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High court to consider affirmative action ban

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.



On Tuesday, the U.S. Supreme Court will hear oral arguments in a case with potentially profound significance for California. In *Schuette v. Coalition for Affirmative Action*, 701 F.3d 466 (6th Cir. 2012) (en banc), cert. granted, 133 S. Ct. 1633 (2013), the court will consider whether it is constitutional for

the voters in a state to ban affirmative action by amending their state constitution through an initiative.

In 2006, Michigan voters passed Proposal 2, which amended the Michigan constitution to prohibit the governments in that state from discriminating or granting preferences based on race or gender in education, employment or contracting. In 1996, California voters passed a virtually identical initiative, Proposition 209, which has greatly restricted affirmative action ever since. If the Supreme Court agrees with the 6th U.S. Circuit Court of Appeals and declares this unconstitutional, it will mean that Proposition 209 is likewise invalid and affirmative action will again be permitted in California.

The issue in *Schuette* is thus different from that previously confronted by the Supreme Court in affirmative action cases. Previous decisions have been about whether the government violates equal protection when it chooses to engage in affirmative action. *Schuette*, though, is about whether it is constitutional for a state, via an initiative, to ban affirmative action.

In 2003, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court held that colleges and universities have a compelling interest in achieving diversity and that they may use race as one factor in their admissions decisions to benefit minorities. In *Grutter*, the Supreme Court upheld the constitutionality of an affirmative action plan by the University of Michigan Law School.

Ward Connerlie, a former Regent of the University of California and the architect of California's Proposition 209, then took his idea to Michigan. Its voters, like California's a decade earlier, approved the initiative banning affirmative action. Immediately lawsuits were filed challenging this as unconstitutional.

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Litigation

Courts heeding attorney general in dietary supplement settlements

Judges in San Francisco Superior Court have rejected recent settlements in Prop. 65 cases after Attorney General Kamala Harris raised doubts.

Bar Associations

Attorneys must guide data privacy policies, State Bar panelists say

Attorneys can serve an enormously important role in helping their clients get a comprehensive understanding of how to best protect their data, panelists said at a State Bar discussion Friday.

Labor/Employment

Brown vetoes mixed motive suits law

Governor shot down a bill by the California Employment Lawyers Association to make it easier to pursue penalties against employers who terminate workers for reasons that include discrimination.

Obituaries

Rosemary M. Dunbar, 1920-2013

Former Los Angeles Superior Court Judge Rosemary M. Dunbar, a civil rights activist, spent more than 20 years handling criminal cases in Compton. She died in September of natural causes at 93.

Litigation

Attorneys in Jewish cemetery litigation duke it out as trial nears

A class action alleging Eden Memorial Park desecrated graves will soon get under way in Los Angeles. As the trial approaches, attorneys are sparring over evidence in the case which seeks more than \$500 million in damages.

Judges and Judiciary

Branch's new chief counsel talks transition, reform

Deborah Brown, chief counsel for the branch's legal services office, took over Oct. 1. She faces the task for making changes to the office after a critical report, and providing courts legal help despite losing staff to budget cuts.

Intellectual Property

Godfather director sues a Coppola wine seller

California.

The federal district court rejected the challenges and upheld Proposal 2. The 6th Circuit reversed in a 2-1 decision, then affirmed the panel decision in an 8-7 en banc ruling and held that Proposal 2 was unconstitutional. The eight judges in the majority all had been appointed by Democratic presidents, while the seven dissenters had been appointed by Republican presidents.

Michigan argues to the Supreme Court that no state is required to engage in affirmative action; the Supreme Court has said that such programs are permissible, not required. The state maintains that a state may choose not to engage in affirmative action and this can be accomplished through an initiative passed by the voters.

But the challengers of Proposal 2 - and I am one of the lawyers for them - argue that it impermissibly restructures the political process along racial lines. Under Proposal 2, groups other than racial minorities can continue to go to the Board of Regents of the University of Michigan or the Michigan state legislature to obtain preferences in admissions. These bodies could award preferences to those who come from Michigan or from a particular part of the state, or those whose parents attended the university, or those with particular interests.

However, if racial minorities want a preference in admission, they need to go through the arduous process of amending the state constitution. In other words, the initiative singles out race and says that it is to be treated differently from all other types of preferences. In practical reality, this means that racial minorities face a significant barrier to using the political process that is not imposed on other groups.

In the past, the Supreme Court has found such hurdles to be unconstitutional. For example, Akron voters amended their city charter to say that open housing laws had to be approved through the initiative process and not by the usual procedure for enacting laws through the city council. The Supreme Court in *Hunter v. Erickson*, 393 U.S. 389 (1969), declared this unconstitutional as impermissibly restructuring the political process along racial lines. The court explained that the law in question was an "explicitly racial classification treating racial housing matters differently from other racial and housing matters."

In the same vein, in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), the court declared unconstitutional a law adopted by initiative that prevented school boards from requiring students to attend schools not nearest or next nearest to the student's place of residence. The Supreme Court ruled the law unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking structure and thus imposes substantial and unique burdens on racial minorities." Although the law nowhere mentioned race and applied in the same way to all races, the court found that it was a racial classification because, like in *Hunter*, the law "removes the authority to address a racial problem - and only a racial problem - from the existing decision-making body, in such a way as to burden minority interests."

No state is required to have an affirmative action program and a law prohibiting affirmative action is constitutional. But when the ban is done through a constitutional amendment, the matter is taken out of the usual political process and the result is to impose a burden uniquely on racial minorities. That is what is not allowed.

Proposition 209 has had a significant effect in California. It decreased the presence of racial minorities at schools like UC Berkeley and UCLA; these schools still have not reached their pre-209 levels in terms of diversity. If Proposal 2 is unconstitutional, then Proposition 209 unquestionably will be too. The Supreme Court's decision in *Schutte* will come down in 2014 and could have a significant effect on diversity in California in education, contracting and employment.

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An attorney representing Francis Ford Coppola is looking to protect his famous surname and stop an Italian goods distributor from encroaching on the family business.

Corporate

Motion-tracking company grabs first GC from Qualcomm

San Jose-based InvenSense Inc., which produces motion-tracking devices used in consumer electronics, announced Thursday that it had named a senior Qualcomm Inc. attorney to head its legal department.

Litigation

Another Toyota sudden acceleration trial to start in November

After a California jury cleared Toyota of wrongdoing in a \$20 million wrongful death lawsuit Thursday, the automaker is gearing up for another fight in federal court.

Law Practice

On the Move

A weekly roundup of lateral attorney moves, law firm office openings and partner promotions from around California.

Clients aren't the only ones needing cybersecurity advice

Attorneys are waking up to the fact that their own firms can be vulnerable to litigation or government enforcement stemming from their use of new technology.

U.S. Supreme Court

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If the U.S. Supreme Court agrees with the 6th Circuit, it will mean that Proposition 209 is likewise invalid and affirmative action will again be permitted in California. By **Erwin Chemerinsky**

Oversimplified slippery slope arguments

There are several different species of "consequential" arguments, and many of them will likely be on display in a case currently before the U.S. high court. By **Brian M. Hoffstadt**

Government

A powerful new tool for brownfield cleanup

Gov. Jerry Brown signed AB 440, which gives local government agencies broad authority to remediate contaminated property in "blighted areas." By **Christopher D. Jensen and Nicole M. Martin**

Letter to the Editor

Musings go too far lampooning high court