

1-1-2007

# Testing the Boundaries of Michigan Constitution Article 1 § 26: Are Domestic Violence Programs at Risk?

Diana Marie Langdon  
*Michigan State University College of Law*

Follow this and additional works at: <http://digitalcommons.law.msu.edu/king>

---

## Recommended Citation

Diana Marie Langdon, *Testing the Boundaries of Michigan Constitution Article 1 § 26: Are Domestic Violence Programs at Risk?* (2007), Available at: <http://digitalcommons.law.msu.edu/king/99>

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Student Scholarship by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact [domannbr@law.msu.edu](mailto:domannbr@law.msu.edu).

TESTING THE BOUNDARIES OF MICHIGAN CONSTITUTION ARTICLE 1 § 26:  
ARE DOMESTIC VIOLENCE PROGRAMS AT RISK?

by  
Diana Marie Langdon

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
under the direction of  
Professor Michael Lawrence  
Spring, 2007

*“It matters how judges decide cases.”<sup>1</sup>*

## INTRODUCTION

Last November, Michigan voters adopted a constitutional amendment barring the state from granting “preferential treatment . . . in the operation of public employment, public education, or public contracting” based upon sex and other prohibited classifications.<sup>2</sup> The electorate could not have appreciated the interpretive difficulties that are certain to flow from the language. Vast implications to the legal rights of individuals result from differing interpretations of a single ambiguity in a legal text.<sup>3</sup> Such implications are compounded greatly where several ambiguities exist, as here.

The prohibition on “preferential treatment” is nowhere defined, and it also extends to protect “groups” as well as “individuals.”<sup>4</sup> Neither the precise scope of the three categories of public action—education, employment, and contracting—in which such preference is prohibited nor the effect on them of the modifying phrase, “in the operation of,” is known.<sup>5</sup> Additionally, the amendment prohibits certain conduct by the state, which is vaguely defined as including, but “not necessarily limited to” certain enumerated political subdivisions.<sup>6</sup> The mischief invited by this language will become clearer as this paper addresses an application of the amendment to certain state programs which most electors probably never considered—the funding and operation of Michigan’s domestic violence programs and services.

Challenges such as this were discussed by advocates on both sides of the pre-election debate. One study by researchers with the Center for Education of Women [CEW] suggested that domestic violence services could be threatened by the amendment.<sup>7</sup>

The amendment's proponents sought to refute that 'myth' merely by repeating that the "MCRI affects only public employment, public contracting, and public education," without explaining the intended meanings of the terms.<sup>8</sup>

In addition to illustrating the amendment's ambiguity, this paper evaluates the legitimacy of the CEW assessment. Part I explores the impact of California's 'civil rights' amendment on domestic violence survivors, laws, and programs. Part II examines the structure of Michigan's domestic violence legal framework and key actors within it. Part III assesses the uncertain impact on civil rights laws and other factors inviting litigation in Michigan. Part IV assesses the risk to Michigan's domestic violence framework under the amendment by evaluating a hypothetical claim by a men's group, defenses to the claims, and interpretations of the amendment language advanced by the hypothetical parties.

#### I. CALIFORNIA'S POST-AMENDMENT EXPERIENCE

The effects of Michigan's amendment, so recently enacted, are still uncertain. The uncertainty may be alleviated by considering the impact of the nearly identical California amendment adopted in 1996.<sup>9</sup> The impact in California is instructive because it shows us both the potential overall effects and possible legal implications in Michigan.

Studies have shown that the effect on the ability of women to compete in the economy has been hindered by the amendment.<sup>10</sup> Potential for similar long term results exists in Michigan. Further, as women lose the ability to compete in the economy, they may be forced to become more economically dependant upon abusive men.<sup>11</sup> This dependance, together with poverty, unemployment, and lack of education creates barriers to escaping a violent relationship.<sup>12</sup> In this way California voters put women at greater risk for domestic violence.

California voters also placed California's domestic violence laws and programs at risk for legal challenges by adopting an amendment so fraught with ambiguity. In one case, a man brought suit as an individual and as a civil rights 'tester' against several domestic violence shelters.<sup>13</sup> He sought an injunction against "denial of full and equal access" to the programs.<sup>14</sup> The suit was dismissed for lack of standing since he personally had no need for services at the time of denial and could not establish injury.<sup>15</sup> Also, the statute under which he sued exempted "lawful programs benefitting women" from its prohibition on denial of access to state-funded programs.<sup>16</sup> His claim that this statutory exemption was unconstitutional also lacked standing.<sup>17</sup>

The "testing" in *Blumhorst* was initiated by the Los Angeles Chapter of the Coalition of Free Men [CFM], a men's rights group.<sup>18</sup> In another suit, the CFM challenged the state laws that provided for the creation of shelter services.<sup>19</sup> In that suit, *Coalition of Free Men v. State*, the CFM challenged several state laws employing gender classifications, including the domestic violence legislation, under a taxpayer's suit provision for unlawful expenditure of funds because it "impermissibly included women and not men in domestic violence protection."<sup>20</sup> Among the many statutes challenged was the California Health & Safety code protecting and benefitting victims of domestic violence.<sup>21</sup> Government Code Section 11139, the exemption challenged in the *Blumhorst* case, was again challenged.<sup>22</sup>

Programs provided under the domestic violence code excluded men.<sup>23</sup> Section 11139 exempts "lawful programs benefitting women."<sup>24</sup> Despite these explicit sex classifications, the case was dismissed because the group did not establish any unlawful expenditures of funds to sustain taxpayer standing.<sup>25</sup> They alleged no "personal interest in, or involvement with" the

statutes they charged as unconstitutional for “citizen suit” standing.<sup>26</sup> They could also not show that the unconstitutionality of the statutes harmed the group or its members.<sup>27</sup>

These challenges to California’s domestic violence laws and programs were unsuccessful. Yet because the merits of the cases were not reached, it is unclear whether the statutes violate the California Constitution. Yet, even had the substantive merits been reached, there are many differences between the legal systems of California and Michigan. The CEW study focused on one difference when it warned that Michigan’s domestic violence programs were at risk absent “protection directly comparable to section 11139.”<sup>28</sup> After a discussion of Michigan’s Domestic Violence legal framework in the next section, the following sections of this paper evaluate the risk to domestic violence programs under the amendment in Michigan.

## II. MICHIGAN’S DOMESTIC VIOLENCE FRAMEWORK

Michigan has a comprehensive scheme to address domestic violence, touching criminal law and procedure, civil protection orders, child protection, welfare, and child custody.<sup>29</sup> This section focuses on the Domestic Violence Prevention and Treatment Act (the Act).<sup>30</sup> Challenges to California laws and funding programs for domestic violence attacked overtly sex-specific language.<sup>31</sup> Michigan’s Act never uses gender-neutral language, and the CFM’s favorably cited the Act as an example of a non-discriminatory law.<sup>32</sup> For instance, the purposes of the Act are unrelated to gender or sex. Its purposes are to:

provide for the prevention and treatment of domestic violence; to develop and establish policies, procedures, and standards for providing domestic violence assistance programs and services; to create a domestic violence prevention board and prescribe its powers and duties; to establish a domestic violence prevention and treatment fund and provide for its use; and to prescribe the powers and duties of the family independence agency.<sup>33</sup>

Just as there is no sex or gender specific language in the purposes section of the Act, the definition of domestic violence used throughout the act is gender neutral as well. It is defined as certain specified acts or conduct carried out by a “person that is not an act of self-defense.”<sup>34</sup> The conduct must be carried out against “a family or household member”<sup>35</sup>

The Act also created the Michigan Domestic Violence Prevention and Treatment Board [MDVPTB] to undertake a variety of activities aimed at the prevention and treatment of domestic violence, none of which reference the sex or gender of victims. These activities include monitoring, developing standards for, and providing planning and technical assistance for local domestic violence programs and services funded under the act.<sup>36</sup> The MDVPTB is empowered to undertake research and advocacy activities to increase public awareness and mobilize public influence against domestic violence.<sup>37</sup> It may also perform studies and make legal and policy recommendations to State governmental decision-makers.<sup>38</sup>

The Act established the Domestic Violence Prevention and Treatment Fund in order to fund these activities and provide grants to local domestic violence programs.<sup>39</sup> The Family Independence Agency was original charged to administer the fund and establish “qualifying criteria for awarding grants or contracts. . . and may specify conditions for each grant or contract” together with the MDVPTB.<sup>40</sup> This responsibility is overseen by the Department of Human Services (DHS).<sup>41</sup> The DHS awards grants or contracts from the fund—subject to MDVPTB approval—to support local programs in the establishment, development, implementation, or maintenance of shelter or training programs, or other “effective means for the prevention and treatment of domestic violence.”<sup>42</sup>

Emergency shelter service is funded on a gender-neutral basis, and the Act approves equally the provision of shelter “directly” at the program’s facility or “indirectly at transient or residential facilities available in the community.”<sup>43</sup> Regardless of where shelter is provided, a program is funded only if it provides at least three of the following services: crisis and support counseling, emergency health care services, legal assistance, financial assistance, housing assistance, transportation assistance, and child care services.<sup>44</sup> The Act is wholly silent with respect to the sex or gender of program beneficiaries.

The Act mandates that local programs secure at least one-fourth of their operating budgets independently of the fund.<sup>45</sup> In addition to this limitation, the Act also specifies that grant or contract preference will be given to an applicant who utilizes “voluntary personnel or available community resources” in establishing emergency shelter services.<sup>46</sup> While gender-neutral, these criteria tend to favor existing programs with well-established non-state funding sources and volunteer networks.

Only non-profit local agencies are eligible for participation in the competitive award process and funding sources include state and federal sources.<sup>47</sup> The State portion of the fund comes from the general fund.<sup>48</sup> Federal funding sources include TANF, Family Violence and Prevention Services, Violence Against Women Formula Grants.<sup>49</sup> While the Act provides that DHS annually evaluate award recipients on certain criteria established by the act—including a “description of the programs and services provided, an analysis of the effectiveness of the programs and services, and an accounting of the use of state funds for the program and services”—it specifies no method of review.<sup>50</sup> Since 2000, the method used has been peer review.<sup>51</sup> The peer review program evaluates local programs’ compliance with quality assurance

standards, both mandatory and recommended, promulgated by the MDVPTB.<sup>52</sup> The review team for each local program includes members of MDVPTB and individuals from local programs.<sup>53</sup>

The Domestic Violence Prevention and Treatment Board Grants are reportedly gender neutral, providing “emergency shelter and related services to victims of domestic violence and their children, transitional supportive housing, and education to service providers and policy makers.”<sup>54</sup> Yet, the beneficiaries of the program are predominantly female. In 2007, 49 local programs were awarded \$14,844,015 from the fund.<sup>55</sup> Only one of the programs publicizes that it admits men to shelter, while several publicize that they house and serve only women, although accommodations for male survivors may more often be made.<sup>56</sup>

### III. UNKNOWN IMPACT ON CIVIL RIGHTS LAW AND OTHER UNCERTAINTIES INVITING LITIGATION

This section discusses whether the Act, and the programs and procedures established by it are likely to be challenged under the new amendment. To adequately make this assessment, the actual or apparent legality of the Act and programs under pre-existing law must be evaluated.

#### *A. The Domestic Violence Framework under Pre-Amendment Civil Rights Law*

Could a men’s group have challenged the local domestic violence programs under Michigan law prior to the amendment’s adoption because they are denied equal access to the same shelter facilities as women or that they are unable to enjoy the advantages of group counseling with women victims of domestic violence? Prior to the amendment, the group would have brought suit under Michigan’s Elliot-Larsen Civil Rights Act (Civil Rights Act).<sup>57</sup> Both the state agencies and the programs are “public services” under Article 3 of the Civil Rights Act as “public services.”<sup>58</sup> Public service is defined as a “department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency

thereof, or a tax- exempt private agency established to provide services to the public.”<sup>59</sup> Article 3 provides that no legal entity may “deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of a . . . public service because of . . . sex.”<sup>60</sup> The claim appears to fall within the section, but no case has successfully challenged the local domestic violence programs or the Act.<sup>61</sup>

Such challenges would probably have failed because the Civil Rights Act’s “except where permitted by law” qualification to the above was interpreted consistent with controlling Supreme Court precedent respecting gender discrimination.<sup>62</sup> In reaffirming the Supreme Court’s intermediate scrutiny standard for gender distinctions, a Michigan Court of Appeal held that “merely because the state engages in a practice that treats men and women differently, it does not necessarily mean that it engages in unlawful gender discrimination” under the Civil Rights Act.<sup>63</sup>

Programs which run afoul of the new amendment would no longer be permitted by law for the purposes of the Civil Rights Act. Therefore, if “preferential treatment . . . on the basis of sex . . . in the operation of . . . public contracting” is construed to apply to the domestic violence programs, they may no longer be permitted. It remains an uncertainty, however, what effect the Michigan courts will decide the amendment has on existing civil rights law, especially the Civil Rights Act. This uncertainty invites litigation testing the potential changes, as do the other factors discussed in the next section.

#### *B. Other Factors Inviting Challenges to the Domestic Violence Framework*

As discussed by commentators in the context of the California amendment employing identical language, the unclear and ambiguous language of the amendment is problematic.<sup>64</sup>

Such uncertainty and the concomitant uncertainty of legal rights and obligations is likely to lead to litigation by individuals and government agencies.

As was noted by commentators of the California system, in Michigan too, the Courts are the institutional actors ultimately poised to resolve the ambiguities.<sup>65</sup> The amendment does not provide for legislative implementation or interpretation because it is “self-executing.”<sup>66</sup> The federal courts are unlikely to advance an interpretation before the state’s highest court has done so.<sup>67</sup> While, of course, the people retain the power to amend or clarify the amendment, no definition of any of its ambiguous terms would garner sufficient support. Since the public seems to be sharply divided even with respect to the meaning of “affirmative action,” a clarification from the people is remote.<sup>68</sup> As plaintiffs may pursue the same remedies under the amendment available previously for violations of civil rights, the Michigan Civil Rights Commission may apply the amendment language to individual claims.<sup>69</sup> Nevertheless, since plaintiffs are permitted to go directly to the courts, they may elect to do so if they anticipate a more favorable interpretation of the amendment for their particular claim.<sup>70</sup>

That Michigan courts ultimately must interpret the amendment’s uncertain text is certain to lead to litigation, but not necessarily to litigation challenging the domestic violence framework in the specific. Nevertheless, since certain groups and associations have as part of their mission challenging domestic violence laws and programs, there is significant motivation for such suits.<sup>71</sup> The State agencies and local programs are well advised to be prepared to defend against them. The following section will facilitate such preparedness with a discussion of the hypothetical claims of a men’s rights group that could be raised under the new constitutional amendment and an assessment of their potential for success.

#### IV. ASSESSING THE AMENDMENT’S THREAT TO MICHIGAN’S DOMESTIC VIOLENCE FRAMEWORK

This section evaluates the best arguments available in a hypothetical claim testing the constitutionality of the Act and the actions of the DHS, the MDVPTB, and local programs implementing it. The potential claims and defenses will first be raised, along with the interpretation each side would likely advance to sustain its respective claims or defenses.

##### *A. Hypothetical Claims Challenging the Framework and Available Defenses*

This section assumes a members of a hypothetical men’s rights group, Towards Mens’ Constitutional Equality [TMCE] raises constitutional challenges to Michigan’s domestic violence framework. This section analyzes the TMCE’s best potential claims and arguments, and the likely defenses of the State, Agencies, and the local programs.<sup>72</sup>

##### *1. TMCE Claims and Interpretations of the Amendment’s Language*

1.) The state and shelter programs jointly violate the constitution because the shelter’s policy and practice of not providing male victims of domestic violence with shelter and victims’ counseling services equal to that provided female victims is an unlawful preference for female beneficiaries of the “operation of public contracting.” 2.)The MDVPTB and DHS violate the constitution by unlawfully funding, regulating, and approving the unlawful preferences through grants of state money. 3.) The eligibility criteria under the act are an unlawful preference for programs which unconstitutionally grant preferential treatment to female victims of domestic violence at the expense of male victims of domestic violence. 4.) The manner of administration of the ACT by DHS and MDVPTB (in promulgating, implementing, and overseeing the quality

assurance programs and procedures) is an unlawful preference for programs which unconstitutionally grant preferential treatment to female beneficiaries.

To prevail on these claims, the TMCE will have to persuade the court to adopt a very broad interpretation of the amendment language. This interpretation provides that the amendment prohibits preferential treatment in which sex is a factor in award or performance of public service contracting by the state, where the action would be permitted by but not required by the federal equal protection clause to remedy established violations of the clause.

## *2. Defendants' Interpretation and Defenses*

The local domestic violence programs and the State agencies will defend by claiming: 1) The TMCE does not have standing to bring the suit. 2.) The claims fail for want of state action. 3.) The complained of actions are not “preferential treatment,” and are not within the “operation of . . . public contracting” intended by the amendment. 4.) Even if they are, the programs and the Act are exempt from the amendment’s application.

To prevail on its defenses, the hypothetical defendants will seek to persuade the court to adopt a much more narrow interpretation of the amendment language than that advanced by the TMCE. The state agencies and the local domestic violence programs will have to persuade the court that preferential treatment in the operation of public contracting means action by the state only, and only in the award of public contracts where the decision to award the contract is predominantly based on the sex of the owner of the enterprise.

## *B. Rules applied by Michigan Courts in Constitutional Construction*

Since both the claims and defenses turn on the court’s construction of the amendment’s language, the next sections discuss how Michigan courts interpret constitutional provisions. The interpretation advanced by the TMCE—urging a very broad application—will be contrasted with the interpretation advanced by the Defendants, which urges a much narrower application. The Michigan rules of constitutional construction will be applied to determine whether either interpretation can be ruled out.

*1. The First Rule of Constitutional Construction—The Common Understanding*

Where the people of the State of Michigan adopt a constitutional amendment, Michigan Courts apply three rules of constitutional construction. First, courts look to the “common understanding” of the language by the people in adopting the amendment.<sup>73</sup> In simple terms, this requires courts to apply the meaning that most people who voted for the amendment would think that it means. As has already been discussed, however, the amendment language is ambiguous, and unsettled, undefined terms are employed in the text. The first rule of construction is therefore of no help under these circumstances.

*2. The Second Rule of Constitutional Construction—Circumstances and Purposes*

Where—as here—the words’ meanings are uncertain, Michigan courts use a second rule to find the common understanding. Courts attempt to glean the voters intended meaning from the “circumstances surrounding the adoption of a constitutional provision and the purposes sought to be accomplished.”<sup>74</sup> The next sections analyze the interpretations advanced by the hypothetical claims and defenses to determine whether either is precluded or preferred by the second rule.

*a. Circumstances Surrounding Adoption*

Michigan courts look to written materials published and circulated by the amendment's proponents, their representations, the ballot language, and the actual language that appearing on the ballot.<sup>75</sup> The petition text indicated that the amendment would "prohibit the State from discriminating against, or granting preferential treatment to, any individual or group on the basis of . . . sex. . . in the operation of ...public contracting."<sup>76</sup>

Although this language is identical to that of the final amendment, many signature gatherers represented that 'preferential treatment' did not encompass affirmative action programs, and some asserted the amendment would protect them.<sup>77</sup> A federal district court found that "the [Michigan Civil Rights Initiative] and its circulators engaged in pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action."<sup>78</sup> This undermines the usefulness of the petitions and contemporaneous statements as evidence of voters' understanding.

When the ballot summary of the proposal was prepared and approved, it was headed, "A proposal to amend the state constitution to ban affirmative action programs that give preferential treatment to groups or individuals based on . . . gender."<sup>79</sup> The summary indicated that the amendment would "[b]an public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their ...gender...for public...contracting purposes."<sup>80</sup> It listed the covered public institutions, but had no "including, but not limited to language" as did the final amendment.<sup>81</sup>

This language raises several inconsistencies from the petition language and that of the final amendment. It appears to use of the phrase "preferential treatment" to mean a subtype of affirmative action, but petition gatherers specifically disclaimed that the amendment would affect

affirmative action.<sup>82</sup> The structure of the sentence suggests that only established official affirmative action programs would be encompassed in the phrase “in the operation of.” This appears to exclude both outreach programs and policies that inadvertently favor any of the specified classes. Inconsistently, and at the same time it appears to broaden the intended scope of public contracting because “for purposes of” suggests an even broader application than the amendment’s “in the operation of” language.<sup>83</sup> It also muddies the state actor issue because it offers an exhaustive list of entities covered by the amendment, while the final amendment does not.<sup>84</sup>

Clearly, no common understanding can be gleaned from these inconsistent messages in the written materials over the course of the amendment’s evolution, especially given the findings of fraud at the petition level. The next section discusses whether the court can discern the voters’ intent from the purposes sought by the amendment’s adoption.

*b. The Purposes Sought by the Amendment’s Adoption*

The purposes sought by the amendment are also unclear. From the timing and sponsorship of the amendment, it is a fair assumption that the public and electorate intended to respond to the race-based affirmative action cases decided by the Supreme Court in *Grutter v. Bollinger* and *Gratz v. Bollinger*.<sup>85</sup> Whether they intended a more permissive or less permissive view than the Supreme Court reached is unclear.<sup>86</sup> Beyond that it is unlikely that voters gave much thought to the other potentially far reaching implications of the amendment’s adoption. The intended scope of the public contracting provision, in particular, is nowhere discussed in the petition or any of the materials, so it is unlikely that any common purpose can be found with respect to that provision.<sup>87</sup> Even the sponsors of the petition avoid focusing discussion on the

public contracting provision in materials addressing frequently asked questions, focusing instead on the public education context.<sup>88</sup>

As the foregoing discussion has demonstrated, the second rule of constitutional construction casts little illumination, if any, upon which interpretation advanced is the proper interpretation to resolve the hypothetical case. With some good fortune the third rule—discussed in the next section—will clear matters up for the court. This rule admonishes courts that “an interpretation that does not create constitutional invalidity is preferred to one that does.”<sup>89</sup>

### *3. The Third Rule of Constitutional Construction—Avoid Constitutional Invalidity*

The third rule of constitutional construction would constrain the courts to find that the proper interpretation of unclear terms should not invalidate other constitutional provisions, state or federal.<sup>90</sup> Any interpretation of the amendment adopted must not create invalidity with respect to the requirements of the federal and state equal protection clauses, and cases interpreting them. Several aspects of these clauses bear upon the proper interpretation of the phrases “preferential treatment”, “in the operation of . . . public contracting”, and the language “includes, but is not necessarily limited to” in the definition of state. The next section discusses each of these provisions in turn.

#### *a. Interpretation of the “Preferential Treatment”*

The Michigan Courts have held that the protection offered under the state equal protection clause is the same as that under the federal equal protection clause as construed by the Supreme Court.<sup>91</sup> In addition, the federal Equal Protection is the baseline protection for the people of the State of Michigan. Even in interpreting the Michigan Constitution, the state courts can be more, but no less protective.<sup>92</sup> Therefore, any interpretation advanced can create

constitutional invalidity only if it goes below the minimum protections of the federal equal protection clause discussed in the next section.<sup>93</sup>

#### i. Level of Scrutiny in Sex Discrimination

State laws providing “dissimilar treatment for men and women . . . similarly situated” violate the federal equal protection clause.<sup>94</sup> In *Craig v. Boren*, the Supreme Court articulated that the equal protection guaranteed by the fourteenth amendment prohibits gender classifications unless they “serve important governmental objectives and . . . [are] . . . substantially related to achievement of those objectives.”<sup>95</sup> The justification advanced by the state for the use of gender classifications must be “exceedingly persuasive” and not pretense for another rationalization.<sup>96</sup> In *United States v. Virginia* the Court found the exclusion of one sex from a prestigious educational program and the creation of an inferior alternative for the other sex was unconstitutional.<sup>97</sup>

Yet, the Supreme Court has also recognized that men and women are not similarly situated due to certain susceptibilities, and such legitimate differences may warrant special protective measures.<sup>98</sup> One commentator argues that domestic violence legislation and women-only shelters would withstand strict scrutiny under this doctrine because strong empirical evidence supports the assertion that men and women are not similarly situated with respect to domestic violence.<sup>99</sup> Nevertheless, that the federal equal protection clause would permit states to offer special protections to women does not necessarily require them to do so. The only interpretation of the amendment that could violate the federal equal protection clause would be one which prohibited what the clause required.<sup>100</sup> In the next section the meanings advanced will be examined in the context of the Supreme Court’s affirmative action jurisprudence.

## ii. The Affirmative Action Context

The Supreme Courts affirmative action similarly suggests that the state is not required to engage in affirmative action, and may in fact may prohibit practices that the federal constitution does not require.<sup>101</sup> In an early affirmative action case, *Regents of University of California v. Bakke*, the Court discussed “serious problems of justice” associated with preferential treatment that it felt could reinforce stereotypical views that “certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”<sup>102</sup> In *Grutter* the Court asserted that race based admissions processes could not “unduly harm members of any racial group.”<sup>103</sup> In *Gratz*, the prohibited admission policies mechanically applied a race-based point system which had the effect of giving disproportionate consideration to race compared with other factors.<sup>104</sup> It is likely that these last two cases were in the minds of those voting for and against the amendment.

The Supreme Court has also decided cases involving impermissible preferences in the award of contracts to women and minority owned businesses. *City of Richmond v. J.A. Cronson Company* established that before a state can justify a minority set aside based on race, the governmental unit must provide evidence that it has actually discriminated in the past against minorities in awarding public contracts, and that disparate numbers and general societal discrimination alone are never enough.<sup>105</sup> The case also affirmed that strict scrutiny was required in remedial race-based classifications.<sup>106</sup> Although the Court did not address the level of scrutiny for sex-based preferences in *Cronson*, a lower court holding requiring that set-asides to women-owned businesses required intermediate scrutiny was affirmed in *Milliken v. Michigan Road Builders' Association*.<sup>107</sup>

In this context, the circumstances under which a state will be permitted to grant preferences in public contracting are already extremely limited; states are still in no wise required to extend such preferences. Interpreting the amendment's preferential treatment language to encompass those programs that are permitted by the federal equal protection clause poses no problem for the Michigan constitution, either, since it requires no greater protection.

Additionally, the reputation of the current Michigan Supreme Court suggests that it would have little trouble asserting the broadest possible application of the amendment, including the broadest meaning for preferential treatment, if it viewed that interpretation as more politically popular.<sup>108</sup> One commentator, writing before the amendment's adoption, suggested that decisions of the Michigan Supreme Court demonstrate its dislike of 'reverse discrimination' and that it could be poised to declare the practice unconstitutional under the Michigan Constitution.<sup>109</sup> The author concluded that the Michigan Supreme Court's Justice "Markman believes that the Michigan Constitution is color-blind. Such a Constitution does not tolerate racial preferences."<sup>110</sup>

### iii. Conclusion

Since it is likely that the intermediate scrutiny standard will still apply, and that the state is not required under the federal precedent to provide affirmative action in public contracting, no constitutional invalidity is created if the court adopts TMCE's very broad interpretation of the amendment—prohibiting programs providing any form of preference even remotely grounded in sex that are permitted but not required by the constitution. Since the state can provide more protection, there is no invalidity created by the defendants' narrower interpretation, either. Thus, the meaning and scope of the term "preferential treatment" is not resolved by the third rule of

interpretation discussed in this section. In the next section, the scope and meaning of the phrase “in the operation of public contracting” will be examined under the third rule.

*b. Interpretation of the Phrase “in the Operation of . . . Public Contracting”*

One possible interpretation of the phrase “in the operation of . . . public contracting” is that the public contracting provision was meant to apply only in the selection or award of public contracts, not to the performance of the contract.<sup>111</sup> The defendants advance this interpretation, arguing that the owners or operators of the enterprise granted the contract, not the contracts intended beneficiaries, must be granted a preference for the amendment to apply. The TMCE would clearly disagree. The discussion in this section first evaluates the meaning of the phrase “in the operation of.”

This modifying phrase could have at least two purposes. First, the phrase could define the requisite level of intent required for the amendment to apply to the given action.<sup>112</sup> Second, it could be meant to define the proximity or nexus between the category of conduct and the preferential treatment.<sup>113</sup> In the public contracting context, construing the nexus as far-reaching could extend the scope to aspects of public contracts’ performance as well as their award.<sup>114</sup> Each of these possibilities is discussed in the next section.

*i. Requisite Level of Intent*

The “in the operation of” language could have been influenced by *Griggs v. Duke Power Company*, which established liability for discriminatory impact in the Title VII context.<sup>115</sup> The argument that the amendment meant to establish a ‘preferential’ impact standard could follow.

Whether such an interpretation would create constitutional invalidity depends again upon cases interpreting the federal and state equal protection clauses.

In *Washington v. Davis* the Supreme Court held that discriminatory impact or effect, without a discriminatory purpose did not violate the federal Equal Protection Clause.<sup>116</sup> In *Personnel Administrator v. Feeney*, the court defined discriminatory purpose as “more than intent as volition or intent as awareness of consequences.”<sup>117</sup> The decision-maker would have to have “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects” upon a particular group.<sup>118</sup> The same approach is adopted by the Michigan courts.<sup>119</sup> Since this doctrine has been settled by the state’s highest court, it is not likely impliedly changed by the amendment. TMCE will have to establish intent to grant preferential treatment—disproportionate effect or impact is not enough.<sup>120</sup>

#### ii. The Expanded Scope of Public Contracting

The Supreme Court contracting cases address set-aside programs to minority businesses because this was the practice being challenged in those specific cases.<sup>121</sup> While the cases explicitly applied to the award of a contract, the broader principle that they espoused was that when government chooses to provide economic benefits it may not do so on the basis of race or sex. States must find other criteria on which to base programs designed to enhance “equality of economic opportunity.”<sup>122</sup> The shelter programs provide a host of economic benefits to the participants including food, shelter, clothing, essential needs, advocacy in legal, housing, and financial areas, and more. While some of these economic benefits are available in alternative settings, the enhanced efficiency of single location access is sacrificed in these alternative

settings.<sup>123</sup> Michigan courts could conclude that the discriminatory economic entitlements of beneficiaries of the programs should be considered under the amendment as well.

The Michigan courts are not required to limit the application of the state equal protection clause to the identical situations to which the federal equal protection clause has been applied in any particular context. Under Michigan law, public contracts are defined to include those “with a governmental entity for the carrying out or completion of any public work”<sup>124</sup> While licences “granted by a governmental activity to engage in certain activity, such as the sale of intoxicating beverages” are excluded, grants and contracts for provision of public services by private entities are notably not excluded from the definition.<sup>125</sup>

Sex-based preferences in the award of public contracts were already prohibited prior to the adoption of the amendment.<sup>126</sup> It is therefore difficult to articulate what this clause of the amendment could have been meant to achieve if not to broaden the scope of public contracting to include aspects of performance as well as award. Finally, any interpretation which did not broaden the scope of the public contracting provision beyond the mere award of a contract would enable a state to subvert the amendment by contracting with private entities who could freely establish affirmative action themselves, immune as private actors.<sup>127</sup>

### iii. Conclusion

No constitutional invalidity is created by either limiting the scope of the “in the operation of . . . public contracting” language to contract awards or expanding the scope of the public contracting provision to include aspects of performance. However, a similar prediction could be made here as was made in the preferential treatment context that the interpretation more likely to be chosen by the Michigan Supreme Court is one more broadly applicable to “reverse discrimination.”<sup>128</sup>

*c. Interpretation of the Amendment's Definition of State*

The final troublesome provision implicated by the claim is the definition of state. The general rule is that the Michigan Constitution is meant to apply only to state action.<sup>129</sup> Nevertheless, the definition of “state” in the amendment could not invalidate any other provision or interpretation of the state constitution because by its terms it is meant to apply only to that section.<sup>130</sup> Thus, the third rule of construction is therefore also of no help in clarifying the definition of state under the amendment.

Like the first and second rules of constitutional construction already discussed, the third rule of constitutional construction—that interpretations advanced must not create constitutional invalidity—is unhelpful in interpreting any of the troublesome language at issue in the hypothetical claims and defenses. For that reason, the interpretation preferred by the TMCE could permissibly be adopted by the Michigan Courts.

*C. The Fate of the Claims Before the Civil Rights Commission and the Michigan Courts*

As discussed in the last section, the interpretation advanced by the Defendants is also not definitively ruled out by the rules of constitutional construction. Their interpretation is very similar to the interpretation advanced by the Michigan Civil Rights Commission. The interpretation of the Commission, and the weight of authority given to the Commissions interpretations are discussed in the following section, along with an analysis of the hypothetical claims and defenses under that interpretation.

### *1. The Michigan Civil Rights Commission Interpretation*

The Michigan Commission on Civil Rights was constitutionally created to administer the equal protection clause of the Michigan Constitution and execute and interpret Michigan's civil rights statutes.<sup>131</sup> The Commission advanced an interpretation of the amendment on March 7, 2007, in a report for the Governor assessing the impact of the constitutional amendment on Michigan's "commitment to diversity."<sup>132</sup> Its interpretation is that the amendment only applies to public institutions which award contracts through a program not open to all in which the "defining factor" in the decision to award the contract is sex, and no exemption to the amendment applies.<sup>133</sup>

If the court adopted the Commission's interpretation, the TMCE claims would fail for want of state action. The claims against the department and the board will fail because sex is not a defining factor in the award of the contracts. It will not suffice that the services provided are gender specific.<sup>134</sup> Also, the claim that the eligibility criteria under the act are discriminatory fails since the defining factors are utilization of volunteers and community resources, not sex of program participants. With respect to their administration of the act, MDVPTB and DHS award grants based on programs' effectiveness, not on beneficiary sex. Under the Commission's interpretation, the programs are outside the amendment's scope and a discussion of the exemptions would never need to be reached.<sup>135</sup>

While it is very likely that the claims would fail under the Commission's framework, this does not end the analysis. The Michigan Courts are not bound to defer to the Commission's interpretation.<sup>136</sup> Also, the TMCE is likely to bypass the commission and challenge the Act and the programs directly in court. In the next section, we revisit the hypothetical claims and attempt to predict how a Michigan Court would resolve them, bearing the foregoing discussions in mind.

## *2. Analysis of Claims and Defenses by Michigan Courts*

This section assumes that the Michigan court has wholly adopted the interpretation of the amendment advanced by the TMCE. The terms at issue, “preferential treatment” and “in the operation of . . . public contracting” are given their broadest reading by the Michigan Courts, since, under the rules of constitutional construction, such interpretations are possible. Doing so permits the assumption that providing segregated shelter and counseling is preferential treatment, and that states’ funding such services engage in preferential treatment. It also permits the assumption that providing a competitive grant is public contracting, and that public entities may not grant preferential treatment to one sex in the performance of such contracts any more than they may in their award. Given these assumptions based on a broad interpretation of the language, the substance of TMCE’s claims are supported. The success of their claim requires they overcome the defenses of the local programs and state agencies, which are discussed in the next section examines whether the other defenses asserted have the potential to succeed.

### *a. Standing*

TMCE must first establish standing to sue to prevail on its claim. While a full analysis of statutory standing is beyond the scope of this paper, at least two avenues are probably available to the group.<sup>137</sup> Provided TMCE meets the statutory requirements, and assuming that is can, the group will nevertheless have to meet constitutional standing requirements, identical in Michigan to the federal standard.<sup>138</sup>

First, TMCE must have suffered “injury in fact.”<sup>139</sup> TMCE could establish that denial of integrated service led to concrete harm in the form of lost communal support, economic advantage of access to multiple on-site services, isolation, and injury from the perpetuation of stereotypes

harming male victims of domestic violence. Second, TMCE must show that the injury it suffered is “fairly traceable to the challenged action of defendant,” and not of anyone else.<sup>140</sup> The harm is traceable to shelters, agencies, and the Act because they operate, fund, and authorize facilities which deny integrated shelter and trauma counseling to men. Third, TMCE must show that it is “likely” that the harm suffered will be “redressed by a favorable decision.”<sup>141</sup> This is only likely if TMCE requests that men be admitted or that separate facilities be funded. Cutting off funding or closing shelters won’t address the alleged harm. Finally, TMCE has standing as an association to sue on members’ behalf “where such members would have standing as individual plaintiffs.”<sup>142</sup> This requirement might be difficult to meet, unless the court reads the amendment’s expansion of protection against discrimination and preferential treatment to “groups” as altering the standing doctrines.<sup>143</sup>

*b. State Action*

Since the definition of state under the amendment is unclear, the plaintiffs would likely have to establish that the challenged preferential treatment is state action under the Michigan Constitution.<sup>144</sup> The local programs are private non-profit entities to whom the amendment will not directly apply. DHS and MDVPTB are state actors, but not directly discriminating. In order for MDVPTB and DHS to be liable for the conduct of the private entities or for the private actors’ conduct to be transformed into state action, there must be a “sufficiently close nexus” between the activities of both sets of actors.<sup>145</sup>

For TMCE, the joint action theory and symbiotic relationship theories are the best means to establish such a nexus. TMCE could argue that the state acts together with members of individual domestic violence programs to regulate the programs and approve continued state funding.<sup>146</sup>

TMCE could also argue that the programs and the state agencies have a peculiar, interdependent relationship from which they both benefit and rely on for continued existence.<sup>147</sup> Relevant to both theories, shelter staff and MDVPTB members act together as quality assurance monitors to establish funding eligibility, state agencies actively solicit additional funding sources on programs' behalf<sup>148</sup> Applying these facts, a court could find state action in TMCE's favor.

*c. Exemptions in the Text of the Amendment*

As the foregoing discussion established, the TMCE could successfully argue that they have standing to assert the claims and that the conduct they oppose is state action under Michigan case law. This suggests that hypothetical defendants' best defense lies in the explicit exceptions to the amendment. The next sections discuss the applicability of the two defenses to the Act, the criteria, and the segregated shelter and counseling practice of the local programs.

*i. Eligibility for Federal Funds:*

The amendment provides an exemption for 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."<sup>149</sup> While the Fund distributes federal funds, it does not appear that federal law requires that the local domestic violence programs segregate facilities and counseling services based upon sex. While the Violence Against Women Act uses gender-specific language, and its stated purposes are gender specific, it does not *mandate* segregated services.<sup>150</sup> The Family Violence Prevention and Services Act mandates non-discrimination by programs receiving federal funds, but allows for consideration of "programmatic factors" based on sex.<sup>151</sup> Nothing in either act requires woman-only services for funding eligibility, so the exemption probably would not apply under the hypothesized facts.

## ii. Bona Fide Qualifications:

Additionally, there amendment states it should not be interpreted to prohibit “bona fide qualifications based on sex that are reasonably necessary to the normal operation of . . . public contracting”<sup>152</sup> This exemption is very likely available to the domestic violence programs and laws, and to the state agencies since two integral purposes of the laws and programs necessitate the segregated services.<sup>153</sup> One paramount purpose of the laws, grants, and shelters is the safety of the victims of domestic violence.<sup>154</sup> Another is the empowerment of survivors of domestic violence.<sup>155</sup>

Requiring the shelter and support groups to admit men would jeopardize the safety (physical and psychological) of the survivors. Men seeking shelter or access to group counseling together with women pose two threats to the safety of survivors. First, there is a risk that the presence of any man could produce fear and anxiety in women who due to trauma may have fear of men as a group.<sup>156</sup> Second, the benefits that have been shown to flow from the women-only spaces would be lost.<sup>157</sup> A further risk that any male seeking services could be a attempting to gain access to a present or former victim could not be eliminated by a screening process, no matter how intensive, without simultaneously violating the empowerment philosophy.<sup>158</sup> In addition, such an intensive screening process could never alleviate the emotional trauma response that is likely to be triggered in victims seeking safety from the generalized male abuser.

Furthermore, the qualifications must be “reasonably”—not absolutely—necessary to the “normal” operation of the program.<sup>159</sup> Providing shelter at separate facilities is reasonably necessary for the reasons discussed above, provided the men’s services are comparable. Privacy is also an important consideration. Support groups for men could be established, and would be

reasonable if there was sufficient demand. In conclusion, the existing services likely satisfy the exemption.

Although the programs are likely exempt from the amendments' application, even assuming the broadest possible interpretation given the language, two things should be remembered. Courts may interpret the bona fide qualification provision narrowly to prevent its application to other contexts. Additionally, no bona fide qualifications based on race are permitted, so women of color programs could be at risk.

### CONCLUSIONS

The foregoing analysis has shown that the claim made by the CEW study at its outset—that domestic violence programs are in danger in Michigan under the amendment—is not likely true.<sup>160</sup> However, the fact that the broad interpretation advanced by the TMCE cannot be definitively ruled out by the Michigan courts' established rules of constitutional construction illustrates the potential sweep of the amendment under such an interpretation. Since the Michigan Supreme court has shown a willingness to root out and eviscerate 'reverse discrimination,' it may be more likely to interpret the amendment broadly and the exceptions narrowly. State agencies and local programs which serve victims of domestic violence may wish to review policies and practices to eliminate any hint of preference for women over men in the exercise of their functions, apart from segregated shelter facilities and group counseling.

Such services constitutionally distinguish between the sexes, as has been discussed in this paper. State agencies and local programs may also wish to consider a request for a declaratory judgment in Michigan state courts as the constitutionality of these services. Although legal challenges to the framework will probably fail, if brought, they must be defended. Legal defense

expenses will be drawn from already scarce funding. Additionally, the threat of such legal challenges gradually erodes innovation and inhibits collaboration between the State and private agencies in the prevention and treatment of domestic violence, transforming the creative exploration of prevention and outreach possibilities to constant compliance assessment.

And, finally, the analysis of “outlier” claims such as this one can advance an overall interpretation of the amendment with greater integrity. When Michigan courts consider potential results in unexpected contexts flowing from an interpretation adopted to favor a certain result in a different context, they may be less likely to make decisions based on politics. The absurd result that nearly ensues from application of the amendment to this hypothetical claim illustrates that the courts are well advised to bear such claims in mind when determining the amendment’s breadth.

---

1. RONALD DWORKIN, LAW'S EMPIRE 1 (1986).

2. The amendment in its entirety reads:

**§ 26 Affirmative action programs.**

Sec. 26. (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.

MICH. CONST., art. I, § 26 (amended 2006).

3. The ambiguity of the word vehicle (whose meaning is relatively clear) posed perplexing problems with respect to the conflicting rights of users of a park in a well known example by H.L.A Hart. He discusses the resolution of such ambiguity:

When we are bold enough to frame some general rule of conduct (e.g. a rule that no vehicle may be taken into the park), the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds...On the other hand, until we have put the general aim of peace in the park into conjunction

---

with those cases which we did not, or perhaps could not initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction, indeterminate. [When we confront the unanticipated case]. . .we shall have rendered more determinate our initial aim, and . . . settled . . . the meaning . . . of a general word.

H.L.A. HART, *THE CONCEPT OF LAW* 128-29 (Oxford Univ. Press, 2d ed.)(1994). This paper confronts the impact of an unanticipated case on the language of the amendment.

4. MICH. CONST., art. I, § 26(2)(amended 2006). For a discussion of how the inclusion of “group” protection from preferential treatment may have changed civil rights law in the context of an identical amendment in California, see Neil Gotunda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONSTITUTIONAL LAW QUARTERLY 1135, 1147 (1996). The resolution of this particular ambiguity is not necessarily implicated in this analysis since the hypothetical claim that will be discussed in Part IV concludes that individuals as represented by the group have suffered adverse action individually.

5. MICH. CONST., art. I, § 26(2)(amended 2006).

6. MICH. CONST., art. I, § 26(3)(amended 2006).

7. Susan W. Kauffman & Anne. K. Davis, UNIV. OF MICH. CTR. FOR EDUC. OF WOMEN, *The Gender Impact of the Proposed Mich. Civil Rights Initiative*, April 2006, at p. 3.

8. MICH. CIVIL RIGHTS INITIATIVE, *Big Myths about MCRI*, [http://www.michigancivilrights.org/media/MCRI\\_Myths.pdf](http://www.michigancivilrights.org/media/MCRI_Myths.pdf) (last visited, April 26, 2007) [hereinafter MCRI MYTHS]. The response is given as ‘FACT’ to the following ‘MYTH’: “Scientific research into breast cancer or other gender-specific diseases may be affected, Domestic Violence Shelters may be eliminated; Breast cancer screening centers may be eliminated.” *Id.*

9. Compare CAL.CONST., art. I, § 31 (amended 1996) with MICH. CONST., art. I, § 26 (amended 2006). Subparts (a), (c), (g), and (h) of the former are identical to (2), (5), (6), and (7) of the latter, apart from references to California instead of Michigan. Subpart (b) of the former is very nearly identical to subpart (8) of the latter, the primary changes being word order. The largest difference between the two is that subpart (f) of the California amendment includes the University of California in its list of covered entities, while the Michigan amendment in subpart (1) creates a separate clause prohibiting preferential treatment by state Universities.

10. ©See, e.g., footnotes 29-38 and accompanying text of Kauffmann & Davis, *supra* note 7.

11. Michelle Fine & Lois Weis, *Disappearing Acts: The State and Violence against Women in the Twentieth Century*, 25 SIGNS: J OF WOMEN IN CULTURE AND SOCIETY 1139 AT 1142 (2000).

12. See, e.g. Bonnie E. Carlson, *A Stress and Coping Approach to Intervention with Abused Women*, 46 FAMILY RELATIONS 291, 291-92 (1997).

- 
13. Blumhorst v. Jewish Family Services of Los Angeles, 24 Cal. Rptr. 3d 474 (Cal Ct. App. 2005).
  14. *Id.* at 477.
  15. *Id.* at 481.
  16. *Id.* at 476 n. 3, *citing* CAL. GOV'T. CODE § 11135(a)(2007)(“no person...shall, on the basis of...sex...be unlawfully denied full and equal access to...any program.”) For the exemption relied upon by the shelters, see *Id.* at 477 n.5, *citing* CAL. GOV'T. CODE § 11139 (2002)(prohibiting an interpretation of § 11135 that would “affect lawful programs which benefit. . . women.”)
  17. *Id.* at 477.
  18. *Id.* at 481.
  19. Coalition of Free Men v. State, No. B172883, 2005 WL 713816 (Cal. App. 2 Dist. Mar. 30, 2005).
  20. *Id.* at \*1.
  21. *Id.* at \*1 n.1, *citing* CAL. HEALTH & SAFETY CODE § 124250-124251.
  22. *Id.*
  23. The Coalition of Free Men assert that all the programs provided by the health and safety codes exclude men. See Appellant’s Brief at 7, *Coalition of Free Men v. State*, 2005 WL 779360 [hereinafter CFM Brief]. The Coalition of Free Men has not abandoned the cause to “gender-neutralize” the health and safety code. According to an article reprinted on the website for the Los Angeles Chapter of the Coalition, another lawsuit is pending against the state to change the statute to be gender inclusive. See Justin Kibbe, *Sex Discrimination...A Human Issue, Not A Gender Issue*, MOUNTAIN VALLEY NEWS, June 15, 2006, *reprinted at* <http://www.ncfmla.org/mountain-valley-news-061506.html> (*last visited April 24, 2007*).
  24. CAL. GOV'T. CODE § 11139 (2002)(protecting “lawful programs which benefit . . .women.”)
  25. Coalition of Free Men, 2005 WL 713816, at \*2.
  26. *Id.* at \*3.
  27. *Id.* at \*6.
  28. Kauffmann & Davis, *supra* note 7, at 3.
  29. For a summary of the range of legal areas affected by domestic violence and remedied by statute in one year alone in Michigan, see DOMESTIC VIOLENCE PREVENTION & TREATMENT BOARD,

---

*Summary of Domestic Violence Legislation Passed in 2001-2002*, February 2, 2003, [http://www.michigan.gov/documents/DVlegislation2001\\_21670\\_7.pdf](http://www.michigan.gov/documents/DVlegislation2001_21670_7.pdf) (last visited April 24, 2007).

30. Domestic Violence Prevention and Treatment Act, MICH. COMP. LAWS §§ 400.1501-10 (1978).
31. *See* CFM Brief, *supra*, note 23 at \*7.
32. *Id.* at \*11 n.3.
33. MICH. COMP. LAWS §§ 400.1501-10 (1978)(Purposes).
34. *Id.* § 400.1501(d).
35.
  - I. causing or attempting to cause physical or mental harm to a family or household member
  - ii. placing a family or household member in fear of physical or mental harm.
  - iii. causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress
  - iv. engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened harassed, or molested.

*Id.* § 400.1501(d)(i)-(iv).
36. *Id.* § 400.1504 (a)-©.
37. *Id.* § 400.1504 (d)-(f).
38. *Id.* § 400.1504(e), (g)-(h).
39. *Id.* § 400.1505.
40. *Id.* The “department” charged with these duties is defined in the definitions section to mean the Family Independence Agency. *Id.* § 1501©.
41. The Family Independence Agency is subsumed by the Michigan Department of Human Services (DHS), of which the MDVPTB is a part. *See* MICH. DEP’T. OF HUMAN SERVICES, *Programs*, [http://www.michigan.gov/documents/FIA-FIASum1\\_15556\\_7.pdf](http://www.michigan.gov/documents/FIA-FIASum1_15556_7.pdf) (program list)(last visited April 26, 2007).
42. *Id.* § 400.1506(1)(a)-©.
43. “Emergency shelter may be provided directly at a facility operated by a prime sponsor or indirectly at transient or residential facilities available in the community.”*Id.* 400.1507(1).
44. *Id.* § 400.1507(1)(a)-(g)
45. *Id.* § 400.1506(3).

---

46. *Id.* § 400.1508 (1).

47. REPORT OF THE HOUSE FISCAL AGENCY OF THE STATE OF MICHIGAN HOUSE OF REPRESENTATIVES, “Directory of State-Administered Grants” FY 2005-6, p.10, <http://house.michigan.gov/hfa/PDFs/grants05-06.pdf> [hereinafter HOUSE REPORT].

48. See MICH. DEP’T. OF HUMAN SERVICES, *Sources of Funding*, [http://www.michigan.gov/dhs/0,1607,7-124-5460\\_7261-15032--,00.html](http://www.michigan.gov/dhs/0,1607,7-124-5460_7261-15032--,00.html).

49. *Id.*

50. MICH. COMP. LAWS §400.1509 (1978).

51. See MICH. DEP’T. OF HUMAN SERVICES, *Quality Assurance Program*, [http://www.michigan.gov/dhs/0,1607,7-124-5460\\_7261\\_7274-15258--,00.html](http://www.michigan.gov/dhs/0,1607,7-124-5460_7261_7274-15258--,00.html) (last visited April 24, 2007).

52. See MICH. DOMESTIC VIOLENCE PREVENTION & TREATMENT BOARD, *Quality Assurance Standards: Complete Standards Including Worksheets*, Revised February 2007, *available at* [http://www.michigan.gov/documents/dhs/Standards\\_-\\_Complete\\_-\\_Revised\\_May\\_2006\\_1\\_176115\\_7.pdf](http://www.michigan.gov/documents/dhs/Standards_-_Complete_-_Revised_May_2006_1_176115_7.pdf) [hereinafter MDVPTB STANDARDS].

53. MICH. DEP’T. OF HUMAN SERVICES, *supra* note 51. The peer review process is described more fully in MICH. DOMESTIC VIOLENCE PREVENTION & TREATMENT BOARD, *Pre-Review Packet*, Revised October 2006, *available at* [http://www.michigan.gov/documents/dhs/Program\\_Pre-Review\\_Packet\\_-\\_October\\_2006\\_1\\_176113\\_7.pdf](http://www.michigan.gov/documents/dhs/Program_Pre-Review_Packet_-_October_2006_1_176113_7.pdf).

54. HOUSE REPORT, *supra* note 47.

55. The DHS published a chart listing all award recipients and amounts granted under various funding sources on the DHS website. See MICH DEP’T. OF HUMAN SERVICES, *2007 Award List*, [http://www.michigan.gov/documents/DHS\\_06\\_AwardList\\_164704\\_7.pdf](http://www.michigan.gov/documents/DHS_06_AwardList_164704_7.pdf). These awards include monies distributed for sexual assault prevention and treatment as well as for domestic violence.

56. Of the 49 programs funded by the DHS, many maintain websites on which they provide information about their shelter facilities and domestic violence counseling services. Several utilize gender neutral language when describing services and programs. See, e.g. UNDERGROUND RAILROAD, INC., *Services*, <http://www.undergroundrailroadinc.org/services.html>; DIANE PEPPLER RESOURCE CENTER, *About*, <http://dprcenter.org/about/>; TURNING POINT, INC., *Emergency Services*, <http://www.turningpointinc.com/turning-point-domestic-violence.html>. Several programs use female specific language when describing in-house emergency shelter. See, e.g., SAFE HORIZONS: CAROLYN’S PLACE SHELTER, <http://www.safehorizonsmi.org/carolyns.html> (Safe Horizons also operates a homeless shelter not limited to women); REGION FOUR COMMUNITY SERVICES, *Welcome to Region Four*, <http://www.regionfour.org/> (“The goal of the Women’s Shelter is to give women the resources needed to handle their individual situations”). Many state that group counseling is available only to female victims. See, e.g., LACADA: LAPEER AREA CITIZENS AGAINST DOMESTIC ASSAULT, *Services*, <http://www/lacada.org/services.htm> (“LACADA provides support groups for

---

both women and children”); OASIS FAMILY RESOURCE CENTER, *Domestic Violence Services*, [http://www.cadillacoasis\\_frc.org/dv\\_services.asp](http://www.cadillacoasis_frc.org/dv_services.asp)(offering ‘women’s empowerment support group’). Several state that all programs or the mission of the program is to serve women. *See, e.g.*, EVE: END VIOLENT ENCOUNTERS, INC., *Mission Statement*, <http://www.eveinc.org/missionstate.html>; EVERY WOMAN’S PLACE, <http://www.everywomansplace.org/> (“a crisis center for women and their children). Only one program publicized explicitly that it serves men. *See* HAVEN: HELP AGAINST VIOLENT ENCOUNTERS NOW, *Haven Services*, <http://www.haven-oakland.org/Residential.html> (“Haven does take men into its shelter when they are victims of domestic violence.”)

57. Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.2101-2901 (1976).

58. *Id.* § 37.2301(b).

59. *Id.*

60. *Id.* § 37.2302(a). I use the term legal entity although the text of section 2303 uses “a person” because the definitions section of the act defines person to include “any legal or commercial entity.”*Id.* §2103(g).

61. While it does not appear that any challenges were brought against domestic violence programs, examination of a related claim could be instructive. A claim of sexual harassment against a police officer in the course of routine traffic stops was within the contemplation of Article 3 of the Civil Rights Act, where the officer was found to deny the benefit of ‘public service’ on the basis of sex. *See* *Diamond v. Witherspoon*, 696 N.W. 2d 770, 779-80 (Mich App. 2005). A few issues bear distinguishing. First, the conduct of the police officer obviously was not permitted by law, where the conduct of the domestic violence service providers probably would be apart from the potential impact of the amendment. *See infra*, notes 62-63 and accompanying text. Second, since “only the person whose civil rights are violated may bring a cause of action under the [Civil Rights Act],” the men’s rights group lacks association standing. *See* *Burchett v. Rx Optical*, 591 N.W.2d 652, 656 (Mich. App. 1998). *But see infra*, note 143 for the question of whether the amendment’s expansion of protections against discrimination and preferential treatment to groups may have altered the standing requirement.

62. MICH. COMP. LAWS ANN. §§ 37.2102 (1976).

63. *Alspaugh v. Commission on Law Enforcement StandRXds*, 634 N.W.2d 161, 166 (Mich. App. 2001) *quoting* *Neal v. Dep’t. of Corrections*, 592 N.W.2d 370 (Mich. App. 1998). In this case, the gender-normed physical fitness requirements for police forces was found not to violate the Civil Rights Act. *Id.*

64. *See, e.g.*, Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999, 1004 (1996)(suggesting the undefined terms will lead to the State applying the amendment’s ambiguous terms broadly to its programs and self restricting to avoid litigation); Girardeau A. Spann, PROPOSITION 209, 47 Duke L. J 187, 207-223(1997)(analyzing a number of ambiguities in the text of the California amendment).

---

65. See Spann, *supra* note 63, at 224; Neil Gotunda, et. al, Legal Implications of Proposition 209—The California Civil Rights Initiative, 24 W. State Univ. L. Rev. 1, 104 (1996) (arguing that the adoption of the California amendment “raises more questions than it answers. It has shifted, for now, significant political decision-making on race, ethnicity and gender from the legislature to the courts.”)

66. MICH. CONST., art. I, § 26(7)(amended 2006).

67. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6<sup>th</sup> Cir. 2006)(the uncertainties in the text and scope of application provided no federal grounds for interfering with the implementation of the amendment until the state courts had opportunity to construe its provisions). The Supreme Court refused to vacate the 6<sup>th</sup> Circuit’s grant of stay, thus cementing the implementation of the amendment in *Coalition to Defend Affirmative Action v. Granholm*, 127 S.Ct. 1146 (Mem.)(2007).

68. *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 at \*2 n.1(E.D. Mich.)(Slip Copy)(indicating that the parties to the case did not agree upon the meaning of the term “affirmative action”).

69. MICH. CONST., art. I, § 26 (6)(amended 2006) provides that remedies for violations of the section “shall be the same . . . as are otherwise available for violations of Michigan’s anti-discrimination law.”

70. See, e.g., *Walters v. Dep’t of Treasury*, 385 N.W.2d 695 (Mich. App. 1986)(construing both the Commission’s Constitutional mandate and the Civil Rights Act to allow plaintiff to choose whether to bring civil rights claim to the Commission, Circuit Courts, or both); *also see* *Womack Scott v. Department of Corrections*, 630 N.W. 2d 650 (Mich. App. 2001)(finding no requirement to exhaust administrative remedies before Commission under Civil Rights Act.)

71. See generally Shannon M. Garrett, *Battered by Equality: Could Minnesota’s Domestic Violence Statutes Survive a “Fathers’ Rights” Assault?* 21 LAW & INEQ. 341 (2003)(discussing the prominence, persuasiveness, and tactics of the men’s/fathers’ equality movement).

72. TMCE could seek to challenge domestic violence laws and programs under all three of the areas of state activity that the amendment prohibits state and local laws and state and local government action amounting to “discrimination on the basis of sex” and “preferences” in the following areas: “in the operation of public contracting, public employment, and public education.” Under the public employment clause, TMCE could potentially challenge the hiring of female staff persons at emergency domestic violence shelters, if this is the practice of programs. It could also challenge under the education clause the practice of some domestic violence programs to enter public schools for the purpose of domestic violence prevention education, and the MDVPTB’s preparation of educational materials for that purposes which refer to the abuser as him and the victim as her. While these potential threats are worthy of analysis, this note focuses only on potential claims under the public contracting clause.

---

73. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, The intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that was the sense designed to be conveyed

*In re Proposal C*, 185 N.W. 2d 9, 14 (Mich. 1971), *quoting* THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 81 (6<sup>th</sup> ed. 1890); *also see* *Wayne County v. Hathcock*, 684 N.W. 2d 765, 779 (Mich. 2004).

74. *In re Proposal C*, 185 N.W. 2d at 14, *citing* *Kearney v. Board of State Auditors*, 155 N.W. 510, 512 (Mich. 1915); *also see* *Committee for Constitutional Reform v. Secretary of State*, 389 N.W.2d 430, 432 (Mich. 1986).

75. To determine the common purpose of constitutional amendment to override a school aid legislative measure, the court compared the pre-existing legal landscape in this area with statements by the attorney general, the board of education which first proposed the measure, the legislative histories of the bills in the state legislature, the reaction of the people in petitioning for a constitutional amendment preventing the bill. *In re Proposal C*, 185 N.W. 2d at 15 n.2. The court also looked to the petitioning process, the petitions, news editorials, public statements of the attorney general and the superintendent of education, and the statements of one of the amendment's proponents who played a key role in drafting the amendment. *Id.*

76. *Operation King's Dream*, 2006 WL 2514115 at \*2 n.2 .

77. *Id.* at \*11-12.

78. *Id.* at \*11. This is relevant as evidence tending to rebut that many voters supported the elimination of affirmative action.

79. MICH. STATE BD. OF CANVASSERS, *Approved Ballot Language for Statewide Ballot Proposal Sponsored by Michigan Civil Rights Initiative Committee*, Jan. 20, 2006, *available at* [http://www.michigan.gov/documents/Bal\\_Lang\\_MCRI\\_152610\\_7.pdf](http://www.michigan.gov/documents/Bal_Lang_MCRI_152610_7.pdf) [hereinafter *BALLOT SUMMARY*].

80. *Id.*

81. *Id.*

82. *See* *Operation King's Dream*, 2006 WL 2514115 at \*11-12.

83. *Compare* *BALLOT SUMMARY*, *supra* note 79, *with* MICH. CONST., art. I, § 26(2)(amended 2006).

---

84. Compare BALLOT SUMMARY, *supra* note 79, with MICH. CONST., art. I, § 26 (3)(amended 2006).

85. See *Grutter v. Bollinger*, 539 U.S. 306 (2003)(holding that law school admission policy designed to reach a critical mass of minority students furthered a compelling state interest in educational diversity and was narrowly tailored to achieve that end); *Gratz v. Bollinger*, 539 U.S. 244 (2003)(holding that mechanical race-based point system in undergraduate freshman admissions policy violated the equal protection). The likelihood that the initiative was meant to respond to these cases is suggested by the fact that the campaign followed on the heels of the Supreme Court's decisions, and was co-directed by Jennifer Gratz, the plaintiff in *Gratz*. See Henry Payne, *Putting Preferences to Vote: Connerly Launches Michigan Ballot Initiative*, NATIONAL REVIEW ONLINE, July 10, 2003 <http://www.nationalreview.com/comment/comment-payne071003.asp>. According to Payne, Connerly "came to Michigan to seize back the initiative from a Supreme Court that only three weeks ago made racial preferences the law of the land." *Id.*

86. As a matter of law, regardless of intent, the people could not have permitted by amendment what the Supreme Court did not permit. See *Decher v. Vaughan*, 177 N.W. 388, 389 (Mich.1920). Nevertheless, some voters were told that the amendment would have affirmed the university policies challenged in the cases, which prompted them to sign the petitions. See *Operation King's Dream*, 2006 WL 2514115 at \*5-7. That others voting for the amendment surely wished to restrict the permissiveness of the Supreme Court decisions is suggested by statements of the initiatives' sponsors that "adoption of this amendment will have the effect of setting a higher standard than the Supreme Court ruling here in Michigan." MICH. CIVIL RIGHTS INITIATIVE, *Proposal 2—Frequently Asked Questions*, [www.michigancivilrights.org/media/http://www.michigancivilrights.orghttp://www.michigancivilrights.orgMCRI\\_FAQs.pdf](http://www.michigancivilrights.org/media/http://www.michigancivilrights.orghttp://www.michigancivilrights.orgMCRI_FAQs.pdf) (last visited April 26, 2007)[hereinafter MCRI FAQ].

87. The argument that the people would be assumed to have meant for the public contracting provision to apply only to those contexts in which affirmative action in public contracting has already arisen in the Supreme Court cases will be discussed in the section that follows regarding whether an interpretation creates constitutional invalidity. See notes 121-128, *infra*, and accompanying text.

88. Neither MCRI MYTHS, *supra* note 8, nor MCRI FAQ, *supra* note 86 explicitly assert whether the amendment covers only the award of contracts or performance as well.

89. *In re Proposal C*, 185 N.W. 2d 9, 14 (Mich. 1971).

90. See generally, *Id.* (considering whether competing interpretations of the proposal at issue violated both the state and federal constitutions).

91. Compare U.S. CONST, amend. XIV, §1, providing that a state may not ". . .deny to any person within its jurisdiction the equal protection of the laws" with MICH. CONST., art. I, § 2 (1963), stating that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof." Despite the additional language which at least seems to intend greater protection, Michigan courts

---

have consistently held it does not. *See, e.g.* *Frame v. Nehls*, 550 N.W.2d 739, 744 (Mich. 1996)(“the Michigan and federal Equal Protection Clauses offer similar protection); *Doe v. Dep’t of Social Services*, 487 N.W.2d 166, 174 (Mich. 1992)(“our equal protection clause was intended to duplicate the federal clause and to offer similar protection”); *Harville v. State Plumbing and Heating, Inc.*, 553 N.W.2d 377 (Mich. App. 1996)(indicating the state equal protection clause is “coextensive with the federal Equal Protection Clause and, thus, understanding the latter is instructive in understanding the former”); *But see* Maurice Kelman, *Foreward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV 413, 436 (1981)(arguing that Michigan courts have required greater protection under the state equal protection clause).

92. “It is elemental that the people of any one state cannot, by any provision in its Constitution or laws, amend the federal Constitution.” *Decher*, 177 N.W. at 389; U.S. CONST., art. VI, § 2. declares that the federal Constitution is “supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” In approving the proposal’s appearance on the November ballot, the Michigan appeals court in *Coalition to Defend Affirmative Action & Integration v. Board of State Canvassers*, found that the amendment was not a covert attempt to change the equal protection or anti-discrimination provisions of the Michigan Constitution for the purposes of a state law specifying the form of such proposals. 686 N.W.2d 287, 290-91(Mich. App. 2004)(form of proposed amendment did not render the equal protection provision “wholly unoperative” by the proposed amendment.) The court disclaimed that it was not deciding only on “the form of the petition. . .not the substance or merits of the proposal.” *Id.* at 289. For that reason, the question is still open in Michigan courts whether the effect of the amendment in particular cases is to create constitutional invalidity.

93. An equal protection argument was advanced before a federal court that the amendment created constitutional invalidity because it impermissibly burdened the specified groups in their ability to participate in the political process. *See Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250(6<sup>th</sup> Cir. 2006). The challengers stated that only members of the specified classes were unable to effectually lobby for and pass ordinary legislation which would benefit their classes while members of other groups not covered by the legislation could do so. *Id.* Members of the specified classes, they argued, were only able to effectuate protection through the constitutional amendment process. *Id.* The federal court rejected their equal protection argument because the “burdened” groups are the majority of the population. *Id.* at 251. This paper does not pursue this avenue since Michigan courts are unlikely to be more protective than federal courts. *See, e.g.*, notes 101-110, *infra*.

94. *Reed v. Reed*, 404 U.S. 71 at 77 (1971).

95. *Craig v. Boren*, 429 U.S. 197-8 (1976)(citing *Reed*, 404 U.S. 71 (1971), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Fronterio v. Richardson*, 411 U.S. 677 (1973) as cases where sufficiently important governmental interests were not found.))

- 
96. *See* U.S. v. Virginia, 518 U.S. 515, 533 (1986)(citing the ‘exceedingly persuasive justification language from *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979))[hereinafter VMI].
97. *Id.* at 533 (indicating that the justification may not be created in response to litigation or rely on generalizations about the differing abilities of men and women.)
98. *See e.g.* Michael M. v. Superior Court 450 U.S. 464 (1981)(upholding a statutory rape law making men and not women liable because men and women not deemed similarly situated); *See also*, Rostker v. Goldberg, 453 U.S. 57 (1981)(women not similarly situated with men for purposes of military draft registration requirement); Parham v. Hughes, 441 U.S. 347 (1979)(mothers of illegitimate children not in same position as fathers for purposes of a wrongful death statute allowing recovery only to mothers); Califano v. Webster, 430 U.S. 313 (1977)(women and men were not similarly situated with respect to wage-earning potential in male dominated job market, so retirement benefit scheme accounting for the disparity was constitutional).
99. *See generally* Holly A. Williams, *Reaching Across Difference: Extending Equality’s Reach to Encompass Governmental Programs that Solely Benefit Women*, 13 UCLA WOMAN’S L.J. 375, 393 (2005)(citing the absence of invidious and stereotypical basis, direct relevance to the statutory purpose of the legislation, remedial purposes, physiological differences, prevention of physical injury, and avoidance of trauma as compelling justifications).
100. According to one commentator, when the VMI court found a constitutional violation, it advanced explicitly that one remedy would be to admit women, and implicitly that another remedy would be to rely solely on private funding sources, since the alternate institution it did establish was insufficient. *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV 1657, 1669 (1997). Had Virginia subsequently adopted a state constitutional amendment prohibited the integration of schools, this would create constitutional invalidity under the rule of constitutional construction under examination.
101. *See e.g.*, Crawford v. Bd. of Ed. of the City of Los Angeles, 458 U.S. 527, 538 (1982)(affirming that a state does not violate the Equal Protection clause “by the mere repeal of . . . policies that were not required by the Federal Constitution in the first place”); *Grutter*, 539 U.S. at 342 (implicitly authorizing the prohibition of affirmative action by directing Michigan universities to look to California where such preferences are prohibited). This has been affirmed by the 6<sup>th</sup> Circuit in the context of the amendment at issue in *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6<sup>th</sup> Cir. 2006)(asserting that *Grutter* “never said, or even hinted, that state universities *must* do what they barely *may* do”).
102. Regents of Univ. of California v. Bakke, 438 U.S. 265, 298 (1978).
103. *Grutter*, 539 U.S. at 341(concluding that the law school admissions criteria did not do so).
104. *Gratz*, 539 U.S. at 270.

---

105. *City of Richmond v. J.A. Cronson Co*, 488 U.S. 469, 472 (1989)(citing the standards elaborated in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)).

106. *Id.*

107. *See Michigan Road Builders' Association v. Milliken*, 834 F.2d 583, 595 (6<sup>th</sup> Cir. 1987), *aff'd mem.*, *Milliken v. Michigan Road Builders' Association*, 489 U.S. 1061(1989)(utilizing an intermediate scrutiny standard to analyze set-asides to women-owned businesses).

108. *See, e.g.*, Nelson P. Miller, “*Judicial Politics*”: *Restoring the Michigan Supreme Court*, MICHIGAN BAR JOURNAL 38 (Jan. 2006)(discussing criticisms advanced against the Michigan Supreme Court by legal texts, law review articles and the like for politically based decision-making.)

109. Glen N. Lenhoff, *The Michigan Supreme Court: the Revolt Against Reverse Discrimination*, MICHIGAN BAR JOURNAL 26, 28 (Jan. 2005).

110. Lenhoff, *supra* note 109 at 27.

111. This is the interpretation advanced by the hypothetical defendants in our case, and is essentially the interpretation adopted by the Michigan Civil Rights Commission, discussed *infra* notes 131-136 and accompanying text.

112. Such a possibility was discussed in the context of the California amendment. *See Spann, supra* note 64, at 217.

113. *Id.* at 215-216.

114. *Id.* at 220.

115. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) finding a purpose of Congress in enacting Title VII was to “remove barriers that have operated...to favor an identifiable group.”

116. 426 U.S. 229 (1976).

117. *Personnel Administrator v. Feeney* 442 U.S. 256, 279 (1979).

118. *Id.* at 279.

119. *See supra* note 91 and accompanying text for discussion of Michigan Constitutional equal protection jurisprudence relative to federal Constitutional equal protection jurisprudence.

120. Discriminatory purpose can be established by the vastly disparate distribution to women currently and historically of benefits from domestic violence programs together with the promotional materials of the programs indicated that a large part of services are offered only to women. *See* note 56, *supra*. A discriminatory purpose could also be found in the mission statement of the MDVPTB, which provides:

---

Domestic Violence is rooted in an antiquated, sexist social structure that produces profound inequalities in the distribution of power and resources, in the roles and relationships between men, women, and children in families, and has devastating effects on victims, their children, and the entire society. . . [MDVPTB] shall promote the empowerment of survivors and seek social change to redress the existing power imbalance within violent relationships.

MICH. DEP'T. OF HUMAN SERVICES, Mission and Philosophy Statement (2007), *available at* [http://www.michigan.gov/dhs/0,1607,7-124-5460\\_7261-51509--,00.html](http://www.michigan.gov/dhs/0,1607,7-124-5460_7261-51509--,00.html) (last visited April 26, 2007)[hereinafter MDVPTB PHILOSOPHY]. The mission statement is cited as one of the guiding principles of the quality assurance standards promulgated by the DHS and MDVPTB. *See* MDVPTB STANDARDS, *supra* note 52. Remedying “societal” sexism is probably no more legitimate an interest than remedying societal racism is a compelling one. *See* notes 105-107 *supra*, and accompanying text for the assertion that remedying societal discrimination is not a compelling state interest.

121. *See generally* Fullilove v. Klutznick, 448 U.S. 448 (1980)(upholding a federal law providing set asides for minority-owned businesses in contracting); Cronson, *supra* note 105 (striking down a state law providing set asides in public contracting for minority owned businesses).

122. *Fullilove*, 448 US at 463 (“The legislative objectives of the [challenged] . . . provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity.”)

123. As established by the Act, programs must provide at least three of the enumerated services to be eligible for funding. *See* MICH. COMP. LAWS, § 400.1507 (1978). A client likely has greater ongoing access to staff and services on-site than at alternative locations.

124. 20 MICH. CIV. JUR. *Public Contracts* § 1 (2006)(defining “public contracting” in the context of the state and its political subdivisions’ powers to include contracts “for the carrying out or completion of any public work.”)

125. *Id.*

126. *See Id.* § 11; *See also* Op Atty Gen 6623 (Mich. 1989)(advising that provisions “in State contracts which impose a mandatory requirement that the prime contractor enter into subcontracts with. . . women owned businesses are no longer valid and enforceable [in Michigan Courts].”

127. Such an argument was made by one commentator in the Context of the California proposal’s language. Spann, *supra* note 64, at 221.

California voters. . .[may have] intended only to prohibit consideration of race and gender in the selection of government contract recipients, but that construction seems as underinclusive as the language of Proposition 209 seems overinclusive. Limiting the reach of Proposition 209 to the selection of contract recipients would enable the government to contract with private entities for affirmative action programs.

*Id.*

---

128. See the discussion of the Michigan Supreme Courts reputation under the interpretation of preferential treatment, *supra* notes 108-110 and accompanying text.

129. The Michigan Constitution applies only to state actors. *See Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 872 (Mich. App. 2005)(comparing the state action requirement to that required by the United States Constitution).

130. MICH. CONST., art. I, § 26 (3)(amended 2006).

131. The Commission was created by the 1963 Constitution, which provides:

The Commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths...and to issue private orders. The commission shall have other powers provided by law to carry out its purposes.

MICH. CONST., art. I, § 29 (1963). For an oft cited review and summary of the Michigan Civil Rights Commission creation and powers, see Roger C. Cramton, *The Powers of the Michigan Civil Rights Commission*, 63 MICH. L. REV. 5 (1963).

132. MICHIGAN CIVIL RIGHTS COMMISSION, “*One Michigan*” at the Crossroads: An Assessment of the Impact of Proposal 06-02 By the Civil Rights Commission, March 7, 2007, available at [http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07\\_1\\_189266\\_7.pdf](http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf).

133. This formulation is derived from key language used in the Commissions Proposed Interactive Decision Making tool. *See Id.* at 31-34.

134. “Although the services provided by the contractors . . . are sex or race specific, the services do not violate Proposal 2 because . . . [they] are not [themselves] based on public employment, contracting, or education.” *Id.* at 38.

135. A full discussion of the amendment’s exemptions will be discussed *infra*, notes 149-159 and accompanying text.

136. *See Regents of University of Michigan v. Michigan Employment Relations Commission*, 204 N.W.2d 218, 221(Mich. 1973)(extending no deference to Commission where a question of Constitutional interpretation was at issue).

137. First, if the quality assurance standards are ‘rules’, Michigan’s Administrative Procedure Act provides for declaratory and injunctive relief as to their “validity and applicability.” *See Michigan Administrative Procedures Act*, MICH. COMP. LAWS ANN. § 24.264 (1969). TMCE may be able to assert representational standing under the APA. *See Don LeDuc, Michigan Administrative Law: Abridged Edition Michigan Administrative Law Primer* 12 T.M. COOLEY L. REV. 21, 110. The general rule is that citizen standing to “vindicate a public wrong or enforce a public right” is not

---

available where the challenger is harmed “no differently than the citizenry at large.” *See* Waterford School District v. State Board of Education, 296 N.W.2d 328, 331(1980). The TMCE or its members denied integrated services may have harm distinct from the citizenry at large. There is also a potential claim for individual plaintiffs under the Civil Rights Act, *supra* note 63 and accompanying text. Nevertheless, an association is not protected under § 2302 (a) which prohibits the denial of civil rights in public services to “individuals.” Only those whose civil rights are directly violated may sue under the Civil Rights Act. Burchett, 591 N.W.2d at 656, discussed *supra*, note 61.

138. *See* Michigan Education Association v. Superintendent of Public Instruction, 724 N.W.2d 478, 481(Mich. App. 2006)(“[O]ur Supreme Court has indeed repeatedly endorsed the test for standing articulated by the United States Supreme Court in *Lujan*.”)

139. National Wildlife Federation v. Cleveland Cliffs Iron Company, 684 N.W.2d 800, 814 (Mich. 2004) Injury in fact is defined as the “invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent’, not ‘conjectural’ or ‘hypothetical’.”*Id.* To meet this requirement, the members would have to have needed services and been provided inadequate services.

140. *Id.*

141. *Id.* The court contrasts likely with “speculative.” *Id.*

142. *Id.* This suggests that TMCE may have trouble establishing standing unless all members have been harmed by denial of services, though individual members denied services would not.

143. MICH. CONST., art. I, § 26 (2)(amended 2006). Such an implication was suggested by Gotunda, et.al, *supra* note 4, at 5.

144. While the Michigan Constitution applies only to state actors, it is unclear whether this requirement is altered by the text of the new amendment with respect only to the amendment itself. *See supra*, note 129 and accompanying text. This section, however, assumes that the state action requirement does apply to the new amendment and concludes that state action could be established under the facts of the hypothetical case.

145. Scalise, 692 N.W.2d at 874 (citing language from *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001)).

146. Scalise, 692 N.W.2d at 875 (discussing joint action or “entwinement” found by *Brentwood* Court where state employees directed private athletic association which regulated athletics in public schools).

147. Scalise, 692 N.W.2d at 877 (discussing Supreme Court finding in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), where race discrimination of a private leaseholder in a building utilizing a government parking structure was state action because “the peculiar relationship. . . confers on each an incidental variety of mutual benefits.”)

---

148. The financial existence of both the local programs and the agencies is bound up together. *See, e.g.,* notes 50-53 *supra*, and accompanying text for a discussion of the quality assurance peer review process. The DHS is empowered by the Act to “enter into agreements with the federal government or private foundations, trusts, or other legal entities for the receipt of funds.” *See* MICH. COMP. LAWS § 400.1510 (1978).

149. MICH. CONST., art. I, § 26 (4)(amended 2006).

150. Violence Against Women Act, 42 U.S.C.A § 379gg(a)(1999)(declaring purpose to “assist States...and units of local government to develop...and strengthen victim services in cases involving violent crimes against women.”)

151. Family Violence Prevention and Services Act, 42 U.S.C. §10406(a)(2) provides that no person shall on the ground of sex...be excluded from participation in...any program...funded in whole or in part with funds made available under this chapter. Nothing in this chapter shall require any such program...to include any individual in any program or activity without taking into consideration that individual’s sex in those certain instances where sex is a bona fide...programmatic factor reasonably necessary to the normal operation of that particular program or activity.

*Id.*

152. MICH. CONST., art. I, § 26 (5)(amended 2006). This is similar to the Family Violence Prevention & Services Act’s bona fide programmatic factor, discussed in note 151, *supra* and accompanying text.

153. In the California context, at least on commentator suggested that the identical provision in the California amendment would protect domestic violence programs, but qualified that they must be available to women and men both. *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1385 (1997)(arguing that programs will survive so long as they are available to women and men).

154. The MDVPTB Philosophy Statement provides as follows:

The Michigan Domestic Violence Prevention and Treatment Board (MDVPTB) shall promote the empowerment of survivors. . . To make informed decisions for themselves and their children, survivors need access to safety and information about domestic violence, available options, and community resources. The MDVPTB is committed to treating survivors with dignity and respect an to providing them the support and advocacy necessary to realize their right to self-determination.

MDVPTB PHILOSOPHY, *supra* note 120.

155. *Id.*

156. This justification is suggested by Williams, *supra* note 99, at 404, where she states “the victimization of a woman by a man can have a detrimental impact on a woman who is forced into contact with a man in the close confines of a supposedly safe place.”

---

157. *Id.* at 403. Williams suggests that freedom from men’s presence in shelters can lead to “a sense of community and hope for increased opportunity in the face of abuse.”*Id.*

158. Subjecting a man to excessive interrogation interferes with the goals of providing “support” and “access to safety and information”, interferes with autonomy and “self-determination”, and perhaps “dignity and respect”. *See* MDVPTB PHILOSOPHY, *supra* note 120.

159. MICH. CONST., art. I, § 26 (5)(amended 2006).

160. The claim by Kauffman & Davis, *supra* note 7, at 3 was raised in the INTRODUCTION to this text.