COLUMNS & CARTOONS

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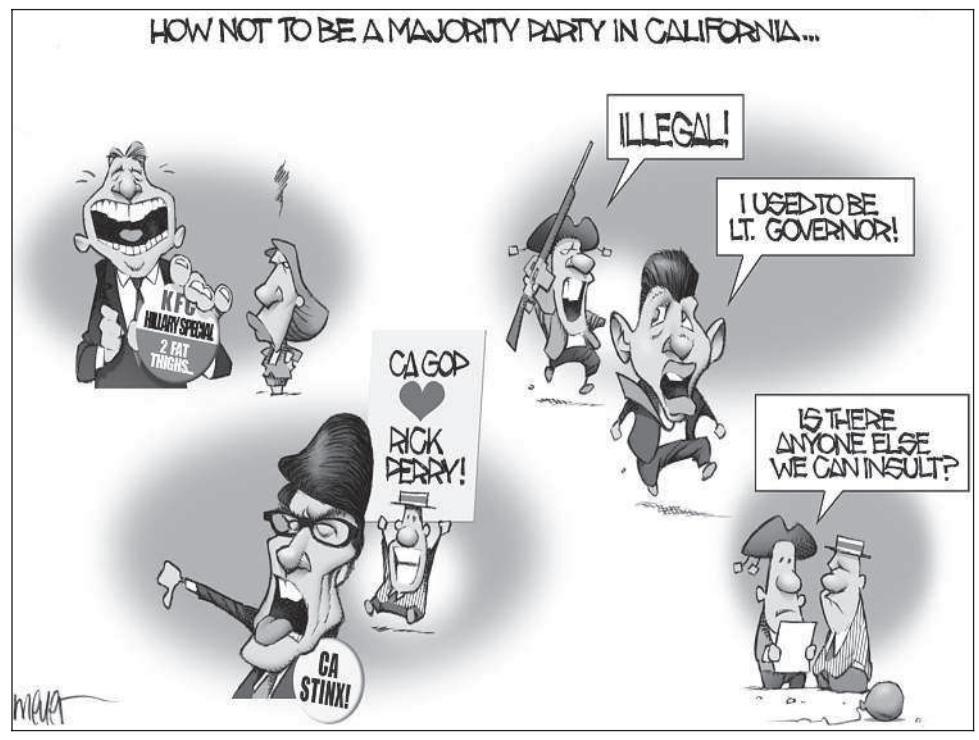


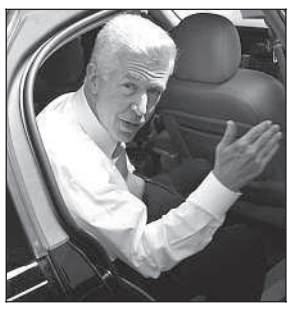
TOM MEYER / SYNDICATED CARTOONIST

Davis recall not as titanic as it seemed then

By JOE MATHEWS
FOR THE REGISTER

Ten years ago this month, it was big news. A large majority of California voters approved the yanking of Gov. Gray Davis. Davis was only the second governor in U.S. history to suffer the indignity of being recalled.

The recall was sexy. In one poll, 99 percent of state residents said they were following news of it. It made the New Yorker and the National Enquirer, Oprah and Howard Stern. Most elections offer voters a choice of a half-dozen dull candidates. The recall offered 135 choices, including a porn star, actor Gary Coleman and a sumo wrestler.



AP FILE PHOTO
Gov. Gray Davis in 2003.

The recall was probably the greatest force for civic engagement I've ever seen in California. While most elections run for years, the recall campaign was just 60 days, the length of a great summer fling. Whether you were in San Diego or in Redding, people were having the same conversations, all about you-know-what.

Critics of the recall said it was a crazy idea, a partisan Republican power grab, a perversion of America's tradition of representative government. Supporters said it was the epitome of popular revolt and the first step toward the remaking of California. Love it or hate it, most everyone agreed – the recall was titanic in impact.

No one thinks that today. Ten years later, the recall seems forgotten, overshadowed by countless other historical events, including a worldwide financial crisis. Politicians and pundits who once hyped it will now tell you that it was overhyped. The same people who ran California 10 years ago are running things today.

But the recall did have some lasting effects: a small but durable movement for political reform in the state, some progressive environmental policies put in place by Davis' replacement, Gov. Arnold Schwarzenegger, and the Huffington Post, fueled in part by the notoriety Arianna Huffington gained as a recall candidate.

Among the recall's darker legacies has been a hardening of the mindset that produced it. Californians maintain a deep contempt for politicians and politics, combined with a deep faith in elections as the way to change things. These impulses are in conflict.

We have yet to realize that real change requires a different mindset. If California wants to create healthy communities and connections among its diverse and far-flung residents, it needs a new story for itself. This can't be done in one big temporary campaign. It takes years, even decades, for large groups of people to coalesce around shared narratives. And you need a common memory – a memory that media and civic institutions must do more to nurture. That way, Californians won't casually forget the results of their momentous decisions, like removing a governor from office.

To put it bluntly, we need better recall.

Joe Mathews writes the Connecting California column for Zocalo Public Square.

JUSTICES MULL FUTURE OF AFFIRMATIVE ACTION

Fate of Michigan law could affect California's Prop. 209.

By ERWIN CHEMERINSKY
FOR THE REGISTER

Is it constitutional for a state's voters to ban affirmative action by amending the state constitution through an initiative? In 2006, Michigan voters passed Proposal 2, which amended the Michigan Constitution to prohibit governments in that state from discriminating or granting preferences based on race or gender in education, employment or contracting.

The constitutionality of this initiative will be argued before the Supreme Court on Oct. 15 in *Schuette v. Coalition for Affirmative Action*. The outcome could matter greatly to California, where voters in 1996 passed a virtually identical initiative, Proposition 209.

58%
Share of Michigan voters who favored Proposal 2 in November 2006 election.

Affirmative action is tremendously controversial. Critics see it as "reverse discrimination" and believe it is wrong for the government to give preferences, such as in admission to educational institutions, based on race. Supporters see affirmative action as essential to remedy past discrimination and to ensure diversity. The legacy of past and current racial discrimination means, that without affirmative action, very few minorities will be enrolled at the nation's top colleges and universities.

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In 2003, in *Grutter v. Bollinger*, 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. The Supreme Court upheld the constitutionality of an affirmative action plan by the University of Michigan Law School.

Ward Connerly, a former University of California regent and the architect of Prop. 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.

The entire 6th U.S. Circuit Court of Appeals, comprised of 15 active judges, ruled 8-7 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. This reflects the deep ideological divide over affirmative action.

Michigan will argue 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. When Prop. 209 was challenged after its passage, the 9th U.S. Circuit Court of Appeals upheld it as constitutional.

But the challengers of Proposal 2 – 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 Michigan Board of Regents or the Michigan 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.

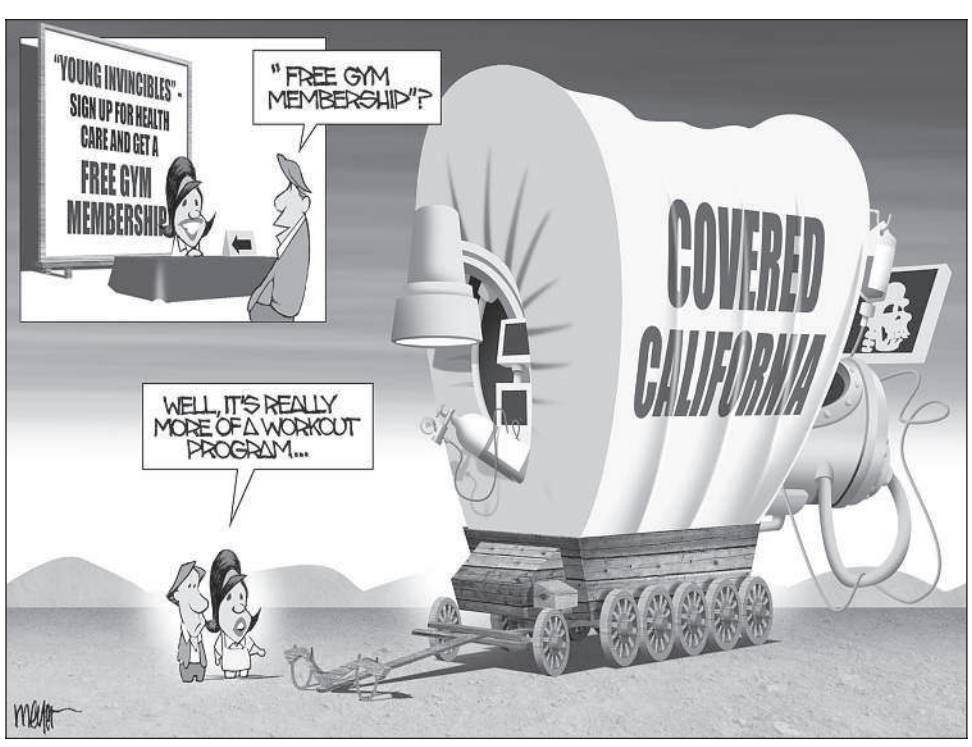
If Michigan's Proposal 2 is unconstitutional, then Prop. 209, unquestionably, will be, too.

In the past, the Supreme Court has found such hurdles to be unconstitutional. For example, voters in Akron, Ohio, 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 declared this unconstitutional as impermissibly restructuring the political process along racial lines.

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.

Prop. 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-Prop. 209 diversity levels. If Proposal 2 is unconstitutional, then Prop. 209, unquestionably, will be, too. The Supreme Court's decision in *Schuette* will come down in 2014 and could have a significant effect on diversity in California in education, contracting and employment.

Erwin Chemerinsky is dean of the UC Irvine School of Law.



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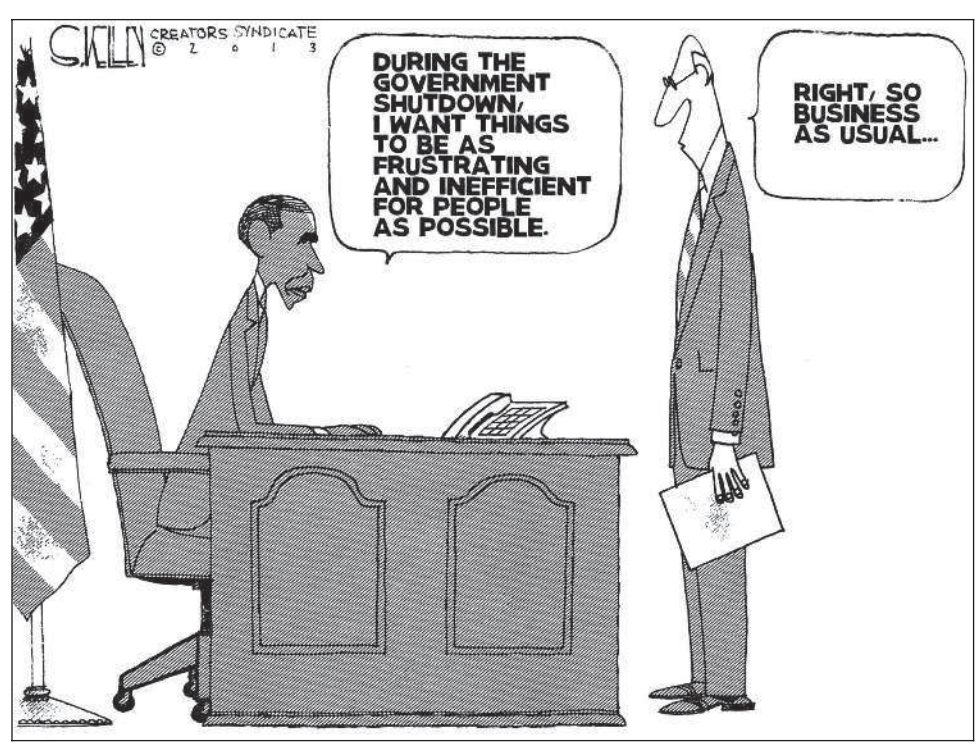

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