

PERSPECTIVES

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Making Sense of the Affirmative Action Debate

Affirmative action and the equality of opportunity in education and employment have been divisive issues across our society, most recently within the state of Michigan. The discussion is more complex than whether one supports or opposes affirmative action policies in college admissions or in employment decisions. Underlying positions taken in terms of affirmative action are deeper notions and beliefs about such fundamental ideas as fairness, merit, entitlement and justice. In general, supporters of affirmative action believe that equal opportunity cannot be achieved in the existing system because access to college and upward social and economic mobility are not equally distributed. Those who oppose affirmative action suggest that affirmative action results in preferences that are antithetical to the very legislation civil rights activists fought for in the 1960s and 1970s. In November of this year, the voters in Michigan will be asked to make choices about this very important issue.

In this issue of "Perspectives" we summarize the affirmative action debate from its inception by executive orders 10925 and 11246 through the *Grutter* and *Gratz v. Bollinger* decisions handed down by the U.S. Supreme Court. Next, we discuss the recent developments in the Michigan Civil Rights Initiative (MCRI) and the ballot proposal upon which voters will decide. Our treatment of these complex issues is intended to be informative and impartial. Our "position" on these matters is this: In this discussion as in many other public concerns, information is a powerful adjunct to democratic practice. If voters are informed, they will be better able to assess how a given proposal accords with their views and with their understanding of what is in the interest of the communities and society of which they are members. Each individual may assess these issues differently and come to different conclusions. Nevertheless, all benefit from an informed debate, which permits each individual to weigh the merits and detriments of each choice fully and honestly. Additionally, we suggest that while two sides of this issue are typically debated, there are other perspectives that might allow for a different type of conversation.

A Brief History of Affirmative Action – Executive Action by President Kennedy

In 1961 President John F. Kennedy issued executive order 10925 calling for equal opportunity in federal contracts and employment and for the creation of the committee on equal employment opportunity. Much of the current debate finds its roots in this initial document. The first portion of the order sets the conditions for affirmative action when it says:

...it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts.

Opponents of affirmative action suggest that current practices have been crafted **with** regard to race, creed, color, and national origin, which they contend is antithetical to the original intent of the executive order and of the subsequent Civil Rights Act. For example, if a university includes race as a factor in its admissions criteria with the goal of ensuring that the student body reflects the racial composition of society at large, opponents would contend that, contrary to President Kennedy's order, *unequal* opportunities are created favoring those from underrepresented populations. Supporters of affirmative action, by contrast, contend that in order to provide "equal opportunity" institutions must consider race, color, or national origin to make sure that decisions are equitable.

Later in the document, President Kennedy continues:

All executive departments and agencies are directed to initiate forthwith studies of current government employment practices within their responsibility. The studies shall be in such form as the Committee may prescribe and shall include statistics on current employment patterns, a review of current procedures, and the recommendation of positive measures for the elimination of any discrimination, direct or indirect, which now exists.

The notion that discrimination can be either “direct or indirect” is critical to the debate, because it recognizes that laws and policies were not the only forms of discrimination; rather, more subtle and perhaps more insidious forms of discrimination can be as powerful barriers as the laws themselves. For example, choosing to live in certain neighborhoods, opposing school bussing, or hiring friends and close acquaintances may be common behaviors, but they can serve to limit opportunities when communities are highly segregated, schools have differential resources, assets and challenges, and peer groups are typically very homogeneous – and can constitute discrimination when done with the *intent* to limit opportunities.

President Johnson and Affirmative Action

President Lyndon B. Johnson summarized the intent of his support for affirmative action, consistent with the notion that discrimination is both direct and indirect, in a speech at Howard University (June 4, 1965):

"You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire, and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result."

The First Legal Case

Affirmative action has been a lightning rod for litigation since the 1970s and the first major legal case was not based on employment practice, but rather on admissions practices at the medical school at the University of California – Davis. Alan Bakke brought suit against the institution, claiming that its strict quota for minority enrollments was a violation of his rights under the equal protection clause of the 14th amendment. In a tenuous, split decision, the Supreme Court ruled that quotas were unconstitutional but that the use of race in admissions was a compelling state interest.

Why This Matters for Colleges

Colleges and universities have been required to comply with all federal laws – including federal civil rights laws and the executive orders noted above – as a condition of their continued eligibility for federal contracts (typically involving federally funded research) and other federal financial support. This means that if federal employers and offices must take affirmative action in their employment and contracting decisions, by extension, colleges and universities that contract with the government must likewise take affirmative action in their employment and subcontracting decisions.

For twenty years subsequent to *Bakke*, cases were brought challenging affirmative action in both education and employment contexts and it became established through the courts that while the use of race and gender may be a compelling state interest, in certain circumstances, any effort to address inequalities must be “narrowly tailored” to the specific situation at hand. The next high-profile case with national implications for higher education was filed by Cheryl Hopwood and three other litigants in 1995 against the University of Texas (UT) at Austin Law School. For the first time in 20 years a Federal Circuit Court of Appeals ruled that affirmative action policies at UT-Austin were to be suspended and that the *Bakke* decision was invalid because educational diversity was not a compelling state interest. The Supreme Court declined to review the case and the decision held for the Fifth Circuit, which includes the states of Texas, Louisiana, and Mississippi.

In the time since *Hopwood*, three states limited their use of affirmative action in public education and other contexts. California eliminated affirmative action first in the University of California (UC) System through Special Proposal – 1 (SP-1) and then through Proposition 209 for all public education, employment, or contracting decisions in the entire state. The state of Washington voted to eliminate the use of affirmative action in public education, employment and contracting through Initiative 200 and the Florida legislature moved to eliminate affirmative action in college admissions in 2000. In those three states, bans on the use of affirmative action remain today and the conversation has slowly shifted away from the Federal Courts to state interpretations.

For the rest of the nation, however, the next major set of challenges to the constitutionality of affirmative action in higher education admissions was brought forth against the University of Michigan with two separate cases – against the law school and the undergraduate admissions policies.

The Michigan Context Today

The *University of Michigan* cases were different from *Bakke*. Where the *Bakke* decision left some ambiguity with respect to what the Court actually supported, the *Grutter* and *Gratz* decisions were much clearer. In each of the *University of Michigan* cases, the Supreme Court affirmed that educational diversity was a compelling state interest, effectively reversing the *Hopwood* decision of the 5th Circuit and concluding that race and ethnicity therefore could be considered in college admissions to achieve student body diversity. At the same time, it ruled the undergraduate approach of awarding points for race (among other factors) was unconstitutional because it treated race in too mechanistic and formulaic a fashion. The *University of Michigan* decisions have important consequences for schools that receive an appreciable number of applications because they confirm that individualized consideration of each application is necessary, even where it may pose an administrative burden.

It is important to understand the use of affirmative action in admissions in its appropriate context. The University of Michigan is one of a handful of colleges in the state of Michigan that use affirmative action in their admissions policies because the concept is inherently related to the distribution of placements (students to be admitted) within a limited set of opportunities (an entering class). Thus, the policy affects decisions made in selective institutions, but has less relevance to institutions in which applications are fewer than the number of available placements. For example, nationally only about 20-25% of all colleges are selective enough that the college must decide who will be granted admission and who will not. Selective institutions typically have more qualified candidates than they can accept, so they must decide who, among all of the applicants, would be best served by admission and whose enrollment would best serve the institutional mission. Most colleges are, in fact, essentially “open admission” meaning that if an applicant has met the minimum qualifications (typically a high school diploma) he or she is automatically admitted to the college. Admission to selective colleges and universities becomes a concern because the benefits of attending them appear disproportionately greater than attendance in less selective institutions. Research suggests that students who attend selective colleges graduate at higher rates, are more civically engaged, and earn higher wages on average, even when controlling for background, preparation and institutional characteristics.

Michigan in November

Shortly after the decisions in *Grutter* and *Gratz* in 2003, the American Civil Rights Institute (ACRI) under the leadership of Ward Connerly – who successfully pushed for the passage of Proposition 209 in California – launched the Michigan Civil Rights Initiative (MCRI). The MCRI quickly began a petition drive to pass a ballot initiative allowing Michigan residents to decide if affirmative action should be permissible in public education, employment, and contracting. A 2004 petition was challenged on the grounds that deceptive wording and practices were used to garner many of the signatures, but the Michigan Supreme Court rejected the challenge, ruling that the petitions were properly worded. The MCRI nevertheless decided to conduct a second petition drive in order to have the proposal on the ballot for the November 2006 elections. Similar challenges have been brought during this second drive, but the Michigan Supreme Court has again concluded that the proposal may be properly placed on the November ballot. As approved by the Michigan State Board of Canvassers, the ballot language describes the MCRI as seeking to “ban affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education, or contracting purposes.”

Individuals on both sides of the affirmative action debate lay claim to the language of eliminating preferential treatment, but they operate with different assumptions in mind. Affirmative action, to its supporters, is a way to eliminate the preferences historically accrued to majority groups both in terms of educational and employment opportunities (e.g., we need to support women and people of color so they may receive ‘equal’ treatment in a society where this has not always been the case). They believe that the reality described by President Johnson in 1965 is still very much present today and that because groups of individuals start at very different and frequently unequal places, affirmative steps are necessary to level the field. Supporters of the MCRI ballot proposal, by contrast, believe the playing field has already been leveled and suggest that any consideration of race is inconsistent with the laws passed as a result of the civil rights movement 40 years earlier (e.g., by paying attention to gender or race, you are treating people unequally). It is the assumption regarding the playing field that is in question here so it is important to consider evidence testing that assumption.

Michigan Facts

There are some sobering facts in the state of Michigan suggesting that the experiences of African Americans in the state is demonstrably different than that of Whites. The good news is that nationally, since the 1960s a higher percentage of African Americans graduate from high school, attend college, and earn degrees. As a group, African Americans have also made important inroads in business and many professions. Whether these changes are attributable to affirmative action or not, they have occurred in the past 40 years. The bad news is that, despite the progress made in terms of improving opportunities for minorities in America, the gaps between groups are still quite large. Test scores, high school graduation and college enrollment rates all suggest that gaps in percentages remain between White and non-majority students. In many cases, White and Asian students score higher on tests than Black or Hispanic students. White high school graduation rates are higher, college attendance and completion rates are higher, and members of the majority group earn more on average in the workforce. Clearly, groups are not yet equal, but then the question becomes: **Is affirmative action a viable method for creating equitable conditions?**

There are at least two additional positions on affirmative action that have to date received limited attention. The first is that discrimination does not exist AND the playing field is level. The data above suggest that this position is hardly plausible and few defend it as such. The second position achieves a middle ground between the two dominant approaches. That is to say, it is possible to both recognize the existing inequalities among different racial groups and be committed to addressing this problem, yet at the same time believe that affirmative action as it has been practiced is not the right solution. This approach is less frequently discussed because it does not propose a viable alternative; rather it opens space for an expanded conversation about the core values undergirding the debate.

Some might suggest that “percentage plans” utilized in Texas, Florida and California, or that class-based approaches to affirmative action fit within this last approach. As well intentioned and potentially viable as

these approaches may be, however, they remove race from the conversation, thereby implying that other factors are really the problem. A more helpful approach might be one that recognizes race does matter in the conversation of equal opportunity and that then uses that recognition as a starting point for crafting alternative solutions to these persistent problems.

Conclusion

The affirmative action debate has been around for a long time and the November ballot initiative in Michigan is not likely to be the last public referendum on the issue. Regardless of where one stands on the policies and practices, it is important for voters to know what Proposal 2 on the November ballot is about and what its implications might be. It is fundamentally about equity, wherever one falls on the political question, and in concrete and predictable terms, it will have an impact on the use of affirmative action in public college admissions, public contracts and public employment. Reasonable people may differ on how equity can best be approached, but there is little question that the short-term impact of the proposal will be to change – and most likely limit – the ability of colleges and employers to diversify college enrollments and the composition of Michigan’s work force, at least in terms of race, ethnicity, gender, and national origin. The more informed voters are, the better equipped they will be to evaluate the ramifications of this important and difficult choice.

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Please feel free to share this document with others. If you have not received it directly but would like to receive future issues, e-mail us at ndaunba@umich.edu. Additionally, we always welcome comments and suggestions as we continue to foster and facilitate the conversation about promoting educational success in Michigan.

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