
RECENT CASE

HI-VOLTAGE WIRE WORKS, INC. V. CITY OF SAN JOSE: THE CALIFORNIA SUPREME COURT BANS MINORITY OUTREACH PROGRAMS UNDER PROPOSITION 209

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On November 30, 2000, the California Supreme Court issued an opinion prohibiting government agencies from targeting recruitment and outreach programs toward minorities and women.

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the high court held, 7-0, that recruitment and outreach programs that focus on minorities and women violate the state constitution as amended by Proposition 209.¹ *Hi-Voltage Wire Works* was the state supreme court's first decision interpreting the scope of Proposition 209. Written by the court's sole African-American member, the majority opinion could have a significant impact on public agencies that have enacted outreach programs in order to mitigate the effects of Proposition 209, including the state's two university systems.²

The unanimous holding masks the divisiveness among the justices and the controversial nature of the opinion. The case produced four separate

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1. 12 P.3d 1068, 1083-84 (Cal. 2000). Proposition 209 is discussed in detail *infra* note 11 and accompanying text.

2. California has two public university systems: the University of California and the California State University.

opinions by the seven justices, including a vehemently written dissent by Chief Justice George.³ Sixteen different amicus briefs were filed, including one by the United States on behalf of the defendant.⁴ Moreover, California Attorney General Bill Lockyer personally appeared before the court to argue in support of the City of San Jose.⁵

The decision is important in two respects. First, the legal holding that minority outreach programs violate Proposition 209 may significantly curtail or alter outreach programs enacted subsequent to this initiative, such as programs enacted by the University of California to attract qualified minority candidates after Proposition 209 drastically reduced minority enrollment. To comply with the decision, government agencies must scrutinize their outreach programs to ensure that they apply neutrally, irrespective of race or sex.⁶ Although numerous amici opposed this holding, the court's conclusion was based on sound statutory interpretation and was compelled by the text of Proposition 209.

The second reason this decision is important is that the majority used a broad rationale to support its holding. Speaking for four of the seven justices, Justice Brown's opinion does much more than resolve the particular legal issue with which the court was faced. The majority engages in a 150-year historical exposition and critique of U.S. Supreme Court cases interpreting the Fourteenth Amendment and the Civil Rights Act of 1964.⁷ It criticizes U.S. Supreme Court decisions that upheld affirmative action programs, implicitly arguing that such decisions contravene the Civil Rights Act and were wrongly decided.⁸ Indeed, the majority sees such decisions as a constitutional anomaly that disregarded individual rights in favor of "entitlement based on group representation."⁹ Finally, the court appears to applaud voter enactment of Proposition 209 as restoration of the principle of color-blind jurisprudence.¹⁰

Whether one agrees or disagrees with affirmative action, one has to question the appropriateness and necessity of the court's criticism of

3. The Chief Justice concurred in the judgment of the court but dissented from its opinion. See *Hi-Voltage Wire Works*, 12 P.3d at 1092 (George, C.J., concurring and dissenting).

4. See *id.* at 1069–70.

5. See *id.* at 1069.

6. Throughout this note, "race" and "sex" classifications are used as a shorthand to refer to all the categories listed in Proposition 209—"race, sex, color, ethnicity, or national origin." CAL. CONST. art. I, § 31.

7. See *Hi-Voltage Wire Works*, 12 P.3d at 1072–79.

8. See *id.* at 1075–79.

9. *Id.* at 1079.

10. See *id.* at 1081–82.

affirmative action jurisprudence and its implicit support of Proposition 209. Indeed, the court should be criticized for using this opportunity needlessly to thrust itself into a policy debate and to express its political views. The majority's rationale casts doubt on the credibility of its ultimate legal conclusion—a conclusion that is readily supportable by normal canons of statutory interpretation and that garnered the support of all seven justices. In a very real sense, the five members of the majority expressed their approval of Proposition 209 and their disapproval of affirmative action. Simply put, the majority inappropriately used the opinion to cast its “vote” for the initiative.

Part I below briefly sets forth the applicable law, namely Proposition 209, as well as the portions of San Jose's recruitment and outreach program that were at issue. Part II analyzes and critiques the “historical” part of the majority opinion, which expresses the justices' views on affirmative action jurisprudence and on Proposition 209. Part III examines the court's holding, and Part IV explores the impact of that holding on other outreach programs.

I. PROPOSITION 209 AND SAN JOSE'S OUTREACH AND RECRUITMENT PROGRAM

Enacted by voters in 1996, Proposition 209 added section 31 to the California Constitution. It prohibits the state and its political subdivisions 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.”¹¹

In response to this initiative, San Jose modified its affirmative action program for public contracting by focusing on outreach and recruiting minority candidates. The disputed portions of the program required contractors bidding on projects valued in excess of \$50,000 to comply with either an outreach component or a participation component.¹²

With respect to the outreach component, the contractor must provide written documentation that he or she has solicited subcontractor bids from four certified minority-owned (MBE) or women-owned (WBE) firms in

11. CAL. CONST. art. I, § 31.

12. See *Hi-Voltage Wire Works*, 12 P.3d at 1071–72.

each trade area identified for the project.¹³ Copies of the solicitation letters must be submitted with the bid. In addition, the contractor must negotiate in good faith with any MBE/WBE that expresses interest in the project and must specify the reasons for rejecting any bids.¹⁴

By contrast, the participation component specifies numerical goals for representation of racial minorities and women. The City determines the number of MBE/WBE subcontractors that would be expected to work on each project in the absence of discrimination.¹⁵ If a contractor lists a sufficient number of MBE's/WBE's in the bid to satisfy this "evidentiary presumption" of nondiscrimination, it will satisfy the program's requirement and the City will not require any documentation of outreach.¹⁶

If a contractor's bid fails to comply with either the outreach or participation component, it is automatically rejected as "nonresponsive."¹⁷ Interestingly, the Program's requirements apply to all contractors, including MBE's and WBE's, and even those not planning to subcontract any part of the project.¹⁸

The plaintiff in this case, Hi-Voltage Wire Works, Inc., was a general contracting firm that had submitted the lowest bid for a city project. Its bid was rejected, however, because it did not comply with either of the program's requirements.¹⁹ The contractor saw no need to outreach to any MBE/WBE subcontractors because it was not planning to subcontract any of the work.²⁰ After its bid was rejected, the plaintiff sought declaratory and injunctive relief to prevent continuation of the program.²¹

The trial court granted plaintiff's motion for summary judgment, holding that both components of the Program constituted race- and sex-based classifications in violation of section 31 as added by Proposition 209.²² The court of appeals affirmed²³ and the state supreme court granted review.

13. *Id.* at 1071. An MBE is a business with at least fifty-one percent minority ownership or control; a WBE must have that proportion of ownership and control by a woman or women. *Id.* at 1070 n.1.

14. *Id.* at 1071.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1071-72.

22. *Id.* at 1072.

23. *Id.*

II. MAJORITY ATTACKS AFFIRMATIVE ACTION AND “VOTES” FOR PROPOSITION 209

A. HISTORY: COLOR-BLIND JURISPRUDENCE

The majority began its analysis by identifying the legal issue: whether San Jose’s program violated the state constitution, as amended by Proposition 209.²⁴ But the majority did far more than resolve this question. The opinion provides an exhaustive, but not unbiased, history of federal and state jurisprudence dealing with equal protection and affirmative action. Indeed, before addressing the particular legal issue, the court seemed to applaud the voters’ passage of Proposition 209 and the demise of affirmative action.

The majority began its discussion with a reference to the Declaration of Independence.²⁵ It noted that although the Nation was founded on the principle that “all men are created equal,” its path to achieving this goal has not been without struggle.²⁶ According to the majority, the low point in the struggle for equality was the Supreme Court’s opinion in *Dred Scott v. Sanford*,²⁷ which denied citizenship to African-Americans.²⁸ Although the Fourteenth Amendment was later enacted to overturn this decision, the Supreme Court continued to validate government-initiated racial restrictions in cases such as *Plessy v. Ferguson*.²⁹

The majority identified *Brown v. Board of Education*³⁰ as a major turning point for the Supreme Court in that it was the first major case to recognize and to apply a “color-blind jurisprudence.”³¹ According to the majority, the principle of color-blind jurisprudence became the common thread in cases following *Brown*, as the “Civil War amendments altogether removed the race line from our government systems.”³²

Next, the majority analyzed the enactment of the Civil Rights Act of 1964, which had been intended to reflect color-blind jurisprudence as

24. *See id.* at 1081.

25. *See id.* at 1072.

26. *Id.*

27. 60 U.S. 393 (1856).

28. *See Hi-Voltage Wire Works*, 12 P.3d at 1073.

29. *See id.* (citing 163 U.S. 537 (1896)).

30. 347 U.S. 483 (1954).

31. *Hi-Voltage Wire Works*, 12 P.3d at 1073–74.

32. *Id.* at 1074 (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 (1979)).

articulated by Justice Harlan in his dissent in *Plessy*.³³ Interestingly, the majority noted that the Civil Rights Act closely parallels Proposition 209 in both language and purpose.³⁴ The court then claimed that cases interpreting the Civil Rights Act are useful in interpreting Proposition 209 as both measures “confirmed and reinforced the role of government as color-blind in these matters.”³⁵

B. ATTACK ON AFFIRMATIVE ACTION

Justice Brown and the majority offered a three-pronged attack against affirmative action. First, they implicitly argued that the U.S. Supreme Court erred in upholding affirmative action, because it violates the Civil Rights Act’s prohibition on race- or sex-conscious government programs.³⁶ For example, the majority criticizes *United Steelworkers v. Weber*,³⁷ where the Supreme Court held that race-conscious affirmative action programs are not forbidden by the Civil Rights Act.³⁸ The majority argues that by rejecting the color-blind mandate of the Civil Rights Act, the Supreme Court disregarded the established view that “[d]iscriminatory preference of any group, minority or majority, is precisely and only what Congress has proscribed’ in Title VII.”³⁹

In his dissent, the Chief Justice took issue with the majority’s unnecessary criticism of past state and U.S. Supreme Court decisions upholding affirmative action.⁴⁰ As he aptly noted, whether or not the Supreme Court was correct in those decisions is simply irrelevant. The case was solely about the scope of Proposition 209, not the proper interpretation of federal statutes or the Equal Protection Clause of the U.S. Constitution.

The majority’s second line of attack was to portray affirmative action in a negative light. Justice Brown argued that in trying to remedy past discrimination, affirmative action “replaced [the] individual right of equal

33. *See id.* at 1075.

34. *See id.*

35. *Id.* at 1076.

36. *See id.* at 1078–79.

37. 443 U.S. 193 (1979).

38. *See Hi-Voltage Wire Works*, 12 P.3d at 1078–79.

39. *Id.* at 1077 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 218 (1979) (Burger, C.J., dissenting) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) (alteration in original)). The majority’s implied criticism is not limited to the U.S. Supreme Court, as it concedes that the California Supreme Court followed *Weber* and held that affirmative action is consistent with the state constitution. *See id.* at 1080–81 (citing *Price v. Civil Serv. Comm’n*, 604 P.2d 1365 (Cal. 1980)).

40. *See id.* at 1093 (George, C.J., concurring and dissenting).

opportunity with proportional group representation.”⁴¹ This unflattering view of affirmative action clearly indicates the majority’s preference for individual rights over “proportional group representation.”

The dissent took issue with the majority’s use of “misleading and unflattering slogans” to characterize affirmative action.⁴² These characterizations ignore the valid justifications favored by affirmative action proponents. More importantly, one can rightfully question whether the court’s legal holding on outreach programs is influenced by its political beliefs against a policy of affirmative action. As the Chief Justice wrote, “the opinion’s resort to these highly charged slogans undermines the credibility of its ruling.”⁴³

In its final blow, the majority equated affirmative action with discriminatory racial policies that were imposed to establish and to preserve segregation.⁴⁴ To the majority, both types of policies should be evaluated in the same light because they ignore the principle of color-blind jurisprudence.⁴⁵ It is irrelevant that the latter were designed to subjugate minorities or to restrict their participation in civil life, whereas the former were designed to remedy years of discrimination. The majority opinion views affirmative action as akin to the “‘indefensible practices of pre-*Brown* days when skin pigmentation and ethnicity were the qualifications that determined a child’s school’”; moreover, it flies in the face of “‘the plea of Justice Harlan . . . for a colorblind America.’”⁴⁶

Drawing this parallel evokes a stinging response from the Chief Justice, as he believes it “does a grave disservice to the sincerely held views of a significant segment of our populace.”⁴⁷ Indeed, the majority’s implication that affirmative action programs should be viewed in the same light as, say, Jim Crow laws only serves to “detract from the persuasiveness and credibility of its ultimate ruling.”⁴⁸

41. *Id.* at 1079.

42. *Id.* at 1094 (George, C.J., concurring and dissenting).

43. *Id.* at 1095 (George, C.J., concurring and dissenting).

44. *See id.* at 1079.

45. *See id.* (“Although pursued for the purpose of eliminating invidious discrimination, history reveals that this prevailing social and political norm [i.e., affirmative action] had its parallel in laws antedating the Civil Rights Act, when government could legally classify according to race.”).

46. *Id.* at 1081 (quoting *DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 229 (Cal. 1981) (Mosk, J., dissenting)).

47. *Id.* at 1095 (George, C.J., concurring and dissenting).

48. *Id.*

C. "VOTE" FOR PROPOSITION 209

The majority opinion seems to view the cases upholding affirmative action as a constitutional anomaly waiting to be rectified. In Justice Brown's words, they represent a "*fundamental shift* from a staunch anti-discrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex-conscious governmental decisionmaking."⁴⁹ This anomaly was rectified by the voters in enacting Proposition 209, as the electorate decided to "'set a different course' from that charted by the courts."⁵⁰

Indeed, rather than merely remarking on the extent to which the initiative changed existing law, the majority appears enthusiastically to applaud the change. The court remarks that the voters intended to reinstitute "an interpretation reflecting the philosophy that '[h]owever it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences, for any purpose, are anathema to the very process of democracy.'"⁵¹

This biased description of affirmative action, as well as the one-sided historical exposition, should raise eyebrows among conservatives and liberals alike. Conservatives should be bothered by the court's refusal to exercise any semblance of judicial restraint. Whether or not one personally agrees with the holding or even the court's view of history, the court should be criticized for unnecessarily injecting its political beliefs into an opinion that should be based on legal analysis. As the Chief Justice wrote, the majority fails to "appreciate[] that its task is simply to interpret and [to] apply the initiative's language so as to effectuate the electorate's intent."⁵² By throwing its support in favor of Proposition 209, the majority exhibited an utter lack of respect and deference towards the political branches of government, as well as the electorate.

In addition to its failure to exercise judicial restraint, the majority opinion diminishes the credibility of the high court. The court could have easily achieved the same legal result by producing one opinion that relied solely on statutory construction. Instead, it engaged in a divisive debate about the merits of affirmative action and the U.S. Supreme Court's alleged

49. *Id.* at 1081 (emphasis added).

50. *Id.* at 1083 (quoting *United Steelworks v. Weber*, 443 U.S. 193, 216 (1970) (Blackmun, J., concurring)).

51. *Id.* (quoting *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390-91 (Cal. 1980) (Mosk, J., dissenting)) (alteration in original).

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

misinterpretations of federal law. This debate is “not only unnecessary to the resolution of the issue before us, but is likely to be viewed as less than evenhanded.”⁵³ The court, therefore, damages its own credibility by providing ammunition to those who would charge that it acted on the basis of its political ideologies.

III. “TARGETED” OUTREACH AND RECRUITMENT PROGRAMS ARE UNCONSTITUTIONAL

After expressing the court’s views on affirmative action and its implicit endorsement of Proposition 209, Part II of the majority opinion finally considers the particular legal issue raised in the case: whether minority outreach and recruitment programs are constitutional after Proposition 209.

The analysis of the question is largely based on ordinary principles of constitutional and statutory construction.⁵⁴ The court first attempted to construe the ordinary meaning of the key terms in the initiative. The two critical terms in Proposition 209 are “discriminate” and “preferential,” as the government is prohibited from doing either based on race, sex, and other characteristics. Citing *Webster’s New World Dictionary*, the court provided the ordinary meaning of these words: “[D]iscriminate’ means ‘to make distinctions in treatment; show partiality . . . or prejudice’; ‘preferential’ means ‘giving . . . priority or advantage to one person . . . over others.’”⁵⁵

The court used these definitions, along with the voters’ intent as evidenced by the ballot arguments, to hold San Jose’s program unconstitutional. First, the court held that the “outreach component” is a form of preferential treatment. Under this provision, contractors were required to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for services, none of which they must do for non-MBE’s/WBE’s. Put simply, this amounted to giving MBE/WBE subcontractors preferential treatment over non-MBE’s/WBE’s.⁵⁶

53. *Id.*

54. Justice Kennard issued the most sensible and straightforward opinion. Concurring only in the judgment of the court, she argued that the decision should be resolved solely by referring to the ordinary meaning of the terms, and should omit analysis of voters’ intent and historical analysis. *See id.* at 1092 (Kennard, J., concurring in judgment).

55. *See id.* at 1082 (quoting WEBSTER’S NEW WORLD DICTIONARY 392, 1062 (3d college ed. 1988)).

56. *See id.* at 1084.

Second, the court held that the “participation component authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals.”⁵⁷ Significantly, the court saw no legally significant distinction between race-conscious numerical goals and quotas or set-asides.⁵⁸ They differ “only in degree” and represent a “‘line drawn on the basis of race and ethnic status’ as well as sex.”⁵⁹ Such line-drawing runs counter to the mandate of Proposition 209.

The court’s holding is legally sound and compelled by the initiative’s language. The initiative unambiguously prohibits the government from granting preferences based on sex and race. Targeted outreach programs provide an exclusive benefit to the groups that are targeted and are, therefore, preferences within the meaning of the initiative.

IV. IMPLICATIONS OF THE BAN ON TARGETED OUTREACH

Other governmental agencies and prospective plaintiffs must determine the proper scope of the opinion and discern what types of outreach programs pass constitutional muster. The strong language clearly indicates that the court will strike down any program which involves governmental preference that is race- or sex-conscious. It does not matter that the program only provides “outreach” by disseminating information. The only relevant inquiry is whether the information dissemination, recruiting effort, or outreach program is conducted in a preferential manner by relying on impermissible classifications.

On the other hand, the decision expressly does *not* ban outreach or recruiting efforts that are not limited by race or sex.⁶⁰ In fact, the court cites one particular outreach program by the City of Los Angeles that would pass constitutional muster. This program mandates “‘reasonable good faith outreach to *all types* of subcontractor enterprises.’”⁶¹ The outreach is not limited to MBE’s/WBE’s and is thus constitutional. Moreover, Justice Mosk wrote separately to explain that the outreach component of San Jose’s program would have been constitutional if contractors had been required to solicit bids from subcontractors without regard to their race or gender.⁶²

57. *Id.*

58. *See id.*

59. *Id.* (quoting *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 289 (1978) (footnote omitted)).

60. *See id.* at 1085.

61. *Id.* (emphasis added) (quoting *Domar Elec., Inc. v. City of Los Angeles*, 885 P.2d 934, 940 (Cal. 1994)).

62. *See id.* at 1091 (Mosk, J., concurring).

One outreach program that is potentially threatened by the court's holding is conducted by the University of California to attract underrepresented minorities. Devised to mitigate the impact of Proposition 209, the university annually mails outreach letters to high-achieving minority high school students.⁶³ These letters provide information about financial aid and encourage minority students to apply to the university.⁶⁴ Although the university has not decided whether the program violates *Hi-Voltage Wire Works*,⁶⁵ it is not conceivable that the high court would let it stand. By targeting the information packets to students on the basis of race or ethnicity, the program runs afoul of the court's admonition for the government to remain color-blind and race-neutral. The court expressly stated that public agencies cannot provide "information" to certain people on the basis of race or gender.⁶⁶

Of course, this program can easily be amended to meet constitutional muster. The University of California can target its outreach programs on the basis of a student's income or family background. For example, the university can mail informational packets to students from high schools in poorer socio-economic neighborhoods or high schools that send a disproportionately low number of students to the university. Such targeting would achieve the standard of color-blindness and would satisfy Proposition 209, though the impact will largely fall upon the intended minority groups.

Similarly, government agencies must ensure that their outreach programs in the public contracting arena are neutral with respect to race and sex. One notable model that would satisfy *Hi-Voltage Wire Works* is the program enacted by San Bernardino County. There, business owners whose assets are less than \$750,000 can be certified as "disadvantaged business enterprises" and automatically receive notice of bidding opportunities.⁶⁷ Thus, it achieves the purpose of outreach programs—to provide notice to underrepresented enterprises—without limiting the criteria to race or sex.

63. See Anne Martinez, *University Outreach Programs Expected to Survive Court Ruling: Post-Prop. 209 Efforts to Increase Student Diversity Avoid Targeting Women and Minorities*, SAN JOSE MERCURY NEWS, Dec. 1, 2000, at 16A.

64. See *id.*

65. See *id.*

66. *Hi-Voltage Wire Works*, 12 P.3d at 1085 (explaining that the voters intended that "programs such as the City's that disseminate information on a selective basis would not continue").

67. See Louis Rom, *No Effect Seen on Inland Recruiting: City and County Agencies Say They Have Ended Affirmative Action Hiring Banned by a Court Decision*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 2, 2000, at B14.

CONCLUSION

Despite the controversial rationale of the majority, the unanimous holding is well-supported and grounded in statutory construction. Public agencies, such as the University of California, must closely scrutinize their existing outreach efforts and find ways to expand their pool of candidates without running afoul of the state constitution.

Perhaps one benefit of the court's overly broad dictum is that it provides notice to government agencies to err on the side of caution and to eliminate or to change any programs that target race or sex in any way. Nevertheless, the state supreme court damaged its credibility by issuing a divisive and politically charged opinion that disregarded judicial restraint and deference to the democratic process.