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GUEST COLUMN

Thomas alone on campaign finance?

By Richard L. Hasen

Justice Clarence Thomas is not afraid to go it alone at the Supreme Court. In *Citizens United v. Federal Election Commission*, the 2010 case striking down the law preventing business corporations from spending money from their general treasury on elections, the vote was 8-1 in favor of a disclosure law also challenged by the plaintiffs. Thomas also was alone in *Doe v. Reed*, a 2010 case upholding the ability of the state of Washington to make public the names of voters signing referendum petitions.

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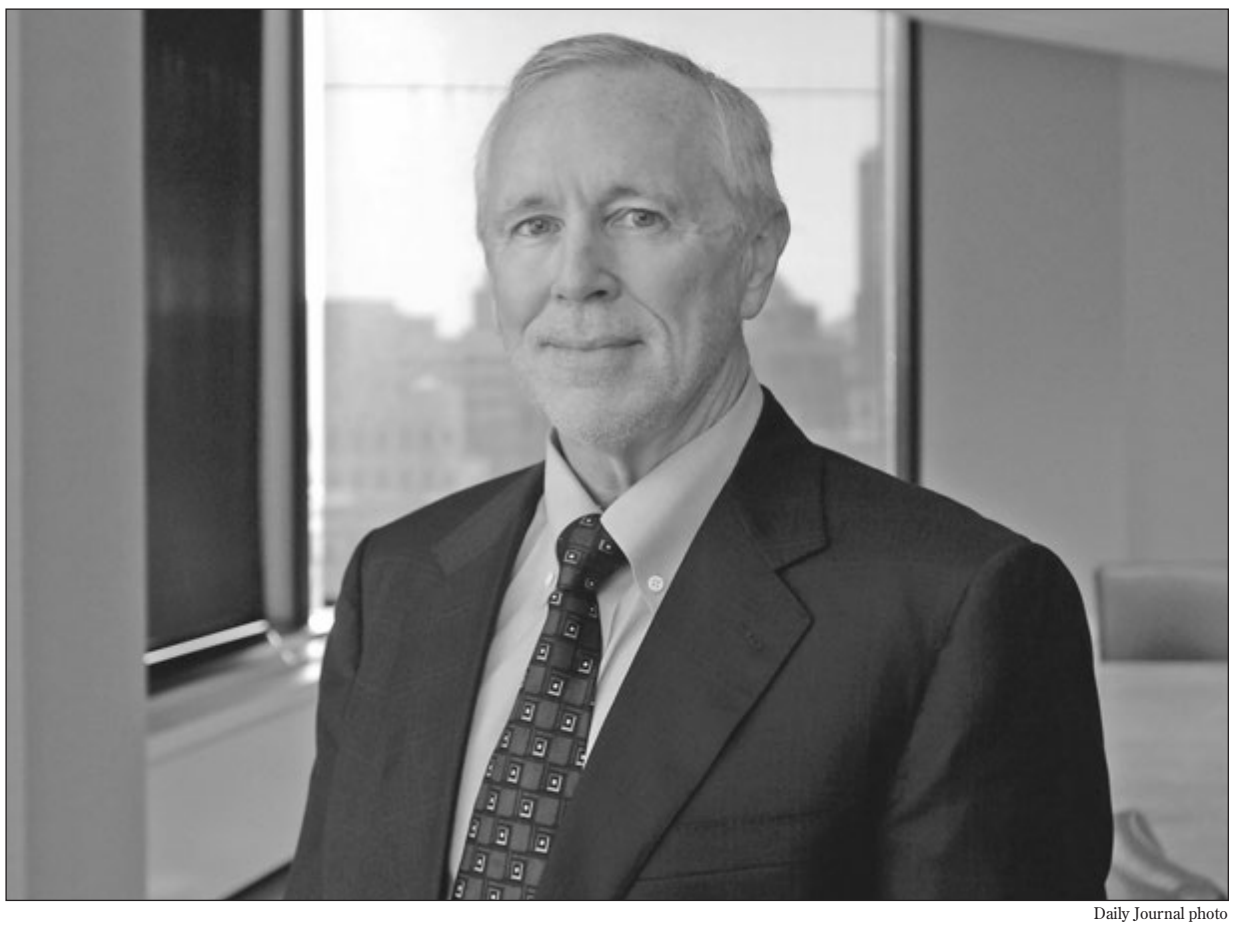
Criminal Law and Procedure: Mexican citizen, who sought to vacate previous conviction that could lead to his deportation, may pursue his appeal without obtaining certificate of probable cause. *People v. Arriaga,* CA Supreme Court, DAR p. 4367



Daily Journal photo

Stephen C. Ryan, a real estate partner at Cox, Castle & Nicholson LLP, said developers must search for subsidies to find money to build affordable housing projects since the demise of redevelopment agencies in the state.

Developers scramble to fund new housing

By Alexandra Schwappach
Daily Journal Staff Writer

For months after the death of local redevelopment agencies, affordable housing projects with committed funds were built with relative ease. But now that redevelopment money has dried up, developers are finding themselves against a wall, having to navigate a labyrinth of state and federal subsidies to complete projects and battling increasing housing prices. As affordable housing becomes all the more important, lawyers say the funding situation has grown dire.

"After the RDAs were dissolved, there was still a period where some deals were still moving ahead," said Stephen C. Ryan, a real estate partner at Cox, Castle & Nicholson LLP. "But at this stage that money is truly gone, and developers are trying really hard to close that gap."

To help get an affordable housing project in Northern California up and running last year, Ryan said he tapped into at least four different layers of subsidies. Each source of funding came with its own set of rules, restrictions and complexities.

This financing hodgepodge is the new normal for affordable housing projects after California's redevelopment agencies, which used tax increment financing to fund community development, were dissolved in 2011 as a cost saving tool amid the state's financial crisis.

Twenty percent of the agencies' revenue — roughly $1 billion a year — was set aside to fund such projects. When the agencies were dissolved, that money was lost.

Another source of funding has yet to replace the agencies as a tool for affordable housing, and as a result developers have had to rely on tax-exempt bonds and low-income housing credits, among other things, to get projects off the ground.

A grim rental situation compounds the funding problems. In California, fair market rent for a two-bedroom apartment is $1,341, according to "Out of Reach," a 2013 study from the National Low Income Housing Coalition. To afford that rent without paying more than 30 percent of income on housing, a household must earn $4,469 monthly, or $53,627 a year.

That would mean a minimum wage earner must work 129 hours a week for 52 weeks a year, or have a household of at least three minimum wage workers contributing to the rent.

But some lawyers are optimistic that a number of bills in the state Legislature could improve the funding situation for affordable housing.

One proposed measure, authored by state Sen. Mark DeSaulnier, D-Concord, would impose a $75 fee on real estate documents for refinancing, which could create anywhere

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DOJ probes defense lawyer bills

US public defender in LA refuses to cooperate, says audits are being misused

By Henry Meier
Daily Journal Staff Writer

LOS ANGELES — A billing dispute between federal indigent defense lawyers and the Central District court has spawned a criminal investigation.

Now, the public defender for the district who was tasked with reviewing panel billing records for the court has refused to cooperate with Department of Justice prosecutors who are threatening to subpoena records.

The dispute began last year when Judge Dale S. Fischer, head of the court's panel attorney program, sent letters to more than a dozen attorneys on the indigent defense panel accusing them of questionable billing practices dating back to 2010. Faced with the prospect of a drawn out investigation and not getting more work, the attorneys quickly repaid or forfeited money, sources said. Fisher reinstated them on the panel.

The judge also ask Sean Kennedy, the public defender, to conduct "reasonableness reviews" of panel attorney bills. Now prosecutors in the Southern District U.S. attorney's office have started asking questions about the panel's billing practices leading some to speculate that Fischer gave them his reviews.

Fischer did not return calls seeking comment.

Kelly Thornton, a spokeswoman for the U.S. attorney's office for the Southern District, declined to discuss the case. "Generally speaking, we don't discuss investigations or even disclose whether we are conducting one," she said in an email.

Kennedy is so outraged by what he sees as a breach of trust that he has refused to cooperate with the Southern District prosecutors and has hired a lawyer to represent his office in the matter.

"The [federal public defender] conducted reasonableness reviews as a service to the court and the [Criminal Justice Act] panel in order to promote honest dialogue about how to conserve scarce funds without sacrificing high quality [representation]," Kennedy said in an email. "We believed our reviews were confidential and would only be shared with the panel lawyer and the reviewing judges. We oppose the release of that information to DOJ lawyers and have declined to discuss the review process with them."

Kennedy declined to elaborate on the dispute. The public defender, who is stepping down in August to take a teaching post at Loyola Law School, has stood up to federal authorities before. At the height of the sequestration crisis last year, Kennedy was the only public defender in the nation who refused to furlough employees, believing it would compromise his office's representation of clients.

The controversy of panel attorney billing is not new either. In 2010, an investigation of panel attorney billing practices throughout the 9th U.S. Circuit Court of Appeals ensnared more than 50 attorneys who agreed to repay funds. None of

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LA County reaches $7.9M settlement deal over aid to poor

By Sarah Parvini
Daily Journal Staff Writer

A coalition of advocates for poor local communities is set to announce a $7.9 million settlement agreement with Los Angeles County on Tuesday that will institute structural reform in the general relief program and pay back aid that was prematurely terminated for tens of thousands of people.

General relief, a loan program mandated by state law and implemented by counties, provides up to $221 per month in cash to help L.A.'s at-risk communities. The aid pays for things such as food, medicine or shelter for as many as 9 months per year to those with less than $50 in assets. Many who are enrolled in the program are homeless and live on Skid Row in downtown Los Angeles.

If approved by the court, the deal would establish a settlement fund to pay damages to people whose benefits were improperly limited or cut off after January 2010. Amounts of up to $171 will be awarded on a sliding scale, based on the number of times a recipient was improperly sanctioned or terminated from the program.

"People who have next to nothing will now have a little," said Daniel Grunfeld of Morgan, Lewis & Bockius LLP, who led negotiations. "More importantly, they will also have the due process guarantees that apply to everyone in our country."

Negotiations lasted 15 months between 19 attorneys and the county, which was represented by Assistant County Counsel Lianne J. Edmonds.

Los Angeles County's general relief program ran into problems in 2008, when a host of people hit hardest by the recession began applying for aid. According to the county, the average monthly caseload has steadily grown from 58,599 in fiscal 2006-07 to a peak of 113,334 during fiscal 2011-12 — a rise of 93 percent. In January, the most recent month for which data is available, 8,807 new general relief cases were approved.

"This doesn't mean that people on general relief are newly unemployed," said Gary Blasi, a professor at the UCLA School of Law who helped draft the agreement. "Often it means that a friend or relative on whom they were depending for survival is newly unemployed and can no longer help support them."

The rise in demand had a devastating financial impact on the county's funds for the program, and plaintiffs' attorneys allege the county began terminating aid around 2010, despite state laws prohibiting such actions. California's Welfare and Institutions Code states that all general relief recipients are entitled to aid for at least 3 months. Los Angeles County allegedly tabulated sanctions — for things as simple as being late to an appointment because the bus was late — during that safe-harbor period, then refused to pay

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Time to embrace race-neutral government

By Joshua Thompson

Associated Press

State Sens. Leland Yee, left, Carol Liu and Ted Lieu initially voted in favor of SCA-5 but later publicly denounced the legislation.

"It is a sordid business, this divvying us up by race." While Chief Justice John Roberts' famous words from *League of United Latin American Citizens v. Perry* were directed at congressional redistricting efforts, they could just as easily apply to the latest battle in the California Legislature.

At stake is Proposition 209 — California's landmark constitutional amendment prohibiting the state and its subdivisions from granting preferential treatment on the basis of race. Passed by voters in 1996, Prop. 209 applies to racially preferential treatment in public education, public employment and public contracting.

Prop. 209 has had a lot of successes in the past 17 years. In cases like *Connerly v. State Personnel Board* and *C & C Construction v. Sacramento Municipal Utility District*, the Courts of Appeal have struck down racially preferential contracting programs. In *Crawford v. Huntington Beach Union School District*, the Court of Appeal struck down a school district's transfer policy that sought to balance students along racial lines. Other lawsuits, for example, against the Port of Oakland and Los Angeles Unified School District, ended after the government agreed to rescind race-conscious policies.

Despite these successes, Prop. 209 has been under attack since its adoption in 1996. Immediately after voters approved it, activist groups challenged it as violating the equal protection clause of the U.S. Constitution. The 9th U.S. Circuit Court of Appeals rejected that argument holding that, "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."

More lawsuits followed. The cities of San Jose and San Francisco attempted to defend racially preferential contracting programs by arguing that Prop. 209 was unconstitutional. Both arguments failed. And just two years ago, the 9th Circuit was forced to consider a challenge to Prop. 209 based on the same legal theory it rejected in 1997. That challenge failed as well.

California's experiment with race-neutral government spawned sister initiatives throughout the country. In 2000, voters in Washington approved I-200. Michigan approved Proposal 2 in 2006. Nebraska, Arizona and Oklahoma followed. Other states, like New Hampshire, Florida and Louisiana also prohibited preferential treatment through legislative enactment, executive order and judicial opinion.

In Michigan — where Proposal 2 passed with 58 percent of the vote — a lawsuit identical to the one rejected by the 9th Circuit was brought. The outcome was different this time as the 6th Circuit struck down Proposal 2 under the equal protection clause. However, the Supreme Court granted Michigan's petition for certiorari less than five months later, and the challenge was heard by the court this past October.

Schuette v. Coalition to Defend Affirmative Action will almost certainly impact California. Prop. 209 and Proposal 2 are nearly identical in their prohibition on racially preferential treatment, and the legal theory that is being argued is the same that the 9th Circuit rejected in 1997. If the Supreme Court were to rule that Proposal 2 violated the Constitution, Prop. 209 would most likely be next.

Yet, it is very difficult to see that scenario unfolding. The legal theory advanced by the race-preference activists has not been used by the court in over 30 years. Accordingly, most Supreme Court scholars expect the court to reverse the 6th Circuit and hold Proposal 2 constitutional. Indeed, it strains credulity to think that the Supreme Court could hold that a law which requires the government to treat everybody equally denies the right to equal protection of the laws.

Against this legal backdrop, the developments in Sacramento over the past couple of months take on increased importance. Unable (or not hopeful) to change Prop. 209 in the courts, the activists attempted to use the Democrat supermajorities in the state Legislature to put the amendment to the voters anew. Senate Constitutional Amendment 5 (SCA-5) would have asked voters to repeal Prop. 209's ban on preferential treatment in university admissions. SCA-5 passed the Senate Jan. 31, and all indications were that it would sail through the Assembly and be put to voters in November. That did not happen.

> 'All that counts as far as these schools are concerned is what the freshman class looks like. They don't care what the senior class looks like.'

Opposition to SCA-5 was swift and impressive. Led primarily by the Asian-American community, pressure was exerted on lawmakers to vote no on SCA-5. A petition urging a no vote on SCA-5 garnered 80,000 signatures in two weeks. Asian-American lawmakers began to publicly denounce SCA-5, including three senators who had previously voted for it. On March 17, SCA-5 died.

The reason for the opposition to SCA-5 from the Asian-American community is obvious. Study after study confirms that when preferential treatment is introduced into university admissions, Asian-Americans suffer. For example, at the University of Texas — where the Supreme Court recently heard arguments on that school's race-based admissions program — an Asian-American student had to score 150 points higher on her SAT to have as likely of a chance of gaining admission over a Hispanic student with identical credentials. The disparity between Asian-American and African-American students is even greater.

Such blatant discrimination should not be countenanced in any state against any individual, but to countenance that type of discrimination against Asian-American students in California is particularly atrocious. After all, Fred Korematsu and Yick Wo were Californians. The state Supreme Court in *People v. Hall* denied Chinese the right to be witnesses in American courts, effectively legalizing white-on-Chinese violence. Even in the 20th Century, the state Legislature banned Chinese, Korean, Japanese and Indian individuals from owning land in the state.

Prop. 209 requires equal treatment under the law, nothing more. To blame it for a perceived lack of racial diversity in the University of California system is like blaming McDonald's for American obesity. The problem is not equal treatment, the problem is that black and Hispanic high school students cannot academically compete with their Asian-American classmates for limited university slots.

Our laws should not paper over this real problem by granting preferential treatment to academically less-prepared students. This is especially true given the mounting evidence suggesting that racial preferences actually harm their intended beneficiaries. Research led by UCLA professor Richard Sander demonstrates that individuals who receive racial preferences suffer many negative effects, including: poorer grades, higher dropout rates, and a tendency to switch to less academically rigorous majors. Racial preferences may sound like a noble idea to some, but it is hard to claim moral superiority when the students you are hoping to benefit will be harmed.

Moreover, Prop. 209 has helped black and Hispanic students in important ways. While enrollment of underrepresented minorities dropped across the UC system after Prop. 209 was adopted, by 2012 nearly every UC school had exceeded its previous enrollment numbers. Only UC Berkeley has yet to surpass its 1997 level, but even at that school the difference is less than 3 percent. More importantly, graduation rates for minority students are up at every UC school. At UC Berkeley, its most recent six-year graduation rate for African-Americans was one of the highest on record.

Put simply, a minority student enrolling at any one of California's public higher education institutions is much more likely to graduate today than she was 17 years ago. And this increase is directly attributable to the effect that Prop. 209 has had on matching students to institutions where they are more likely to succeed academically.

Tackling the root problem — inadequate primary and secondary education — is a daunting endeavor, but its scope should not make it unassailable. Unfortunately, as evidenced by a recent letter from UCLA Chancellor Gene Block, university officials are more concerned with blaming Prop. 209. Political scientist Abigail Thernstrom explained this phenomenon best when she said, "All that counts as far as these schools are concerned is what the freshman class looks like. They don't care what the senior class looks like."

The divvying up by race is truly a sordid business, and it should not take the outrage of the Asian-American community to see it. By requiring the government to treat everybody equally, Prop. 209 forbids divvying up by race. And thanks to some courageous individuals from an oft-discriminated-against racial group, all Californians will get to enjoy that promise a little longer. As California forges ahead with its race-neutral experiment, we come closer to realizing the truth behind another famous quote from the chief justice: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

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Thomas alone in *McCutcheon* ruling?

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Again in *Shelby County v. Holder*, the 2013 blockbuster case preventing Congress from enforcing a part of the Voting Rights Act which required states with a history of racial discrimination in voting to get approval before making changes in their voting rules, Thomas alone would have gone farther than the majority. While the majority struck the coverage formula of the act, leaving the preclearance provision standing in case Congress could enact a new constitutional coverage formula, Thomas was ready to strike preclearance, too. "By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision," he wrote.

But it was somewhat of a surprise last week when Thomas wrote only for himself in the *McCutcheon* campaign finance case, depriving Chief Justice John Roberts of a majority opinion. *McCutcheon* concerned the constitutionality of a federal law which limited the total amount of money that an individual could donate to all federal candidates for office, political parties, and certain political committees in a two-year period. Since the 1976 opinion of *Buckley v. Valeo*, the Supreme Court has reviewed challenges to spending limits under strict scrutiny, but challenges to campaign contribution limits under a laxer "exacting scrutiny" standard.

Roberts, for four justices, wrote a plurality opinion striking down the law under the First Amendment. The opinion applied "exacting scrutiny" and refused the request of Sen. Mitch McConnell and others to apply strict scrutiny. "[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review." Thomas, for himself only, wrote that he would apply strict scrutiny to all campaign limits and presumably strike all of them down: "This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment."

Why was the solitary Thomas opinion a surprise given his willingness to go it alone in other cases? Because Justices Antonin Scalia and Anthony Kennedy in past cases have signed onto earlier Thomas opinions, including the 2001 case *FEC v. Colorado Republican Federal Campaign Committee*, arguing for the application of strict scrutiny to campaign contribution limits.

The loss of Scalia and Kennedy appears to be more about tactics and appearances than substance. As I explained in a recent article in Slate, Roberts' plurality opinion in *McCutcheon* used subtle means to reach almost the same outcome as that favored by Thomas. Rather than applying "exacting scrutiny" in the typical lax way that the court has used in the past, the chief justice made that "exacting" level of scrutiny "rigorous." Rather than apply a capacious definition of the state's anticorruption interest to balance against First Amendment rights, the chief justice severely constricted the meaning of corruption to something akin to bribery. And the chief justice peppered his opinion with all kinds of dicta providing the means for challenging soft money limits on political party fundraising and ultimately all contribution limits.

This was vintage Roberts playing his long game. He would rather take two, or four, steps to go down the road rather than run down that road where Thomas is. But he and Thomas are on the same road and will usually end up in the same place.

When the chief justice first tried this go-slow tactic in the campaign finance area, in a case called *Wisconsin Right to Life v. FEC*, he was criticized severely by both Scalia from the right and Justice David Souter from the left for all but overturning old precedent upholding the corporate spending ban. Scalia said the chief justice was exhibiting "faux judicial restraint." It took the next case in this area, *Citizens United*, for the chief justice to catch up on the road to Scalia, Kennedy and Thomas.

This time in *McCutcheon*, Scalia and Kennedy seemed willing to go along with some faux judicial restraint. If Thomas had his way, all campaign contribution limit laws would be subject to immediate challenge and would fall rather quickly. The gradualism of the chief justice means that's a project that takes a few more years.

The chief justice's gradualism also means that the court takes less public heat. It is hard to explain to the public how an opinion on aggregate contribution limits affects what's left of campaign finance law. Lower court application of *McCutcheon* will take a few years, and the heat from the opinion will dissipate. Then, when the court is ready, it can deliver the knockout blow. It did that in both the voting rights area, first warning of the unconstitutionality of the act and then striking it down, and in the *WRTL-Citizens United* sequence as to corporate spending in candidate elections.

Thomas has no interest in faux judicial restraint or a PR effort for the benefit of the court. But the other justices seem to be warming to the chief justice's velvet glove.

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