

LEADERSHIP ASSEMBLY
For
A NEW CONVERSATION ON RACE AND ETHNICITY
(ANCORE)

December 8, 2006

Held at St. Francis Retreat
Bethany House
703 E Main St, Dewitt, MI 48820

Legal Review

With respect to the legal status of the Constitutional Amendment to "ban affirmative action programs that give preferences on the basis of race, gender, color, ethnicity, or national origin" let us first observe that several lawyers are present and we invite them to speak to the issue. With that said, two further observations are pertinent.

First, the constitutional amendment creates *a necessary legal task* only for one agency in the State of Michigan, and that is the Office of the Attorney General, which is obligated to defend the amendment against legal challenges already filed. This observation is vital, because it should remind other agencies, and especially municipalities and universities, that *the challenge of the amendment is a policy challenge rather than a legal challenge*.

We should also notice the announcement from California's Pacific Legal Foundation, that it "will monitor enforcement of the ballot initiative in Michigan. Ten years after voters passed the similar Proposition 209 in California, the group has ongoing lawsuits against government groups alleging they are not following the law."[1] In short, PLF will monitor in Michigan (from California) the things that should not be done.

The pertinence of this observation may be gleaned from an exchange I had with a policy representative from the Michigan Municipal League, whose participation I had urged in this workshop. The response from that policy desk was to refer the issue to the League's legal desk. That is a large mistake that repeats the mistakes of agencies in California subsequent to passage of Proposition 209. A major reason that we scheduled this workshop even prior to the election was to try to counsel agencies away from that mistake. Treating the issue as a legal matter rather than as a policy matter means diverting millions of dollars away from solutions to problems of exclusion and toward a merely defensive reaction, at best, and the creation of Potemkin subterfuges at worst – neither of which actually address real

[1] Tuesday, December 05, 2006, *Detroit News*.

problems experienced by real people. Officials extending from the Governor of the State to the City Council in Grand Rapids will disserve the people of this State insofar as they foster such diversions of resources rather than taking the opportunity to focus resources on the very problems that all insist supposedly justified affirmative action preferences in the first place. We will see later, for example, that there are concrete steps to be taken – if bold – that could close the achievement gap on a five-year time table. Moreover, we have good evidence that Wayne State University Law School has already established a praiseworthy posture of seeking a policy-based approach to this opportunity (one that we encouraged in conversation with that faculty weeks prior to the election). Money spent on legal evasions should instead be focused on positive engagement. It may similarly be remarked that Pacific Legal Foundation's concededly worthy effort nonetheless fails to meet the test of telling us what should be done rather what should not be done.

That leads to the second observation in this regard. We learn from California's experience just how much of a waste of resources legal evasions are. A lengthy period of expensive litigation there ended after several years in nothing but the emphatic re-affirmation of the voters' judgment. The most notable case in that long series of legal challenges was *Hi-Voltage Wire Works v. City of San Jose* (2001), with an opinion written by then California Supreme Court Justice Janice Brown that clearly established that outreach was permissible.

For example, if universities once recruited students exclusively in privileged communities but now extend recruitment efforts to previously neglected areas, that is a legitimate correction of inequitable practices, restoring justice where injustice was the rule. Universities have historically been so narrow in their recruitment efforts, that they could legitimately practice affirmative action outreach for the next fifty years and not have made up for all of the past neglect. On the other hand, Justice Brown held that fake outreach that was a subterfuge for race-based preferences was unconstitutional. She rejected the logical fallacy that outreach to previously neglected communities somehow constitutes a kind of preference. Advertising is aimed at audiences, and the more

inclusive the aim, the more effective the advertisement for the purposes of affirmative action outreach.[2]

For our purposes the point is to observe that posing the question of Proposal Two as a legal question is both unnecessary and unwise. Many people acknowledged during the pre-election debates that affirmative action preferences contributed nothing to improve the legendary failures of inner city schools or the dysfunctional conditions of life in crime-ridden, fragmented communities. These are the issues that need attention, and the attention they need is policy-focused attention, from universities no less than from other governmental agencies.

Any rear-guard defense of affirmative action preferences, such as the University of Michigan immediately proposed in the aftermath of the vote, is both a disservice to and an abuse of those communities in need. Affirmative Action preferences are a political minstrel show, with whites in black face perpetuating racism. The legal opportunity we face now is the opportunity to embrace an escape from this last vestige of official racism.

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[2] Many forms of affirmative action outreach are permitted and practiced in California today and remain legitimate in Michigan. In addition to *Hi-Voltage* California's *Connerly v. State Personnel Board* (2001) makes clear that "outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden." Both cases are cited to this effect in Power Point training materials developed by the California State Personnel Board (see www.spb.ca.gov/civilrights). Conversations with equal opportunity managers at two California Universities, the UC President's Office, and the State Personnel Board, as well as with a legal analyst for the California State Association for Counties conveyed very similar understandings of what is and is not permitted. It is not permitted to advertise a position exclusively to women or minorities. It is permissible to undertake targeted and focused outreach to women and minorities provided the overall recruitment effort is broad and inclusive. Ads may still say, "women and minorities are encouraged to apply," and may be placed in journals aimed at a female or specific racial or ethnic group readership. Consider, for example, these words from an ad for an Academic Coordinator placed by UC-Riverside in *Diverse Issues in Higher Education* (5/18/3006): "EO/AA Employer with a strong institutional commitment." Carol Allen will shortly present a full elaboration of these issues.