

THE MICHIGAN CIVIL RIGHTS INITIATIVE AND THE CIVIL RIGHTS ACT OF 1964

*Carl Cohen** †

The underlying principle of the Michigan Civil Rights Initiative (MCRI), adopted by state wide vote on 7 November 2006, is identical to that of the Civil Rights Act of 1964. Section 601 of the Civil Rights Act provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

The recent passage of the MCRI results now in the inclusion [in Article 1, Section 26 of the Michigan constitution] of section (2), which provides: “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.”

The latter but not the former includes sex as one of the impermissible bases of discrimination, and also specifies three spheres in which the prohibition is to be effective; but the essence of the one is the essence of the other. The Civil Rights Act is a Federal statute that remains in force. Why then was there a need for the Michigan Civil Rights Initiative? I explain.

Some have argued that the two prohibitions differ in that the MCRI expressly prohibits ethnic preferences [by including the words “or grant preferential treatment to”] as well as ethnic discrimination, while the Civil Rights Act does not mention preferential treatment. Might it be that preferences were to be permitted under the Civil Rights Act? No, most assuredly not. Members of the Congress that adopted the Civil Rights Act in the summer of 1964 knew precisely the force of what they were enacting, and they were explicit in stating that minority preferences were certainly among the forms of discrimination that the Act was intended to forbid.

The Civil Rights Act was adopted in the House of Representatives by a vote of 290–130 on 10 February 1964. The ensuing debate on the Act in the Senate was long and intense. Senator Hubert Humphrey (D, Minnesota), soon to become Vice president and later the Democratic candidate for president, was the floor leader for the bill in the Senate; the bill was not referred to committee, but was marked up and debated in detail on the Senate floor, the entire body participating. Every Senator spoke; every Senator voted.

* Professor of Philosophy, University of Michigan.

† Suggested citation: Carl Cohen, *The Michigan Civil Rights Initiative and the Civil Rights Act of 1964*, 105 MICH. L. REV. FIRST IMPRESSIONS 117 (2007), <http://www.michiganlawreview.org/firstimpressions/vol105/cohen.pdf>.

Those Senators were making history, and they knew it. The record of those debates appears in volume 110 of *The Congressional Record, 1964*, extending intermittently over exactly thirteen thousand pages (from page 1,511 to page 14,511) of ten massive tomes. There is no case in which the intentions of the Congress in the adoption of a Federal statute are more fully or more clearly set forth.

During this extraordinary debate a group of southern senators who opposed it and who may be fairly described as racists repeatedly complained that the bill, if adopted, would lead to preferences for minorities. Senator Humphrey rejected that claim with disdain:

That bugaboo has been brought up a dozen times, but it is nonexistent. *In fact, the very opposite is true.* [The bill] prohibits discrimination. In effect it says that race, religion, and national origin are not to be used as the basis for hiring and firing. . . .

In this speech Humphrey gives a series of examples that

[M]akes clear what is implicit throughout the whole [bill] . . . that individuals may not be discriminated against because of race, religion, sex, or national origin. The truth is that this [bill] forbids discriminating against *anyone* on account of race. This is the simple and complete truth.

Senator after senator rose to give the same assurance.

Senator Sparkman (D, Alabama) and Senator Smathers (D, Florida) put the same attack against the bill more subtly. Under it, they suggested, employers might be *coerced* by Federal agencies into giving preference by race. Would that not be permitted by this bill? The answer, this time from Senator Williams (D, New Jersey) was emphatic. Opponents, he replied,

[P]ersist in opposing a provision which is not only not contained in the bill *but is specifically excluded from it.* . . . [T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. *Both forms of discrimination are prohibited by . . . this bill.* . . . Some people charge that [the bill] favors the Negro at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense.

But the claim that racial preference for minorities would be encouraged by the Civil Rights Act was hammered repeatedly. Senator Humphrey was obliged to take up the battle yet again:

[The bill] does not provide that any preferential treatment. . . shall be given to Negroes or to any other persons or groups. . . . *In fact [the bill] would prohibit preferential treatment for any particular group,* and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

In sum: a careful and honest reading of the Civil Rights Act and of the debates that led to its enactment leaves no possible doubt that race prefer-

ences given by an institution receiving Federal financial assistance could not have been lawful after the passage of that statute. That is the plain meaning of its unambiguous language.

How then was it possible for this result to have been circumvented in *Regents of the University of California v. Bakke* in 1978, and in the Michigan cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*, in 2003? Justice Powell, in his *Bakke* opinion, characterized the language of the Civil Rights Act, Section 601, cited above, as “majestic in its sweep.” He noted that proponents of Title VI had “repeatedly declared that the bill enacted constitutional principles.” That is correct, of course; an existing right to equal treatment under the Constitution is indeed given flesh in the detail of the Civil Rights Act. From this Justice Powell concluded that Title VI “must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” And thus in 2003, when the race preferences given by the University of Michigan Law School were found to be not inconsistent with the Equal Protection Clause, it appeared to follow that those preferences could not have violated the Civil Rights Act.

Is this view of the Civil Rights Act correct? Respectfully I submit that it is not.

The issue before the Court in *Bakke* was the legality of an admissions system, at the Medical School of the University of California at Davis, in which preference was given by race. The Court struck that system down, and ordered Bakke admitted. Four justices there emphasized the principle that the Court “ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” They then held that a statutory resolution of the matter at hand was in fact inescapable. Justice Stevens, writing for these four, presented an argument of very great simplicity. The three premises were these:

Premise 1: Section 601 of the Civil Rights Act of 1964 [No discrimination is permitted under any program receiving Federal financial assistance.]

Premise 2: Preference by race—one form of discrimination—was given by the University of California when Alan Bakke sought admission. This was admitted and undeniable.

Premise 3: The University of California was receiving a great deal of Federal financial assistance. This was never in doubt.

Conclusion: “The plain language of the statute therefore requires” that the lower court’s decision striking down the University’s admission system be affirmed.

If ever there were a compelling deductive argument in appellate jurisprudence this is it. No other result could have been justified unless the cited language of the statute misstates the actual intent of the Congress that enacted it. But the intent of the Congress in enacting the Civil Rights Act of 1964 is perfectly clear, as we have seen, and was certainly not misstated in Section 601. Justice Stevens reviews the legislative history of the Act

briefly, concluding that a colorblind standard on the part of government is precisely what was intended.

At much greater length I have shown (in *Affirmative Action and Racial Preference*, Oxford University Press, 2003, pp. 56–71) that this intent of the Congress in adopting the Civil Rights Act is *utterly indisputable*.

Expressly, repeatedly, and very forcefully the proponents of the Act—Senators and Congressmen, Democrats and Republicans, by the score—explicated and illuminated the thrust of the bill they were defending; they intended to insure the equal treatment of the races, and they most certainly intended to forbid all racial preferences and all racial discrimination by the state.

One may not conclude, I contend, that if in some settings race preferences are found (as in *Grutter*) to be consistent with the Equal Protection Clause, that this (highly disputable) consistency vitiates the unambiguous words and plain meaning of an Act of the United States Congress. It is true that during the debates on the Civil Rights Act in 1964 a colorblind standard for government agencies was taken to flow directly from the Constitution. But that does *not* mean, as four justices of the court very forcefully observed in *Bakke*, that the Civil Rights Act did no more than codify an existing Constitutional prohibition. The statutory prohibition against discrimination of Section 601, these justices said, “is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require.” Title VI is *consistent* with the Constitution, of course, and was intended as a weapon to implement the racial equality called for by the Equal Protection Clause. But the Act also has, as those justices wrote, “*independent force, with language and emphasis in addition to that found in the Constitution.*”

In a footnote Justice Stevens elaborates on the language and thrust of the Civil Rights Act that distinguishes it from the Constitution, pointing out that its focus on fairness to *individuals* rather than fairness to *classes* is embodied in both Title VII and Title VI of the Act. Stevens quotes a remark made by Senator Pastore (D, Rhode Island) during the Senate debates: “The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition.”

Title VI, like other provisions of the Civil Rights Act, “*may independently* proscribe conduct that the Constitution does not.” The applicability of Title VI does not rely on the analysis of the Equal Protection Clause; it does not depend upon Constitutional interpretation. In 1974 the Supreme Court decided, in *Lau v. Nichols*, that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 Chinese-speaking children was a violation of Title VI of the Civil Rights Act. This result was reached expressly because discrimination based on “race, color, or national origin” in any program or activity “receiving federal financial assistance” was forbidden; it was *not* the Equal Protection Clause, but Title VI of the Civil Rights Act that resolved the matter. Justice Douglas, presenting the conclusion of a unanimous Court in that case, was explicit: “We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . . to reverse the

Court of Appeals.” Justice Powell himself, years later, emphasized the fact that the decision in that case (*Lau*) “rested solely on the statute.” This underscores the point that the statute can speak against forms or patterns of discrimination concerning which the Constitution may be silent.

And if ever a statute spoke, and spoke clearly, it was the Civil Rights Act of 1964. “In unmistakable terms,” Justice Stevens writes, “the Act prohibits the exclusion of individuals from federally funded programs because of their race.” That is a provision of *law*, a provision that makes resort to the Constitution entirely unnecessary in this matter. He continues: “We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a Constitutional appendage.”

Right. He captures here the letter and the spirit of one of the great pieces of legislation in our national history, a statute enacted with extraordinary care and after painstaking deliberation by a body—the Congress of the United States—possessing the highest authority.

After the summer of 1964 race preferences given by universities receiving federal financial assistance were plainly against the law. Had this been acknowledged decades ago, as an honest reading of Federal law required, there would have been no need for Prop. 209 in California in 1996, for Initiative 200 in the State of Washington in 1998, or for the Michigan Civil Rights Initiative in 2006.

The prohibition of preference by race and national origin meets with overwhelming support by American voters whenever it is put before them. After the striking success of the Michigan Civil Rights Initiative (58%–42%), which was approved by the electorate in 2006 in all but three counties of the state—in the face of well-financed opposition by corporations, universities, and every major newspaper, and presented to voters on the ballot in language calculated to encourage opposition—it is probable that similar initiatives will arise and be adopted in other states, perhaps in many other states. Had the language on the Michigan ballot been taken directly from the operative paragraph of the Initiative itself [“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”] which would have been most accurate and fair, the electoral result would have been even more lop-sided.

The Civil Rights Act of 1964 gave unambiguous concreteness to the principle that the state may not give preference by race. That has been settled law for more than *forty years*. We may hope that our courts will now attend to the plain language and unambiguous force of that Federal statute, and by doing so will make it unnecessary for citizens to expend funds and energies unbounded to put the very same proposition on the ballot of state after state. How many times must that principle be formally approved before state universities, and other institutions that find race preferences convenient, will cease their efforts to evade it? In Michigan race preference by the

state is now a violation of our Constitution. But everywhere in the United States today race preference by the state is a violation of Federal law.