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The Michigan Civil Rights Initiative: How Could It Impact Michigan Indian People?

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Introduction

- In the year 2000, unemployment for American Indians was the highest among any minority at 7.6 percent.[1]
- In the ten years between 1981 and 2001, American Indians with degrees had risen by 151.9 percent. Affirmative action was "key tool used to increase American Indian enrollment."[2]
- In California, where a constitutional amendment similar to MCRI passed, American Indian college freshman enrollment is approximately two-thirds of the number before the amendment was passed.[3]
- Following the passage of that amendment, a suit was filed in California to end all programs and services that employ gender- or race-based classifications.[4]
- The language of the ballot is misleading and can confuse voters by leading them to believe they are protecting affirmative action by voting to adopt the amendment

The "Michigan Civil Rights Initiative"

These are just a few of the reasons why the Michigan Civil Rights Initiative (MCRI) will have a negative effect if passed in November. A misnomer, the proposed "Civil Rights Initiative" would effectively ban "programs that give preferential treatment

to groups or individuals based on their race, gender, color ethnicity or national origin."[5]

The actual ballot language is as follows:

*** BEGINNING TEXT ***

A PROPOSAL TO AMEND THE STATE CONSTITUTIONA TO BAN AFFIRMATIVE ACTION PROGRAMS THAT GIVE PREFERENTIAL TREATMENT TO GROUPS OR INDIVIDUALS BASED ON THEIR RACE, GENDER, COLOR, ETHNICITY OR NATIONAL ORIGIN FOR PUBLIC EMPLOYMENT, EDUCATION OR CONTRACTING PURPOSES.

The proposed constitutional amendment would:

- Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education, or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges, and school districts.
- Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color, or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin.)

Should this proposal be adopted?[6]

*** END TEXT ***

Affirmative Action and American Indians in Higher Education

Affirmative action programs are essential to ensure equal opportunities for American Indians. Statistics show that "[i]n 2000, American Indians had the highest percentage of unemployment, 7.6 percent."[7] The corresponding percentage for whites

was only 2.9 percent.[8] The American Council on Education in 2003 pointed out "[b]etween 1981-2001, the total number of degrees conferred on American Indians has risen substantially, by 151.9 percent. During this period, affirmative action was a key tool used to increase American Indian enrollment."[9] The first affirmative action program designed to encourage American Indians to go to law school led to a 150% increase in the number of American Indian lawyers within four years of the program's creation.[10] These are a few illustrations of the importance of affirmative action in Indian Country, and why it is important to vote against the passage of this constitutional amendment.

The Confusing Text of the MCRI

The language of the MCRI is troubling because it was written intentionally TO confuse voters. The ballot language was drafted to make the voter believe that by voting for the amendment, he or she is creating a more equitable situation. Similar amendments have been passed in both California (Proposition 209) and in Washington (Initiative 200). The text of the MCRI and the California and Washington proposals are almost the same – which is not surprising since the same group of anti-affirmative action activists proposes them. When Washington was considering the amendment, the Colville Confederated Tribes raised $5,000 for the campaign to defeat the amendment. The Tribe's spokesperson, Sheila Whitelaw, believed wording of the amendment assured its passage. On November 23, 1998, shortly after the amendment's passage, Indian Country Today reported:

> I-200 passed with 58 percent of the vote, winning in every county in the state except one. "I think personally that it was the wording," Whitelaw said. "The wording seemed to reaffirm affirmative action." . . . Gov. Gary Locke . . . in a pre-election statement, expressed concern about the wording and the consequences I-200 could have. "At first glance it appears to promote equality." the governor said. "But in reality, it very likely will have the opposite effect because of its vague and broadly written language, I-200 can and will be read many ways; it is confusing and will create a tangle of expensive lawsuits."[11]

Like the Washington amendment, the Michigan Civil Rights Initiative appears to equate affirmative action with granting preferential treatment. This problem also arose while pro-MCRI workers collected signatures for the petition to put the amendment on the ballot. In a case in federal court, brought by those who believe the petition signatures were obtained illegally, some witnesses testified that they were confused by the phrase "preferential treatment." They testified that they did not realize the phrase "preferential treatment" was being equated with affirmative action.[12] In addition, the last paragraph of the ballot language states that the amendment would ban the state from "discriminating against" people based on race or gender, leading the voter to think that the amendment will ban discrimination, rather than banning affirmative action.

Targeting Michigan's Elite Public Universities

Interestingly, the ballot language the voters will see at the polls is not the same language which will be added to the Michigan Constitution. The actual language is as follows:

ARTICLE I, SECTION 26: *Civil Rights.*

1. The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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. The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

3. For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

4. This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

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

6. 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 Michigan anti-discrimination law.

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

8. This section applies only to action taken after the effective date of this section.

9. This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

From this language, it's clear the amendment is being used to target certain, elite public universities. The constitutional language does not list all the public universities in the

state, but singles out University of Michigan, Michigan State, and Wayne State University. The amendment, however, already defined "state" as "the state itself, any city, county, and public college, university, or community college, school district, or other political subdivision or governmental instrumentality."

Since recent U.S. Supreme Court decisions, *Gutter v. Bollinger* and *Gratz v. Bollinger*,[13] Michigan universities have had to look at candidates holistically, using race as one of many factors in the admissions process. In those cases, the Court reaffirmed the use of affirmative action in college and law school admissions, as long as the school used race and ethnicity "as one factor among many others, provided that this consideration is not done in a mechanistic way."[14] It is clear that this amendment is directed at closing the door for students of color to Michigan's elite universities.

In addition, this amendment will likely end any targeted recruitment of minority students, and may limit programs designed to keep those students in school through graduation. In California, court interpretations of Proposition 209 have led University of California officials to question whether they can continue targeted recruitment programs, including sending out information about financial aid. [15]

MCRI Impact on Higher Education

1. California

The removal of affirmative action in California, for example, has had a dramatic effect on higher education. Since the passage of Proposition 209 in California, "UCLA,

which is located in the county with the second largest African American population in the United States, will enroll the smallest number of entering African American freshman 'since at least 1973.'"[16] American Indian freshman enrollment at UCLA declined by ***one-third***.[17] American Indian enrollment in all of the University of California schools declined by ***one-half***.[18] Minority law school admissions at Boalt Hall (UC Berkeley's law school) fell by two-thirds,[19] but American Indian admission at Boalt Hall ***declined to zero***.[20] American Indian enrollment for all of the University of California law schools declined by a full ***one-half***. [21] UC Berkeley Chancellor Robert Birgeneau believes the law has backfired, and in an article entitled just that, he says:

> We are … missing out on exceptional African American, Latino and Native American students who can not only succeed here, but whose participation can improve the education the university offers all its students.
>
> . . . The single most important skill that a 21st century student must master is 'intercultural competence' – the ability best learned via experience to navigate successfully in today's globalized society.[22]

2. Washington

In Washington, the state's voters enacted Initiative 200 in 1998. Just as in California, minority enrollment decline significantly.[23] American Indian enrollment at the University of Washington declined ***by 20 percent***.[24]

3. Texas

In Texas, affirmative action was made illegal in the courts in *Hopwood v. Texas,*[25] rather than the legislature or by constitutional amendment. The University of Texas Law School ***stopped affirmative action programs for American Indians***.[26] American Indian

enrollment in Texas universities declined by ***53 percent***.[27] American Indian enrollment at the University of Texas Law School dropped by ***40 percent***. [28]

After the *Hopwood* decision – where a federal court found affirmative action illegal – state legislators decided to implement the "10 Percent Plan."[29] The plan allowed universities, such as Texas A&M and University of Texas, to automatically admit the top 10% of all high school seniors. The hope was since many of the state's public schools populations were African-American or Latino, minority enrollment would. However, in 1998 "the 296 African-American students admitted … at UT Austin represent only 2.9% of all admissions, in contrast to 4.3%(416) the year before the law changed."[30] The number of "Hispanic students went down 7%."[31] The "10 Percent Plan" failed miserably for very simple reasons:

> States like Oklahoma, where campus affirmative action is still permitted, lured away talented minority students with scholarships. Some educators speculate that the real problem may be that in many impoverished schools even the top graduates are unable to afford the relatively low tuition and board at the Texas campuses involved in the plan. Also, many eligible high school grads may opt not to apply out of fear the work might be too difficult.[32]

If the MCRI passes, expect minority, especially American Indian, enrollment in Michigan's public universities to decline substantially. That is – after all – the whole reason for proposing the amendment.

MCRI and Public Programs

After the passing of Proposition 209 in California, the Gov. Pete Wilson, joined by Ward Connerly, sued the State Personnel Board to end the remaining affirmative action

programs still in existence in the state, mainly civil service and community college hiring and in state government contracting.[33] In that decision, the court ruled that the Proposition "prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny."[34] As Kaufman points out:

> *Connerly v. State Personnel Board* declared that Prop. 209 would invalidate those California statutes that employ gender-or race-based classifications for the purpose of targeting programs or services, even if they are permitted under federal law or meet the strict scrutiny standard, except when either (a) federal law requires the state to engage in the particular action or (b) the state would be threatened with ineligibility for a federal funding program and a corresponding loss of federal funds if it did not engage in that action.[35]

Enforcing Proposition 209, Governor Pete Wilson took no time in creating a list of programs that he believed violated the amendment and asked for their repeal. Some of these programs included:

> Pre-college outreach and preparation for low-income and minority students, including reading, math, science, SAT preparation, academic preparation and college outreach and information.
>
> A program helping paraprofessional teachers become fully licensed teachers, with an emphasis on training minorities.
>
> Scholarships, fellowships and grants at all levels of education that take into consideration race gender, ethnicity or national origin.
>
> Affirmative action in public contracting including not only those efforts with explicit goals but also outreach programs and notification of bidding opportunities for women-and minority-owned businesses.
>
> Public contracting requirements to include businesses owned by minorities, women, and disabled veterans.[36]

These are all programs that could come under fire from Republican Attorney General Mike Cox if this amendment passes in Michigan.

Conclusion

In our knowledge-based society, it is imperative that all citizens have access to quality education. This amendment will prevent that. University of Michigan President James Duderstadt points out that "[f]ewer than one-quarter of Michigan citizens have college degrees."[37] Segregation is one factor in degree attainment, and '[t]here of the top 10 and five of the top 25 most segregated cities in the country are in Michigan, and the Detroit metropolitan areas is the second most segregated in the nation- second only to Gary/Hammond, Indiana."[38] It is clear that with the passing of this amendment, not only will American Indians be adversely affected, but the attainment of a knowledge based economy will be impossible, furthering the depressed economic conditions that plague Michigan.

Endnotes

[1] Census 2000, taken from "Facts on Affirmative Action and American Indians," Can be viewed at www.Civilrights.org, Jan. 1, 2004 (last viewed September 25, 2006).
[2] Twentieth Annual Status Report on Minorities in Higher Education, taken from "Facts on Affirmative Action and American Indians." Can be viewed at www.Civilrights.org, Jan. 1, 2004 (last viewed September 25, 2006).
[3] *Freshman Enrollment of Native Americans, 1995-2004*, University of California Office of the President, Student Affairs Division, Office of Admissions. April 2006.
[4] See *Connerly v. State Personnel Board*, 92 Cal.App.4th 16 (Cal.App. 3 Dist., 2001).
[5] Proposal. Can be viewed at http://www.michigancivilrights.org/ballotlanguage.html (last viewed September 25, 2006).
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[12] *Operation King's Dream v. Connerly*, 2006 WL 2514115 (E.D.Mich.).
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[15] Kidder, William C., *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, n255 (2001).
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[22] Birgeneau, Robert. "Anti-Bias Law Has Backfired." *LA Times*. 25 March 2005. Can be viewed at http://www.berkeley.edu/news/media/releases/2005/03/29_oped.shtml (last viewed September 25, 2006).
[23] Univ. of Wash., Office of the President, President's Cover Letter: Maintaining Diversity at the University of Washington After Initiative 200 (May 1999).
[24] *Id.*
[25] 78 F.3d 932 (5th Cir. 1996).
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[29] Adam Cohen, "Back to Square One," *Time*, Apr. 20, 1998.
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[31] *Id.*
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[35] Kaufman, Susan. "The Potential Impact of the Michigan Civil rights Initiative on Employment, Education, and Contracting." June 2006. Can be viewed at http://www.umich.edu/~cew/PDFs/MCRIecon6-25.pdf (last viewed September 25, 2006).
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