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FACTS

In 1996, California voters approved Proposition 209, thereby amending their constitution to prohibit governmental entities from "discriminat[ing] against, or grant[ing] 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."[1] Prior to the constitutional amendment, the City of San Jose (the "City") required private contractors to make "reasonable efforts" to hire minorities in order for the contractor to be considered for government contracts.[2] The City focused on increasing the participation of Minority Business Enterprises ("MBEs") and Women Business Enterprises ("WBEs") in public works projects.[3] The City would set participation goals based on the number of available, qualified MBEs and WBEs and award its construction contracts to the lowest "responsible bidder" — the contractor who had met or exceeded these goals or had made and documented its reasonable efforts to attain the City's goal.[4]

After the constitution was amended the City implemented measures for a new program, the "Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in Excess of $50,000" (the "Program").[5] The goal of the Program was to eliminate the ongoing discrimination against women and minorities that the City had continued to find in public construction contracting.[6] The City structured the Program to require its potential prime contractors to demonstrate that they did not discriminate against any MBE or WBE subcontractors.[7] In order to be considered for a city construction contract, a contractor had to show that it complied with either the "Documentation of Outreach" or the "Documentation of Participation" requirement of the Program.[8] If a contractor failed to make a showing that it had fulfilled one of these two options in the hiring of subcontractors, the City would reject its bid.[9]

Under the "Documentation of Outreach" option, a contractor had to provide written documentation that it had taken certain specified steps to seek

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1. CAL. CONST. art. I, § 31.
2. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 72 Cal. App. 4th 600, 603 (1999).
3. *Id.* at 603 (defining MBEs and WBEs as businesses in which at least 51% of business is owned and controlled by one or more minority persons or women).
4. *Id.* at 603.
5. *Id.* at 604-05.
6. *Id.* at 605.
7. *Id.*
8. *Id.*
9. *Id.* at 606.

MBE or WBE subcontractors.[10] First, the contractor was required to send written notice to four certified MBE or WBE subcontracting firms for each trade area of a project.[11] Then the contractor was required to contact, or document at least three attempts to contact, the MBE or WBE businesses in order to gauge their interest in the project.[12] Finally, the contractor had an affirmative duty to negotiate in good faith with interested MBE or WBE businesses, and was required to specify reasons for rejecting a MBE or WBE business's bid.[13]

The "Documentation of Participation" option created an "evidentiary presumption" that discrimination did not occur throughout the bidding process.[14] The contractor could invoke the presumption that discrimination had not occurred if his or her bid included at least the same percentage of WBE or MBE businesses that a nondiscriminatory bid would include, based on a percentage that was calculated by the City.[15] The City determined the minimum number of WBE or MBE businesses that should be included in each project by calculating a ratio of the available MBEs and WBEs to the total potential opportunities per project.[16] A contractor that satisfied the Documentation of Participation option did not have to satisfy the Documentation of Outreach option and vice versa.

Allen Jones and Hi-Voltage Wire Works ("Hi-Voltage"), respectively, a city taxpayer and a general contracting firm, sued the City asserting that the Program was discriminatory and therefore in violation of article I, section 31 of the California Constitution.[17] In 1997, Hi-Voltage had placed the lowest bid for a public works project but was rejected because it failed to satisfy either of the outreach or participation components of the City's Program.[18] Both plaintiffs claimed that the Program forced contractors to unlawfully prefer MBE and WBE businesses by giving them "special assistance and information" that other subcontractors did not receive.[19] The City and the plaintiffs both moved for summary judgment.

The Superior Court ruled that the Program violated article I, section 31 and granted the plaintiffs' motion for summary judgment.[20] The Court of Appeals

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10. *Id.* at 605.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 605-06.
15. *Id.* at 606.
16. *Id.*
17. *Id.*
18. *Id.* (noting that Hi-Voltage failed to meet requirements of Program because it intended to use its own subcontractors for project).
19. *Id.*
20. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1072 (Cal. 2000).

affirmed the lower court's ruling, finding that the City's outreach option of the program granted special treatment to minority- and women-owned businesses that other businesses were not given.[21] In addition, it found that the participation option, which the City argued was intended only as a "screening process" for discrimination, was nonetheless discriminatory.[22] The Court of Appeals held that the effects of the participation option led to preferential treatment; thus, the City's lack of intent to discriminate was irrelevant.[23] Therefore, the court enjoined the City from implementing the Program. The Supreme Court of California granted the City's petition of review.[24]

HOLDING

The Supreme Court of California affirmed the California Court of Appeals' ruling that the Program violated article I, section 31 of the California Constitution.[25] The court held that the Program was unconstitutional because it required, or at least encouraged, contractors to give preferential treatment to subcontractors on the basis of race or gender as proscribed by article I, section 31 of the California Constitution.[26]

ANALYSIS

Although all seven justices of the California Supreme Court agreed that the City's program violated article I, section 31, they did not all join the majority opinion. Justice Brown, who wrote the opinion for the court, found it necessary to look at the long history of equal protection jurisprudence before reaching the issue of the Program's constitutionality. Justice Mosk concurred with the opinion, but felt it was necessary to also discuss ways in which the City's Program could be changed to comport with the terms of the amendment.[27] Justice Kennard concurred in the judgment but did not join the majority opinion because he believed the issue could be resolved simply by referring to the plain meaning of the constitutional text and by reviewing the ballot materials.[28] Chief Justice George concurred in the judgment but did not join the majority opinion.[29] He argued in his dissent that the court's role is to

21. *Hi-Voltage*, 12 P.3d at 1072.
22. 12 P.3d at 1072.
23. *Id.*at 1072.
24. *Id.*
25. *Id.* at 1082.
26. *Id.*
27. *Id.* at 1091-92 (Mosk, J., concurring).
28. *Id.* at 1092 (Kennard, J., concurring).
29. *Id.* at 1092-93 (George, C.J., concurring and dissenting).

"interpret and apply the language of the new state constitutional provision so as to effectuate the intent of the voters who adopted the measure."[30] He believed there was no reason for the court to review past judicial opinions or to consider the validity of affirmative action programs in general.[31]

The majority opinion first studied the path the United States Supreme Court has taken in shifting from a strict standard of nondiscrimination to a standard that permits race or sex-conscious classifications. In *Brown v. Board of Education*,[32] the Supreme Court unanimously held that the doctrine of "separate but equal" in public education violated a person's Equal Protection rights as guaranteed by the Fourteenth Amendment.[33] Following the *Brown* decision, the Court began to apply a strict standard that found any racial discrimination endorsed by the government to be a violation of the Fourteenth Amendment of the Constitution.[34] Despite these decisions that were in keeping with Justice Harlan's view of a "color-blind" government,[35] discrimination remained a reality in America.[36] To combat this ongoing discrimination, Congress enacted the Civil Rights Act of 1964.[37]

Title VII of the Civil Right Act ("Title VII") established that discrimination by an employer based on an employee's race, color, sex, or national origin is unlawful.[38] Because the language and purpose of article I, section 31 of the California Constitution closely mirrored that of Title VII, the court examined the historical judicial interpretation of Title VII.[39] Following Title VII's enactment, the Supreme Court held that the objective of the Civil

30. *Id.* at 1093 (George, C.J., concurring and dissenting).

31. *Id.* at 1093-94 (George, C.J., concurring and dissenting).

32. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

33. *Id.* at 495.

34. *Hi-Voltage*, 12 P.3d at 1073-74. *See* Peterson v. Greenville, 373 U.S. 244 (1963) (holding that when state passes law that requires segregation, it violates of Fourteenth Amendment); Loving v. Virginia, 388 U.S. 1 (1967) (holding state ban on interracial marriages unconstitutional). Even before the *Brown* decision, the Court had already begun to develop a staunch antidiscrimination standard in its jurisprudence. *See, e.g.*, Hughes v. Superior Ct. of California, 339 U.S. 460, 463 (1950) (holding that injunction that proscribed demonstration by picketers who were seeking to force the hiring of certain number of African-American employees at grocery store in proportion to the number of African-American customers was not violation of the picketers' free speech rights, reasoning that to allow demonstration would "give constitutional protection to petitioner's efforts to subject opportunity of getting job to quota system"); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (declaring state court's enforcement of discriminatory restrictive covenant unconstitutional).

35. *Hi-Voltage*, 12 P.3d at 1073 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.")).

36. *Id.* at 1075.

37. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994).

38. Title VII states, in part, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

39. *Hi-Voltage*, 12 P.3d at 1075-79.

Rights Act was to achieve absolute equality in employment[40] for all individuals, not just minorities.[41] The Court stated that Title VII imposes no "duty to adopt a hiring procedure that maximizes hiring of minority employees."[42] In essence, the Court's application of Title VII reaffirmed Congress' intent that the government act as a color-blind entity.[43]

The Supreme Court of California noted, however, that the Supreme Court's decision in *Steelworkers v. Weber*[44] substantially changed the scheme of Title VII jurisprudence.[45] In *Weber*, the Court held that an abolition of all affirmative action would be contrary to the intent of Title VII.[46] The Court reasoned that because Congress' intent in enacting the Civil Rights Act was to remedy pervasive discrimination against African-Americans, to ban all voluntary or private affirmative action programs that sought to remedy such discrimination would be contrary to that intent.[47] In addition, Justice Blackmun's concurrence noted that Title VII permits racial classifications in jobs that are "traditionally segregated."[48] The *Weber* decision was a radical departure from the Court's previous decisions that compelled color-blind treatment under Title VII.[49]

Following the *Weber* decision, the Supreme Court attempted to reconcile its support of race-conscious action with its prior color-blind jurisprudence.[50] In *Sheet Metal Workers v. EEOC*,[51] the Court held that Title VII does not prohibit affirmative action programs established to remedy past discrimination.[52] In reaching this decision, a plurality of the Court articulated that Title VII could serve to "guarantee equal employment opportunities but

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40. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (holding that Congress's intent in enacting Title VII was to "achieve equality of employment opportunities," and finding that "[d]iscriminatory preference for any group, minority or majority" was proscribed).

41. *See* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976) (finding that "[Title VII's] terms are not limited to discrimination against members of any particular race").

42. *Hi-Voltage*, 12 P.3d at 1076 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978)).

43. *Id.* at 1076.

44. Steelworkers v. Weber, 443 U.S. 193 (1979).

45. *Hi-Voltage*, 12 P.3d at 1076 (citing Steelworkers v. Weber, 443 U.S. 193 (1979)).

46. *Weber*, 443 U.S. at 201-02.

47. *Id.* at 202-03.

48. *Id.* at 212 (Blackmun, J., concurring).

49. *Hi-Voltage*, 12 P.3d at 1077-78. *See Weber*, 443 U.S. 193, 220 (Rehnquist, J., dissenting) (stating that Court's majority opinion was contrary to settled law, as well as legislative history that had established that Civil Rights Act forbade discrimination against *any* individual); *Weber*, 443 U.S. 193, 218 (Burger, C.J., dissenting) (citing McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 283 (1976)) (finding that majority opinion was contrary to precedent that held Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees").

50. *Hi-Voltage*, 12 P.3d at 1078.

51. Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

52. *Sheet Metal Workers*, 478 U.S. 421, 445 (1986).

to 'foster' them as well."[53] The Court in *Sheet Metal Workers* noted that even when an employer "formally ceases to engage in discrimination," informal discrimination or the employer's reputation might serve as a deterrent for minority applicants.[54] In situations such as these, the court found that "affirmative race-conscious relief may be the only means available to 'assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'"[55] A year later, in *Johnson v. Transportation Agency*,[56] the Court held that a public agency that did not have a prior history of sex discrimination was nonetheless justified in promoting a woman over a man who ranked higher for a promotion because there existed a "conspicuous. . . imbalance in traditionally segregated job categories."[57]

The majority opinion in *Hi-Voltage* recognized that the California courts had paralleled the decisions of the United States Supreme Court, which changed the law "from protection of equal opportunity for all individuals to entitlement based on group representation."[58] In *Hughes v. Superior Court*,[59] later reviewed by the United States Supreme Court in *Hughes v. Superior Court of California*,[60] the California court upheld a judgment of contempt against picketers whose primary objective was to induce the hiring of African-American clerks at a grocery store.[61] In *Hughes*, the court condemned the protesters' objective, which was to compel discriminatory hiring of one race over another, rather than to dispel discrimination.[62] In *Bakke v. Regents of University of California* (*Bakke I*),[63] the California court refused to uphold a program that reserved a specific number of admission slots for minority students.[64] Although the court recognized that such a quota system had the laudable purpose of remedying past discrimination, it concluded that "sanction[ing] racial discrimination against a race—any race—is a dangerous concept fraught with potential for misuse in situations which involve far less

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53. *Id.* at 448.
54. *Id.* at 449.
55. *Id.* at 449-50.
56. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).
57. *Johnson*, 480 U.S. at 630.
58. *Hi-Voltage*, 12 F.3d at 1079.
59. *Hughes v. Superior Ct.*, 32 Cal. 2d 850 (1948).
60. *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460 (1950).
61. *Hughes v. Superior Ct.*, 32 Cal. 2d at 854.
62. *Id.* at 856.
63. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34 (1976) (*Bakke I*). Later, in its plurality opinion, the United States Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (*Bakke II*), affirmed the California court's ruling that the admissions program was illegal and that the applicant should be admitted to the school, but reversed the court's judgment that enjoined the medical school from "according *any* consideration to race in its admissions process." *Id.* (emphasis added).
64. *Bakke I*, 18 Cal. 3d at 61-62.

laudable objectives than are manifest in the present case.[65] The court found that the admissions program denied equal protection.[66]

Following the *Weber* decision in 1979, California, like the Supreme Court, shifted from no tolerance of any form of discrimination to an allowance of some affirmative action programs.[67] Rather than taking a "color-blind" approach to employment programs, the California court upheld race-conscious programs that were intended to remedy past discrimination.[68] For instance, in *Price v. Civil Service Commission of Sacramento County*,[69] the court permitted a race-conscious hiring program that required preferential treatment of minorities because the program was intended to remedy past acts of discrimination.[70] Dissenting in the *Price* opinion, Judge Mosk characterized the majority's decision as "purport[ing] to eliminate discrimination by means of creating discrimination; they construe equality of all persons regardless of race to mean preference for persons of some races over others; and a hiring program which compels compliance by a reluctant [county agency] is described as voluntary."[71] A year later, in *DeRonde v. Regents of University of California*,[72] the court held that considering race as a qualifying factor in a law school admissions program was not unconstitutional.[73] The *Hi-Voltage* court acknowledged that these decisions represented a "shift from a staunch antidiscrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex-conscious governmental decisionmaking."[74]

The *Hi-Voltage* majority opinion then applied this history as background to determine whether the City's MBE/WBE program violated article I, section 31 of the California Constitution.[75] The sole question the court considered was whether the Program required preferential treatment or discrimination as prohibited by article I, section 31.[76] In considering this question, the court analyzed the language of the amendment, interpreting it in its "natural" and "ordinary" sense.[77]

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65. *Id.* at 61-62.
66. *Id.*
67. *Hi-Voltage*, 12 P.3d at 1080.
68. *Id.* at 1080-81.
69. Price v. Civil Serv. Comm'n, 26 Cal. 3d 257 (1980).
70. *Price*, 26 Cal. 3d 257, 270 (1980).
71. *Hi-Voltage*, 12 P.3d at 1081 (quoting *Price*, 26 Cal. 3d 257, 287 (Mosk, J., dissenting)).
72. DeRonde v. Regents of Univ. of Cal., 28 Cal. 3d 875 (1981).
73. *DeRonde*, 28 Cal. 3d 875, 890 (1981).
74. *Hi-Voltage*, 12 P.3d at 1081.
75. *Id.* at 1082.
76. *Id.* at 1081.
77. *Id.* at 1082 (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 245 (1978); People ex rel. Lungren v. Superior Ct., 14 Cal. 4th 294, 302 (1997)).

In interpreting section 31, the court found no evidence in the language of the amendment or in the ballot materials to indicate that the intent of the voters was contrary to the plain meaning of the terms used.[78] The court consulted a dictionary to determine the plain meaning of the terms and found "discriminate" to be defined as "to make distinctions in treatment; show partiality (in favor of) or prejudice (against)," and "preferential treatment" to mean "giving 'preference,' which is 'a giving of priority or advantage to one person ...over others.'"[79] The court concluded, as the Court of Appeals held, that the City's outreach option of the program gave preferential treatment to MBE and WBE subcontractors and that the participation option discriminated against non-MBE/WBE businesses.[80]

The court then tested its interpretation of the text against the ballot materials, which bore on the voters' intent and placed Proposition 209 in a historical setting.[81] The argument in favor of the amendment suggested that in voting for the amendment, Californians would reinstate the strict non-discrimination standards that the courts had followed in pre-*Weber* decisions.[82] The court agreed with the district court's interpretation of the ballot materials in *Coalition for Economic Equity v. Wilson* (*Coalition I*),[83] in which it determined that "the people of California meant to do something more than simply restate existing law when they adopted Proposition 209."[84] In fact, the ballot materials made it clear that Proposition 209 was intended to reinstate a "color-blind" government, in which there would be "zero tolerance for discrimination against—or for—any individual."[85] The majority therefore concluded that the California voters intended to change the nature of their public programs and to remove all evidence of discrimination when they amended their constitution.[86]

The court concluded that both the outreach and participation components of the Program were unconstitutional.[87] It found that the outreach component required contractors to give preferential treatment to MBEs andWBEs, which

78. *Id.*

79. *Id.* (quoting WEBSTER'S NEW WORLD DICTIONARY at 392, 1062 (3d college ed. 1988).

80. *Id.*

81. *Id.* (citing Powers v. City of Richmond, 10 Cal. 4th 85, 93 (1995)). The ballot materials include the Attorney General's summary arguments and the legislative analyst's comments. The courts assumed that these ballot materials assisted the voters in approving the amendment, and should therefore be examined to determine the voters' intent. Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 612, n.12.

82. *Id.* at 1082-1083.

83. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D.Cal. 1996) (*Coalition I*).

84. *Hi-Voltage*, 12 P.3d at 1083 (quoting *Coalition I*, 946 F. Supp. 1480, 1489 (N.D.Cal 1996)).

85. *Id.* at 1083 (quoting Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of prop. 209, p. 32).

86. *Id.*

87. *Id.* at 1083-1084.

clearly violated the prohibition against preferential treatment in section 31.[88] The court also concluded that the participation component was discriminatory because it encouraged contractors to meet "race- and sex-conscious numerical goals."[89] The court found that the participation option was similar to a policy that sets discriminatory quotas or set-asides.[90] Therefore, the participation option encouraged discrimination against non-MBE/WBEs.[91]

The court stressed that the Program put a burden on the contractor to make a showing that he or she did not discriminate, even though there was no prima facie evidence of past discrimination.[92] The court found that this aspect of the Program was completely contrary to the burden-shifting analysis used in discrimination claims under Title VII.[93] In such claims, a plaintiff carries the initial burden of establishing a prima facie case of discrimination.[94] If the plaintiff makes a prima facie case, the employer must articulate a "legitimate, nondiscriminatory reason" for the employer's actions.[95] If the employer can articulate such a reason, the burden shifts back to the plaintiff to demonstrate that the employer's reason is simply a pretext for discrimination.[96] The Program, however, placed the burden on the contractors to prove nondiscrimination, and this could only be accomplished by satisfying one of the Program's two options. Because the court had already concluded that these options were discriminatory, it found the only way for a contractor to "prove it does not discriminate against minorities and women [is] by discriminating or granting preferences in their favor."[97]

The majority concluded that a program that grants special treatment to some groups based on race or sex and not to others is exactly what the voters sought to prohibit when they voted for Proposition 209.[98] However, recognizing that some outreach programs may be lawful, the majority limited its holding to outreach programs that require prime contractors to "notify,

88. *Id.* at 1084.
89. *Id.*
90. *Id.* at 1084 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1076 n.7 (citing McDonell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
95. *Id.*(quoting *McDonnell Douglas*, 411 U.S. at 802).
96. *Id.*
97. *Id.* at 1085. In addition, the court went on to point out that the evidentiary presumption that the contractor must show when choosing the participation option is contrary to the principles of the Civil Rights Act. Title VII gives no protection to an employer that has a racially proportionate workforce; rather, the purpose of Title VII is to ensure that every applicant has an equal opportunity for a job opening, regardless of his or her race. *Id.* (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978)).
98. *Id.* at 1085.

solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids."[99]

In its defense, the City put forth several arguments to support the constitutionality of the Program. The court, however, rejected these arguments. For example, the City argued that its specific outreach program was outside the scope section 31. The City argued that *Lungren v. Superior Court*[100] established that "targeted" or "focused" outreach programs are outside of the scope of section 31.[101] In *Lungren*, the Court of Appeals held that voters were not misled to believe that the amendment would keep affirmative action programs intact when the term affirmative action was not used in the ballot materials.[102] The *Lungren* court stated that use of the term "affirmative action" in the ballot materials would have been overinclusive because "most definitions of the term would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs."[103]

The City claimed that from this remark in the *Lungren* opinion, California voters were misled to believe that outreach programs would remain intact under Proposition 209.[104] The majority rejected this argument and considered the *Lungren* court's opinion to be overly broad.[105] The *Lungren* court was not considering whether the City's Program was constitutional, or the meaning of the terms "preferential treatment" or "discriminates" as applied to the Program, and therefore, the majority was not compelled to incorporate the dicta in the *Lungren* opinion in its interpretation of article 31.[106]

The City asserted that voters were misled to believe that "targeted" outreach programs would remain intact despite the amendment, because the ballot argument in favor of Proposition 209 failed to mention that such outreach programs would be unconstitutional.[107] However, the majority did not construe the ballot materials as an exhaustive list of which programs would be impermissible under Proposition 209.[108] Rather, the majority read the ballot materials as a general statement that any program that discriminated would be prohibited, and any program that did not discriminate would be legal.[109]

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99. *Id.* at 1086.
100. Lungren v. Superior Ct., 48 Cal. App. 4th 435 (1996).
101. *Hi-Voltage*, 12 P.3d at 1086.
102. *Lungren*, 48 Cal. App. 4th at 442.
103. *Id.*
104. *Hi-Voltage*, 12 P.3d at 1086.
105. 12 P.3d at 1086.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

In addition, the City argued that "focused" outreach did not constitute a preference under the current construction of Title VII and the equal protection clause.[110] However, the majority pointed out that the ballot materials stress that the initiative focused on "restat[ing] the historic Civil Rights Act."[111] As the majority opinion previously explained, the historic Civil Rights Act sought to protect all persons from discrimination and ensure equal protection for all.[112] By 1996, the judicial interpretation of the Civil Rights Act and the equal protection clause had evolved into statutes that permitted programs that afforded preferential treatment to some groups of individuals who had suffered from past discrimination.[113] Just as the court in *Coalition I* had stated that California voters intended "something more," the majority opinion construed Proposition 209 to be a repudiation of the current construction of Title VII and the equal protection clause, and a reversion to the historical construction that required equal treatment for all persons.[114]

According to the City, the outreach option of the Program was a valid method to increase the number of qualified subcontractors for bidding because it did not use race as a factor to set participation goals, quotas, or good faith efforts.[115] The court rejected this argument, stating that the City should not have assumed that a program would be automatically race-neutral simply because it was designated an outreach program.[116] If the outreach program discriminates against a certain individual based on race or gender, then it is unconstitutional.[117] In this case, the court concluded that the outreach option required preferential treatment to some businesses and not others and was therefore unconstitutional.[118]

The City also asserted that some race-conscious programs are permitted under equal protection.[119] The majority pointed out, however, that whether the Program passes equal protection standards was irrelevant.[120] The court noted that article I, section 31 sets a higher standard than that of equal protection, allowing for no "compelling state interest" exception.[121] Therefore, the proper analysis is not whether the Program meets the minimum standards of equal

110. *Id.*
111. *Id.* (quoting Ballot Pamphlet, argument in favor of Prop. 209, p.32).
112. *Id.*
113. *Id.*
114. *Id.* at 1086-87 (quoting Coalition for Econ. Equal. v. Wilson, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996)).
115. *Id.* at 1087.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

protection, but rather whether the Program is permissible under article I, section 31 of the California Constitution.[122]

The City also contended that it was obligated under federal law to eradicate any past discrimination in subcontractor hiring that it found in its disparity study.[123] This argument failed for several reasons. First, the court established that the United States Supreme Court has never held that "societal discrimination alone is sufficient to justify a racial classification."[124] The only duty of the City, therefore, is the "affirmative duty to desegregate."[125] When a state or government entity has intentionally discriminated, race-conscious programs are the only likely remedies for such discrimination.[126] While the City's disparity study for the hiring of MBE and WBE subcontractors revealed discrimination, the court noted that the study did not show that the City intentionally discriminated.[127]

Second, the City's argument that it had a federal duty to eradicate discrimination failed because it confused what is permissible under the Constitution with what is obligatory.[128] The Fourteenth Amendment permits some race-conscious programs in certain circumstances but does not require them.[129] The court noted that "the mere fact that affirmative action is permissible under the [federal] regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action."[130] In his concurring opinion, Justice Mosk agreed with the majority's analysis regarding its application of article I, section 31 of the California Constitution to the City's Program.[131] However, Justice Mosk extended his discussion further and suggested methods by which the City's Program could be modified to comply with article I, section 31 to serve as a model for future programs that may be challenged under the same provision.[132]

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122. *Id.*

123. *Id.* at 1087. The court noted, however, that in oral arguments counsel for the City conceded that the Program was not constitutionally required or obligatory under federal law. *Id.*

124. *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

125. *Wygant*, 476 U.S. at 276 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971)). *See also* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) (holding statute enacted to prohibit any student to be assigned or bussed to attend school on account of race or to create a racial balance or ratio was unconstitutional, since the prohibition conflicted with constitutional duty of school authorities to disestablish racially segregated, dual school systems); Associated Gen. Contractors of Cal., Inc. v. City of San Francisco, 813 F. 2d 922, 929 (9th Cir. 1987) (stating that state or its political subdivision has constitutional duty "to ascertain whether it is denying its citizens equal protection of the laws, and if so, to take corrective steps").

126. *Hi-Voltage*, 12 P.3d at 1088.

127. *Id.* at 1088.

128. *Id.*

129. *Id.*

130. *Id.* (quoting Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996)).

131. *Hi-Voltage*, 12 P.3d at 1089 (Mosk, J., concurring).

132. *Id.* at 1091 (Mosk, J., concurring).

Justice Kennard also concurred in the judgment, but not the majority's opinion.[133] Justice Kennard argued that the best method to interpret article I, section 31 was through the plain meaning of the statute and a review of the ballot materials.[134] Kennard stressed that the majority could have reached the same decision by interpreting the statute in its natural sense, without "discuss[ing] potentially divisive matters, such as the history of judicial construction of federal constitutional equal protection and statutory civil rights provisions as applied to racial distinctions."[135]

Chief Justice George's concurrence and dissent agreed with the other Justices that the City's Program violated article I, section 31.[136] However, George's opinion asserted that the majority failed in its task to simply "interpret and apply the initiative's language so as to effectuate the electorate's intent."[137] George reasoned that the majority departed from its role by applying and interpreting other statutes, such as the Equal Protection Clause and Title VII, rather than interpreting article I, section 31.[138] The correct analysis should have been to look at Proposition 209's contemporary history, the voters' intent and the specifics of the Program to determine whether the Program constituted a violation of article I, section 31.[139]

CONCLUSION

On its face, the City of San Jose's Program was consistent with the purpose of article I, section 31 because its purpose was to end discrimination in government contracting.[140] However, the means employed by the City to remedy this discrimination directly violated the constitutional provision because they encouraged preferential treatment to a group or individual based on race or sex.[141] In effect, article I, section 31 of the California Constitution, and other provisions like it in other states, prohibit governments from using affirmative actions plans to eliminate discrimination.[142]

Article I, section 31 promotes absolute equality by proscribing any discrimination based on race. It seeks to ensure that all persons seeking employment or an education from the government have the same opportunity.

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133. *Id.* at 1092 (Kennard, J., concurring).
134. *Id.*
135. *Id.*
136. *Id.* at 1092 (George, C.J., concurring and dissenting).
137. *Id.* at 1093 (George, C.J., concurring and dissenting).
138. *Id.*
139. *Id.* at 1095 (George, C.J., concurring and dissenting).
140. Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 608 (1999).
141. *Id.* at 620.
142. *Id.* at 608.

However, article I, section 31 leaves no recourse for a government to remedy past discrimination or to ensure that no discrimination exists. In *Hi-Voltage*, the City of San Jose attempted to remedy discrimination in the hiring of subcontractors by prime contractors hired by the City. By ruling that the City's Program to end such discrimination was unconstitutional, the court left the City with no means to ensure that prime contractors are not discriminating. While Justice Mosk's concurrence gave an example of a program that would be constitutional, the practical effect of such a program is doubtful. In the end, the proposed program, and certainly any other constitutional program, would rely on the employer's conscience not to discriminate.

The effects of Proposition 209 have also been felt by the California educational system. After Proposition 209 was adopted, African-American and Hispanic admissions fell dramatically at the University of California at Berkeley.[143] For instance, in 1998, African-American admissions were down by 56 percent from 1997.[144] By 1999, the eight largest undergraduate campuses of the University of California had returned to pre-Proposition 209 numbers, mainly due to the rise in admissions at less competitive California universities, such as University of California at Davis, Santa Cruz and Riverside.[145] Some supporters of Proposition 209 point to data that reveal that where there used to exist a large difference between black and white students' grades, before the implementation of Proposition 209, there is now no substantial difference in the grades of whites and minorities.[146] Such supporters assert that finally, students are being admitted based on their ability, rather than their race.[147]

These results have not come without a cost. African-American, Hispanic and Native American students admitted to prestigious schools such as Berkeley recognize that their numbers have dwindle, and are hesitant to attend a university where there are so few students of their race.[148] Graduate schools in California are also experiencing dwindling numbers of minority students attending their schools. For instance, the University of California Law School admissions went from a 1994 first-year class that included 46 African-Americans and 57 Hispanics to a 1999 first-year class with two African-Americans and 17 Hispanics.[149] In addition, the University of California is

143. Michelle Locke, *California Lt. Governor Seeks to Repair Damaged Diversity*, BLACK ISSUES IN HIGHER ED., Apr. 13, 2000, at 14.

144. *Id.*

145. Gail Heriot, *Equal Protection Works; The End of Racial Preferences in California Has Been an Unheralded Success*, THE WEEKLY STANDARD, Apr. 17, 2000, at 19.

146. *Id.*

147. *Id.*

148. Kevin Peraino, *Berkeley's New Colors*, NEWSWEEK, Sept. 18, 2000, at 61.

149. John Nichols, *The Beat*, THE NATION, Apr. 3, 2000, at 8.

spending $150 million—twice the amount spent before the amendment—in the form of outreach programs that are designed to increase the amount of underrepresented minority students.[150]

The California Supreme Court's ruling on San Jose's outreach program will undoubtedly mean that the University of California will also have to tighten its outreach programs, which use some forms of targeted outreach and recruitment.[151] The court's ruling will undoubtedly affect other government programs in California that target underrepresented minorities, leaving a bleak future for any type of outreach program.[152]

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150. Kevin Peraino, *Berkeley's New Colors*, NEWSWEEK, Sept. 18, 2000, at 61.

151. Pamela Burdman, *UC System Has No Leeway to Consider Race in Admissions, Despite Recent Court Ruling; University of California Outreach Programs Targeted*, BLACK ISSUES IN HIGHER ED., Jan. 4, 2001, at 22.

152. *Id.*