Recent Cases: The Equal Protection Challenge To Proposition 209

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In April of 1997, a three-judge panel of the Court of Appeals for the Ninth Circuit reversed federal district court judge Thelton Henderson and rejected as a matter of law a facial equal protection challenge brought against California's (now) famous Proposition 209,1 which forbids all California government entities from engaging in any race-conscious affirmative action preference program in public contracting, employment or education.2 In the few pages that follow, I will describe the plaintiffs' constitutional theory,3 discuss briefly why the Ninth Circuit's rejection of it was not particularly faithful to Supreme Court precedent, and speculate a bit about why the plaintiffs' legal theory, while sound under existing cases, had a tough time capturing the imagination of the American people.

I. THE PLAINTIFFS' CONSTITUTIONAL THEORY

The argument against Proposition 209's constitutionality under existing law is premised on a line of Supreme Court cases I have elsewhere called the Hunter doctrine.4 The two most important of these, for present purposes, are Hunter v. Erickson,5 and Seattle School District No. 1 v. Washington.6 In Hunter, the citizens of Akron amended their city charter

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1. In relevant part, Proposition 209 provides: "The State shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."
3. For much more elaboration on the equal protection theory, see Amar & Caminker, Political Burdens, supra note 2 and Amar & Caminker, Reply, supra note 2.
4. See id.
to require approval by a majority of Akron voters before any City Council ordinance relating to racial or religious discrimination in real estate transactions could go into effect. The Supreme Court struck down the charter amendment as violative of equal protection. The Court expressly declined to rest its holding on a finding of invidious intent. Instead, the Court said the law on its face drew an impermissible racial classification because it treated "racial housing matters differently [and less favorably]" than other matters. Although the charter amendment made no formal distinctions between persons of different races, the Court found that it would uniquely disadvantage beneficiaries of antidiscrimination ordinances (i.e., minorities) by forcing such ordinances to run a legislative gauntlet of popular approval that other laws—and thus other interest groups—were spared.

The second case, Seattle, applied and extended Hunter. In response to widespread de facto racial segregation in Seattle area schools, a local school district adopted a race-conscious busing and pupil assignment plan designed to eliminate racial imbalance. The local program prompted the people of Washington to enact Initiative 350, which as understood by the Supreme Court removed local authority over racial busing alone and shifted that authority to state government, while leaving intact local authority to engage in busing for any other educationally valid reason. The Supreme Court invalidated Initiative 350 on equal protection grounds, again declining to rest its holding on any finding of invidious intent. Instead, as was true of the invalid Akron charter amendment in Hunter, Initiative 350 was flawed because it selectively removed a program of particular importance to racial minorities—integrative busing—from a level that was more politically accessible for minorities (local school districts) to a level that was more remote and less accessible (state government).

The cases essentially employ a two-part test for challenging a law on equal protection grounds. First, one must show that the law in question is "racial" or "racial in character," in that it singles out for special treatment issues that are particularly associated with racial minority interests. Second, the challenger must show that the law imposes an unfair political process burden with regard to these "racial matters" by restructuring the political process so as to entrench resolution of these issues in a way unfavorable to minorities. Strict scrutiny is triggered only if the challenger satisfies both parts of the test. A law that imposes special political process burdens on classes not defined by race does not directly implicate the case law. Similarly, a law that deals explicitly and selectively with "racial" issues but does not restructure the political process by imposing entrenching burdens upon minority interests is unproblematic. For example, the simple repeal of a specific antidiscrimination ordinance or affirmative action pro-

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Proposition 209's defenders, see Amar & Caminker, Political Burdens, supra note 2, at 1049-53; Amar & Caminker, Reply, supra note 2, at 1010-13.

gram by the enacting entity would be entirely permissible.

Under this framework, Proposition 209 seemed vulnerable. As I have previously written:

[Proposition 209] singles out race and treats it differently from any other criterion for public employment, education and contracting decisions. In doing so, [Proposition 209] isolates an issue of special interest to minorities—affirmative action programs designed to remedy past racial wrongs and bring minorities together with nonminorities in educational and vocational settings—and relegates this issue to the highest and most entrenched level of governmental decisionmaking [—the California Constitution.]

II. THE JUDICIAL RECESSION OF PLAINTIFFS’ THEORY

Plaintiffs’ Hunter theory was embraced (albeit tentatively, because a preliminary injunction was all that was at issue at that time) by the district court, and rejected as a matter of law by the Ninth Circuit. In reversing the district court’s grant of a preliminary injunction, the Ninth Circuit effectively held that plaintiffs had a zero percent chance of succeeding on the merits at trial, because the Hunter doctrine simply was not on point. In other words, the Ninth Circuit declined to apply the equal protection analysis established in Hunter and Seattle.

In particular, the Ninth Circuit reasoned that since equal protection law generally and increasingly frowns on all racial classifications—that is, laws that make the race of an individual relevant to the receipt of a benefit or imposition of a burden—then as a matter of logic, a law like 209, which makes race absolutely irrelevant to government decisionmaking, could hardly be attacked as violating equal protection. Indeed, the Court labeled as “paradoxical” the idea that a law mandating race-neutral treatment could itself be considered a racial classification subject to scrutiny.

8. These are the only programs uniquely foreclosed by Proposition 209, because race-conscious programs that have either the goal or effect of perpetuating racial animus, or which have the goal or effect of keeping the races separate will never survive strict scrutiny and are thus already unconstitutional.
11. I do not have time or space to discuss the Ninth Circuit’s treatment of the legal standards governing review of a district court’s preliminary injunction, but let me say that this treatment raises interesting and complicated civil procedure questions, quite apart from the complex equal protection questions in the case.
12. See Coalition for Economic Equity, 110 F. 3d at 709. Earlier in its opinion, the Court made essentially the same point, albeit with more rhetorical flair:

Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race. . . . Plaintiffs charge this ban on unequal treatment denies members of certain races . . . equal protection of the laws. If merely stating this alleged equal protection does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

Id. at 1439.
Maybe plaintiffs' legal argument was paradoxical—but only if by paradoxical we mean (as many dictionaries in fact define “paradox” to mean) a “statement that is seemingly contradictory to received wisdom or common sense, but which may well be true.” Plaintiffs' legal assertions were true because they tracked Hunter and Seattle so tightly. In fact—and this is a major criticism of the Ninth Circuit’s opinion—if the plaintiff’s theory was paradoxical, so too was the result and analysis in Seattle. For in that case, the Court held Initiative 350 to be a racial classification subject to strict scrutiny, even though Initiative 350 by its terms mandated race-neutral pupil assignment. In other words, Initiative 350 sought to make race irrelevant to government decisions in the pupil assignment and busing realm, and yet the Court considered it a racial classification. The Court did so because Initiative 350, notwithstanding its formal race-neutrality, dealt with racial matters in a way that discriminated against the interests of minorities because minorities had a special interest in achieving busing affirmative action programs. Thus, the Seattle Court cared less about formal equality and more about contextual, substantive equality of access to favorable political results.

To be sure, the Ninth Circuit made a few half-hearted efforts to distinguish Seattle and limit it to its facts, but the real thrust of the Ninth Circuit’s approach was to disown a Supreme Court line of cases whose reasoning is controversial (or perhaps nonsensical, to the Ninth Circuit), and whose outcomes may very well lack the support of a current majority of the current Supreme Court. As I have elsewhere suggested, I feel duti-

13. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (emphasis added).
14. Two in particular warrant mention. First, the Ninth Circuit suggested that race-conscious busing at issue in Seattle is somehow different from the race-conscious programs foreclosed by Proposition 209. See Coalition for Economic Equity, 122 F.3d at 708, n.16. It is hard to see why, for these purposes. Racial busing is race-conscious government action that would be subject to strict scrutiny today, and would have been subject to strict scrutiny at the time of Seattle. Justice Blackmun’s majority opinion in Seattle specifically declined to constitutionally bless Seattle’s busing programs, and Justice Powell argued forcefully in his dissent that the busing programs themselves might well have been unconstitutional. Let us remember that Seattle’s busing was undertaken to redress de facto, and not de jure segregation, and thus may have been hard to constitutionally justify. Contrast that with the programs 209 shuts down, which by definition are programs that survive strict scrutiny (else they would already be illegal, irrespective of 209). Thus, in terms of whether they are constitutionally permissible, the programs at issue under 209 are on firmer ground than the Seattle busing program. And from the perspective of persons of color, it is hard to understand why they have a keener interest in busing than other remedial and diversity-based race consciousness. Finally, in terms of the burden placed upon non-minorities, the Ninth Circuit, I think, is wide of the mark when it suggests that racial busing does not impose burdens on non-minorities, whereas affirmative action preference programs involve a zero-sum situation where minority gains come at the expense of non-minority losses. Who does the Ninth Circuit think were objecting to Seattle’s busing programs, anyway? Certainly non-minority students who got shipped away from their neighborhood schools felt they were being burdened.

Second, the Ninth Circuit relied on Crawford. Space limitations prevent me from explaining why Crawford should not undermine the plaintiff’s argument, but let me refer interested readers to Amar & Caminker, Political Burdens, supra note 2, at 1049-53.
15. For a discussion of how recent affirmative action cases by the Court, which seem to dispar-
ful lower courts should faithfully apply Supreme Court precedent with which they disagree, even if they can with some basis predict that the Supreme Court itself will not affirm the earlier decisions.16

III. LESSONS FROM THE LITIGATION

Let us take a step back and ask: Why did plaintiffs’ challenge fail in the Ninth Circuit, and why did the Supreme Court decline to review the case?17 One simple answer is that *Hunter* and *Seattle*18 were cases decided by a Supreme Court whose equal protection first principles were very different from those of the Ninth Circuit panel or the current Court. Perhaps. It is certainly true that equal protection decisions by the Supreme and lower courts today (particularly when reviewing affirmative action programs) are much more formalistic and much less contextual than was the *Seattle* analysis. But that doesn’t quite explain why plaintiffs’ challenge failed to energize mainstream liberals, which I think it did not. Indeed, most of the public—including most liberals, I think—saw the court challenge less as a legal one and more as a political one. I do not for one moment want to disparage Judge Henderson’s fine opinion granting plaintiffs’ a preliminary injunction, which as I have argued was dictated by a faithful application of *Seattle*. Instead, what I am trying to suggest is that the nature of the *Seattle* theory itself in some ways seems more about politics than it does constitutional principle. Racial preferences can’t be singled out—the *Seattle* argument runs—because other preferences remain. If other groups, like acquaintances of politicians, children of alumni or donors, etc., can claim their spoils—can scrap for goodies—why not minorities? The suggestion of the *Seattle* theory is that if some nonmeritocratic criteria are used in distributing contracts and jobs and university slots, then you can’t single out for inferior treatment programs designed to benefit minority groups.

Now I am not saying that this “equality of opportunity for beneficial programs” argument does not have some theoretical appeal. When only racial minorities have their claims for assistance moved to the state constitutional level—where minorities may never have succeeded before—and everyone else can participate in the rough and tumble of local processes, it looks like a gerrymander. So this “equal access to preferences” argument is not without merit. But it certainly doesn’t play well in the heartland—to the American public. And I don’t think it played very well at the Supreme Court, where the political context in which a case is decided is far from ir-

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16. See *Amar & Caminker, Political Burdens*, supra note 2, at 1035.
17. Plaintiffs’ petition for certiorari was denied on November 3, 1997.
18. Of course, by lumping *Hunter* and *Seattle* together I do not mean to suggest that no one could distinguish between the two.
relevant. For that reason, the question is not whether, as a dry analytic matter, Seattle can be distinguished from 209, but rather whether a result like Seattle makes sense in today's world. I don't know if it does or not, but it seems to me that the basic theme of Seattle's defenders should be the Constitution's pro-integration bias. If Seattle made sense in 1981 as a constitutional matter, it was because integration of Seattle schools made constitutional sense, even if that meant assigning some kids on the basis of race, so long as it could be done in a not-too disruptive way.

To put my basic suggestion slightly differently, perhaps, the Constitution is not indifferent as between having narrowly tailored and integrative remedial and diversity programs in existence, and not. To say, as the Court has, that there is no enforceable requirement that these programs exist (and for that reason municipalities can repeal them if they want), is not quite to say that we aren't constitutionally better off with programs that can survive strict scrutiny on the books. For that reason, even though we don't require states to enact these programs, we are uncomfortable with their entrenched rejection in one fell swoop. Now maybe this line between the right of repeal and the impermissibility of entrenched rejection can't hold, and that Seattle goes by the boards. I really am not sure—I have to think about it even more.