The Michigan Civil Rights Initiative & the Future of Racial Preferences

*By Roger Clegg & Terence J. Pell**

On November 7, 2006, the people of Michigan voted by an overwhelming 58-42% margin in favor of Proposal 2, the Michigan Civil Rights Initiative (MCRI), which bans state discrimination and preference on the basis of race, ethnicity, and sex in employment, contracting, and education programs. Ward Connerly—who, along with Jennifer Gratz, led the campaign for the passage of Proposal 2—announced the following month that he would begin an exploratory process for a "Super Tuesday for Equality" in November 2008, identifying nine states for which anti-preference ballot initiatives would be explored: Arizona, Colorado, Missouri, Nebraska, Nevada, Ohio, Oregon, South Dakota, and Wyoming.

This, then, is a good time to take stock of the lessons to be learned from MCRI and the impact it will likely have. This essay is divided into three parts: (1) a discussion of the immediate and obvious lessons and impact of the passage of MCRI itself; (2) a narrative of the appalling reaction of the University of Michigan, in particular, to MCRI's passage and what that might presage; and (3) some concluding thoughts on why, the University's reaction to the contrary notwithstanding, there is really no principled alternative, in 2007, to the abolition of government preferences based on race, ethnicity, and sex.

Immediate Lessons and Impact

The first and perhaps most obvious lesson to be drawn from the Michigan vote is that preferences of this sort are very unpopular: banned by a 58% majority of the popular vote, in a blue state, in a Democratic year, with opponents vastly outspending the supporters (by estimates that varied from 3-to-1 to 5-to-1). Voters approved the amendment over the well-publicized objections of the corporate establishment, the political establishment (Democrat and Republican alike), the media establishment, the civil rights establishment, the labor unions, and even the clergy. Voter sentiment in Michigan is similar to sentiment elsewhere. Indeed, the ban in Michigan follows that of identical bans—also by decisive margins—in two other blue states (California and Washington) in two other Democratic years (1996 and 1998).

The political significance of the vote is twofold. First, it makes it likely that if Connerly gets similar referenda on the ballot in other states, they will pass handily. Second, the support for anti-preference ballot initiatives does not depend on the support of either the major political parties, which, for different reasons, generally oppose or, at least, are reluctant to support Connerly's efforts.

The legal significance of the vote is also twofold. First, the Supreme Court does, to an extent, follow the election returns. Those justices who worry about establishment disapproval if they strike down racial preferences may be reassured if the public at least has provided them some political cover. Second, as more and more universities stop using racial admission preferences, it becomes harder and harder for the remaining schools to insist that one simply cannot run a decent university without them. Consider: The University of California public system of higher education—probably the nation's best—has not used preferences for ten years now. Washington's public universities have not used them since 1998. Florida abandoned its system of preferences in 1999. Texas used no preferences between 1996 and 2004. The University of Georgia, too, went without preferences for a time, in the early 2000s. And now add another highly regarded state system—Michigan's—to the mix. Though minority enrollment has dropped at a handful of schools in these states, overall the record is good. Hundreds of public colleges and universities have learned how to enroll academically competitive, diverse classes without the use of racial preferences. "How essential, then, can preferences be?" the Supreme Court will eventually have to ask.

Moreover, it has become increasingly clear that schools are not adhering to the limited use of race outlined by the Supreme Court most recently in *Grutter v. Bollinger* and *Gratz v. Bollinger*. Though the Court insisted that schools examine race alongside many other factors that might contribute to diversity, evidence that surfaced during the campaign for MCRI showed that race had become an even bigger factor in admissions to the University of Michigan than before. Three weeks prior to the vote in Michigan, the Center for Equal Opportunity released three studies that documented the extent to which racial and ethnic preferences were being used by the University of Michigan in its undergraduate, law school, and medical school admissions. The studies were based on data supplied by the University itself, pursuant to freedom of information requests filed by the Center and the Michigan Association of Scholars. Severe discrimination, favoring black applicants over white and Asian applicants, was found at all three schools, in all four years for which data were received (1999, 2003, 2004, and 2005, the most recent year for which data were available). Hispanics were also favored, but less so. Frequently whites were given preferences over Asians, although to a still smaller extent. Especially noteworthy, race and ethnicity were more heavily weighted in undergraduate admissions in the most recent admissions than in the system declared unconstitutional by the Supreme Court in 2003.

Thus, in the most recent year for which data were available (2005), the median black admittee's SAT score was 1160, versus 1260 for Hispanics, 1350 for whites, and 1400 for Asians. High-school GPAs were 3.4 for the median black, 3.6 for Hispanics, 3.8 for Asians, and 3.9 for whites. In the four years analyzed, the University of Michigan rejected over 8,000 Hispanics, Asians, and whites who had higher SAT or ACT scores and GPAs than the median black admittee—including nearly 2700 students in 2005 alone. The black-to-white odds ratio for 2005 was 70 to 1 among students taking the SAT, and 63 to 1 for students taking the ACT. (To put this in perspective, the odds ratio for non-smokers versus smokers dying from

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lung cancer is 14 to 1.) In terms of probability of admissions in 2005, black and Hispanic students with a 1240 SAT and a 3.2 high school GPA, for instance, had a 9 out of 10 chance of admissions, while whites and Asians in this group had only a 1 out of 10 chance.[1]

Clearly, the University of Michigan has made only token changes to its admissions system in response to *Grutter* and *Gratz*. If true in other states, this fact will increase the number and likelihood of success among further legal challenges. The perception that courts are unwilling to rein in such unlawful use of race standards has seemed only to harden public favor for ballot initiatives.

Litigation in the Aftermath of Proposal 2

Michigan Governor Jennifer Granholm and University of Michigan President Mary Sue Coleman are both staunch supporters of racial preferences. In two successful campaigns for governor, Granholm made a point of her support for every manner of race-conscious engineering. Coleman, for her part, was hired by University of Michigan regents during the final years of defense before the Supreme Court over University policies. It is not unreasonable to suppose that she was hired in part on the basis of her commitment to furthering those policies.

Both Granholm and Coleman looked for ways to minimize the effect of MCRI once it passed. In a speech on the steps of the University's "Diag" the day following passage, Coleman said, "[Proposal 2] is an experiment that we cannot, and will not, allow to take seed here at Michigan." She vowed to immediately seek a one-year delay of the amendment, and promised a full-scale legal assault in the longer term on the amendment "as it pertains to higher education."

In fact, there was a legal vehicle for challenging Proposal 2 already in place, one tailored by a well-known advocacy group called "Coalition to Defend Affirmative Action By Any Means Necessary" (more popularly known by its acronym, "BAMN"). BAMN filed a federal lawsuit broadly challenging MCRI on Equal Protection and First Amendment grounds. The suit named as defendants Governor Granholm, the three major Michigan state universities, and various other state entities and officials.

With forty-five days till MCRI became law, Coleman had to work fast. She got the presidents of the two other Michigan universities to join her in filing a cross-claim against the Governor, asking the court to enjoin the Governor from enforcing the terms of Proposal 2 with respect to college admissions during the current admissions cycle. By way of rationale, she proclaimed herself uncertain about the new requirements of the Amendment, and said it would be unfair to guess. In her legal analysis, she asserted that the term "preference" was only meant to ban "irrational" preferences and not preferential policies carefully crafted to achieve the benefits of diversity. But prior to the passage of Proposal 2, Coleman had repeatedly stated that the Amendment would mean an end to race-conscious admissions policies, and explained her vigorous campaign against it on this understanding.

It could have been fairly straightforward for the University to eliminate race from its admissions system. Already 80% of its applicants were evaluated without regard to race. The Amendment only required the University do the same with respect to the remaining 20%. The University touts its ability to evaluate all aspects of an applicant's file, including non-academic contributions to "diversity;" so, eliminating race still left the University plenty of ground on which to make evaluations.

After filing cross-claim against the Governor, Coleman's lawyers worked to persuade all parties to agree to a stipulated settlement of the claim. Days later, the executive branch of the state—including the Governor, the Attorney General, and presidents of the three major public universities, together with BAMN—went before U.S. District Judge David M. Lawson with a unanimous request to give their settlement the force of a federal court order. Judge Lawson issued an order immediately, barring anyone from enforcing Proposal 2 against the universities (including private litigants) until July 1, 2007.

Lawson issued his order despite having several pending motions to intervene from individuals and groups opposed to the delay before him—including one from Eric Russell, who was just then applying to the University of Michigan Law School. Judge Lawson signed the order, stating that the interests of the public were adequately represented by their elected officials—meaning Granholm, Cox, Coleman, and two other university presidents. With the exception of Cox, all had declared their intention to do whatever it took to undermine Proposal 2. Lawson's authority to suspend the state constitutional provision depended on a prior determination that the Amendment violated federal law. But the judge never took up the question. With the pro bono help of partner Charles J. Cooper of the Washington law firm of Cooper & Kirk, PLLC, Russell filed an emergency appeal to the U.S. Court of Appeals for the Sixth Circuit. and it was left to a three-judge appeals panel to consider whether a state amendment banning the use of racial preferences somehow violated federal law.

With a sweeping, fast decision, the panel declared that the citizens of the states may at any time decide to do away with racial preferences. The panel's decision, authored by Jeffery Sutton, will smooth the way for state ballot initiatives now being planned for other states. It makes clear that neither state schools nor racial minorities have a federal right to racial preferences. The point is an important one. Opponents of statewide bans against racial preferences have long argued that prohibiting the use of racial preferences across-the-board violates the Equal Protection Clause of the Fourteenth Amendment because it imposes special burdens on the ability of minority individuals to lobby for racial preferences. On this view, racial preferences are just like any kind of favored legislative treatment, and it is unfair to single out race-based favoritism for special procedural burdens, especially an absolute ban. But the Fourteenth Amendment generally forbids racial distinctions of any kind in state law. This was the Ninth Circuit's reason for rejecting the idea that a California ban on racial preferences somehow violated the Fourteenth Amendment in 1997. As Judge Diarmuid O'Scannlain put it, "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."

The panel's decision adopted O'Scannlain's analysis, and noted that the Supreme Court itself only recently suggested that

states were free to ban racial preferences in its 2003 decisions involving the University of Michigan. In *Grutter v. Bollinger*, the Court explicitly directed schools to look to California, Florida, and Washington State, where racial preferences in admissions were (and are still) prohibited by state law.[2] As a general matter, states are free to provide "more" equal protection than the 14th Amendment happens to require. The panel concluded, "In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification."

Coleman's advanced a second argument, one based on the First Amendment. They claiming that, following *Grutter*, schools like the University of Michigan have a federal right to racial preferences to achieve the educational benefits of diversity. According to their argument, the Court's rationale in recognizing a "diversity" interest relied on the First Amendment interest colleges have in making such academic decisions as to whom to admit and what to teach. So, the three Michigan universities argued that, even if a statewide ban on race preferences did not violate the constitutional rights of minority individuals, it at least violated the right of state universities to assemble racially diverse classes. The Sixth Circuit panel dispensed with this argument, as well, holding that a First Amendment *interest* (assembling diverse classrooms) is not the same as a First Amendment *right* (trumping a citizen ballot initiative). The court noted that the citizens of Michigan possess First Amendment rights against the state, not the other way around.

Citizen ballot initiatives in California and Washington have not faced the sort of systematic, across-the-board executive branch resistance that MCRI has thus far received. Governors in both states have held that it is the oath of office to faithfully enforce the law, whether or not they happen to agree with it. Perhaps because the University of Michigan has been so closely identified with the political fight to preserve racial preferences, officials in Michigan feel more confident in their position. But official barriers may well crumble, now that the Sixth Circuit has decisively ruled against the possible federal challenges to Proposal 2.

Perhaps the fact that the University of Michigan has been so closely identified with the political fight to preserve racial preferences explains why officials in that state felt more confident in defying the law. And perhaps official obstruction in Michigan will crumble now that the Sixth Circuit has decisively ruled against the possible federal challenges to Proposal 2. In either event, the overheated character of the official reaction to date only points to the increasingly weak case for racial preferences, a subject we take up in the concluding section of this essay.

The Racial-Preference End Game

Last year, Detroit mayor Kwame Kilpatrick raised eyebrows when he proclaimed, George Wallace-style, "Affirmative action today, affirmative action tomorrow, affirmative action forever!" He was, of course, explaining his opposition to the Michigan Civil Rights Initiative. That declaration may have been an extreme example, but, still, one wonders what the vision of people like Mayor Kilpatrick is with respect to American race relations and, more specifically, what their exit strategy is for racial preferences. It is clearly more muddled and pessimistic than their opponents'.

There is obvious irony in this. Once upon a time, Martin Luther King, Jr., wrote a book titled *Why We Can't Wait*. In those days, it was liberals who were in a hurry when it came to ending discrimination, who wanted to end all the naysaying nonsense and enact their vision forthwith, without delay. Now the roles of left and right are reversed. Now it is conservatives—and, indeed, most Americans—whose vision on race relations is more likely to be simple and clear. Discrimination, both public and private, is a bad thing. Laws against it should be enforced. Individuals are of course free to embrace their ethnic identity—and wear "Kiss Me I'm Irish" or "Black Is Beautiful" buttons (or maybe both, for Mayor Kilpatrick)—but that identity should have only de minimis social relevance and absolutely no legal consequences.

Social programs for the disadvantaged should be means-tested but color-blind. If you are poor and need a scholarship, for instance, it does not matter whether your poverty is somehow traceable to the fact that an ancestor came over on a slaveship, rather than via a leaky boat in the South China Sea, or by swimming the Rio Grande—or even if your poverty is a result of the fact that you were born in a dying West Virginia coal town. The fact that African Americans were once enslaved and, after that, subjected to Jim Crow laws, is neither denied nor minimized, but two wrongs do not make a right. America is not the same country is was in 1865 or even 1965, and the time—at long last—to end racial preferences of all kinds has come. Right now.

But what does the Left want? For at least some of them, it is not clear that they share most Americans' distrust of racial classifications and desire to minimize racial identity and identity politics. One senses that the "celebration of diversity" requires, first of all, individuals to embrace a color-based or national-origin-based view of self and the world. One has to wear that "Kiss Me I'm Irish" or "Black Is Beautiful" button prominently, and all year around. It is not that other people will not forget your ethnicity; it is that you do not want them to, your own self.

To be sure, that is not true of all liberals. But there does seem to be much more agreement among them that racial preferences need to remain in place. They need to remain in place until… well, when exactly? "Forever"? We are very skeptical that the proponents of racial preferences have given much thought to an exit strategy. We say this for three reasons.

First, it is the nature of preferences and the bureaucracies they create that, the longer they are in place, the harder it is to dismantle them.

Second, the number of groups eligible for the preferences keeps expanding. First African Americans. But then Native Americans and Latinos. Then women. Then Asians. Doubtless other non-European ethnic groups—e.g., Arab Americans, who are now frequently and ironically discriminated against by "affirmative action"—are not far behind. The multiplication of eligible groups makes it more and more likely that…

… Third, the day will never come when all the different "racial disparities" used to justify preferences will all come to an end. What is more, the presence of racial preferences

often makes it harder to end racial disparities. After all, those preferences undermine the self-reliance and sense of personal responsibility which—more so even than ending still-existing discrimination—is the real necessity today for the continued advancement of, especially, African Americans.

Those of us who oppose racial preferences know that racial disparities still exist, and we join all Americans in wishing that they did not. But our vision of how to accomplish this task is more realistic. We should, first and foremost, ensure that the laws against racial discrimination are vigorously enforced. We are confident that this can be done and that doing so will make a difference—that members of all racial and ethnic groups can meet the rigors of competition. The proponents of preferences seem not to share this confidence. In all events, increasingly no one can doubt the harms and unintended consequences of the continued use of racial double standards in all aspects of American life. Regardless what else one thinks must be done, everyone ought to agree that the time for ending racial preferences has come.

The first obligation of government is to do no harm. Americans have made enormous progress in the last generation toward a multiracial, multiethnic society in which the dream that we be judged by the content of our character and not the color of our skin is not just a dream, but a reality. Younger Americans, in particular, seem less and less to be motivated by, or even to notice, race; bigotry is, quite literally, dying out. Now is not the time—if it ever was—to further institutionalize racial preferences and all the resentment and stigmatization that goes with them.

An increasingly multi-racial and multi-ethnic America will have difficulty surviving in the twenty-first century it it does not act now to end a system of state-imposed racial and ethnic preferences. For in such a society, it will become increasingly rancorous to determine which groups are to be preferred and which ones discriminated against, and to define and police membership in the various groups.

Endnotes

1 Studies posted on the Center for Equal Opportunity's website: www.ceousa.org.

2 539 U.S. 306 (2003), at 342.