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Preview of October Term 2012

Supreme Court's Social Calendar Wide Open But Same-Sex Marriage, VRA May Join Party

The cases granted so far for the U.S. Supreme Court's October 2012 term have not been stacked with socially divisive issues that garner the lion's share of attention from either the public or the press. However, a number of potential powder-keg petitions are waiting action from the court.

Currently, the court is scheduled to hear one affirmative action case challenging the undergraduate admissions program at the University of Texas. Its decision will mark a quick turnaround for the court on the racially charged issue, having decided *Grutter v. Bolinger*, 539 U.S. 306 (2003), less than a decade ago and upholding race-based considerations in university admissions.

But affirmative action is by no means the only hot-button issue on the court's radar. Petitions for certiorari currently awaiting action include challenges to Section 5 of the Voting Rights Act, the federal Defense of Marriage Act, and a California proposition banning same-sex marriage across the state. Of course, whether the court grants review in any of these cases and how it will handle them is still up for grabs.

Discrimination in School Admissions. Set for argument Oct. 10, 2012, *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011) (79 U.S.L.W. 1941), *cert. granted*, 80 U.S.L.W. 3475 (U.S. Feb. 21, 2012) (No. 11–345), asks the question whether under the Equal Protection Clause of the 14th Amendment and *Grutter*, the undergraduate admissions program at the University of Texas at Austin is constitutional.

Generally speaking, Texas universities must accept all Texas high school applicants who are in the top 10 percent of their high school class. But UT added other considerations to its applicant metrics. It also computes an academic index using the applicant's high school class rank, standardized test scores, and high school curriculum, and uses a personal achievement index to reward students whose merit is not adequately reflected by class rank and test scores.

In 2004, however, UT discovered that minorities were still underrepresented in the school community. It therefore adopted a policy to include race as one of many factors considered in admissions. That policy produced noticeable results.

Under *Grutter*, a university may use a ''narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.'' The *Grutter* court said that enrolling a ''critical mass'' of minority students to increase minority engagement in the classroom and enhance minority contributions to the character of the school is a compelling interest ''that can justify the use of race in university admissions.''

Two applicants denied admission to UT challenged the system. Upholding the policy, the Fifth Circuit said that an admissions program that takes race into account is narrowly tailored ''if it allows for individualized consideration of applicants of all races.'' It added that in some respects UT's admissions policy ''is superior to the *Grutter* plan,'' because it ''does not keep a running tally of underrepresented minority representation.''

What's the Deal? In *Grutter*, Justice Sandra Day O'Connor wrote: ''We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.'' That was in 2003—nine years ago—and the issue is back at the Supreme Court this term. That begs the question: Why so soon?

Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational

Social Issues Facing Court

Aside from the affirmative action questions presented by *Fisher v. University of Texas at Austin*, No. 11-345, a number of cases involving social issues are waiting for a green light from the Supreme Court, including:

- the constitutionality of the Defense of Marriage Act (*Massachusetts v. U.S. Department of Health and Human Services*, No. 12-15, et seq.);
- California's definition of ''marriage'' as the union between a man and woman (*Hollingsworth v. Perry*, No. 12-144); and
- the constitutionality of Section 5 of the Voting Rights Act (*Shelby County, Ala. v. Holder*, No. 12-96; *Nix v. Holder*, 12-81).

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Fund, San Antonio, Texas, told BNA Sept. 13 that at least part of the reason for the quick turnaround is the new composition of the court.

Agreeing with that, Paul J. Orfanedes, Judicial Watch, Washington, D.C., pointed out to BNA Sept. 12 that O'Connor has retired, and ''was replaced by Justice Alito, whom many would probably say is more reliably conservative.''

Saenz said that it is hard to see how UT's admissions policy does not satisfy the *Grutter* standard. He also said, however, that the school's arguments in support of its policy will need to persuade only five justices.

While Justice Anthony M. Kennedy could be the swing vote, Saenz suggested that after the health care case last spring, the Chief Justice may actually hold the swing vote here.

Changing Parameters. Saenz noted that this is the first time since *Grutter* that the court is revisiting the issue of race-conscious concerns with a real possibility that it will change the parameters that have been accepted for running admissions programs.

Orfanedes said that the case ''presents a unique opportunity for the court to affirm, once and for all, that neither race nor ethnicity have any role to play in how the government treats people.'' He noted that Judicial Watch's amicus brief supporting the applicants in this case argues that ''race in particular is a discredited social construct that has no basis in science, and that race and its close cousin, ethnicity, are crude and inherently ambiguous and can never be narrowly tailored to further a compelling interest in diversity, meaning that they can never survive strict scrutiny.''

Taking another shot at *Grutter*, Orfanedes noted that it was only the second opinion since the adoption of strict scrutiny in which the court validated racial discrimination by government actors in non-remedial circumstances. The other case, he noted, was *Korematsu v. United States*, 323 U.S. 214 (1944), in which the court ''upheld the ordering of persons of Japanese ancestry into internment camps during World War II.''

Future Admissions Policies. If UT wins, *Grutter* will be reaffirmed, Saenz said. But if the applicants win, there's no telling what will happen to admissions policies, he added. That will depend in part on what element of the *Grutter* tailoring test the court focuses on in its decision, he said.

Orfanedes said that if the school wins ''we can expect to see other post-secondary institutions adopt similar admissions policies that take into consideration applicants' self-identified race or Hispanic/Latino ethnicity.'' He explained that the UT policy only references Hispanic/Latino ethnicity. Moreover, he said that more groups may advocate ''for different iterations of the University of Texas' racial and ethnic classifications in order to secure favored (or at least not disfavored) treatment, as well as non-racial or ethnic groups advocating for non-racial or non-ethnic favoritism.''

International Considerations

Professor Constance de la Vega, International Human Rights Clinic, University of San Francisco School of Law, told BNA that *Fisher* has an international element that should not be overlooked. She said that under the International Convention on the Elimination of All Forms of Racial Discrimination, to which the United States is a party, the government has an ''affirmative obligation'' to reach equality in education. She said that considering race in admissions policies is a ''special measure'' that should be used to attain equality in education and is consistent with the United States' obligation under the treaty. ''Special measure'' is affirmative action in international law terminology.

De la Vega noted that most members of the Supreme Court probably will not consider the international implication of UT's policy. She added, however, that Justice Ruth Bader Ginsburg noted in her *Grutter* concurrence that the court's holding comported with the United States's obligation under CERD.

Saenz said that if the Supreme Court says that race cannot be a factor in admissions policies, that will force school districts to look at and take steps to combat their past discrimination of minorities and institutional barriers, such as poverty, that prevent minority groups from doing well in school generally. He added, however, that it's costly to address those criteria.

Orfanedes said that if the Supreme Court upholds the Fifth Circuit's ruling, ''we believe it will rule narrowly and keep the same standard applied in *Grutter*.'' On the other hand, if it reverses the Fifth Circuit, he said, ''we believe it will return to a more traditional strict scrutiny analysis.''

Voting Rights Act. Two voting rights cases with petitions pending before the court are *Shelby County, Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012) (80 U.S.L.W. 1595), *petition for cert. filed*, 81 U.S.L.W. 3064 (U.S. July 20, 2012) (No. 12-96), and *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012) (80 U.S.L.W. 1608), *petition for cert. filed sub nom. Nix v. Holder*, 81 U.S.L.W. 3064 (U.S. July 20, 2012) (No. 12–81).

The VRA targets racial discrimination in voting procedures in parts of the country that have historically had a problem with bias. Section 2 of the statute forbids any voting practice or procedure that denies a citizen the right to vote because of his race.

Section 5 suspends changes in voting procedures until they are submitted to and approved by either a three-judge panel of the U.S. District Court for the District of Columbia, or the attorney general. The state or locality will win preclearance only if it shows that the change

will not deny anyone the right to vote on account of race.

In Section 4(b), Congress set out a formula for applying Section 5 to any state or locality that used a voting test or device as of Nov. 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 presidential election. Congress chose these criteria specifically to cover Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—the states with the worst history of racial discrimination in the voting context. Under Section 4(a), however, a state or locality can earn an exemption from Section 5 if it shows that for a specified number of years it has not used any device to deny the right to vote on account of race.

The petitions for certiorari in *Shelby County* and *Nix* directly challenge the constitutionality of Section 5. *Shelby County* questions whether the congressional decision to reauthorize Section 5 ''under the pre-existing coverage formula of Section 4(b) of the [VRA] exceeded [Congress's] authority'' under the 15th Amendment, and thus violated the 10th Amendment and Article IV. *Nix*'s challenge is under the 14th and 15th Amendments and also attacks Section 4(b).

Review Possible. The consensus among attorneys for the voting rights cases seems to be that the court will grant certiorari in at least one of them. The guiding light for that prediction is *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 77 U.S.L.W. 4593 (2009), in which the Supreme Court sidestepped the issue of Section 5's constitutionality, but nevertheless discussed constitutional problems associated with it.

Joshua P. Thompson, Pacific Legal Foundation, Sacramento, Calif., told BNA Sept. 11, ''It is highly likely that the Supreme Court grants certiorari in either *Shelby County* or *Nix* (or both).'' He explained, ''in *Northwest Austin*, the Supreme Court went out of its way to discuss some of the constitutional problems with Section 5, sending strong hints to Congress that it needed to amend the law before it came before the court again.''

Homero Tristan, Tristan & Cervantes, Chicago, who has experience with voting rights cases in Illinois, including representation of the Chicago Aldermanic Latino Caucus in the redistricting process, told BNA Sept. 12 that it is likely the Supreme Court will grant certiorari. He too noted that the *NAMUD* court stated ''that the preclearance provisions 'raise serious constitutional questions.' '' He added, ''Although it is not typical for the court to take a matter soon after dodging the question, th[e] uniqueness of this issue calls for discussion at the Supreme Court level.''

Ilya Shapiro, Cato Institute, Washington, D.C., told BNA Sept. 11 that he is not completely sure whether the court will grant review, but that if it does, ''it will be to strike down Section 5.'' He added, however, that an alternative for the court is to strike down the Section 4(b) formula.

But, in that scenario, Congress could relegislate Section 4(b) and Section 5 would still be valid, he said.

Discrimination Against Minority Voters Not Eradicated. Tristan said that these cases are important because the VRA is important. The cases ''remind us that discrimination against minority voters has not been eradicated since the act's passage,'' he said.

Workplace Discrimination

One employment case set for argument on Nov. 26 also addresses important issues of racial discrimination. *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (No. 11–556), deals with harassment by coworkers and asks the court to settle a circuit split over whether a supervisor is a person who is vested with direct authority to oversee the victim's daily work, or whether supervisors are only those who can ''hire, fire, demote, promote, transfer, or discipline the victim.''

Professor Daniel R. Ortiz, University of Virginia School of Law Supreme Court Litigation Clinic, who is on the team of attorneys representing Vance, told BNA that the court's decision will have important practical implications for suits under Title VII of the 1964 Civil Rights Act. He said it will determine ''what kind of liability rule—negligence or vicarious liability—applies to the employer.''

Both Thompson and Shapiro disagree with Tristan on the current need for Section 5. Thompson called it ''one of the most federally intrusive laws ever conceived by Congress.'' He said that by placing states ''in the Deep South under federal receivership, Section 5 upends the traditional dual sovereignty inherent in our constitutional structure.'' Moreover, he said that Section 5 was adopted ''to alleviate the rampant discrimination that was pervasive throughout the Jim Crow South in the 1960s.'' But today, claims of voting discrimination are as prevalent in the North as they are in the South, he said.

According to Thompson, ''Section 5's coverage bogs down jurisdictions that want to improve voting conditions for minorities (by forcing them to go through a costly and burdensome federal approval process).'' He added, ''Section 5 is an unconstitutional law when jurisdictions are more eager to remove discriminatory barriers to voting, and prevented from easily doing so.''

'Do Away With Section 5.' Shapiro said that the court should ''do away with Section 5.'' It conflicts with Section 2 and the 14th Amendment, he said. Furthermore, it was adopted to combat extraordinary conditions, such as Jim Crow laws, that no longer exist, he said. Since those problems are no longer systemic, when they do crop up, Section 2 will provide a valid avenue for relief, he said.

Tristan agreed that if the court abolishes Section 5, voters will be forced to seek redress for voter discrimination under Section 2. But he added, ''The remedy would no longer be precautionary.''

Shapiro suggested that if the court does not grant certiorari in either voting rights case, the country will continue to see big legal battles over election regulation and what legislation complies with Section 5.

Thompson noted that if neither case is granted certiorari, Congress will not be forced to ''address important questions of *current* discrimination in voting, and Section 5 remains in place until 2031.''

Definition of 'Marriage.' On the marriage front, the DOMA cases and the Proposition 8 case present different issues, but the undercurrent in both cases is the definition of marriage.

Section 3 of DOMA defines ''marriage'' for purposes of federal law to mean ''only a legal union between one man and one woman as husband and wife.'' It adds that a ''spouse'' means ''a person of the opposite sex who is a husband or a wife.'' While the statute does not invalidate same-sex marriages, it does penalize same-sex couples by preventing them from doing such things as filing joint tax returns, and collecting Social Security survivor benefits. It also prevents federal employees from sharing their health benefits with their same-sex spouses.

In *Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012) (80 U.S.L.W. 1675), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), the First Circuit held that DOMA violates the Equal Protection Clause. Applying Supreme Court precedent, it said that ''gays and lesbians have long been the subject of discrimination,'' and that DOMA impermissibly limits the federal benefits they can receive while granting the same benefits to legally married same-sex couples. Among other things, it added that ''no precedent exists for DOMA's sweeping general 'federal' definition of marriage for all federal statutes and programs.''

In the petition for certiorari, the court is being asked to decide whether Section 3 ''violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.''

On the other hand, in *Perry v. Brown*, 671 F.3d 1052, (9th Cir. 2012) (80 U.S.L.W. 1070), *petition for cert. filed sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144), the Ninth Circuit held that Proposition 8, which was adopted by the voters in California and seeks to limit ''marriage'' under state law to the union between a man and a woman, violates the Equal Protection Clause.

The key to the appeals court holding, however, was that same-sex marriages were recognized in California before Proposition 8 was adopted, and the proponents of the law did not offer any valid reasons for making the change. The court stressed that it did not address the broader issue of whether ''under the Constitution same-sex couples may *ever* be denied the right to marry.''

The petition for certiorari asks the Supreme Court to decide whether the 14th Amendment's Equal Protection Clause ''prohibits the State of California from defining marriage as the union of a man and a woman.''

Challenging DOMA. Jon W. Davidson, Legal Director, Lambda Legal, Los Angeles, told BNA Sept. 11 that there are four other DOMA cases with certiorari petitions filed with the Supreme Court. Only *Massachusetts*, however, has garnered a circuit court opinion. The others are at the court seeking cert before judgment.

Davidson explained that Section 3 requires ''the federal government to treat lawfully-married same-sex couples as single.'' Noting a General Accounting Office study, he said that Section 3 applies to 1,138 federal statutes. He added, ''There is no legal precedent in history for the federal government to treat couples that are legally married under state law as unmarried for all purposes of federal law.''

Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, Boston, told BNA Sept. 13, ''Equal protection promises that likes are to be treated alike, but DOMA treats married same-sex couples as unmarried for all purposes of all 1,138 federal laws in which marital status is a factor.'' She added, ''As long as the federal government uses 'marriage' and 'spouse' as a basis for extending benefits or burdens, then the federal government needs a basis for discriminating between identically married people.''

But William J. Olson, Vienna, Va., who submitted an amicus brief in *Perry* supporting Hollingsworth, told BNA Sept. 12, ''The U.S. Constitution neither protects nor compels marriage by homosexuals. Indeed, it does not address marriage at all.''

Olson also said, ''The question of the definition of marriage is one of great historic importance because it is central to the concept of family—the basic social and economic building block of society.''

Mixed Signal From Government. Davidson noted that the Department of Justice and the White House have both concluded that DOMA is unconstitutional and are no longer defending the law. Therefore, the Bipartisan Legal Advisory Committee of the House of Representatives intervened in each of the cases and is defending the law.

According to Davidson, ''It is widely believed that the Supreme Court will grant certiorari in one or more of these cases.'' He explained, ''Every party to the cases agrees that Supreme Court review is warranted and necessary and the fact that a federal law—here, one that is incredibly sweeping—has been held unconstitutional, and that the Executive Branch is asking the Court to hear the case make review quite likely.''

Furthermore, Davidson said that if review is granted, the likelihood of Section 3 being struck down is ''quite high.'' He noted that in a recent survey, 69 percent of the constitutional law professors asked said that Section 3 is unconstitutional. He added that ''the case raises important federalism questions about whether the federal government has an interest in what has traditionally been the state's province (subject to constitutional minimums) regarding who may marry and justices concerned about federal power may therefore be more receptive to striking down Section 3.''

Bonauto pointed out that a number of courts ''have recently held there is no legitimate and independent federal interest that is rationally served by denying federal respect only to marriages of same-sex couples.''

Extraordinarily Important Decision. An ultimate decision on the merits by the Supreme Court ''will not only be extraordinarily important because of the broad impact of Section 3 . . . but it also may lead to the Supreme Court deciding, among other things, the fundamental question of what level of judicial scrutiny applies to laws that discriminate based on sexual orientation, a question it did not need to, and has not reached, in prior gay rights cases it has heard,'' Davidson said.

According to Bonauto, if the couples in the DOMA cases prevail, the federal government will have to treat married same-sex couples ''as the married people they are.'' She added, however, that the case will not ''reach the issues of the right to marry or state recognition of marriages.''

If review is not granted, the issue is not going to go away, Davidson said. The other cases will return to their respective courts and be back after those courts hand down their decisions, he noted. Furthermore, ''there are another nine legal challenges to DOMA pending around the country,'' he said.

Other DOMA Cases Include:

- *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*, *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. June 29, 2012) (No. 12-13);
- *Golinski v. Office of Personnel Management*, *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12-16);
- *Windsor v. United States*, *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. July 16, 2012) (No. 12-63);
- *United States v. Windsor*, *petition for cert. filed*, 81 U.S.L.W. 3116 (U.S. Sept. 11, 2012) (No. 12-307);
- *Pedersen v. Office of Personnel Management*, *petition for cert. filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231);
- *Office of Personnel Management v. Pedersen*, *petition for cert. filed*, 81 U.S.L.W. 3115 (U.S. Sept. 11, 2012) (No. 12-302).

Proposition 8 on Different Footing. The likelihood of certiorari being granted in *Perry* ''is a much closer question,'' Davidson said. He explained that the Ninth Circuit's opinion is narrow, and ''avoided the broad question of whether same-sex couples share the constitutional right to marry that the Supreme Court previously has held to be fundamental and whether it denies equal protection not to allow same-sex couples to marry when different-sex couples may.''

Bonauto agreed that the Ninth Circuit's decision in *Perry* is very narrow and that it presents a ''harder call.'' She said that the court ruled that the case's unique scenario ''raises the specter that marriage was withdrawn to express disapproval of a disfavored group.''

According to Davidson, ''The Supreme Court may feel that, given the Ninth Circuit's framing of the question on appeal, it need not at this time wade into the question of whether states in general must allow same-sex couples to marry. . . . The Court may conclude that it should allow questions about the freedom to marry to percolate further in the lower courts and politically.''

Even so, Bonauto said, ''Some people on both sides hope the Court will step into the broader issues of the right to marry, even though those issues are only beginning to percolate in federal courts.''

But, if the court does grant review, the ramifications of the opinion will depend on how broadly it rules, Davidson said. Among other things, he said that the court can rule that the petitioners do not have a right to appeal—an issue that is presented by the petition—it can affirm on the grounds adopted by the Ninth Circuit, and it can decide the broader issue of whether ''any state that provides same-sex couples the same rights and responsibilities provided to spouses no longer has any legitimate reason not to allow them to marry.''

The court can also ''decide that the 44 states that currently do not allow same-sex couples to marry must instead do so,'' Davidson said.

Possible Set-Back for Gay Rights. On the other hand, Davidson said, the Supreme Court ''could reverse the Ninth Circuit's decision, which would be a massive setback for the gay rights movement, as it would require rejection of all the plaintiffs' arguments, putting an end to all federal litigation by same-sex couples seeking the right to marry, likely rejecting heightened scrutiny of sexual orientation discrimination, and likely accepting arguments that may have very broad implications with respect to unequal treatment of lesbians and gay men in a variety of settings.''

If review is not granted, same-sex couples in California will again be able to marry, but the case ''will have no immediate, direct impact on the marriage laws of other states,'' Davidson said.

According to Davidson, 54 percent of the constitutional law professors in the survey he cited earlier ''believe the Constitution requires states to allow same-sex couples to marry.'' If review is granted, however, he said that the court will strike down Proposition 8 on limited grounds ''and will not reach more sweeping questions about the freedom to marry.''

Davidson said that it is likely that the Supreme Court will hear at least either the DOMA cases or the Proposition 8 case this term. The opinion or opinions handed down by the court will likely have ''important ramifications on the development of sexual orientation law,'' he said. Regardless of what the court ultimately decides to do, ''this year is sure to be a historic one on the path toward equality for the lesbian and gay community,'' he said.

No Power to Regulate. Olson said that the 10th Amendment reserves to the individual states the authority to define marriage, including whether to change the definition of marriage. The citizens of California chose not alter the traditional definition of marriage, and ''[i]t is not the prerogative of the federal courts to second guess this decision by the state,'' he said.

Olson found it ''unsettling'' that the lower federal courts delegitimized ''the decision of the people of California by imputing to them base motives.'' He said, ''When the sovereign people exercise their authority as the sovereign, the judiciary has no right to question their motives.''

Chastising the Ninth Circuit, Olson said that the court ''plucked a federally guaranteed right to marry out of thin air.'' He said that the right had its genesis in ''deeply flawed decisions'' such as *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), ''where the U.S. Supreme Court assumed the role of protector of homosexuality, irrespective of the text and context of the Constitution, which have nothing to say on the topic.''

Issue of 'Biblical Proportions.' Instead, Olson pointed to *Reynolds v. United States*, 98 U.S. (8 Otto.) 145 (1878), and *Loving v. Virginia*, 388 U.S. 1 (1967), which he said ''kept American law in conformity with the Biblical definition of marriage, as an institution ordained and established by God, not one defined by the discretion of civil authorities.'' He added, in both the DOMA and Proposition 8 cases, the Supreme Court ''is being urged to employ its power of judicial review not only to

reject this fixed rule of what constitutes a marriage, but to assume that it has the discretion to overturn our Creator's definition of marriage—a usurpation of, shall we say, Biblical proportions.''

Because the Supreme Court has not heard any cases involving DOMA or any of the equivalent state laws, ''it would seem likely'' that review will be granted at least in the DOMA case, Olson said.

The *Perry* court ''makes the novel and unprecedented argument that a state is less free to take a right away (even though that did not happen here) than it is to choose not to grant a right in the first place,'' Olson said. If that opinion is allowed to stand, states within the Ninth Circuit will need to be ''very careful making new public choices, since neither the state legislature nor the people acting directly may be allowed to change their minds, forever bound by the Ninth Circuit's one-way ratchet,'' he said.

BY BERNARD J. PAZANOWSKI