CRC Memorandum

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Statewide Issues on the November General Election Ballot

Proposal 2006-02: Michigan Civil Rights Initiative

This CRC Memorandum is a summary of Report 343, a more detailed analysis of the statewide ballot proposal.

On November 7, 2006, the citizens of Michigan will vote on an initiated proposal dealing with affirmative action and preferential treatment in the public sector. This proposal seeks to amend the Michigan Constitution by adding a Section 26 to Article 1 "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." The amendment language contains the following limitations and clarifications: 1) it would not prohibit action that must be taken to establish or maintain eligibility for any federal program(s) if ineligibility would result in a loss of federal funds; 2) it would not prohibit bona fide qualifications based on sex (e.g., female prison guards at female prisons); 3) the remedies available for violations of this proposal are to be the same regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law; 4) if any part(s) of the section is found to be in conflict with federal law or the United States Constitution, that part is to be severable from the remaining portions of the section; 5) it would apply only to alleged actions of discrimination that occur after its effective date; and, 6) it would not affect current court orders or consent decrees.

Affirmative Action and Preferential Treatment in the United States

Race has played a prominent role in American history. Slavery, although never named, was written into the U.S. Constitution and segregation was sanctioned by the government throughout much of our history. After passage of the Civil Rights Act of 1964, affirmative action programs were instituted by the federal and state governments to help open up opportunities previously denied to women and minorities.

Affirmative action is a complicated term that has come to comprise multiple meanings. The U.S. Commission on Civil Rights defines affirmative action as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[1] The goal of affirmative action programs is to accelerate the process of achieving equality between the sexes and among the races. However, these programs led to charges of reverse discrimination and have created a new form of racial tension.

Five landmark U.S. Supreme Court decisions have interpreted the vague laws regarding affirmative action, preferential treatment, and reverse discrimination. In *University of California Regents v. Bakke* (1978), the Court defined racial classifications of all types as "inherently suspect" and limited affirmative action programs in public education. *Richmond v. J. A. Croson Co.* (1989) mandated strict scrutiny of all racial classifications (benign as well as invidious) made by state and local governments. *Adarand Constructors, Inc. v. Pena* (1995) extended the requirement of strict scrutiny review to all racial classifications made by the federal government. Two University of Michigan (UM) cases, *Grutter v. Bollinger et al.* (2003) and *Gratz et al. v. Bollinger et al.* (2003), defined what is legal in regard to public university admissions policies. Minority status can be viewed by university officials as a single positive factor, among many, contributing to student-body diversity. It cannot be given a fixed number of points or be used to meet some sort of minority "quota" or "set-aside." These court rulings provide narrow opportunities for the use of affirmative action preferences in public employment, education, and contracting.

Experience in Other States. In November 1996, California voters passed Proposition 209, also known as the

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California Civil Rights Initiative, which is the model upon which the Michigan Civil Rights Initiative (MCRI) was based. Since passage of Proposition 209, many lawsuits have worked their way through the California court system and provide direction on implementing the amendment and on the programs and policies that will no longer withstand constitutional review. In 2001, the University of California (UC) responded to Proposition 209 with implementation of its "Eligibility in Local Context" plan. This plan guarantees admission to the top four percent of graduating students from each public and private high school in the state to one of the UC system's eight campuses, although not necessarily to the campus of their choice. Enrollments of blacks and Hispanics in the UC system dropped initially after passage of Proposition 209. They remain below or near their pre-Proposition 209 levels (as of 2004 enrollment data). During the same time period, enrollments of white students have declined as well, while enrollments of Asian students and students whose ethnic origin is unknown have risen. At the state's two most selective universities, UC Berkeley and UCLA, minority enrollments remain well below their pre-Proposition 209 levels. Even before Proposition 209 was adopted, blacks and Hispanics were underrepresented in the UC system while Asians were over-represented compared to their percentage of the state population.[4]

In addition to its four percent plan, UC has intensified outreach and recruitment efforts through focusing on "programs designed to in-

Glossary of Terms[2]

Affirmative Action. A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.

Benign Discrimination. This is a controversial term because many view it as a remedy to deal with social inequalities, not as a form of discrimination. A definition of benign is "harmless" or "having little or no detrimental effect."[3] Benign discrimination is discrimination that serves an important governmental interest, such as increasing diversity or remedying the effects of past discriminatory behavior. It has been practiced by governments in the years since the passage of the Civil Rights Act of 1964 through affirmative action preference programs to promote qualified minorities and women. It has been argued by the government to be "harmless discrimination" because its intent is not to discriminate against a group of individuals, but to help those groups that have historically been discriminated against to achieve equality.

Discrimination. The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap.

Intermediate Scrutiny. A standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective.

Invidious Discrimination. Discrimination that is offensive or objectionable, especially because it involves prejudice or stereotyping.

Judicial Review. A court's power to review the actions of other branches or levels of government; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional.

Rational-Basis Test. A principle whereby a court will uphold a law as valid under the Equal Protection Clause if it bears a reasonable relationship to the attainment of some legitimate governmental objective.

Reverse Discrimination. Preferential treatment of minorities, usually through affirmative action programs, in a way that adversely affects members of a majority group.

Strict Judicial Scrutiny. The standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.

crease enrollments of students from low-income families, those with little family experience in higher education, and those who attend schools that traditionally do not send large numbers of students on to four-year institutions."[5] According to UC administrators, Proposition 209 has been construed broadly to outlaw race-conscious recruitment and outreach. However, student groups at UC-Berkeley have worked on recruiting under-represented students and the admissions office has held recruiting events targeted at specific groups since passage of Proposition 209. Additionally, the University offers several scholarships aimed at attracting under-represented students through focusing on eligible under-represented high schools and socioeconomic status.[6] Public universities have also been able to collaborate with private nonprofit groups that provide programs targeted at specific groups (provided that the university is not granting preferential treatment through the collaboration). For example, UC-Berkeley provides students and alumni to serve as role models for Techbridge, a nonprofit organization that organizes after school, and summer programs designed to encourage girls in technology, science and engineering (since this is run by a private organization, the programs are legally able to be offered exclusively to females).

Three other states have experience limiting affirmative action programs as well. Voters in Washington passed a proposal similar to Proposition 209, thereby limiting affirmative action preference programs in the public sector. Texas public universities were unable to grant affirmative action preferences after a federal court ruled against the University of Texas (UT) in *Hopwood v. University Texas Law School* (1996). In Florida, Governor Bush issued his "One Florida" initiative through executive order, ending affirmative action preference programs in the public sector. The greatest impact in all of these states has been felt at the public universities, leading Texas and Florida to enact some form of a "percent plan" similar to the four percent plan in California that provides automatic public university admission to the top-performing students from each high school in the state. Public universities in all four states have also had some success in raising minority enrollment through intensified outreach and recruitment efforts.[7]

Implications of MCRI for Michigan

University Admissions. After the 2003 U.S. Supreme Court decisions, UM-Ann Arbor was forced to change its undergraduate admissions policy. It is still allowed to have a race-conscious admissions program, but applicants are reviewed individually and holistically with minority status representing only one possible aspect of diversity. If Proposal 2006-02 passes, UM will no longer be able to consider race, ethnicity, or national origin as a plus factor in the admissions process as it now does in its undergraduate and graduate admissions programs. UM will still be able to consider race-neutral non-academic factors in admissions, such as socioeconomic status, geography, and personal interests.

The passage of this proposal will be felt most strongly at UM-Ann Arbor. Other Michigan public universities do not appear to use affirmative action preference programs in making undergraduate admissions decisions. Many of the university websites contain an equal opportunity statement and focus on academic and extracurricular admissions criteria.

It is difficult to determine how admissions decisions are made at the graduate and professional level. Most universities offer general academic standards that all applicants must meet, but note that additional criteria on which a candidate will be judged vary by program. It is likely that some graduate programs consider race as a factor in a holistic review of applicants. This is fairly easy to do in small graduate programs while still following the guidelines set in the *Grutter* case. In professional programs, diversity is a priority and most admissions policies consider personal qualities, such as race and ethnicity, when deciding whom to admit. If any specific programs at the undergraduate or graduate level provide a preference based on gender (e.g., nursing programs preferring male ap-

plicants), they will be affected by passage of this proposal.

Michigan would have a hard time adopting a percent plan similar to other states' plans, because it does not have a public university system like those in California, Texas, and Florida. Instead, Michigan has a number of independent public universities. Also, UM is significantly more selective than even the most elite public schools in Texas, Florida, and Washington, though not more selective than certain schools in the UC system. Therefore, in order to accept the top percent of high school graduates from all schools throughout the state with no other universities to whom it could pass on the lower performing "top" students, UM would likely have to sacrifice its selectivity. If the University is unwilling to do this, it would have to rely on increased recruitment and outreach in order to maintain its diversity. The University has already intensified efforts to recruit students generally, and minority students particularly, as a result of the Supreme Court rulings and the initial drop in applications and in minority admissions that followed those rulings.[8]

Other university programs that are targeted toward specific groups should remain legal unless they operate to exclude any individuals based on minority status or gender. UM has a Women in Science and Engineering (WiSE) program that provides outreach to K-12 girls to encourage them in science and engineering disciplines.[9] While the program is aggressively targeted toward girls, it does not exclude boys that wish to participate. Wayne State University (WSU) has a Center for Chicano-Boricua Studies that does appear to provide a benefit to Latino students and therefore it may be affected by passage of Proposal 2006-02. Furthermore, any state funded scholarships restricted by minority status or gender may have to be revised if the proposal passes, but similar privately funded scholarships should remain intact. All universities would still be able to take any affirmative action required by the federal government when it comes to hiring and recruiting faculty. However, there is the possibility that passage of Proposal 2006-02 could reduce the attractiveness of state universities to prominent faculty members. For more information on university, state and local programs that may be affected by passage of Proposal 2006-02, see Citizens Research Council Report 343.[10]

K-12 Education. It does not appear that passage of Proposal 2006-02 would have a strong affect on public K-12 education in Michigan. Based on evidence from California, it would likely remove the ability of public schools (including magnet schools) to use affirmative action preferences in assigning students to specific schools in order to achieve racial balance. However, no school districts in Michigan appear to be doing this currently. If Proposal 2006-02 passes, it would prohibit public schools from using any kind of preferences based on minority status or gender in hiring decisions (e.g., if any schools currently have a preference for hiring male elementary school teachers, they would no longer legally be able to maintain that preference).

State Government. The Supreme Court rulings in *Croson* and *Adarand* severely limited the ability of the federal and state governments to implement and enforce affirmative action programs that provide preferential treatment to minorities. These programs are always subjected to the legal standard of strict scrutiny, which is often hard to meet (discrimination and preferential treatment based on gender is subjected to the standard of intermediate scrutiny).

Michigan has a four-person Civil Service Commission (CSC) that creates and enforces Civil Service Rules. The CSC rules explicitly state that the State of Michigan is an equal opportunity employer and that employment decisions are based on merit. However, there is a section that discusses the "elimination of the present effects of past discrimination." There are currently no such authorized programs being implemented in state government. If Proposal 2006-02 passes, it should have no direct impact at the moment on state classified employment. However, it would remove the opportunity for state departments to institute affirmative action preferences if evidence of past discriminatory behavior arises.

Procurement and contracting in state government appear to be handled completely through competitive bidding procedures.

The Michigan Department of Transportation (MDOT) operates a Disadvantaged Business Enterprise (DBE) program, but this is a state-run federal program that is required to receive federal funds. State transportation dollars are maintained separately and are not used to comply with the DBE program.

State departments do practice other types of affirmative action programs, such as minority outreach programs through advertising and increased minority recruitment. These programs are limited to outreach and selection is based solely on merit. If Proposal 2006-02 passes, some of these programs may have to be revised if they operate to exclude individuals or groups on the basis of race, gender, color, ethnicity, or national origin. However, whether or not this amendment would affect these programs would depend on its interpretation by the courts.

A CRC report released in 2004 on employment trends in state government from 1966 to 2003 found that females and minorities have been making progress and increasing their numbers in state employment (primarily in professional, administrator and official positions) over the years.[11] State hiring policy does not currently involve affirmative action preferences, therefore if Proposal 2006-02 passes, it should not have a strong affect on state government diversity (however, affirmative action preferences in state government hiring in the past may have helped, at least partially, the state workforce achieve its current level of diversity).

Local Government. Michigan has 1,859 general purpose units of government (counties, cities, villages, and townships). The large number of local governmental entities prohibits a review of the charters, ordinances, policies, and collective bargaining agreements of all local governments throughout the state. A sample of the larger local governmental entities was reviewed. An examination of the charters of many cities throughout the state showed that only a small number of cities in the state made reference to affirmative action programs in their charters.

All units of local government have non-discrimination and equal employment policies mandating that employees and applicants are not to be discriminated against because of race, gender, color, ethnicity, or national origin, among other things. Many hiring policies are based on merit and competitive testing (testing includes, but is not limited to, written tests, performance based tests, licensure verification, background investigations, telephone and personal interviews, and evaluation of applicants' experience and training). Most procurement and contracting policies require selection to be made through a competitive bidding process. Some units have policies 1) requiring contractors to file affirmative action clearances, state that they are equal opportunity employers, or employ minorities and females commensurate with their availability in the labor recruitment area; 2) establishing diversity spending objectives; or, 3) offering bid discounts to firms that increase supplier or workforce diversity. Programs such as these may be affected by passage of Proposal 2006-02.

Any employment or contracting policies that operate to provide preferences or benefits based on an applicant's minority status or gender would be affected by passage of this proposal. Units of local government that have affirmative action programs to encourage equal opportunity and to increase the diversity of applicants (without providing preferences or excluding certain groups) should not be affected by Proposal 2006-02.

There also remain gray areas where it is difficult to assess what the affect of Proposal 2006-02 would be on local government. These include, but are not limited to, targeted outreach policies (at what point do they operate to provide a preference) and vague goals to increase diversity (e.g., a policy of encouraging contractors to develop and maintain a diverse workforce with no requirements or measures of contractor diversity). If any units of local government receive federal funds, then any action they must take to comply with acceptance of those funds would not be affected by Proposal 2006-02. They would still be required to adhere to federal affirmative action requirements.

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Conclusion

If Proposal 2006-02 passes, it will not outlaw all affirmative action programs in the state. Michigan statutes contain various references to affirmative action and minority status or gender. Only those that grant preferential treatment to individuals or groups on the basis of minority status or gender would be invalidated by this amendment. However, determining what constitutes preferential treatment would be left to the Michigan court system. Therefore, if Proposal 2006-02 passes, its ultimate impact will be determined by State government and the court system. There would likely be numerous lawsuits filed to test the boundaries of the amendment and to interpret and clarify its impact in Michigan.

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[1] Dunn, Brian J. and Zandarski, Amy M. "The Evolution of Affirmative Action: Background on the Debate." Michigan Legislative Service Bureau, Legislative Research Division 18.3 (1998): 1-41.

[2] Garner, Bryan A., ed. Black's Law Dictionary. 7th ed. 1999.

[3] "Benign." The American Heritage Dictionary of the English Language. 4th ed. Houghton Mifflin Company, 2000

[4] Horn, Catherine L. and Flores, Stella M. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences." Cambridge, MA: The Civil Rights Project at Harvard University, 2003; and University of California, Office of the President. www.ucop.edu/news/factsheets/Flowfrc_9504.pdf. (accessed 10 April 2006)

[5] University of California – Office of the President, Student Academic Affairs. "Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies." March 2003. www.ucop.edu/sas/publish/aa_final2.pdf. (accessed 6 September 2006

[6] See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."

[7] See Horn. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences."

[8] Lederman, Doug. "Upturn for Minority Students at Michigan." Inside Higher Ed 7 June 2005. http://insidehighered.com/news/2005/06/07/mich. (accessed 19 April 2006)

[9] "Frequently Asked Questions about the Proposed 'Michigan Civil Rights Initiative.'" University of Michigan website: Information on U-M Admissions Lawsuits. 9 May 2006. www.vpcomm.umich.edu/admissions/new/mbp_faq.html. (accessed 24 August 2006)

[10] "Statewide Issues on the November General Election Ballot, Proposal 2006-02: Michigan Civil Rights Initiative." Report 343. September 2006. www.crcmich.org/PUBLICAT/2000s/2006/rpt343.pdf.

[11] "Employment Trends in State Government, FY1966 – FY2003," February 2004. www.crcmich.org/PUBLICAT/2000s/2004/rpt336.pdf.