

Proposition 209 and School Desegregation Programs in California*

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I. INTRODUCTION

On November 5, 1996, California voters struck a severe blow to affirmative action by approving Proposition 209 as an amendment to the California Constitution.¹ Embodied as article I, section 31, the primary thrust of the initiative provides that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”² While seemingly straightforward, section 31, like other constitutional imperatives or prohibitions, may be easier to enunciate as a legal principal than it is to apply in practice. The devil may be in the details, and California courts have only begun to grapple with questions of interpretation and the scope of section 31.³

One thing is certain: Proposition 209 has survived a direct constitutional challenge and is the law in California.⁴ In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit Court of Appeals upheld the constitutionality of Proposition 209, stating: “That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification.”⁵ Although questions of interpretation remain, the overall effect of

1. Proposition 209 was approved by California voters by a fifty-four to forty-six percent margin. Dave Leshner, *Battle over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A1.

2. CAL. CONST. art. I, § 31.

3. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997) (upholding the constitutionality of section 31 in the face of an equal protection challenge); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1083–84 (Cal. 2000) (holding the City of San Jose’s women and minority outreach program involving City contracts violative of section 31); *Bd. of Educ. v. Superior Court*, 71 Cal. Rptr. 2d 562, 563, 578 (Ct. App. 1998) (upholding the lower court’s decision to expedite termination of the court’s involvement in the case, but disapproving of the court’s seeming reliance on section 31 as the grounds for doing so); *Kidd v. State*, 72 Cal. Rptr. 2d 758, 770, 772–73 (Ct. App. 1998) (holding the state’s supplemental certification affirmative action policy for civil service hiring violative of section 31).

4. *Coalition for Econ. Equity*, 122 F.3d at 711. The suit challenging Proposition 209 was filed in federal court on November 6, 1996, the day following the vote. *Id.* at 697.

5. *Id.* at 708. Relying on the “Hunter Doctrine,” the plaintiffs in *Coalition for Economic Equity* alleged that Proposition 209 violated the Equal Protection Clause of the Fourteenth Amendment, contending “that Proposition 209 imposes an ‘unequal political structure’ that denies women and minorities a right to seek preferential treatment from the lowest level of government.” *Id.* at 703.

Proposition 209 is undoubtedly far reaching.⁶ This Comment will focus on the potential effects of section 31 on public schools, an area that may face unique challenges.⁷

A. Proposition 209 and Desegregation⁸ Programs in Public Schools

This Comment will investigate section 31's possible impact on primary and secondary public school programs, ranging from court-ordered or court-supervised desegregation programs to voluntary school choice and magnet programs. The inquiry is important because school districts, unlike other public entities, have unique equal protection obligations under the California Constitution to remedy racial isolation.⁹ Fulfilling this duty, when it arises, is an inherently complicated and costly task.¹⁰ School districts are dependent upon state and federal

6. In *Hi-Voltage*, the California Supreme Court held that a City of San Jose outreach program geared toward increasing bidding opportunities for minority- and women-owned businesses (MBEs and WBEs) violated section 31. 12 P.3d at 1083-84. The program, which the City had modified after the effective date of section 31 in order to comply with its proscriptions, requires contractors bidding on city projects to demonstrate that they have not discriminated or given preference to any subcontractors based on "race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin." *Id.* at 1070-71 & n.2. Under the program, contractors must fulfill either an MBE or WBE participation or an outreach component in order for their bids to be considered "responsive." *Id.* at 1071.

7. Although not addressed by this Comment, the effect of Proposition 209 (and an earlier University of California Board of Regents resolution which ended admission preferences) on affirmative action programs in the university admissions setting is also of critical importance and is the subject of a lively debate among scholars. See WALTER FEINBERG, *ON HIGHER GROUND: EDUCATION AND THE CASE FOR AFFIRMATIVE ACTION* 1-16 (1998). See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (discussing affirmative action); CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (Gary Orfield & Edward Miller eds., 1998); Constance Hawke, *Reframing the Rationale for Affirmative Action in Higher Education Admissions*, 135 ED. LAW REP. 1 (1999) (providing an overview of the debate surrounding affirmative action).

8. The terms "integration" and "desegregation" should be read as being functionally equivalent. Both terms are employed because courts generally refer to the duty to desegregate, while school districts usually refer to the process as integration. The use of one or the other term is context-driven and is not intended to imply any difference in meaning.

9. CAL. CONST. art. I, § 7. See also *infra* Part II.B.

10. E.g., CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING* 137-44 (1990) (analyzing the logistics and costs associated with implementing magnet programs).

integration funding¹¹ to implement the programs necessary to carry this duty out. With the enactment of section 31, school districts are confronted with an additional variable that potentially makes their task even more difficult. If section 31 were determined to be broadly applicable to school integration programs, an affected school district would be faced with the daunting task of having to fulfill its constitutional duty to remedy racial isolation without resorting to anything that could be construed as granting a racial preference.¹²

It is not the purpose of this Comment to rehash the relative merits of section 31,¹³ or affirmative action¹⁴ in general. Rather, the goal of this Comment is simply to provide insight and guidance to policy makers—particularly at the school district level—who may be tasked with having to reconcile their constitutional duty to remedy racial isolation with section 31's proscription against granting "racial preferences."

Part II provides a brief historical overview of federal and California State equal protection jurisprudence as it relates to primary and secondary public schools. Specifically, Part II will examine a school

11. California currently provides funding for school integration programs under Education Code sections 42243.6 (providing guidelines for reimbursement of the costs mandated by courts) and 42249 (providing guidelines for reimbursement of the voluntary integration program costs). CAL EDUC. CODE §§ 42243.6, 42249 (West 1993 & Supp. 2000).

12. This is a worst case scenario which assumes that section 31 is applicable to all school integration programs. As discussed *infra* Parts III–IV, section 31 almost certainly does not reach court-ordered integration plans and, arguably, does not reach purely voluntary plans either.

13. There is already an abundance of such analysis elsewhere. See generally Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141 (1998) (discussing Proposition 209); Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459 (1999) (suggesting amendments to Proposition 209); Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999 (1996) (assessing the impact of the California Civil Rights Initiative); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997) (reviewing the impact of the California Civil Rights Initiative); Note, *The Constitutionality of Proposition 209 as Applied*, 111 HARV. L. REV. 2081 (1998) (reviewing the constitutionality of Proposition 209).

14. For a sample of recent books and articles on the subject of affirmative action, see CHILLING ADMISSIONS, *supra* note 7; TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996); FEINBERG, *supra* note 7; PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY* (1995); Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196 (1999–2000); Kathleen A. Graves, Comment, *Affirmative Action in Law School Admissions: An Analysis of Why Affirmative Action Is No Longer the Answer . . . Or Is It?*, 23 S. ILL. U. L.J. 149 (1998); David Gergen, Editorial, *Becoming 'Race Savvy': The End of Affirmative Action Brings Unexpectedly Drastic Results*, U.S. NEWS & WORLD REP., June 2, 1997, at 78.

district's obligations under the California Constitution to remedy segregation or racial isolation—which is broader than that imposed under the Federal Constitution.¹⁵ Part III addresses the possible effects of section 31 on court-ordered or court-supervised integration programs. This is the easiest of the questions posed and, as will be shown, the answer is that section 31 should have no effect on programs in this category.¹⁶ Part III also addresses whether section 31 forecloses all use of “preferences” in future remedial schemes in school desegregation cases. In cases where a court determines that the use of preferences is *necessary* to fulfill a school district's constitutional obligations, it is clear that the application of section 31 to prevent such a remedy would itself run afoul of the Federal Constitution.¹⁷ The same reasoning applies to the use of preferences arising under a consent decree, although it is likely that some sort of findings would be necessary to substantiate the need for the remedy.

Finally, Part IV addresses the more difficult question of whether the use of racial criteria in purely voluntary programs, such as school choice and magnet programs, falls within the reach of section 31. As for voluntary programs already in place at the effective date of the initiative, the answer again, is that section 31 should have no effect.¹⁸ However, voluntary programs initiated or modified after the effective date of the initiative may indeed be threatened by section 31. It is a close call; there is authority both for and against the inclusion of such voluntary programs within the scope of section 31. The easiest argument to articulate is probably that these programs are within the scope of section 31, since this result hews more closely to the language, intent, and underlying policy of the section. However, there are compelling reasons why section 31 should not be given this effect, and there is at least some indication that courts may be willing to *impliedly exempt* school integration efforts from its provisions.¹⁹ In any event, school districts faced with implementing new programs or modifying pre-existing programs should tread carefully and assume that section 31 may be triggered.

15. See *infra* Part II.B. (noting that California schools have an affirmative constitutional duty to remedy segregation—regardless of its cause).

16. CAL. CONST. art. I, § 31(d).

17. Volokh, *supra* note 13, at 1387. Volokh only addresses this issue within the context of federal courts. See also *infra* Part III.B.

18. CAL. CONST. art. I, § 31(b).

19. See *infra* Part III.

To provide context, this analysis will trace the experience of one California school district, the San Diego Unified School District (SDUSD). SDUSD's experience typifies the process: as it first came under court order to redress racial isolation within the district; later, as it developed a voluntary integration plan; and finally, as its integration plan came under attack on the grounds that certain elements of the program violated section 31.²⁰

II. HISTORICAL CONTEXT

A. Court-Enforced Desegregation Under the Federal Constitution

In the landmark decision *Brown v. Board of Education*,²¹ the Supreme Court held that racial segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment.²² In so doing, the Court laid to rest the infamous "separate but equal" doctrine first enunciated in *Plessy v. Ferguson*,²³ concluding that "[s]eparate educational facilities are inherently unequal."²⁴ However, *Brown*'s immediate effect on school desegregation efforts was not as profound as one might imagine. While *Brown* established the necessary legal principle that segregated schools were "inherently unequal" and thus violated the Equal Protection Clause,²⁵ the Court provided little guidance as to what steps an affected school district must take to fulfill its constitutional duty.²⁶ One year later, the Court provided scant additional guidance when it announced in its subsequent decision, also captioned *Brown v. Board of Education*,²⁷ that desegregation should proceed "with all deliberate speed."²⁸

Lacking clear guidance from the Supreme Court, the means of implementing *Brown*'s mandate were left to federal district courts in the South.²⁹ These courts immediately came under immense local political

20. See *infra* Part II.C.

21. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (hereinafter *Brown I*).

22. *Id.* at 495.

23. 163 U.S. 537 (1896).

24. *Brown I*, 347 U.S. at 495. The *Brown I* holding was limited to segregation in a public school setting, *id.*, but was to have a profound effect on other areas, such as housing, employment, and higher education, and, in a very real sense, started the civil rights revolution. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 7 (1996).

25. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

26. ORFIELD & EATON, *supra* note 24, at 7.

27. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (hereinafter *Brown II*).

28. *Id.* at 301.

29. ORFIELD & EATON, *supra* note 24, at 7.

pressure from opponents to desegregation.³⁰ As a result, desegregation cases were subject to long delays and judicial action was generally limited to enforcing minor changes.³¹ Consequently, the segregated character of education in the South remained generally intact for more than a decade following the *Brown* decisions.³² In the North, where segregation took on a different character, serious desegregation efforts did not take place until the mid-1970s.³³

It was not until the Court's decisions in *Green v. County School Board* (1968),³⁴ *Swann v. Charlotte-Mecklenburg Board of Education* (1971),³⁵ and *Keyes v. Denver School District No. 1* (1973)³⁶ that the Court added "teeth" to the *Brown* mandate by establishing definitive guidelines and a remedial framework for school desegregation.

Under this modern remedial framework, upon a judicial finding of de jure segregation,³⁷ the affected school district must eliminate any prior discriminatory practices, and is further charged with the "affirmative duty to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system."³⁸ Lest there be any doubt about the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 7-8.

34. 391 U.S. 430, 437-38 (1968) (holding that schools must dismantle segregated systems "root and branch" and that segregation must be achieved with respect to facilities, staff, faculty, extracurricular activities, and transportation).

35. 402 U.S. 1, 15, 30 (1971) (holding that formerly segregated schools are "charged with the affirmative duty to take whatever steps [including busing that] might be necessary to convert to a unitary system" (citing *Green*, 391 U.S. at 437-38)).

36. 413 U.S. 189, 201-03 (1973) (holding that school districts are responsible for policies such as constructing schools in racially isolated neighborhoods and gerrymandering attendance zones that result in racial segregation).

37. De jure segregation is defined as "[g]enerally refer[ing] to segregation directly intended or mandated by law or otherwise issuing from an official racial classification.... [The t]erm comprehends any situation in which the activities of school authorities have had a racially discriminatory impact...." BLACK'S LAW DICTIONARY 425 (6th ed. 1990).

38. Bradley W. Joondoph, Note, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 149 (1993) (citing *Freeman v. Pitts*, 503 U.S. 467, 485 (1992)). Joondoph summarizes the court-ordered desegregation process under the federal Constitution as follows:

The process of court-ordered desegregation begins with a finding that discrimination by school officials has led to segregation in a school district. Upon such a finding, the district court usually orders the school district to come forward with a comprehensive plan to desegregate its schools. If the court finds the school district's plan unsatisfactory, the court must devise such a scheme itself. In either case, the school system is legally bound by the

scope and depth of a school district's responsibility to desegregate, the Court in *Swann* candidly observed: "The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some."³⁹ Clearly then, lower courts were to use the full range of their equitable powers in combating segregation.

While the *Green*, *Swann*, and *Keyes* trilogy fleshed out the scope of a school district's duty to desegregate and provided a remedial framework for fulfilling this duty, it also marked the high tide of the Court's judicial activism in school desegregation cases.⁴⁰ Following *Keyes*, the Court's focus appeared to shift from rigorous enforcement of school desegregation to one of judicial restraint. Beginning with *Milliken v. Bradley*,⁴¹ the Court has demonstrated an unwillingness to expand the scope of the duty to desegregate or the list of permissible remedies.⁴²

In *Milliken*, the Court struck down the use of an interdistrict desegregation remedy employed in Detroit schools, holding that such a remedy was impermissible unless it could be demonstrated that each of the affected districts or the state had taken action which contributed to segregation.⁴³ This decision severely limited desegregation efforts in northern cities where minorities are primarily clustered in dense inner-city areas, surrounded by predominantly white suburbs.⁴⁴ For its part, the Rehnquist Court⁴⁵ has demonstrated an increasing skepticism toward

desegregation plan, and the district court retains jurisdiction over the case until the school district is fully desegregated. Once the school district believes it has fulfilled its obligations under the court-ordered plan, it may petition the court for a declaration that the school district has achieved "unitary status," and for dissolution of the court's desegregation order. If the court finds that the school district has successfully desegregated, it will return control of the system to local authorities. Once declared unitary, the school district's constitutional obligations are the same as those of any other nonsegregated school system.

Id. at 149-50 (internal citations omitted).

39. *Swann*, 402 U.S. at 28.

40. Joondeph, *supra* note 38, at 170.

41. 418 U.S. 717 (1974).

42. Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 170 (1999).

43. *Milliken*, 418 U.S. at 745.

44. ORFIELD & EATON, *supra* note 24, at 10-11.

45. Chief Justice Rehnquist's personal support for desegregation efforts has been tepid at best. As the sole dissenter in *Keyes*, Rehnquist stated:

The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require. It then adds to this potpourri a confusing enunciation of evidentiary rules in order to make it more likely that the trial court will on remand reach the result which the Court apparently wants it to reach. Since I believe neither of these steps is justified by prior decisions of this Court, I dissent.

the continuation of court-ordered desegregation remedies.⁴⁶ As one commentator noted:

This retreat [away from the Court's earlier activist stance in desegregation cases] has been fueled, at least in part, by three recent Supreme Court decisions—*Board of Education v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins*. Although not altering any fundamental legal principles, the decisions evinced a clear hostility to the continuation of court-ordered desegregation remedies. In each opinion, the Court emphasized that the judicial supervision of formerly segregated school districts was intended to be temporary, and that federal district courts should return control over public schools to politically accountable local officials as soon as practicable.⁴⁷

Notwithstanding the Rehnquist Court's antipathy, the general remedial scheme established by the Court in *Green*, *Swann*, and *Keyes* remains largely in place.⁴⁸ School districts continue to have a constitutional duty to take affirmative steps to remedy desegregation upon a finding of de jure segregation.

B. Court-Enforced Desegregation Under the California Constitution

In 1976, the California Supreme Court outlined the broad duty under the California Constitution to remedy segregation or racial isolation in the landmark decision *Crawford v. Board of Education*.⁴⁹ In *Crawford I*, the court held that "school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.'"⁵⁰ The "regardless of its cause" language is significant because it means that in California a school district has an affirmative duty to remedy both de jure and de facto

413 U.S. at 265 (Rehnquist, J., dissenting). One commentator has noted that "although Rehnquist accepted *Brown* in theory, he gave it a narrow interpretation and disagreed with many of the later Supreme Court decisions that spelled out *Brown*'s mandate." ORFIELD & EATON, *supra* note 24, at 10. Interestingly, Rehnquist was a Supreme Court clerk when *Brown* was decided and authored a memo which stated: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed." *Id.* Rehnquist later claimed that the memo expressed Justice Jackson's early views on *Brown* rather than his own views on the matter. *Id.*

46. Joondeph, *supra* note 42, at 170.

47. *Id.* (internal citations omitted).

48. *Id.*

49. 551 P.2d 28 (Cal. 1976) (hereinafter *Crawford I*).

50. *Id.* at 30 (citing *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878, 882 (Cal. 1963)). The court made it clear that its holding merely affirmed the court's earlier decision in *Jackson* and its progeny. *Id.* at 33-34.

segregation.⁵¹ The court explained:

Given the fundamental importance of education, particularly to minority children, and the distinctive racial harm traditionally inflicted by segregated education, a school board bears an obligation, under article I, section 7, subdivision (a) of the California Constitution, mandating the equal protection of the laws, to attempt to alleviate segregated education and its harmful consequences, even if such segregation results from the application of a facially neutral state policy.⁵²

As noted above, a school district's obligation under the federal Constitution extends only to remedying de jure segregation.⁵³ That is, the duty is triggered only when the segregation is an outgrowth of the activities or policies of the school authorities themselves. Consequently, the constitutional burden facing school districts is more stringent under the California Constitution than under the federal Constitution.⁵⁴

This result was not altered by the passage of Proposition I in 1979. Proposition I, embodied in article I, section 7 of the California Constitution,⁵⁵ limits the power of state courts to order busing and school reassignment to that which is exercised by federal courts under the Equal Protection Clause of the Fourteenth Amendment.⁵⁶ In upholding the constitutionality of Proposition I, the U.S. Supreme Court underscored the different obligations under state and federal law. The Court stated:

[E]ven after Proposition I, the California Constitution still imposes a greater

51. *Crawford I*, 551 P.2d at 33. De facto segregation is defined as "[s]egregation which is inadvertent and without assistance of school authorities and not caused by any state action, but rather by social, economic and other determinates." BLACK'S LAW DICTIONARY 416 (6th ed. 1990).

52. *Crawford I*, 551 P.2d at 39. De facto segregation generally refers to segregation not caused by the school district itself. See BLACK'S LAW DICTIONARY, *supra* note 51. Thus, the language "results from the application of a facially neutral state policy" should be construed to mean segregation which exists in the face of a neutral state policy.

53. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971).

54. Interestingly, the *Crawford I* court recognized that *Swann* and other recent Supreme Court opinions held that the federal constitutional burden extended only to de jure segregation. The court nonetheless concluded that the issue of whether a school district's obligation under the Federal Constitution extends to combating purely de facto segregation "remains an open question." *Crawford*, 551 P.3d at 33.

55. CAL. CONST. art. I, § 7(a).

[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause

Id.

56. *Crawford v. Bd. of Educ.*, 458 U.S. 527, 532 (1982) (hereinafter *Crawford II*).

duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, *whether or not there has been a finding of intentional segregation*. The school districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.⁵⁷

The California Supreme Court had previously reached the same conclusion in *McKinny v. Oxnard Union High School District*,⁵⁸ stating: “the amendment [Proposition I] neither releases school districts from their state constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation.”⁵⁹

It should be recognized that, from a practical standpoint, the continuing validity of the more stringent duty to desegregate under the California Constitution may be in question. Although *Crawford I* remains good law and California school districts continue to have an affirmative duty to remedy both de jure and de facto segregation,⁶⁰ any prescribed remedy must be limited to that which is allowed under federal law. While California is free to construe its state law equal protection duty as more stringent than that imposed under the Federal Constitution,⁶¹ any remedial action is necessarily restricted by the application of the Supremacy Clause⁶² and the Equal Protection Clause of the Fourteenth Amendment.⁶³

57. *Id.* at 535–36 (emphasis added).

58. 642 P.2d 460 (Cal. 1982).

59. *Id.* at 467.

60. See *supra* notes 49–54 and accompanying text.

61. *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1382 (1978). At that time, Justice Rehnquist stated:

[T]he only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as this Court is concerned, they are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board.

.... While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.

Id. at 1382–83 (opinion in chambers on application for stay).

62. U.S. CONST. art. VI, § 2.

63. U.S. CONST. amend. XIV, § 1.

First in *City of Richmond v. J.A. Croson Co.* (1989)⁶⁴ and again in *Adarand Constructors, Inc. v. Peña* (1995),⁶⁵ the Supreme Court held that any use of racial classifications by a state actor will be subject to strict judicial scrutiny.⁶⁶ This means that even “benign” or “remedial” racial classifications will be treated as suspect.⁶⁷ In order to survive strict scrutiny, the racial classification employed must serve a “compelling governmental interest” and the means must be “narrowly tailored” to accomplish that purpose.⁶⁸

While neither *Croson* nor *Adarand* dealt directly with school desegregation, lower federal courts have uniformly interpreted their mandate as applicable to desegregation cases. In five recent decisions involving the use of racial criteria in a public school setting, the lower courts have uniformly subjected the programs in question to strict scrutiny.⁶⁹ Consequently, it is presumptively clear that all such programs will be subject to the highest level of judicial scrutiny in the future.

While some ambiguity remains as to what qualifies as a sufficiently compelling governmental interest in order to survive strict scrutiny analysis, at least four Supreme Court Justices have concluded that only a remedial purpose involving de jure discrimination will suffice.⁷⁰ It is at least possible that courts may recognize furthering diversity as a sufficiently compelling interest to survive strict scrutiny.⁷¹ However, it

64. 488 U.S. 469 (1989).

65. 515 U.S. 200 (1995).

66. *Croson*, 488 U.S. at 493 (holding that any use of racial classifications in state and local affirmative action programs must withstand strict scrutiny analysis); *Adarand*, 515 U.S. at 227 (extending the *Croson* holding to include affirmative action programs initiated by Congress).

67. *Adarand*, 515 U.S. at 227.

68. *Id.* Commentators have described strict scrutiny analysis as being strict in theory, fatal in fact. While this characterization is almost certainly true in cases involving “invidious” discrimination, strict scrutiny should not always prove fatal in cases involving benign classifications. In *Adarand*, Justice O’Connor took exception to this notion, stating:

Finally, we wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.

Id. at 237 (internal citations omitted).

69. *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 129 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000); *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (9th Cir. 1998); *Wessmann v. Gittens*, 160 F.3d 790, 794 (1st Cir. 1998); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 626 (W.D.N.Y. 1999); *Hunter v. Regents of the Univ. of Cal.*, 971 F. Supp. 1316, 1323 (C.D. Cal. 1997).

70. *Croson*, 488 U.S. at 493.

71. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (Powell,

is well settled that the objective of remedying societal discrimination or segregation (i.e., de facto segregation) does not constitute a sufficiently compelling interest.⁷² Consequently, while school districts have an affirmative duty to remedy de facto segregation or racial isolation under the California Constitution, any prescribed remedy is limited to that which is allowable under federal law, *which does not recognize remedying de facto segregation as a sufficiently compelling interest to survive strict scrutiny*.⁷³ Thus, California school districts would appear to be in somewhat of a *Catch-22*.

C. Court-Ordered Desegregation in San Diego

It was under the *Crawford I* standard that the court in *Carlin v. Board of Education*⁷⁴ ordered the San Diego Unified School District (SDUSD) to present a plan to alleviate racial isolation and its harmful effects.⁷⁵ The ruling was based on a finding that twenty-three of the district's schools were racially isolated.⁷⁶ In August, 1977, the court approved the district's voluntary integration plan⁷⁷ which included, among its many provisions, the Voluntary Ethnic Enrollment Program (VEEP) and an expanded Magnet School Program.⁷⁸ Thereafter, the court reviewed and

J.) (identifying diversity as a sufficiently compelling interest in a university admissions setting); *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (holding that there may be nonremedial justifications for employing racial classifications that could survive strict scrutiny). *But see Hopwood v. Texas*, 78 F.3d 932, 948-49 (5th Cir. 1996) (holding that only a remedial purpose in the face of de jure discrimination was a sufficiently compelling interest).

72. *Bakke*, 438 U.S. at 311-15; *Adarand*, 515 U.S. at 227.

73. Interestingly, commentary and case law is not to be found on this point. Given the importance of school integration, a more searching analysis on this topic is warranted. The point is simply raised here as being potentially significant, leaving it to others to explore more fully.

74. *Carlin v. Bd. of Educ.*, No. 303800 (Cal. Super. Ct., S. D. 1996) (final order terminating court jurisdiction) (hereinafter *Carlin I*). The *Carlin* class, representing minority school children, originally brought suit against SDUSD in 1967, seeking to compel the school district to integrate its schools. *Id.* at 2.

75. *Bd. of Educ. v. Superior Court*, 71 Cal. Rptr. 2d. 562, 563-64 (Ct. App. 1998) (describing historical context) (hereinafter *Carlin II*).

76. *Id.*

77. *Id.* at 564. Although the district's integration plan was labeled "voluntary," it should not be confused with purely voluntary plans which *do not* arise under a court order or consent decree.

78. 1 S.D. UNIFIED SCH. DIST., SAN DIEGO PLAN FOR RACIAL INTEGRATION, 153, 155 (1977).

approved the district's plan on an annual basis.⁷⁹

In 1980, a group of parents and students calling themselves "Groundswell" successfully intervened in the suit.⁸⁰ It appears that, at least initially, Groundswell was only opposed to the *mandatory* assignment of students based on race or ethnicity.⁸¹ However, over time, Groundswell extended its opposition to include the district's use of race as a factor in its school choice and magnet programs, and the court's continued involvement in the case.⁸²

In 1985, after concluding that the district had made meaningful progress, the court issued a final order which mandated that the various programs in the district's integration plan remain in effect and required the district to file annual reports with the court.⁸³ The final order further provided that the court would retain continuing jurisdiction in the case, but would take further action only upon notice of motion for "good cause shown."⁸⁴ Nearly a decade later, the court issued an amended final order that made minor modifications to the integration plan and reaffirmed the court's continuing jurisdiction in the case.⁸⁵

In 1992, and again in 1994, Groundswell filed motions asking the court to discharge the writ of mandate and to issue an order for "final approval" of the district's integration plan.⁸⁶ In each instance, the court denied Groundswell's motion.⁸⁷ Finally, in January, 1996, the court acquiesced and granted Groundswell's motion to discharge the writ⁸⁸ and to issue an order for the final approval of the district's voluntary integration plan.⁸⁹ In granting Groundswell's motion:

The court observed [that] providing equal opportunity in schools had "become a way of life" and over the years the court's role had evolved into a supervisory role, with the District initiating its own changes. The court said it was time to end its involvement and discharge the writ when jurisdiction ended, commenting "it is not entirely proper for the appearance of the court of being some sort of a lord of a democratic institution such as the school district for

79. *Carlin I*, No. 303800 at 2 (detailing the history of the court-ordered integration plan).

80. *Carlin II*, 71 Cal. Rptr. 2d at 563-64.

81. *Id.*

82. *Id.*

83. *Id.* at 564.

84. *Id.*

85. *Id.*

86. Petition for Writ of Mandate or Prohibition or Other Appropriate Relief; Memorandum of Points and Authorities in Support Thereof, at 4-5, Bd. of Educ. v. Super. Ct. (Cal. Ct. App. 1997) (No. 303800).

87. *Id.*

88. "Although the court orally stated it intended to discharge the writ, the order of August 16, 1996, did not do so." *Carlin II*, 71 Cal. Rptr. 2d at 564 n.2.

89. *Carlin I*, No. 303800, at 2.

more than 28 years.”⁹⁰

Following a hearing in late July, the court issued a “Final Order Terminating Court Jurisdiction” which directed the district to maintain its integration plan and broadly outlined the programs which were to be continued under the plan.⁹¹ The final order also contained a sunset provision which provided that “after January 1, 2000, the District’s failure to comply with *any* of the specific provisions of this Order will not constitute a violation or contempt of this order.”⁹² Although the court had orally stated that it intended to discharge the writ when it originally granted Groundswell’s motion, it failed to do so in the final order.⁹³ Groundswell’s petitions for writ review of the order were denied by both the intermediate appellate court and the California Supreme Court.⁹⁴ Significantly, Groundswell did not actually appeal the order.⁹⁵

Emboldened by the passage of Proposition 209, the “California Civil Rights Initiative” (CCRI),⁹⁶ Groundswell returned to court less than

90. *Carlin II*, 71 Cal. Rptr. 2d at 564 (citing the court record).

91. *Id.*

92. *Id.*

93. *Id.* at 564 n.2. No explanation was given for the court’s ultimate decision not to discharge the writ.

94. *Id.* at 564.

95. *Id.*

96. CAL. CONST. art. 1, § 31:

Discrimination based on race, sex, color, ethnicity, or national origin; gender-based qualifications in public employment, education, or contracting

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section’s effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the

seven months later in July, 1997, launching yet another assault on the district's integration plan.⁹⁷ Specifically, Groundswell sought to eliminate the district's VEEP and school choice programs in order to bring the district's integration plan into compliance with section 31, and to terminate the court's jurisdiction in the case.⁹⁸ The stage was thus set for a potential confrontation between a court-ordered integration plan and Proposition 209.

III. PROPOSITION 209 AND COURT-ORDERED DESEGREGATION IN PUBLIC SCHOOLS

That Proposition 209 would immediately be used as a vehicle to attack a court-ordered integration plan was by no means an obvious result of its passage. The express terms of article I, section 31(d) would seem to put court-ordered integration plans beyond its reach.⁹⁹ The provision states: "Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section."¹⁰⁰ Eugene Volokh, who served as a legal advisor for the pro-Proposition 209 campaign, wrote after its passage that clause (d) "protects a specific, narrow category of settled expectations."¹⁰¹ In other words, pre-existing court orders and consent decrees were expressly exempted from the scope of the initiative. The legislative analyst's report, found in the Proposition 209 ballot materials, addressed clause (d) specifically within the context of public schools, stating simply: "It [Proposition 209] would not . . . affect *court-ordered* desegregation programs."¹⁰²

As an aside, the exemption of existing consent decrees may have been compelled by other constitutional considerations. The "narrow category

state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Id.

97. *Carlin II*, 71 Cal. Rptr. 2d at 564.

98. *Id.*

99. CAL. CONST. art. I, § 31(d).

100. *Id.*

101. Volokh, *supra* note 13, at 1336, 1386.

102. CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 30-31 (Nov. 5, 1996) (discussing effect of the initiative on public schools).

of settled expectations" that Volokh explains is protected by clause (d) may be the settled expectations of parties to a contract. Consent decrees are contractual in nature in that they are essentially judicially enforced agreements.¹⁰³ As such, they may fall within the protection of the contracts clause of the U.S. Constitution which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."¹⁰⁴

As a constitutional amendment, section 31 is a state action and is therefore subject to the proscriptions of the contracts clause.¹⁰⁵ It may be that the drafters of Proposition 209 included clause (d), at least in part, to preempt potential challenges to the initiative premised on a contract clause violation. As stated by the Supreme Court, "[t]he obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them."¹⁰⁶ Absent clause (d), section 31 clearly has the potential of disturbing the settled expectations and rights of the parties to a consent decree. Therefore, school districts operating under a consent decree may be able to assert the additional defense that an attack premised on section 31 violates the contracts clause.¹⁰⁷

103. BLACK'S LAW DICTIONARY 411 (6th ed. 1990)

[A consent decree] is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case It binds only the consenting parties; and is not binding upon the court.

Id.

104. U.S. CONST. art. I, § 10, cl. 1. The California Constitution contains a nearly identical provision which is functionally equivalent to the federal provision. Article I, section 9 provides: "A . . . law impairing the obligation of contracts may not be passed." CAL. CONST. art. I, § 9.

105. See 16B AM. JUR. 2D *Constitutional Law* § 734 (1998) ("Any enactment, regardless of its source, to which a state gives the force of law is a law within the meaning of this provision, and this includes . . . state constitutions and constitutional amendments.").

106. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934).

107. *Walsh v. Bd. of Admin. of Pub. Employees Ret. Sys.*, 6 Cal. Rptr. 2d 118, 127 (Ct. App. 1992). The court outlined the requisite analysis for evaluating a contract clause claim:

When a claim is presented under the contract clause three questions may arise. First, it must be determined whether there is a valid contract to be impaired. The contract clause does not protect expectations that are based upon contracts that are invalid, illegal, unenforceable, or which arise without the giving of consideration. Nor does the contract clause protect expectations which are based upon legal theories other than contract, such as quasi-contract or estoppel. Second, if a contract is found, it must be determined whether a challenged law is consistent with its express or implied terms. Modification of contractual rights through subsequent legislation may be consistent with, rather

In light of the express language of section 31, it is somewhat surprising that the court granted Groundswell's request for a new public hearing on a matter that had been settled less than seven months earlier by the same court and from which no appeal had been taken.¹⁰⁸ As mentioned above, Groundswell's request for a hearing was based primarily upon the group's assertion that the district's integration plan was in conflict with section 31.¹⁰⁹ Specifically, Groundswell argued that the VEEP and school choice programs ran afoul of section 31 "as they provided for 'mandatory race balancing of classrooms' and 'racial gerrymandering of school boundaries.'"¹¹⁰

At the August, 1997, hearing, both the school district and the *Carlin* class opposed any modification of the existing order on the grounds that Groundswell had not appealed the final order and in essence sought reconsideration of matters previously raised and rejected.¹¹¹ Both parties further argued that section 31 expressly excluded existing court orders from its scope.¹¹² The district also expressed grave concern that termination of the integration plan would jeopardize a sizable amount of state and federal integration funding that could not be replaced without drastically affecting other school programs.¹¹³ The thrust of Groundswell's argument at the hearing was that the court's continuing jurisdiction and maintenance of the final order prevented nonclass constituents from exercising their civil rights under section 31.¹¹⁴

While the court denied the motion to discharge the writ of mandate and to modify the district's integration plan, it did move up the termination date of court supervision from January 1, 2000, to July 1, 1998, if the constitutionality of section 31 was upheld.¹¹⁵ In so ruling,

than an impairment of, the contract of the parties. Finally, if impairment is found, it must be determined whether the impairing law exceeds the bounds of the constitutional limitations.

Id. (internal citations omitted).

108. See *Carlin II*, 71 Cal. Rptr. 2d 562, 564 (Ct. App. 1998).

109. *Id.*

110. *Id.* (quoting from Groundswell's ex parte petition for a hearing). "In support [of their petition], Groundswell submitted two parents' statements claiming District's plan hindered children from attending their nearest school." *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 565. Specifically, the district stated that "\$49 million in state integration funds and \$2 million in federal magnet integration funds" could be lost. *Id.*

114. *Id.* (quoting from the trial court record).

115. *Id.* at 565-66. The modified paragraph of the final order provides:

It is further provided that if on or before July 1, 1998 Proposition 209 has been upheld as constitutional the date in paragraph 24 after which "the District's failure to comply with the provisions of this Order will not constitute a violation or contempt of this Order" shall be changed from "January 1, 2000" to "July 1, 1998." If on July 1, 1998, the constitutionality of Proposition 209 has not yet been decided, and subsequent to July 1, 1998 Proposition 209 is

the court noted that the district's demonstrated commitment to the integration plan substantially diminished the need for continuing jurisdiction in the case.¹¹⁶ But it is clear that the catalyst for accelerating the end of jurisdiction in the case was Proposition 209.

First, the court questioned the school district's counsel as to whether continuing the case and judicial control over the integration plan was consistent with the underlying principles of section 31.¹¹⁷ More significantly, after noting that Proposition 209 represents the "voice of the people," the court stated that section 31 "seems to be inconsistent with a court-ordered program such as we have here."¹¹⁸ In the end, the court justified the accelerated termination of jurisdiction on the grounds that "supervision was no longer necessary" and that section 31 constitutes a "change of circumstance" from when the matter was heard the previous year.¹¹⁹

In basing its decision, even if only in part, on section 31, the superior court erred. The language of clause (d) is simple and straightforward: "*Nothing in this section shall be interpreted as invalidating any court order.*"¹²⁰ The meaning and intent of the clause is self-evident. In the absence of ambiguity, it is inappropriate for a court to look beyond the actual text to determine the scope or meaning of a legislative provision.¹²¹ The established principles of statutory construction are equally applicable to constitutional provisions.¹²² As enunciated by the California Supreme Court:

upheld as constitutional, the date in paragraph 24 shall be changed from "January 1, 2000" to the date when the decision upholding the constitutionality of Proposition 209 becomes final. If Proposition 209 is held to be unconstitutional, the date in paragraph 24 shall remain "January 1, 2000."

Id. at 566 n.4.

116. *Id.* at 565.

The [trial] court stated: "I recall my comment a year ago on this case that it appeared to me that the efforts to balance the schools to avoid isolation of races or ethnic students in certain areas is a way of life with the school district. It's done just automatically, almost like breathing . . . [¶] [W]e watched it for a year and there has been no call upon the Court for any ruling except [Groundswell's] desire to make a few changes and to terminate."

Id. (quoting from the trial court record) (first alteration added).

117. *Id.*

118. *Id.* (quoting from the trial court record).

119. *Id.* at 565-66 (quoting from the trial court record).

120. CAL. CONST. art. I, § 31(d) (emphasis added).

121. *Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 84 Cal. Rptr. 2d 804, 807 (Ct. App. 1999).

122. *Mut. Life Ins. Co. v. City of Los Angeles*, 787 P.2d 996, 998 (Cal. 1990).

[I]n arriving at the meaning of a [constitutional provision], consideration must be given to the words employed, giving to every word, clause and sentence their ordinary meaning. If doubts and ambiguities remain then, and only then, are we warranted in seeking elsewhere for aid When . . . “the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).”¹²³

Granted, the court did not actually invalidate the district’s integration plan or discharge the writ of mandate; to do so on the grounds of section 31 would have been clearly impermissible. But even the line of questioning as to whether continued judicial control over the district was consistent with the principles behind section 31 was inappropriate. The sole principle relating to section 31 that should have concerned the court is that it did not apply—by its expressed terms—to existing court orders in effect when it was enacted.¹²⁴ It follows that utilizing section 31 as a stated rationale for ending court jurisdiction in the case was inappropriate as well.¹²⁵ The court, in effect, gave greater breadth to section 31 than the text provides.¹²⁶

The district brought a mandamus proceeding seeking to vacate the superior court’s order terminating jurisdiction, and the appellate court issued an order to show cause on November 19, 1997.¹²⁷ While upholding the lower court’s order, the appellate court was careful to step back from the superior court’s seeming endorsement of the applicability of section 31 to court-ordered integration plans.¹²⁸ The court admonished:

The parties have attributed meaning and consequences to the court’s order which it simply does not have. The court did *not* say it was compelled by Section 31 to end District’s integration plan. Nor did the court say it was ending the plan at all. Rather, it questioned the wisdom of the court, rather than District and its constituents, controlling policy where there was no showing of a

123. *Id.* at 998–99 (citing *Lungren v. Deukmejian*, 755 P.2d 299, 303, 304 (Cal. 1988)) (other internal citations omitted).

124. CAL. CONST. art. I, § 31(d).

125. This is not to say that there were not other justifications for terminating the case—or even that continued judicial oversight was necessary. Indeed, ending the case conforms with a growing trend of judicial skepticism toward long-term judicial oversight of school desegregation programs and the court’s increasing willingness to relinquish control over the programs. Joondeph, *supra* note 42, at 170–71.

126. *E.g.*, *Howard Jarvis Taxpayers*, 84 Cal. Rptr. 2d at 807 (stating that a “court may not add to [a] statute or rewrite it to conform to an assumed intent that is not apparent in its language”).

127. *Carlin II*, 71 Cal. Rptr. 2d 562, 563, 566 (Ct. App. 1998). The Los Angeles Unified School District and the California Voluntary Integration Association filed amicus curiae briefs. *Id.* at 566. The SDUSD “and *Carlin* class also filed notices of appeal.” *Id.* at 566 n.5.

128. *Id.* at 563, 566.

continuing need to supervise the plan.¹²⁹

The court emphasized the propriety of ending judicial oversight and the growing impetus to return control of integration programs back to local officials and policy makers.¹³⁰ In support, the court cited the Supreme Court's most recent pronouncements on the issue, *Board of Education v. Dowell*¹³¹ and *Freeman v. Pitts*,¹³² which underscore the temporary nature of judicial oversight of school desegregation programs. These cases seem to "encourage" courts to relinquish control by giving the courts broad discretion to determine that oversight is no longer necessary.¹³³ In short, the appellate court upheld the lower court's order on the ground that the court had properly exercised its inherent discretion to end judicial involvement in the case for the simple reason that judicial oversight was no longer necessary, not because it was compelled to do so by section 31.¹³⁴

By carefully framing its holding so as to "decouple" section 31 from the lower court's decision to end jurisdiction in the case, the appellate court tacitly acknowledged that section 31, by its very terms, does not affect integration plans in this category.¹³⁵ In short, desegregation or integration plans which were subject to court order or consent decree at the effective date of section 31 are not subject to its provisions.¹³⁶ These programs are expressly exempt from the section's coverage by clause (d) and any judicial interpretation to the contrary would violate the general rules of statutory construction.¹³⁷

129. *Id.* at 566. "The parties and amici curiae urge[d the court] to determine Section 31's scope and effect" on not only court-ordered plans, but also on voluntary and post-amendment integration plans. *Id.* In response, the court stated that "[t]he broad questions posed here were not before the superior court, were not briefed, and need not be answered to resolve this proceeding." *Id.*

130. *Id.* at 566-67; see also Joondeph, *supra* note 38, at 149-50.

131. *Carlin II*, 71 Cal. Rptr. 2d at 566 (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991)).

132. *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

133. *Id.* at 566-67.

134. While it may be true that judicial oversight was no longer necessary, the court may have neglected to address a relevant procedural issue. Specifically, one could argue that the lower court's dismissal of Groundswell's equal protection and "racial gerrymandering" claims, coupled with the appellate court's refusal to accept section 31 as an appropriate justification for ending the case, left Groundswell with no new grounds for revisiting the August 16, 1996, final order, which therefore was res judicata to the 1997 order.

135. *Carlin II*, 71 Cal. Rptr. 2d at 563, 566.

136. CAL. CONST. art. I, § 31(d).

137. *Id.*

Two additional issues relating to desegregation programs arising under court order or consent decree are worth discussing. First, does the termination of court jurisdiction in a case thereby leave the associated integration plan susceptible to the proscriptions of section 31? Finally, does section 31 foreclose the future use of preferences in school integration cases?

*A. Applicability of Proposition 209 when the Court
Terminates Jurisdiction*

The resolution of this question involves two related inquiries. First, does the underlying court order remain in effect after the court has quit the case? Second, if the school district is no longer under court order, do the prohibitions of section 31 subsequently attach to the associated integration plan? In *Carlin II*, the court made it clear that ending the case affected neither the court order nor the integration plan.¹³⁸ “The [superior] court’s August 1996 order directed District to continue and to increase its integration programs and goals. Significantly, no party appealed that order and it remains viable with only the supervision end date modified.”¹³⁹ Subsequent to the *Carlin II* decision, Groundswell again brought a motion to discharge the original writ of mandate.¹⁴⁰ This time, the superior court ordered the discharge of the March, 1977, writ, but added that the court’s 1996 final order directing the continuation of the district’s integration program “remains viable.”¹⁴¹ The same result was apparently reached when the Los Angeles Superior Court terminated its supervision over the Los Angeles Unified School District’s desegregation plan in 1981.¹⁴² The court’s final order “did not relieve the Los Angeles USD of its duty to address racial isolation or continue the desegregation plan.”¹⁴³ Presumably then, if a court order terminating jurisdiction also approves the existing integration plan or directs its continuance, the affected school district is still technically operating under a court order. In such a case, it is clear that the underlying integration plan continues to be exempt from section 31.

Even if it were determined that a court order terminates when a court ends its jurisdiction in the case, it is still unlikely that section 31 would attach at that point. Clause (d) speaks only to court orders and consent

138. *Carlin II*, 71 Cal. Rptr. 2d at 567–68.

139. *Id.* at 567.

140. Order on Order to Show Cause Granting Discharge of Writ of Mandate at 2, *Carlin v. Bd. of Educ.* (1998) (No. 303800) (hereinafter *Carlin III*).

141. *Id.*

142. Amicus Curiae Brief in Support of Petitioner at 4, *Carlin II*, 71 Cal. Rptr. 2d 562 (Cal. 1998) (No. D029639).

143. *Id.*

decrees in place at the effective date of the initiative.¹⁴⁴ Thus, the determinant factor is simply whether the court order or consent decree was viable when section 31 became effective. Clause (b), which limits the application of section 31 to action taken after its effective date, accomplishes this same result.¹⁴⁵ In either case, the integration plan is effectively “grandfathered-in” and is unaffected by section 31.¹⁴⁶

B. Use of Preferences in Future Remedial Schemes

The fact that clause (d) only refers to court orders or decrees *in force as of the effective date of this provision* could imply that section 31 is intended to cover prospective court orders or consent decrees.¹⁴⁷ However, assuming this was the drafter’s actual intent and, further, that California voters approved Proposition 209 with this understanding, there are fundamental constitutional constraints that prevent section 31 from being given such force. It is well settled law that otherwise valid state laws must give way when necessary to vindicate a federally recognized right.¹⁴⁸ As one court noted:

Once a court has found a federal constitutional or statutory violation . . . a state law cannot prevent a necessary remedy. Under the Supremacy Clause, the federal remedy prevails. “To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes upon them.”¹⁴⁹

In school desegregation cases, the federal right flows from the Equal Protection Clause¹⁵⁰ which has been interpreted to guarantee the *right* to

144. CAL. CONST. art. I, § 31(d).

145. *Id.* § 31(b).

146. Although the result is the same, the means of arriving at that conclusion may have funding ramifications. Specifically, if it is determined that a school district is no longer under court order, it may lose eligibility for the state’s reimbursement program which covers costs mandated by courts. CAL. EDUC. CODE § 42243.6 (West 1993 & Supp. 2000).

147. CAL. CONST. art. I, § 31(b).

148. *E.g.* *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (holding that a “taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 45 (1971) (stating that “state policy must give way when it operates to hinder vindication of federal constitutional guarantees”); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (observing that once a federal violation is found, “a state law cannot prevent a necessary remedy”).

149. *Perkins*, 47 F.3d at 216 (citing *Jenkins*, 495 U.S. at 57).

150. U.S. CONST. amend. XIV, § 1.

attend a nonsegregated school.¹⁵¹ In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court stated that “if a state-imposed limitation on a school authority’s discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.”¹⁵² In *Missouri v. Jenkins* (1990), the Court upheld the extraordinary measure of a federal court ordering a school district to levy taxes to pay for a court-ordered desegregation remedy.¹⁵³ In so doing, the court enjoined the operation of a Missouri law which would have prevented the school district from assessing such a tax.¹⁵⁴

In the present setting, upon a finding of de jure segregation or racial isolation, any proposed remedial scheme will invariably involve the use of racial “preferences” in one way or another. If a court has the power to order a school district to levy taxes in excess of that which is allowed under state law in order to vindicate a federal right, it stands to reason that a court is certainly able to require or approve the use of “preferences” notwithstanding section 31. Consequently, if a court interpreted section 31 in a way that obstructed the application of a remedy deemed necessary under federal law, section 31 would be unconstitutional as applied.

Not surprisingly, this result is supported by a panel of constitutional law scholars who conducted a preliminary analysis of Proposition 209 for the California Senate Research Office.¹⁵⁵ The panel concluded that Proposition 209 cannot forbid remedies required by federal law, whether in state or federal court cases.¹⁵⁶

IV. PROPOSITION 209 AND VOLUNTARY INTEGRATION PROGRAMS IN PUBLIC SCHOOLS

To begin, section 31 should not affect voluntary integration programs that were in place when California voters approved the initiative. As with pre-existing court orders and consent decrees, pre-existing voluntary integration programs were simply written out of the effective provisions of section 31.¹⁵⁷ Section 31(b) clearly provides that the section is only applicable to action taken after the section’s effective

151. *Brown I*, 347 U.S. 483 (1954).

152. *Swann*, 402 U.S. at 45.

153. *Jenkins*, 495 U.S. at 57.

154. *Id.*

155. KATE SPROUL, CAL. SENATE OFF. RES., THE CONSTITUTIONALITY OF THE PROPOSED CALIFORNIA CIVIL RIGHTS INITIATIVE 15 (1995).

156. *Id.*

157. CAL. CONST. art. I, § 31(b), (d).

date.¹⁵⁸ Thus, any programs already in place when Proposition 209 was approved are shielded from its reach.¹⁵⁹ Again, the general rules of statutory construction apply and any judicial interpretation that circumvents clause (b) would be legally untenable.¹⁶⁰ As one court stated: "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."¹⁶¹

However, the treatment of voluntary programs not already in place at the initiative's effective date is an open question. Part of the difficulty in answering this question lies in the lack of definition and potential ambiguities in the wording of section 31 itself. As a general policy statement, section 31 is straightforward and clear: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁶² But like other constitutional provisions, its application may give rise to varied interpretations, and in the end may be anything but straightforward.¹⁶³ There are a number of unanswered questions.

Most significantly, section 31 does not define either "preferential treatment" or "preference."¹⁶⁴ Arguably, a reasonable explanation for the failure to define preference is simply that, given the common understanding of the word and its ordinary usage, no further elaboration was necessary.¹⁶⁵ Webster's Dictionary defines preference simply as "the act, fact, or principle of giving advantages to some over others."¹⁶⁶

158. *Id.* § 31(b) ("This section shall apply only to action taken after the section's effective date.").

159. Of course, any subsequent action involving a pre-existing program may trigger section 31. Volokh, *supra* note 13, at 1386 ("Any hiring, admissions, or contracting decisions made before the effective date are unaffected, though . . . subsequent [actions which are related] . . . have to be neutral.").

160. See *supra* Part III (analyzing statutory construction).

161. Howard Jarvis Taxpayers Ass'n v. City of San Diego, 84 Cal. Rptr. 2d 804, 807 (Ct. App. 1999) (quoting Lungren v. Superior Court, 926 P.2d 1042, 1046 (Cal. 1996)).

162. CAL. CONST. art. I, § 31(a).

163. For a complete discussion of these interpretations, see cases cited *supra* note 3.

164. CAL. CONST. art. I, § 31(a).

165. Black's Law Dictionary does not provide any assistance either; it fails to define preference as used within this context. BLACK'S LAW DICTIONARY 815, 816 (6th ed. 1990).

166. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 927 (9th ed. 1989).

Logically, a “preference” connotes the use of any distinctive trait or characteristic in such a way that a possessor of that trait or characteristic is viewed more favorably than an individual who does not possess the trait. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*,¹⁶⁷ the California Supreme Court appears to endorse such a broad interpretation of the term when it quotes approvingly from the lower court’s decision. “[T]he term ‘preferential treatment’ . . . viewed in its ordinary, natural sense, refers to any kind of treatment favoring one group or individual over another. The prohibition is not limited to set-asides, quotas, and ‘plus factors,’ but extends to all preferences granted to the target groups.”¹⁶⁸ Accordingly, the use of race or ethnicity as a qualifying factor¹⁶⁹ in busing, school assignment, school choice, or magnet programs would appear to constitute a preference. But as every first-year law student quickly learns, the use of even simple terms in a legal context may give rise to nuances and shades of meaning where none seemingly existed before. There is reputable authority that the use of racial criteria in a school desegregation setting does not necessarily constitute a preference.¹⁷⁰

Courts have distinguished school desegregation and integration programs in a primary and secondary education setting from affirmative action programs in general.¹⁷¹ For example, in *Coalition for Economic Equity v. Wilson*, the Ninth Circuit Court stated:

We have recognized, however, that “‘stacked deck’ programs [such as race-based ‘affirmative action’] trench on Fourteenth Amendment values in ways that ‘reshuffle’ programs [such as school desegregation] do not.” Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.¹⁷²

Consequently, courts may be willing to construe school integration programs as fundamentally different from other programs that grant “preferential treatment,” and thereby avoid triggering section 31. Indeed, there are compelling reasons for distinguishing and carving out special treatment for school integration programs.

167. 12 P.3d 1068 (Cal. 2000).

168. *Id.* at 1072 (quoting from the California Court of Appeal’s decision).

169. The phrase “qualifying factor” is intended to mean any use of race in this context, whether it is the sole criteria used or is merely one of many factors considered by a school district.

170. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.10, at 399 (3d ed. 1999).

171. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997).

172. *Id.* at 707 (citing *Associated Gen. Contractors v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1387 (9th Cir. 1980)) (alterations in original).

First, courts have historically afforded special consideration to primary and secondary education and the devastating affects of segregation in this setting.¹⁷³ As the Supreme Court stated in *Brown I*:

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.¹⁷⁴

This sentiment was echoed by the California Supreme Court in *Crawford I*, which spoke of the “fundamental importance of education” and the “distinctive racial harm traditionally inflicted by segregated education.”¹⁷⁵ The court stated that “the importance of adopting and implementing policies which avoid ‘racially specific’ harm to minority groups takes on special constitutional significance with respect to the field of education, because, at least in this state, education has been explicitly recognized for equal protection purposes as a ‘fundamental interest.’”¹⁷⁶ These factors were deemed so compelling that the court extended a school district’s duty to desegregate to include situations involving de facto segregation or racial isolation.¹⁷⁷

Additionally, there is an obvious need for flexibility in light of the broad constitutional mandate facing California school districts to remedy racial isolation. Under California law, the equal protection duty

173. See *supra* Part II.A–B; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (highlighting the importance of public education in general). Justice Powell revisited the language from the landmark decision in *Brown I*, noting:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. (quoting *Brown I*, 347 U.S. 483, 493 (1954)). Justice Powell went on to note, “This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided.” *Id.* at 30.

174. *Brown I*, 347 U.S. at 494.

175. *Crawford I*, 551 P.2d 28, 39 (Cal. 1976).

176. *Id.* at 38–39 (citing *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971)).

177. *Id.* at 30.

imposed upon school districts is greater than that imposed upon other public entities, for it is only in the public school setting that de facto segregation must be remedied.¹⁷⁸ Even in the absence of court involvement, school districts have an affirmative duty to combat de facto segregation or racial isolation.¹⁷⁹

Given this mandate, affected school districts should be afforded the means necessary for carrying it out. Requiring California school districts to remedy de facto segregation or racial isolation while simultaneously proscribing the use of racial criteria within the context of this remedy would put these districts in an untenable position. Further, if section 31 is interpreted to be broadly applicable to voluntary integration programs, individuals seeking to vindicate their constitutional rights as defined in *Crawford I* would be forced to resort to the courts. In short, if *Crawford I* remains good law, the mandate it creates appears to be irreconcilable with the prohibitions of section 31.

Finally, there is a strong thread of case law and legal commentary which suggests that integration efforts in primary and secondary education are fundamentally different from affirmative action programs in an employment or higher education setting. The later two settings involve so-called “stacked deck” or “zero-sum” affirmative action programs.¹⁸⁰ With such programs, there is a clear “winner” and “loser.” Anytime someone is hired or granted admission through an affirmative action program, someone else is correspondingly denied the opportunity to be employed in that particular position or enrolled in that particular university.¹⁸¹ In contrast, it has been asserted that all children reap the benefits from integration programs and no child is denied access to a public education.¹⁸² As one constitutional law treatise states:

Voluntary measures to end de facto school segregation in elementary and high schools by use of racial classifications and integration programs have been upheld consistently by both federal and state courts. These situations may be differentiated from preferential admissions to professional schools because all students are provided with a public education and no person has a right to attend segregated schools.¹⁸³

178. See *supra* notes 49–54 and accompanying text. But see *supra* notes 64–78 and accompanying text (questioning the continued validity of the more stringent equal protection requirements under California law).

179. *Crawford I*, 551 P.2d at 30.

180. *Assoc. Gen. Contractors v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1387 (9th Cir. 1980).

181. Sean Pager, *Is Busing Preferential?—An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 36–37 (1999).

182. *Id.*

183. ROTUNDA & NOWAK, *supra* note 170, at 399. The text does acknowledge that “some students may suffer because they are no longer able to attend the best schools,” but concludes (not altogether convincingly) that “schools should be relatively equal

This was precisely the position taken in *Coalition for Economic Equity* by California Attorney General Dan Lungren.¹⁸⁴ Specifically, Lungren argued that “[b]using’ and ‘student assignment’ on the basis of race” is not covered by the CCRI because it *does not* “involv[e] preferences.”¹⁸⁵ Lungren’s position is instructive given that he was an outspoken advocate for Proposition 209 and was one of the signatories to the pro-209 ballot arguments.¹⁸⁶ Presumably, the current Attorney General, Bill Lockyer, who argued for a more flexible interpretation of “preferential treatment” in *Hi-Voltage*, will maintain this position.¹⁸⁷

The main difficulty with this position is that it requires an interpretation that school desegregation programs are *impliedly exempt* from the reach of section 31. There is simply no assurance that a court will find such an implied exemption. Professor Volokh—in essence asserting that a “preference” is a “preference”—argues strenuously that such programs are clearly covered by section 31.

[P]rograms that provide academic assistance to all black or Hispanic students, but only to those Asian or white students who are economically disadvantaged, are barred. Though there are people of all races among their beneficiaries, they still treat applicants differently based on race. Likewise, an ethnically based assignment of a student to a particular public school is prohibited—though the student would in any event go to some school, he is treated differently based on race in school selection.¹⁸⁸

The most compelling evidence that the use of race as a factor in a voluntary integration setting *may* constitute “preferential treatment” is found in the Proposition 209 ballot materials. Specifically, the legislative analyst suggested that Proposition 209 may affect the funding

within a school district.” *Id.*

184. Volokh, *supra* note 13, at 1344 (citing Appellants’ Reply Brief at 9–10, 14 n.6, *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (Nos. 97-1503-15031)).

185. *Id.* (emphasis added).

186. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 30–31 (Nov. 5, 1996).

187. Attorney General Lockyer, representing the State of California, filed an amicus curiae brief on behalf of the City of San Jose. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1069 (Cal. 2000). See also David Kravets, *Justices: Prop. 209 Bans Contract Preferences*, ORANGE COUNTY REG., Sept. 7, 2000, available at <http://www.ocregister.com/politics/7prop209cci.shtml> (noting that Attorney General Lockyer personally argued in defense of San Jose’s MBE/WBE outreach program).

188. Volokh, *supra* note 13, at 1343–44 (internal footnotes omitted). “Clause (a) thus does indeed ‘prohibit all race-conscious’ (and sex-conscious) decisions, forbidding any ‘differen[ce]’ in ‘treat[ment]’ based on race, sex, color, ethnicity, and national origin in public employment, education, or contracting.” *Id.* at 1343 (citation omitted).

for voluntary integration programs.

[T]he measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts Examples of desegregation spending that could be affected by the measure include the special funding given to (1) “magnet” schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated “racially isolated minority schools” that are located in areas with high proportions of racial or ethnic minorities.¹⁸⁹

While a position asserted by the legislative analyst in sample ballot materials is nonbinding, it is given weight in circumstances where the actual language of a statute or constitutional provision is ambiguous.¹⁹⁰ As the court in *Hi-Voltage* noted, these “extrinsic aids” may also be used to test a court’s construction of a statute or constitutional provision in instances where the language of the text is clear.¹⁹¹ Indeed, after first declaring that “the language of Proposition 209 is clear and literally interpreted does not lead to absurd results,” the *Hi-Voltage* court drew liberally from the Proposition 209 ballot materials, particularly the Legislative Analyst’s report, in finding that San Jose’s outreach program for women- and minority-owned businesses violated section 31.¹⁹² In essence, the court rationalized that if it was not abundantly clear from the text of section 31 that the outreach program in question constituted “preferential treatment,” the fact that the analyst’s report singled out such programs as potentially impacted by the provision removed any remaining doubt as to its applicability.

Given the *Hi-Voltage* court’s literal interpretation of “preferential treatment” and the fact that the analyst also singled out voluntary school integration programs as potentially impacted, the search for an implied exception for such programs could prove to be in vain. In the end, this question will undoubtedly be decided in court. Given the need for flexibility in light of the constitutional mandate to address racial isolation, a school district should be able to at least make a case that voluntary integration programs should be impliedly exempt from section 31.

V. CONCLUSION

While Proposition 209 has indelibly changed the face of affirmative

189. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 30–31 (Nov. 5, 1996) (discussing effect of the initiative on public schools).

190. *San Francisco Taxpayers Ass’n v. Bd. of Supervisors*, 828 P.2d 147, 153 (Cal. 1992); *Carman v. Alvord*, 644 P.2d 192, 199 (Cal. 1982).

191. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1082 (Cal. 2000).

192. *Id.* at 1082–85.

action in California, its effect on primary and secondary school integration programs may not be as sweeping as it is in the areas of public employment and higher education. School integration programs in place at the effective date of the initiative or which arise under court order or consent decree are simply not covered by section 31—and the canons of statutory construction should preclude any judicial interpretation to the contrary. As for purely voluntary integration programs implemented after the effective date of the initiative, there is room for legitimate debate. Arguably, these programs should also be exempt from section 31. However, the California Supreme Court's recent decision in *Hi-Voltage* does not bode well for finding such an implied exemption.

Notwithstanding the growing judicial skepticism toward affirmative action¹⁹³ and the growth of voter-initiated anti-affirmative action measures, such as Proposition 209 and Washington state's Initiative 200,¹⁹⁴ recent polls and studies have shown that Americans overwhelmingly oppose racial segregation and support the underlying goals of diversity.¹⁹⁵ If the courts ultimately determine that voluntary integration programs are covered by section 31, there are alternatives available for furthering the goals of diversity and racial integration that are beyond the reach of its provisions. Section 31 proscribes only preferences based on *race, sex, color, ethnicity, or national origin*;¹⁹⁶ a school district remains free to employ preferences based on other criteria in making enrollment decisions. Schools could simply use race-neutral factors such as socio-economic status or geography as proxies in furthering integration efforts.¹⁹⁷ Admittedly, the use of race-neutral

193. See *supra* Part II.

194. Initiative 200, which is similar to Proposition 209, was approved by Washington voters in November, 1998. WASH. REV. CODE ANN. §§ 49.60.400, 49.60.401 (West Supp. 2001). The initiative states in relevant part that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.* § 49.60.400(a) (West Supp. 2001).

195. Crenshaw, *supra* note 14, at 204 n.23.

196. CAL. CONST. art. I, § 31(a).

197. The recent decision of the San Diego Unified School District to modify its voluntary integration program is a good example of the use of other criteria in promoting diversity. The San Diego proposal simply eliminated all use of racial criteria in its school choice and magnet programs—and instead relies on geographic factors. San Diego City Schools: Draft Proposal for Magnet and VEEP Eligibility (Sept. 22, 1999). For the reasons discussed in this Comment, this modification was unnecessary. San

selection criteria is an imperfect vehicle for promoting racial integration.¹⁹⁸ However, this approach is certainly viable and should be pursued by school districts when faced with the alternative of doing nothing and leaving school integration to chance.

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Diego's integration plan fits squarely within two of the express exemptions of section 31, and was therefore beyond its reach.

198. CHILLING ADMISSIONS, *supra* note 7, at 33–50.