its activist muscle by ignoring post-Federalist Papers precedent.[24]

The *About F.A.C.E.* note also raises interesting and pertinent issues concerning the equality and liberty rights of women by questioning the constitutional sustainability, in light of *López*, of the Freedom of Access to Clinic Entrances Act ("F.A.C.E.").[25] The rights of women over their bodies and destinies are central to any equality discussion. The role of law is particularly significant with respect to defining and determining women's place in society and their status *vis à vis* men, considering the fact that women did not participate with any widespread authority in the declaration and development of the vast majority of constitutional law. The Constitution was indeed, and still is to a large degree, blind to

[22] Anna Kampourakis & Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of López*, 11 ST. JOHN'S J. LEGAL COMMENT. 191, 194-200 (1995). The authors review the historical background of the Commerce Clause as used to validate civil rights actions. *Id.* This raises the question whether the employment of, as well as reliance on, the Commerce Clause, as effective as it was in its heyday, was the proper foundation upon which to build equal rights and protections, particularly in light of present-day erosion of the clause's potency.

[23] 115 S. Ct. 1624 (1995).

[24] Kampourakis & Tarr, *supra* note 22, at 202-03 (indicating that Court's interpretivist reliance on original intent is ineffective to deal with modern-day needs and that many of hard-fought gains won in such areas as civil rights for Black Americans might be placed in jeopardy by decisions such as *López*).

[25] *See* Kampourakis & Tarr, *supra* note 22, at 214-18 (noting possibility that *López* decision may result in reversal of decisions upholding F.A.C.E. as courts may find that obstruction of entrances to abortion clinics and its attending violence does not have substantial effect on commerce while also suggesting alternative constitutional grounds for validity of F.A.C.E.).

women.[26] Now it is being argued (erroneously, yet successfully) to be color-blind as well.[27]

For instance, Dean Macchiarola reviews the voting redistricting cases and the attending claims of racial gerrymandering, including *Shaw v. Reno*.[28] In that case and others like it, the politics of the Court yields the following result: four justices aim for real equality which requires consideration of historic inequities (meaning it requires considerations of the plight of Blacks) and four justices insist on virtual equality and impose "color-blindness" as the rule (meaning ignoring the historical plight of Blacks) notwithstanding the lasting impact of two centuries of racism and the fact that such so-called "color-blindness" results in *white* districts. Justice O'Connor constitutes a swing vote ensuring that these redistricting cases and the judicial trend they set can do nothing but promote a jurisprudence of doubt.

Issues of rights, powers and uncertainty also arise in the criminal context. In *Reasonable Doubt Jury Instructions*,[29] the authors explain how the Supreme Court's fluctuating standard for the sufficiency of the reasonable doubt jury instruction has decreased the availability of a federal challenge to deficient instructions. In particular, the authors critique the Court's recent *Victor v. Nebraska*[30] holding which lowers the standard of review of jury instructions to a "reasonable likelihood" that the instruction was applied unconstitutionally. This less stringent standard of review

[26] It should be noted that gender classifications still receive less than strict scrutiny under equal protection analysis. *See, e.g.*, Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("This Court's recent cases teach that such [gender-based] classifications must bear a close and substantial relationship to important governmental objectives.") (citations omitted). *But see* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (holding that peremptory challenges cannot be exercised on basis of sex); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny"). The subject of peremptory challenges is also discussed *infra* at notes 43-48 and accompanying text.

[27] *See* Karen M. Berberich, Note, *Strict in Theory, Not Fatal in Fact: An Analysis of Federal Affirmative Action Programs in the Wake of Adarand Constructors, Inc. v. Peña*, 11 ST. JOHN'S J. LEGAL COMMENT. 101 (1995). In *Adarand*, 115 S. Ct. 2097 (1995), Justice Scalia, in a concurring opinion, states that "[i]n the eyes of government, we are just one race . . . ." *Id.* at 2119 (Scalia, J., concurring). One might ask to which race he is referring.

[28] 113 S. Ct. 2816 (1993). The drawing of districts in North Carolina predominantly on the basis of race was held to be a violation of equal protection. *Id.* at 2832.

[29] Henry D. Gabriel & Katherine A Barski, *Reasonable Doubt Jury Instructions: The Supreme Court Struggles to Live by Its Principles*, 11 ST. JOHN'S J. LEGAL COMMENT. 73 (1995). In addition to the federalism issues raised by the authors, the article discusses the fundamental importance of the reasonable doubt standard.

[30] 114 S. Ct. 1239 (1994).

constitutes an erosion of the federal rights of criminal defendants and possibly infringes on their rights to a presumption of innocence and a fair, impartial trial.

The Supreme Court also has retreated from its lofty stands concerning cruel and unusual punishment. This retrenchment is most evident, of course, in the re-institution of the death penalty in *Gregg v. Georgia*.[31] To be sure, the death penalty is the subject of much emotional debate with the international community generally rejecting such form of punishment[32] and the United States insisting on its sovereign right to impose it.[33] Notwithstanding the *Gregg* case, grave doubts as to the appropriateness of the death penalty plague the justices. A quintessential example of this—one of great relevance to the notion of equality—is Justice Blackmun's statement upon retirement that after years of supporting the death penalty, he had concluded that it was unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[34]

Particularly daunting in light of such concerns is the Court's ruling in *Stanford v. Kentucky*[35] which affirms the constitutionality of the imposition of the death penalty on minors. Just one year prior, the Court had concluded in *Thompson v. Oklahoma*[36] that the Eighth and Fourteenth Amendments prohibited the execution

[31] 428 U.S. 153 (1976). The Supreme Court held that the death penalty as punishment for certain crimes does not constitute cruel and unusual punishment under the Eighth Amendment. *Id.* at 186-87.

[32] International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6(2), 999 U.N.T.S. 171, 174 (1966) [hereinafter ICCPR] ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes . . . ."). "Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women." *Id.* at art. 6(5).

[33] The United States, in acceding to the ICCPR, took a reservation to article 6:
The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

[34] Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting).

[35] 492 U.S. 361 (1989).

[36] 487 U.S. 815 (1988).

of a defendant convicted of first degree murder for an offense committed when he was fifteen-years-old. The Court applied the "evolving standards of decency" and concluded the execution of a person who was younger than sixteen-years-old when s/he committed the capital offense, did not conform to those standards.

Perhaps prognosticating a trend much more evident now, the shift from *Thompson* to *Stanford* was made possible by Justice O'Connor's swing vote. In her *Thompson* concurrence, she sided with Justices Stevens, Blackmun and Marshall, finding that the death penalty was unconstitutional. In her *Stanford* concurrence, she joined Justices Scalia, Rehnquist, White (who constituted the *Thompson* dissenters) and Kennedy (who did not participate in *Thompson*), and concluded that the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age did not constitute cruel and unusual punishment. Noting that it is the job of the Justices to identify what the "*evolving* standards of decency" are, Justice Scalia, speaking for the majority, ironically set the eighteenth century as the appropriate framework within which to decide the constitutionality of the imposition of the death penalty on minors in the twentieth century.[37]

The decision in *Stanford* flies in the face of international standards which expressly proscribe the imposition of the death penalty on persons under eighteen.[38] Thus, our jurisprudence rejects international standards of decency, which rejection places us in interesting company. The United States is the only industrialized state that still imposes the death penalty at all. Moreover, other than the United States, the only six countries worldwide known to have executed juveniles in the last decade are Barbados (which has since raised the age to eighteen), Iran, Iraq, Nigeria, Pakistan and Bangladesh.[39]

In this context, it is not surprising that although the Supreme Court has never directly ruled on the constitutionality of chain

[37] *Stanford*, 492 U.S. at 378.

[38] *See supra* notes 32-33 and accompanying text. The United States reserved against the part of this provision that proscribes imposition of the death penalty on minors but acceded to the portion that prohibits the imposition of the death penalty on pregnant women. *Id.*

[39] NAACP Legal Defense and Educ. Fund, Inc., *Juveniles* (on file with author).

gangs, the author of *Prometheus Rebound*[40] doubts that such form of punishment, disgraceful as it may be, would be deemed cruel and unusual. In the wake of *Stanford*, it seems indeed doubtful that the Supreme Court would be willing to define "standards of decency"[41] by international or any such high standards of inhuman(e) treatment. In the present socio-political climate, the constitutional validity of chain gangs does not pose any obstacle for the revival of the odious practice in some states and its proposed revival in many others. Significantly, the racial and economic dimensions of criminal incarceration in our society, past and present, illustrate a serious predicament in the equality debate.

The concept of equality also arises in the area of peremptory challenges—a practice that the note Batson *Challenges and the Jury Project*,[42] views as having outlived its usefulness in the jury selection process given the Supreme Court's decision not to allow discriminatory peremptories without cause.[43] The authors state that the purpose of the right to a jury trial is "to eliminate potential prejudice and bias and to establish fair and impartial juries." While certainly that should be the goal, in actual practice both sides (prosecution and defense) effectively rely on peremptory challenges—challenges which, by definition, need not be explained, to try and weed out those potential jurors whose viewpoint differs from the one forming the basic theory of their case. *Swain v. Alabama*,[44] is a perfect example of this strategy. In that case, Blacks were entirely excluded from the jury and a Black man convicted of raping a white woman was subsequently sentenced to death. Clearly this tactic is antithetical to the search for a fair and impartial jury. To allow a challenge with a view to an outcome-determinative result is not a search for fairness and impartiality; rather, it is an attempt to stack the deck in favor of a desired result regardless of its correctness.[45] The Court has prohibited

[40] Consuelo A. Vasquez, Note, *Prometheus Rebound by the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. LEGAL COMMENT. 221, 256-58 (1995).

[41] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[42] James A. Domini & Eric Sheridan, Note, *Batson Challenges and the Jury Project: Is New York Ready to Eliminate Discrimination from Jury Selection?*, 11 ST. JOHN'S J. LEGAL COMMENT. 169 (1995).

[43] Batson v. Kentucky, 476 U.S. 79, 96 (1986) (holding state must have race neutral reason for challenging minority jurors).

[44] 380 U.S. 202 (1965).

[45] *See* Domini & Sheridan, *supra* note 42, at 169. The authors state that the purpose of the right to a jury trial is "to eliminate potential prejudice and bias and to establish fair

race-based[46] as well as sex-based[47] peremptories, reasoning that such discrimination in the jury selection does unconstitutional harm to litigants, jurors, members of the excluded community and society as a whole. However, and importantly, as evident in *Hernández v. New York*,[48] the Court refused to apply the *Batson* and *J.E.B.* rationales to language, with possible discriminatory effects. It is at least arguable, if not probable (although the Court rejected this position), that language can be a proxy for ethnicity or national origin, both of which are protected classifications.[49] Yet the Court's dismissal of the proxy argument reinforces its "color-blind" perspective, much like the "pregnant person"[50] category reveals its gender-blind approach—approaches that engender only virtual, not real, equality.

In *The* Davis *Case and the First Amendment*, Professor Margulies continues the exposition of subjectivity in judicial, particularly Supreme Court, decision-making. He reveals that *Davis*,[51] by permitting the government to ignore known discriminatory consequences, and allowing analysis solely on the basis of discriminatory intent, under the guise of neutrality perpetuates the anything-but-neutral *status quo*. Facially, *Davis* insists that the Court's only obligation in dealing with fundamental constitutional rights is to remain neutral. Such a "neutral" approach impedes the rectification of race, sex and ethnicity disparities because based on historical facts, the *status quo* is racialized, sexualized, ethnicized and gendered.

and impartial juries." *Id.* While certainly that should be the goal, in actual practice both sides (prosecution and defense) effectively rely on peremptory challenges—challenges which, by definition, need not be explained, to try and weed out those potential jurors whose view-point differs from the one forming the basic theory of their case. Swain v. Alabama, 380 U.S. 202 (1965), is a perfect example of this strategy. In that case, Blacks were entirely excluded from the jury and a Black man convicted of raping a white woman was subsequently sentenced to death. *Id.* at 202. Clearly this tactic is antithetical to the search for a fair and impartial jury.

46 *Batson*, 476 U.S. at 100.

47 J.E.B. v. Alabama *ex. rel.* T.B., 114 S. Ct. 1419, 1421 (1994) ("Gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

48 500 U.S. 352 (1991).

49 Courts have held that "Hispanics" are a cognizable racial group. *See* Domini & Sheridan, *supra* note 42, at 183.

50 *See* Geduldig v. Aiello, 417 U.S. 484 (1974). The Court upheld the exclusion of pregnancy from state disability insurance finding that such classification, *i.e.*, pregnant versus non-pregnant persons, was not gender-based. *Id.* at 496-97.

51 426 U.S. 229 (1976) (rejecting challenge to civil service examination as racially discriminatory).

The Rehnquist Court's ostensibly neutral approach to equality (which while plainly neutral in appearance predestines unequal results by engrafting the gendered, ethnicized, racialized *status quo* as the norm) is in stark contrast to the Warren Court's methodology which never purported to be neutral in the *Davis* sense. Rather, in the Warren era, the goal of elimination of racial disparities from the voting booth to the jails, from housing to jobs, guided the Court's jurisprudence. During its term, the Warren Court reformed and transformed law in its zeal to achieve *real* equality. On the other hand, the present Court's insistence upon color-blindness and neutrality simply serves to perpetuate historic, built-in *in*equality. Consequently, its jurisprudence emerges as a model of *virtual* equality. One striking example provided by Professor Margulies is the absurdity of even suggesting that poor persons and wealthy persons have an equal right to use their property to disseminate their respective messages. This is, at best, a concept "full of sound and fury, signifying nothing." If the poor, having no property, cannot communicate a message for lack of a forum then the concept of the poor possessing First Amendment rights is spurious.

Just as possession of property can make a difference in one's ability in actuality to enjoy one's fundamental rights, so can education make a difference in one's capability to attain equality of opportunity. Although the Court has never held that education is a fundamental right,[52] it has recognized that states can regulate education by, for example, instituting compulsory school attendance requirements.[53] In *Check-Out Time at the Hotel California*, in light of the erosion of equality analysis, the author suggests that the appropriate analytical construct for invalidating the provisions in California's Proposition 187 that seek to deny primary and secondary education to "illegal aliens," is the Fourteenth Amendment's mandate that no state may "deny to any *person*

[52] San Antonio Indep. Sch. Dist. v. Rodríguez, 411 U.S. 1, 35 (1973).

[53] *See* John R. Bunker, Note, *Check-Out Time at the Hotel California: The Last Resort of Constitutional Arguments and Proposition 187 Considered*, 11 ST. JOHN'S J. LEGAL COMMENT. 137, 149-55 (1995) (reviewing state compulsory attendance laws and discussing major cases with respect to authority of states to control education programs). Such ability of states to control education programs, however, are not without significant limitations. *Id.*

within its jurisdiction the equal protection of the laws."[54] Given that education is compelled by law, the author posits that any prohibition by a state of a child's school attendance because of undocumented status constitutes a denial of the obligation to provide "protection of the laws" as required by the Constitution.

This "protection of the laws" analysis is particularly attractive in light of the shrinking reach of equality protections. Moreover, it would provide protection against the plainly xenophobic provisions of Proposition 187 even in the absence of issues of federalism.[55] In this context, the Proposition's usage of language is telling. The term "illegal alien" reveals that the California law is grounded upon fear of and distaste for the "different," making "outsiders" fair game for scapegoating. Certainly, there is nothing in our jurisprudence that even remotely provides a foundation for either calling a person illegal—although his/her acts, including his/her presence on United States soil can be—or denominating persons as "other worldly" although they, of course, can be from another country and of foreign nationality.

Finally, this "protection of the laws" approach would strengthen the precedential value of *Plyler v. Doe*[56] where a closely divided Supreme Court recognized the importance of education to American culture and society. The Court ruled that denial of a public education to children of undocumented foreigners violated the Equal Protection Clause. Significantly, however, the Court did not conclude either that education was a fundamental right or that undocumented status was a suspect class, thus taking the analysis out of the exacting strict scrutiny level of review. With a "protection of the laws" framework, the milder level of analysis will not permit states to deny access to education to all persons within the jurisdiction, including poor, undocumented children.

[54] U.S. CONST. amend. XIV (emphasis added). Significantly, the phrase "person within its jurisdictional limits" makes clear that this protection reaches all persons—citizens and non-citizens (both documented and undocumented) alike.

[55] The California provisions were largely stricken in League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) based on notions of federalism—as a constitutional matter, it is the province of the federal government and not of individual states to regulate immigration based upon the Uniform Rule of Naturalization Clause (U.S. CONST. art. I, § 8, cl. 4) and the Foreign Relations Power Clause (U.S. CONST. art. 2, § 2, cl. 2). This would not, however, mean much *vis à vis* the merits of such a provision if the regulation were included in a federal statute.

[56] 457 U.S. 202 (1982).

Nowhere in our jurisprudence does the issue of equality create more polarity than in the area of "affirmative action" as narrowly defined to consist of race-, ethnicity-, and even sex-based "preferences." The concept, coined in the height of the civil rights era, was intended to make equality a reality for those who for essentially the entire history of this country had been excluded and marginalized from enjoying the fruits of social, technical, employment and educational progress. The Civil Rights Acts, barring discrimination in employment, education, housing and even immigration on the basis of race, sex, color, national origin and religion, were the vehicles that would make the dream of equality come true. Recently, with the affirmative action debate, this dream has become a nightmare.

Ironically, although affirmative action takes many forms, the only models under attack are those models that grant "preferences" to persons of color and majority women. Sometimes the opposition to these programs sounds in paternalism claiming that the programs "stigmatize" those they seek to protect, *i.e.*, those who receive *or fall into the category that is designated to receive* the so-called preference. Paul Rockwell in his article *Angry White Guys for Affirmative Action* describes the duplicity of the "stigma" argument. First, he notes that "[w]e hear a lot about the so-called stigma of affirmative action for minorities and women [and] [w]e are told that affirmative action harms the psyches of African-Americans, Latinos[/as], and women."[57] Then he unearths the disingenuousness of such an assertion.

> It is a strange argument. Veterans are not stigmatized by the GI Bill. Europeans are not stigmatized by the Marshall Plan. Corporate farmers are not stigmatized by huge water giveaways and million-dollar price supports. The citizens of Orange County, a Republican stronghold, seeking a bailout to cover their bankers' gambling losses, are not holding their heads in shame. The $500 billion federal bailout of the savings and loan industry, a fiasco of deregulation, is the biggest financial set-aside program in U.S. history. Its beneficiaries feel no stigma.

[57] Paul Rockwell, *Angry White Guys for Affirmative Action* at http://www.inmotionmagazine.com *or* http://www.cts.com/browse/publish/index3.html.

> Only when the beneficiaries of affirmative action are women and people of color is there a stigma. Where there is . . . no racism, or sexism, there is no stigma.
>
> Affirmative action is already part of the fabric of American life. We are all bound together in a vast network of affirmative action . . . .[58]

Notwithstanding the patent infirmity of this "stigma" rationale, the Supreme Court has embraced it as an appropriate basis to dismantle racial preferences: "[u]nless [race-based classifications] are strictly reserved for remedial settings, *they may in fact promote notions of racial inferiority and lead to a politics of racial hostility*."[59] Yet, veterans' preferences[60] and alumni preferences[61] remain happily in place.

As the *Strict in Theory, Not Fatal In Fact* article explains, the decisions of the Court over the last decade have eroded the utilitarian nature of affirmative action as a tool to achieve real equality. Starting with *Bakke*,[62] followed by *Croson*[63] and culminating in *Adarand*[64] the Court has narrowed the scope of relief to such an extent so as to render it illusory. To be sure, the Court in *Adarand* makes it clear that affirmative action remains viable as a form of relief. However, the new test sets a "strict scrutiny" standard of review. Any plan, to satisfy constitutional requirements, must be narrowly tailored to meet a compelling state interest.[65] Again relying on color-blindness, the Court rolls the law

[58] *Id.*

[59] City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (emphasis added).

[60] Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 280-81 (1979).

[61] Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir.), *cert. denied sub nom*, Thurgood Marshall Legal Soc. v. Hopwood, 116 S. Ct. 2580 (1996).

[62] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (stating that preference for "members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

[63] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (Scalia, J., concurring) (illustrating Scalia's color-blind approach which simply ignores history of racial discrimination and segregation). Justice Scalia, in a concurring opinion, explained his view of "preferences" as unconstitutional: "[r]acial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *Id.* at 528.

[64] Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995). "By requiring strict scrutiny of racial classifications, we require courts to make sure that a government classification based on race, which" so seldom provide[s] a relevant basis for disparate treatment, "is legitimate, before permitting unequal treatment based on race." (citation omitted). *Id.* at 2113.

[65] *Adarand*, 115 S. Ct. at 2117 ("Racial classifications . . . must serve a compelling governmental interest and must be narrowly tailored to further that interest.").

back in time to an era when is was *legal and accepted* to use color as a reason to *exclude*. Under the rubric of "reverse discrimination" (a telling term as it forces one to ask reverse to what?), we are led to the inescapable conclusion that the normative, exclusionary model still reigns. Although discrimination on the basis of race is illegal discrimination pure and simple, discrimination against the "majority" is called something different because it is somewhat more wrong than discriminating against "outsiders"—the Court thus *relies on race* in order to proscribe reliance on race.

The recent *Hopwood v. Texas*[66] Fifth Circuit decision leaves no doubt that lower courts are ready and eager to follow the Supreme Court's lead in retrenching affirmative action relief. *Hopwood* rejected a racial preference scheme instituted by the University of Texas School of Law in order to remedy its admitted, historic *de jure* discrimination—incidentally the sole recognized compelling state interest in modern constitutional doctrine.[67] *Hopwood* followed the Court's declared preference for a color-blind scheme, even in an institution that admittedly had historically expressly *excluded* those at whom the "preferences" program was aimed. Significantly, because of its past racially exclusionary practices, the Texas alumni are overwhelmingly a racially homogeneous (white) group. Nonetheless, the same *Hopwood* court that invalidated racial and ethnic preferences stated that "[w]hile the use of race per se is proscribed . . . a university may properly favor one applicant over another because of his[/her] . . . relationship to school alumni."[68] This, too, claims to be a color-blind standard. To be sure, this ought not come as a surprise after the "neutrality" driven Court decisions insisting that pregnancy is not sex-related[69] and that Spanish language ability is not national-origin related.[70]

[66] 78 F.3d 932, *cert. denied sub nom*, Thurgood Marshall Legal Soc. v. Hopwood, 116 S. Ct. 2580 (1996).

[67] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) ("Modern equal protection has recognized only one interest: remedying the effects of racial discrimination.") (O'Connor, J., dissenting). Justice O'Connor was joined in her dissent by Justices Rehnquist, Scalia and Kennedy. *Id.* Justice Thomas, who joined the Court after the *Metro Broadcasting* decision was rendered, joined the dissenting judges in *Metro Broadcasting* to make that dissenting position the *Adarand* majority.

[68] *Hopwood*, 78 F.3d at 946.

[69] Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974).

[70] Hernández v. New York, 500 U.S. 352, 375 (1991).

"No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause

This retrogression of our equality jurisprudence is deeply troubling in light of the country's history. Most distressing of the consequences is that this neutral and blind construct renders the attainment of real equality overwhelmingly difficult, if not impossible. Professor Thurow's foot-race imagery, used to explain the equality dilemma, particularly in a construct that has been erected on *in*equality, is enlightening and sobering:

> Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those runners with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.
>
> Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.[71]

The Court's present view of equality mirrors Thurow's hypothetical race with very real life consequences. The Court's imposition of a color-blind standard in 1996, when a color-bound standard had existed in one respect or another for over two centuries,[72] is no different from doing away with a handicap three-fourths of the way into a four-lap race. I am not a betting woman, but given the odds for the completion of that last lap, it is not a major risk to predict the victor as the team never hindered by the weights—the weight of discrimination. The fairness or even-handedness—the equality—of the conditions that exist in the run-

unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination which is."

Id. (O'Connor, Scalia, JJ., concurring).

[71] LESTER THUROW, THE ZERO-SUM SOCIETY 188 (1980).

[72] It is indisputable that in this country inequality was the rule with respect to state action until the passage of the Civil War Amendments and with respect to private action until the mid-1960s passage of the Civil Rights Acts.

ning of the anchor leg is fictional in light of the history; the vanishing of the weights creates a myth of fairness—of virtual equality—that can never translate to real opportunity. This is our constitutional reality as we prepare to enter the twenty-first century.

The articles in this Symposium raise fundamental issues of fairness, liberty, justice and equality. The Supreme Court has had a checkered past in all of these areas simply because it has not existed and does not operate in a vacuum. The rule of law can play a significant role in addressing inequality as it can in effecting (in)equality. Equality may be an elusive ideal, but the idea of working towards a reality that is more just, more fair, more equal, need not elude us forever.