

## “FRAMING AFFIRMATIVE ACTION”

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With the passage of the Michigan Civil Rights Initiative (“MCRI”), Michigan joins California and Washington to constitute the new post-affirmative action frontier. For proponents such as Ward Connerly, affirmative action is on the edge of extinction. Connerly plans to carry his campaign against what he calls “racial preferences” to eight states in 2008, scoring a decisive Super-Tuesday repudiation of a social policy that he portrays as the contemporary face of racial discrimination.

On the other side of the issue, proponents of affirmative action are struggling to regroup, fearful that the confluence of lukewarm support among Democratic allies, messy presidential politics and a menacing Supreme Court may spell the end of affirmative action as we know it. Of course predictions of the untimely departure of affirmative action have been wrong before. Indeed, the Supreme Court’s surprising decision in *Grutter v. Bollinger* caught runaway circuit judges and trigger happy pundits celebrating the demise of affirmative action a little too soon.

Yet the terms of the Court’s decision sparing affirmative action from constitutional death inexorably led to the MCRI. Staging an end-run around *Grutter*, MCRI’s proponents sought to capitalize on the fact that while the Court permitted affirmative action to survive as an institutional prerogative of the law school, it did not recognize affirmative action as a matter of constitutional right, a guardian against the unwarranted exclusion of institutionally marginalized groups. *Grutter* did reaffirm and expand the diversity logic of Justice Powell’s “lonely opinion” in *University of California Regents v. Bakke*, previously maligned and discredited by anti-affirmative action forces. Yet the Court failed to breathe new life into a more fundamental predicate for affirmative action articulated in the footnotes of Powell’s compromise judgment. There Justice Powell suggested that if there was evidence that the traditional admissions criteria constituted an unfair barrier for qualified minority students then affirmative action policies that offset those criteria would not represent a form of preferential treatment. Unsurprisingly, neither Michigan nor any other university seeking to defend affirmative action has opted to re-present these measures as something other than racial preferences. It is this failure to challenge the fundamental baselines of merit which ground allegations of preferential treatment that leaves affirmative action defenseless, a rudderless vessel set adrift upon a sea of distortion and racial resentment.

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The politics of racial resentment, readily expressed and fully mobilized in the campaign to enact the MCRI, should give pause to anyone who carries even a vague sense that political majorities ought not be trusted to dictate the rights and interests of relatively powerless groups. One need not be a radical critic of contemporary hegemonic practices to voice this concern. The idea that such exercises of electoral power cannot be uncritically accepted as a product of deliberative democracy is deeply rooted—albeit inconsistently acknowledged—in our Republic. Yet notwithstanding Madison’s famous reservations, the celebrated footnote 4, and a half century of jurisprudence acknowledging the risks of the tyranny of the majority, concerns that the MCRI and Connerly’s national campaign might constitute precisely this phenomenon have been fairly muted across the political spectrum. Indeed, the very perception that this trio of anti-affirmative initiatives constitutes a mortal wound to affirmative action is premised on the appearance of a fair and legitimate process by which affirmative action has been presented, evaluated, and repudiated not only in the court of popular opinion but in courts of law as well. Yet, this appearance of cross-institutional settlement on the question of affirmative action is the product of a framing. Obscured in the framing of this issue as a principled debate about “preferences” is the collusion between constitutional, political and cultural forces insulating the current distribution of racial power and installing a particular social ideology—colorblindness—as the exclusive vision of racial justice in American society. This is a vicious circle rather than a parallel press, with feedback loops that together constitute a structured pattern of racial inequality.

#### THE SET-UP

What enhances the appearance of fairness and cross-institutional settlement is the assumption that the MCRI constitutes an exercise in deliberative democracy, a by-the-book, up-or-down vote in which the populace has rendered an informed, considered judgment on the matter. As a judgment from a parallel institution to the courts, it adds another arrow to the anti-affirmative action quiver. Yet the MCRI does not stand apart as a separate institutional judgment. The presumption of institutional fairness that attaches to the MCRI is itself a product of the judicially authorized ideology that these political contests are supposed to affirm or reject.

At the Court level, affirmative action is set up as a preference by undercutting the relevance of the very inequalities that affirmative action is meant to correct. The very fact that affirmative action is not required and is thus vulnerable to majoritarian politics is a product of a doctrine that acknowledges societal discrimination but labels it too amorphous and “ageless” for judicially sanctioned remediation. Yet it is into this very arena of disadvantage and discrimination that the Court delivers affirmative action, permitting the majority to kill these policies while retaining preferences that channel opportunities to recipients they prefer. This electoral process, animated in the Michigan campaign by stereotyping, scape-goating and fraudulent canvassing, is dubbed “deliberative” by the mere fact that people have voted. A

decision that rests the legitimacy of the MCRI on the mere fact that “the people have voted” means that the Court has associated democracy with majoritarian decision-making in a context distorted by societal discrimination, historical segregation, and the sustained competitive advantage of whites over nonwhites. This societal disadvantage, represented as “just there” is in fact constructed, facilitated and reinforced by the very rules of competition between whites and nonwhites that the Court has authorized in the struggle for opportunity, resources, representation, and power.

The Court’s “neutrality,” expressed through its refusal to intervene in a decision by the electorate, stands in marked contrast to its interventions against political decisions that facilitate affirmative action on behalf of minority interests. Although the MCRI targets only racial and gender “preferences” while leaving a host of genuine preferences fully viable, this gerrymandered bit of constitutional lawmaking retains its aura of legitimacy because the “preferences” that were eliminated are formally symmetrical—the ban applies to whites as well as nonwhites, to men as well as women—even though the effects are functionally asymmetrical. But the choice to highlight form over function, to ground equality in formal symmetry rather than functional asymmetry, is an ideological component of colorblindness itself. It is a contemporary framing choice seriously compromised by its legacy as a descendent of *Plessy v. Ferguson*, where its focus on segregation’s symmetries (both blacks and whites were disabled from sitting in each others cars) rather than its asymmetries (segregation symbolized and created second class citizenship for Blacks) rendered segregation perfectly constitutional.

Of course, a different constitutional predicate—a different frame and a different set of background rules—would limit the opportunities for majorities to add affirmative action to the long list of decisions undertaken to push back against equality demands of racial minorities. A different understanding of where the line should be drawn between “actual” discrimination and “societal” discrimination might broaden the responsibility of gatekeepers and managers to correct and limit the effects of discrimination manifested within their institutions. A fuller appreciation of how race specific public policies reach into the future through legal rules insulating current distributions of wealth and entitlements might help discredit assertions that the status quo represents a fair and neutral baseline from which to measure corrective measures. An understanding of intentional discrimination informed by cognitive research would broaden the range of discriminatory outcomes that could be viewed as correctible by institutional actors seeking to eliminate the effects of discrimination within their own spheres of influence. In short, a broader, deeper understanding of discrimination would create a broader and deeper predicate for affirmative action.

#### COLORBLINDNESS

At the same time that affirmative action has been framed in a manner that invites fierce resistance, the campaign to eliminate race and gender conscious remedies has been largely underappreciated for the radical

intervention that it actually represents. Anti-affirmative action activists frame their efforts as a simple plea to return to a fairer time before affirmative action distorted and unfairly denied deserving whites and men an equal opportunity. In this light, the MCRI delivers us to that past and releases us from an unfortunate and divisive conflict about race and gender preferences. Even many of those who would rather maintain affirmative action temporarily are sympathetic to the idea that its elimination will bring an end to racial and gender jockeying and the divisive politics of resentment. They may have preferred an end to come later, perhaps on Justice O'Connor's twenty-five year time frame, but eliminating it now is seen to have many positive effects.

This assumption is a mistake. As Michigan citizens will soon witness, there is no simple end to affirmative action discourse because the campaign against these policies does not have a simple, straightforward target. Indeed, its purpose is not simply a matter of eliminating a set of policies, but in installing a particular orientation towards inequality itself—one that mandates the elimination of race or gender discourses rooted in redistribution. The central assumption that animates the anti-preference movement is that all identity-conscious policies constitute forms of preferential treatment and discrimination. Yet, critics of affirmative action cannot effortlessly achieve their goal without pitched and bloody institutional battles because anti-affirmative propositions such as MCRI cannot on their own mandate gender blindness or color blindness. Such initiatives simply require non-discrimination and the elimination of what is perceived to be preferential treatment. To fully realize the elimination of all race or gender conscious policies, there would have to be consensus that all identity conscious policies constitute preferences. As subsequent litigation and contestation over affirmative action will reveal, exactly which departures from colorblindness or gender-blindness constitute impermissible preferences and which do not is in no way subject to categorical definition.

Installing this ideology across a host of institutions is where the next battle lies. The MCRI is not the end game, but simply a beachhead from which to ground a dizzying attack on a wide array of politics and practices. Even voters who supported Proposal 2 might be surprised at the great lengths that organized opposition will take to install this vision. If the experience of California serves as a true measure, Michiganders will witness attacks against an array of programs and policies that stretch even the most conventional definitions of what constitutes "preferential treatment." They should not be surprised to find challenges to ethnic and women's studies programs, identity-based student organizations, ethnic alumni associations, outreach and noticing requirements, and even breast cancer screenings and domestic violence shelters as forms of preference. Not all of these efforts will be successful, but they clearly confirm that there is a broader agenda at play.

Where the proponents of anti-affirmative action initiatives are likely to achieve effortless victories is in institutions that have heretofore failed to subject their everyday practices and organizational values to any meaningful equity analysis. The consequences of this failure may well generate a surprising split among various segments of affirmative action's supporters.

Predictably, some members of this constituency—most likely the beneficiaries themselves—will assume that the successful history of using differential criteria to select, educate and produce generations of highly successful and accomplished minority professionals will forever foreclose a hasty retreat to criteria that will reproduce racial disparities that rival the 1960s. If gatekeepers were thought to have learned anything from the several decades in which affirmative action was practiced, one might certainly presume that at least one lesson would point to the intolerable unfairness of sustaining what has been revealed to be artificial barriers to exclude generations of minorities who are virtually identical in promise to those alums who are feted and celebrated by their respective institutions. Those who resist a return to the exclusive use of undifferentiated criteria might be buoyed in their hopes that the high level studies that confirm the success of affirmative admissions policies would reinforce their arguments that differential criteria are not preferences at all, and that if anything violates the MCRI, it would be the unjustified return to exclusionary criteria. Not only preferences are barred by MCRI, but discrimination as well. But the assumption that affirmative action supporters would stand shoulder to shoulder to collectively interrogate their institution’s exclusionary practices will lead to profound disappointment for those who hope for a united front. What will be revealed is that for many traditional supporters of affirmative action, this commitment does not constitute an indictment of the standard criteria, nor does it reveal an awareness of the racial parameters of exclusion that affirmative action was intended to neutralize. Unfortunately, since affirmative action policies have been seen as special measures to lift up the marginally qualified, many supporters will snap back to the traditional criteria so fast that heads will spin. Worst still will be those who will “overinterpret” the MCRI, believing that the very act of noticing much less commenting on the racial hemorrhaging that will take place runs afoul of the MCRI.

In these moments, proponents of MCRI will be gleefully close to being handed their ultimate goal, one wished for but not mandated by the MCRI. What will emerge is a recognition that what is really at stake here is more than eliminating so-called “reverse discrimination.” These battles will reveal that the agenda here is to erase our very ability to articulate any legitimate rationale for recognizing—must less neutralizing—the profound asymmetries in opportunity and access that exist throughout American society. What the proponents of the ideology of colorblindness seek is far more than some ideal of equality. Theirs is a much more radical agenda designed to resolve the problem of inequality by essentially removing it from political and legal discourse altogether.

#### COMPETING BACKSTORIES

At the end of the day, whether the advocates for MCRI, and other initiatives like it, can successfully extend their campaign deep into our political culture turns on the relative strength of their backstory in comparison to the counter-narrative offered by those who defend affirmative action. The MCRI

back story paints a clear portrait, although it represents a societal fantasy. Its language invites voters to cast a vote for a return to the past. It is hard to see how an explicit invitation to return to an American past can possibly function as an endorsement of colorblindness, but the past that the MCRI invites Americans to join is a mythical past wherein equal treatment and non-discrimination ruled the day. It is a past where people were given a fair shake based not on who they were, but on their merit. Affirmative action is said to have disrupted this past to create the proportional representation of underrepresented minorities in a broad range of American institutions. In this sense, equality of opportunity is said to have been replaced by equality of results. And, the language of the Civil Rights Movement appears to add moral authority to this fantasy.

This back story, obviously fabricated and thin on reality, nonetheless finds amplification in the opinions of more influential and legitimate sources such as the Supreme Court. In each of its major affirmative action cases, the racial past has been pictured as a distant reality disconnected from the present. From this perspective, antidiscrimination law appears as a portal through which contemporary Americans stepped through to a brand new present, a world free of the structural iniquities forged during the era of American apartheid. Indeed, the present is so attenuated from that past that we have to speculate whether the social realities in which we now live bear anything but the most coincidental relation to our nation's recent past. The popular fiction of a past where equality reigns supreme, a past divorced from social reality, serves to reframe contemporary forms of racial inequality as somewhat of a sociological puzzle, largely the result of cultural and personal choices that should not be artificially interfered with or socially engineered out of existence.

These descriptive world views ground the claim that colorblindness symbolizes nothing more than a return to an era of principled equality wherein one pays little or no attention to a person's racial identity. Yet this colorblind ideal is fueled by racial stereotypes and group-based explanations for the marginalization of certain racial minorities, justifications that contradict the idea that this perspective transcends a color-conscious prism. To the contrary, colorblind advocates rely on logics of racial difference to naturalize and legitimize the very inequalities that affirmative action seeks to remedy. Consider Ward Connerly's response to the fact that out of more than 4,200 freshmen currently enrolled at UCLA, only about 100 are African American. His assertion that black freshmen would do better if they stopped listening to rap music and focused on the books is the quintessential illustration of the color-conscious politics of the so-called colorblind constituency.

#### THE PUBLIC DEBATE

The public debate on affirmative action receives and amplifies the opponents' backstory both in terms of what it chooses to highlight and what it systematically chooses to ignore. The growing sense that race discrimination and inequality is passé and largely irrelevant is amplified, if not actually

produced, in the media’s failure to actively report on the reasons why affirmative action is necessary. A study by the media watchdog Fairness and Accuracy in Reporting drives this point home. FAIR researched the coverage of affirmative action in major newspapers over a six month period and found that in over 80% of the stories affirmative action was not linked in any way to processes of discrimination or inequality. Affirmative action in these stories is wholly disconnected from any sense of fairness, and unrelated obstacles and disadvantages that might be faced by its beneficiaries. Readers are thus invited to view the dearth of minorities that would otherwise prevail in the absence of affirmative action as simply the product of their own making. Without saying so, affirmative action is thus easily presented at best as an act of noblesse oblige, and at worst as unfair act of social engineering.

Equally telling was the fact that the vast majority of stories failed to mention either white women or other people of color as beneficiaries of affirmative action. Most of the very few that did mention white women or other racial groups soon abandoned even this momentary recognition to focus exclusively on African Americans as the focus of the controversy. The role of African Americans as the sole representative of affirmative action was starkly symbolized by a cover illustration on the Newsweek issue providing coverage on *Grutter v. Bollinger* and *Gratz v. Bollinger*. Appearing under the title, *Affirmative Action: Do We Still Need It? 10 Ways to Think about it Now* was a picture of a young African American man, dressed in preppy khakis, shirt, and tie. Wearing spectacles and sporting a book, the figure cut a confident pose reflecting apparent class advantage and perhaps even racial entitlement. Unknown to the casual observer, the image itself was utterly staged—the young man was not a University of Michigan student but a model. Credits on the inside cover provide appropriate acknowledgements to the various vendors that supplied the tie, the specs and the clothes.

For Newsweek, this illustration represented the quintessential image of the affirmative action beneficiary as a means to suggest at least three ways of thinking about whether affirmative action was still necessary: the programs were about race, not about gender, they were about African Americans, not about other people of color, and they were about extending advantages to elite Blacks, rather than impoverished African Americans. Thus, the graphic powerfully amplified the distorted discourse around affirmative action, one that suggests that these policies represent a set of entitlement programs for middle class and potentially undeserving African Americans. Of course nothing could be further from the truth. This is simply a gross distortion of reality, especially given that the primary beneficiaries of affirmative action have been Euro-American women.

This stereotypical image captures in multiple ways the distorted framing of affirmative action that advocates must learn to meet more effectively. Recognizing that anti-Black stereotypes constitute readily deployable capital against affirmative action presents a delicate Catch 22 for proponents. They must meet the stereotypes squarely while at the same time broadening

the image of the beneficiary class to reveal the multitude of non-African Americans who have benefited from these programs and who also stand to lose should they be eliminated. Yet the call to perform this delicate maneuver in Michigan gave way to a rather blunt and ultimately ineffective strategy of highlighting women and girls as the principle beneficiaries of affirmative action.

Replicating the strategy used in Washington, the campaign to defeat MCRI featured images, testimonials and radio spots that focused on affirmative action's benefits to women. In this sense, the campaign sought to reframe affirmative action as something other than a black entitlement program. Instead, it was presented as a friendlier, familiar, and family-centric set of programs that benefited working families. Supporters of affirmative action also sought an upbeat chord, amplifying the trend away from the negative imagery associated with racial discrimination toward a positive message of opportunity and shared destiny across racial group differences. Media gurus, pollsters, and opinion researchers seemed to advise that contested social justice issues might be better positioned in the public mind if they were reframed in a manner that avoided the "divisiveness" of racial discourse.

But, there are serious limitations to this strategy, and the outcomes in California, Washington and Michigan indicate that this approach is not a recipe for success. The strategy hardly seemed effective in persuading white women—only 43% of them voted against Proposal 2 in Michigan while 57% voted for its passage. In the ten years since the adoption of Prop. 209 in California, there has been virtually no movement in persuading white women to vote in favor of affirmative action. Moreover, this way of framing the debate managed to capture only 42% of the overall vote. The only good news is that greater percentages of people of color voted against the proposal in Michigan than in California, an even more impressive fact given that many minority organizers complained that anti-MCRI messaging was not targeted to their communities.

It is probably true, of course, that so-called "persuadable" audiences initially responded positively to affirmative action when these messages are grounded in their understanding of barriers to women's advancement. However, this receptivity does not appear to be sustainable during the long road to the ballot box. It is possible that this strategy proved ineffective because it failed to contest the racially tinted frames that Americans already have about this issue. Foregrounding (white) women in the frame does little to erase the omnipresent racial subject that serves as a lightning rod for most of the stereotypes associated with affirmative action. Blacks are still at the center of the picture, and voters who show some receptivity to the gender analysis still must be inoculated in some way against the stereotypes and race-baiting that pervades this debate. Opponents of affirmative action managed to simply roll the campaign's highlighting of women into their unchanged view that the debate was really about Black people. Said one Michigan woman of her white friends, "A lot of them see right through this campaign strategy.





