

WHAT THE MCRI CAN TEACH WHITE LITIGANTS ABOUT WHITE DOMINANCE

Adam Gitlin* †

The ballots have barely been counted, but litigation to enjoin implementation of the now-codified Michigan Civil Rights Initiative (“MCRI”) or at least limit its effect on admissions practices in Michigan’s universities is already underway. One of the primary arguments against the MCRI—and the basis upon which some plaintiff professors assert standing—is that students will suffer an impaired education if current admissions practices are discarded. Assuming that the MCRI survives these legal challenges, educators should be consoled somewhat to know the MCRI may still offer some pedagogy as compensation: litigation will likely be brought to enforce its provisions, and that litigation is likely to fail, but not without some whites still learning a bit about what race means in America today.

I. THE LITIGANTS

Since the passage of California’s Proposition 209 in 1996, which officially prohibited affirmative action in that state, white higher-education applicants have not filed suit against the University of California for discrimination in admissions. This is thanks in part to the University canceling certain initiatives before even trying them out, but is still remarkable given that whispers abound that the University is in fact employing racial preferences in admissions decisions. For two reasons, white applicants to Michigan universities may be more inclined to take up the gauntlet of litigation should they be refused admission. The first reason is historical, the second theoretical.

First, would-be litigants have the recent *Gratz v. Bollinger* success behind them in Michigan. In California, momentum from the Supreme Court’s 1978 decision in *University of California Regents v. Bakke* is limited because any galvanizing effect it may have had has dissipated by now. When Californians passed Proposition 209, California did not have that immediate history of a successful challenge to the use of racial preferences in admissions. In Michigan, litigation to protect the rights of whites may seem not only more appropriate, but, because of its recent history, more winnable.

The second reason stems from the nature of admissions processes itself. In a recently published paper, economists Roland Fryer and Glenn Loury model employment decisions made on individual match-ups of members of

* J.D. Candidate, University of Michigan Law School.

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a group that benefits from affirmative action against members of a group that does not. Affirmative action in this tournament setting requires greater effort from those for whom no affirmative action target is set, because they are competing for spots for which others have a handicap. Without affirmative action, but with the goal of diversity still in place, the authors predict that applicants will overwhelmingly exert less effort. To wit, in the educational setting, white applicants won't try as hard to be admitted in the absence of affirmative action.

In MCRI Michigan, the range of responses of whites to group handicaps like that modeled by Fryer and Loury is expanded. If white applicants perceive admissions officers to be cheating, then instead of working harder, as they might under a tournament scheme in which the rewards were determined based on explicitly authorized differential treatment, they will simply take to the courts. Yes, they must be prepared to lose, and for standing reasons, will not be able to demand admission as relief, but the lionizing of Jennifer Gratz by the anti-affirmative action movement gives reason to believe that finding plaintiffs will not be too difficult.

II. THE LITIGATION

Yet the cases themselves will be difficult to win for evidentiary, statistical, and institutional reasons. First, white litigants will likely have to meet an intent standard. Since *Washington v. Davis*, the Supreme Court has generally required plaintiffs alleging race-based discrimination to show that the state actor acted with discriminatory intent. Article I, § 26 of the Michigan Constitution now mandates that public universities “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.” The language focuses on the universities as actors, and never explicitly mentions a prohibition on disparate “impact” or “effect,” unlike civil rights laws offering relief for disparate impact. Moreover, although Michigan civil rights law does allow for disparate impact claims with no proof of discriminatory intent, such claims are rarely successful, and only when some facially neutral policy that is used to classify all members of one group as deserving of different treatment (like a pregnancy disability-leave policy), a claim that here would confront a daunting bar. It is therefore more useful for analytical purposes to assume courts will apply an intent standard if universities are accused of derogating their responsibilities under the codified MCRI.

Discriminatory intent is harder to show now, because state and private actors are more likely to be aware of the law, and are thus unlikely to leave smoking guns lying around; cases in which evidence of discrimination is unambiguous (“We don't take your kind”) rarely offer comforting precedent, because they tend to settle as soon as the carelessly misplaced firearm is identified. Accusations that an admissions decision was based on race invite attribution of that decision to holistic analysis, or other assessments that may be harder to quantify or disagree with (like essay quality).

Harder still will be to show discrimination when determinative factors used are difficult to parse from race. State universities will not be blind to signals of race, like membership in a student organization dedicated to appreciating the heritage of a particular race. Admissions officers on the witness stand will then be able to point to any factor other than race and attribute the admissions decision to the marginal effect of that non-race factor, and do so credibly.

But these officers may not have to be so evasive. Diversity is still a legitimate objective—indeed, a “compelling state interest”—incapable of being maintained in universities solely in reliance upon economic progress, according to recent projections based on income gaps between black and white families, yet still necessary for one reason or another. For example, the American Bar Association’s (“ABA”) revised equal-opportunity and diversity standard effectively makes the pursuit of diversity a requirement for law school accreditation. Without being permitted to use racial preferences, some admissions officers will have to find alternative ways of meeting that imperative. If they subsequently lend more weight to applications from students who are members of organizations whose *raison d’être* is the appreciation of certain under-represented racial minorities, isolating race itself as the deciding factor will be difficult for those alleging race-based admission. Reliance on organization membership must be permissible, assuming the organization does not itself limit membership on the basis of race. This reliance must be allowed even where the members of the student organization at issue are overwhelmingly of the racial minority upon whose heritage the organization is founded. For an organization like the University of Michigan Law School, if nothing else, any court analyzing such an admissions policy under a disparate treatment standard will have to contend with the argument that ABA accreditation is a “business necessity” that may justify the policy.

White litigants will also face an uphill statistical battle, because they will initiate litigation at a time when debates are raging about the validity of using traditional regression techniques to assess causality; the friction in this field is highlighted quite lucidly in a series of pieces by Professors Richard Sander and Daniel Ho on the question of whether going to higher-tier law schools causes black students to pass the bar exam at lower rates. These arguments have the potential to spill over into litigation, making causation even harder to prove statistically.

Institutionally, white litigants will engage a system in which the status quo is that diversity reigns. Because the default in public (as well as most private) institutions of higher learning is a diversity-dominated approach to admissions, diversity appears to be the “natural” state of things, as if un-engineered by the state. In the education setting, diversity is the general rule—it starts with outreach programs in the early years of education, and continues in various forms of scholarships, academic concentrations, post-graduate fellowships, and private-sector recruiting. Even many opponents of racial preferences agree that exposure to the thoughts, attitudes, and experiences of those coming from different walks of life ought to be part and

parcel of formal education, certainly at the collegiate level. Those attempting to enforce the MCRI will therefore be challenging not only the discrete decisions of university officials, but also a practice approaching a societal norm that is accepted without justification by many of its adherents.

In employment discrimination cases, litigants who are members of an allegedly excluded racial minority face a similar institutional hurdle. Their proof requirement, though not explicitly stated as such, is to show why it is unnatural that only whites occupy certain positions at a given firm. That showing is tough to make, because in a labor market permeated by white dominance, where whiteness leads to certain jobs and being well compensated for them, it is difficult to discern what, specifically, about a particular business or industry is so generous to whites over nonwhites. Even if racial diversity in the education setting is more apparently the product of deliberate action than white dominance is in the employment setting, the same is a function of time: diversity is a young concept, conceived in part to combat white dominance in education, whereas white dominance in the employment setting is older, better entrenched, and purposefully, if sometimes thinly, veiled.

III. THE LESSON

Whites—especially those likely to have voted for the MCRI—are not likely to perceive the quotidian disparities in treatment that members of racial minorities suffer in the employment context daily, often before they even secure a position. Matched pairs testing, an empirical technique used in the social sciences to quantify the effect of one characteristic on a set of outcomes, other things being equal, has lately been used to illuminate some of these obstacles: It may be that an “African American sounding name” on a résumé results in a lower chance of a callback interview than a “White sounding name” would. It may be a self-identified black jobseeker with no criminal record has a lower chance of securing certain employment than a white candidate with comparable credentials and a felony conviction. These experiential differences are noticeable, and beyond cavil in the right circumstances.

And just as, with roughly equal qualifications, Lakisha and Jamal will have a harder time getting certain jobs than Emily and Greg, they may still have an easier time getting into Michigan universities, because even though admissions officers will not be able to consider their race, they will still be able to guess what students with certain names can bring to classroom discussion. Admissions officers would not use those names as proxies allowing use of racial preferences, but rather to point out how non-race attributes attractive in a candidate may be difficult to tease apart from race. Of the panoply of factors used to make admissions decisions, showing that race was the deciding factor, while contending it masqueraded behind a name, will thus be a formidable challenge. One wonders how willing a court would be to alter the admissions process and fashion injunctive relief against a university that uses name etymology as an admissions criterion.

White litigants will encounter difficulty in trying to demonstrate that race itself was responsible for their failure to be admitted, solely or jointly (depending on how courts interpret the amendment's prohibitions, and whether the latter construction saves the MCRI under *Grutter v. Bollinger*). Yet that difficulty may educate them on the frustration inherent in litigation within a system built upon perpetual exclusion of certain people in the name of a priority advanced by those who control that system. To be sure, some will only be embittered and dig in their heels, ready to take on the system like so many pioneers of workplace integration. But maybe in the process others will come to realize how unequal American society still is, and will begin to understand why proponents of consideration of race in admissions believe as they do.