

More Fair to Whom?

Michigan and, in particular, the University of Michigan have in many ways been ground zero for the highly public debate on minority admissions. This certainly remains true as the United States Court of Appeals for the Sixth Circuit recently vacated its panel's decision (finding that the Proposal 2 prohibition on the consideration of race in an admissions process is unconstitutional) so that it may rehear the case en banc.¹

A (Very) Brief History

The University of Michigan's quest for diversity dates back to at least 1988, when it issued *The Michigan Mandate: A Strategic Linking of Academic Excellence and Social Diversity* largely in response to student protests.² The university has subsequently reflected that "the *Michigan Mandate* document proclaimed a major institutional commitment to address issues of racial/ethnic diversity and equity" and that it detailed how diversity was viewed as "an essential element in making the institution highly competitive for the future."³ Most important, the mandate is seen as having established "a critical strategic linkage between an enhanced focus on campus diversity and academic excellence."⁴ The university continued this pursuit, issuing a progress report and recommitting itself to diversity and academic excellence in 1995.⁵

In 1997, two lawsuits challenged the ways in which the university's policies assured admission of students of color. These lawsuits eventually culminated in landmark decisions by the United

WINNERS AND LOSERS POST PROPOSAL 2

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States Supreme Court in *Gratz* (undergraduate)⁶ and *Grutter* (law school).⁷ The latter held that “universities cannot establish quotas for members of certain racial groups” but may “consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration....”⁸

Shortly thereafter, opponents of the University of Michigan’s admissions policies and the Supreme Court’s ruling began a campaign to place the issue on the ballot where it could be decided by popular vote. Advocates failed in their first effort to reach the ballot in 2004 but were successful in 2006, though only through what the Sixth Circuit panel described as “methods that undermine[d] the integrity and fairness of our democratic processes.”⁹

Commonly known as Proposal 2, Michigan voters passed the initiative (58 percent to 42 percent) on November 7, 2006. Proposal 2 amended Michigan’s Constitution by adding Article I, Section 26, which provides in relevant part that

[t]he University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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.¹⁰

Challenges to the constitutional provision proved largely unsuccessful until this past July 1 when a panel of the Sixth Circuit held that “those portions of Proposal 2 that affect Michigan’s public institutions of higher education violate the Equal Protection Clause.”¹¹ Michigan’s attorney general asked the Sixth Circuit to reconsider the case, and on September 9, 2011, it agreed. The court vacated the panel opinion and will rehear the case en banc, with arguments scheduled for March 7, 2012.

Thus, the constitutionality of Michigan’s voter-enacted prohibition on the consideration of race in university admissions remains unresolved. Enough time has passed, however, that it is possible to begin assessing the prohibition’s effect.

“Objective” Numbers

Objective statistical information is presented in two charts accompanying this article (see pages 26 and 27). The first presents information provided by the University of Michigan¹² showing the percentage of underrepresented minorities in undergraduate, medical, and law school admissions classes before the Supreme Court decisions in *Gratz*¹³ and *Grutter*¹⁴ (2001), after the opinions but immediately before adoption of Section 26 (2005), and most recently for 2010 when the effects of the resulting policy changes

FAST FACTS:

The Michigan Mandate is seen as having established “a critical strategic linkage between an enhanced focus on campus diversity and academic excellence.”

To assume the same group will always be given preferential treatment is either outright racism (supremacy) or abject defeatism (societal inequities will never be overcome), neither of which is a premise the authors find acceptable.

should be apparent. The second chart presents official ABA data¹⁵ as reported by the schools. In addition to Michigan’s five law schools, comparison information is provided for what *U.S. News and World Report* has determined to be America’s top 10 law schools because the effects of admissions policies are presumed to be most apparent in “elite” or “highly selective” universities.¹⁶

While the admissions numbers are objective, they remain open to subjective interpretation. The historical Michigan data shows that both the Supreme Court’s decisions and the decision of Michigan’s voters had significant impact on the number of minorities present in the ranks of newly admitted students. Minority representation fell in the undergraduate, medical, and law schools, first after the Supreme Court limited consideration of race and then again after Michigan voters prohibited it.

Still, whether this change is positive or negative depends on one’s perspective. Is this a giant step backward that is unfair to students who are members of groups trying to overcome the legacy of discrimination? Or is it a great step forward, providing fairness to now-admitted students who would otherwise have had to attend a different university?

Do Two Rights Make Anyone Wrong?

Proposal 2’s proponents argue the numbers prove that previous policies resulted in admission of less academically qualified persons of color at the expense of white applicants with higher grade point averages or test scores. They conclude it is unfair to deny admission to more qualified white students and punish them for things over which they had no control and for which they bear no responsibility. They are correct.

Proposal 2’s opponents argue the numbers prove the prohibition will perpetuate the underrepresentation of persons of color. They contend the historical denial of equal opportunities has created inequities that will never be corrected if persons of color continue to be underrepresented in the halls of higher education. They state that “objective” measures of current performance (like admissions test scores) are directly impacted by the presence or absence of educational opportunity. They conclude that it is unfair to prohibit affirmative action and thereby punish students of color for things over which they had no control and for which they bear no responsibility. They are also correct.

This is the reality of affirmative action. It is a process by which we can address prior inequities, but only by artificially creating new ones. Whether past inequities may perpetuate themselves in a way that makes it impossible to address them by means other than affirmative action is a question well beyond the scope of this brief article. So is discussion of how we should (or if we can) assess the relative harms of different inequalities.

From this perspective, statistical admissions information adds little to the fundamental debate over if and when affirmative action is appropriate. Both sides point to the same numbers to prove their opposing viewpoints.

Much of the public debate over minority admissions has stopped here—comparing the student who gets in to the one who doesn't and questioning the relative fairness of admitting one applicant but not the other. But what if we recognize that either admission decision is both fair and unfair?

The answer may be that we've been asking the wrong question.

What About the Rest of Us?

Let's go back to 1988. The University of Michigan began its pursuit of diversity in response to student protests asserting admissions policies were unfair to applicants of color. While the university ultimately agreed, it did not stop there. *The Michigan Mandate* was specifically subtitled *A Strategic Linking of Academic Excellence and Social Diversity*. This link between diversity and academic excellence remains at the core of the school's diversity efforts.¹⁷

The University of Michigan is hardly alone in recognizing this link. The Supreme Court found support for diversity in numerous studies that establish the essential value of a diverse student body.¹⁸ *Grutter* stated that “[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.”¹⁹

Underrepresented Minority (URM) Enrollment Compared to Total Enrollment (new fall term students)

University of Michigan—Ann Arbor

		2001	2005	2010*
UNDERGRADUATE	Enrollment	5,540	6,115	6,496
	# URM	812	812	660
	% URM	14.7%	13.3%	10.2%
LAW SCHOOL	Enrollment**	355	363	374
	# URM	46	36	35
	% URM	13.0%	9.9%	9.4%
MED SCHOOL	Enrollment	170	177	170
	# URM	24	23	17
	% URM	14.1%	13.0%	10.0%

Data provided to authors by the University of Michigan Office of Budget and Planning and based on internal enrollment and degree data displays as of April 5, 2011.

* Before 2010, underrepresented minority (URM) counts are based on what individuals considered their primary race/ethnicity. Beginning in 2010, students no longer identify their primary race/ethnicity and may indicate each race that is applicable. Individuals are counted as URM's if they selected at least one underrepresented category.

** Fall 2000 data is used in place of fall 2001 data for the law school.

The *Harvard Educational Review* published a post-*Grutter* study designed to examine empirically whether “exposure to racial diversity in college has the long-term benefit of preparing students to understand multiple perspectives, to negotiate conflict, and to relate to different worldviews.”²⁰ Examining white individuals' exposure to racial diversity during and after college, the study determined that “[c]ontrary to the discourse that frames people of color as the sole beneficiaries of affirmative action and integration, [the] findings demonstrate that racial diversity is also essential to the prosperity of white Americans, whether they come from segregated or diverse precollege neighborhoods.”²¹ The study concluded that “[c]ollege exposure to diversity is more important than precollege or postcollege exposure in terms of developing pluralistic skills that reflect the highest stages of moral and intellectual development.”²²

The study suggests “...business leaders might go so far as to publicly announce their preference for hiring graduates from certain selective institutions that have particularly diverse student bodies” or even that they “consider recruiting employees from less-selective institutions, which are more likely to offer diverse learning environments.”²³

These conclusions should not be mistaken as an overly dramatic social scientist's hyperbole. They merely verify the belief of 65 of America's largest corporate competitors, who submitted a joint amicus brief in *Grutter* and *Gratz* indicating their desire to hire graduates of diverse institutions.

As the value of diversity becomes increasingly recognized, it also becomes a greater part of the decision-making process for applicants choosing where to apply or attend. Diversity statistics are a prominent part of the unranked information provided by the ABA.²⁴ While not currently factored into the most widely used school rankings, separate diversity rankings are available to students to whom this is already an important consideration.²⁵ The State Bar of California recently asked *U.S. News* to give 15 percent weight to diversity in its overall law school rankings.²⁶ While the information reflected in the accompanying chart does not establish that diversity will help a school achieve greatness, it does prove diversity doesn't impede that goal. It also shows that great schools value diversity.

Admissions Aren't Just About Our Universities

Michigan must remain focused on diversity and inclusion to prepare individuals for the knowledge-based economy and remain competitive in the global marketplace. Maintaining the capacity to relate to people from all parts of the world, now and in the future, will continue to require diversity and inclusion within school systems (pre-K through higher education), workplaces, and communities.

Today's students are tomorrow's workforce. Even after Proposal 2, Michigan's Constitution and laws jealously guard against interference with the educational autonomy and academic freedom of Michigan's universities. Moreover, the United States Supreme Court has long recognized education as a critical function of government. Indeed, among all the functions served by state

Diversity Enrollment Statistics, 2009–2010

Michigan Law Schools and Top Ten Law Schools in the U.S.

Law School (in alphabetical order)	% minority	% All Hispanics	% American Indian/ Alaska Native	% Asian	% Black/ African American	% Native Hawaiian/ Pacific Islander	% 2 or more races	% Nonresident Alien	% White/Caucasian	% Unknown	% Attrition	FACULTY % Minority
Cooley	26.8	5.6	0.5	5.1	13.3	0.0	2.1	5.4	65.0	2.8	11.17	12.1
Detroit Mercy	19.1	3.4	0.6	2.9	12.2	0.0	0.0	20.4	60.5	0.0	9.49	13.9
Michigan	21.7	4.1	0.4	10.4	2.8	0.0	3.9	2.3	68.1	7.9	1.06	17.2
Michigan State	15.4	3.4	1.4	2.8	6.9	0.1	0.8	6.8	71.2	6.7	2.94	14.3
Wayne State	15.8	2.9	0.8	5.4	6.7	0.0	0.0	2.8	71.7	9.6	2.12	9.1

Cal. Berkley	37.7	12.3	1.7	16.7	4.8	2.1	0.0	4.0	44.7	13.6	0.66	20.3
Chicago	28.1	9.9	0.2	9.0	5.8	0.0	3.2	2.1	58.2	11.7	1.10	24.6
Columbia	32.2	5.7	0.5	16.6	7.7	0.1	1.6	8.7	58.5	0.6	0.15	18.2
Harvard	32.9	7.9	0.6	5.0	11.3	7.5	0.6	0.5	54.2	12.4	0.17	12.2
Michigan	21.7	4.1	0.4	10.4	2.8	0.0	3.9	2.3	68.1	7.9	1.06	17.2
NYU	25.3	7.2	0.2	10.1	7.7	0.0	0.1	3.6	49.2	21.9	1.19	14.1
Penn	30.3	4.6	0.0	14.1	7.5	0.0	4.1	3.1	63.4	3.2	0.87	14.9
Stanford	34.7	10.2	1.6	9.8	10.2	0.0	3.0	1.8	55.5	8.1	0.70	22.6
UVA	23.0	5.1	0.8	9.2	6.1	0.0	1.7	1.0	62.8	13.2	1.08	11.5
Yale	29.9	7.3	0.2	13.2	6.5	0.0	2.7	5.1	62.5	2.5	0.16	11.6

“Official ABA Data” as reported by the Law School Admissions Council (LSAC) at www.lsac.org and in *ABA-LSAC Official Guide to ABA-Approved Law Schools™* (2012 Edition)

and local governments, “education is perhaps the most important.”²⁷ This prevailing constitutional thread woven by *Brown v Board of Education* more than 50 years ago demonstrates profound appreciation and deep respect for education in our democratic system of government.

Education, workforce development, and economic growth are interrelated. Michigan companies have provided substantial financial support for minorities in higher education. General Motors, Chrysler, Kellogg, Steelcase, TRW, and Whirlpool joined other Fortune 500 companies in filing a joint amicus brief with the Supreme Court in 2003, supporting the University of Michigan’s affirmative action programs. To ensure they remain globally competitive in the twenty-first century, these Michigan-based companies rely on affirmative action programs to achieve diversity and develop talent and innovation within their workforce. Expanded access to higher education for minorities must be accomplished to match state, national, and global workforce needs and to continue inspiring business growth in the state.

As Michigan pursues an economic transformation centered around life sciences, high-tech research, development and manufacturing, and emerging green technology, the inevitable challenges of that evolution persist. Thus, the state has a compelling interest in finding ways to ensure that its students remain in school and graduate with a quality education, opening doors to college for a larger number of students. This path is vital for individuals and businesses to thrive in the new knowledge-based economy.

Winners and Losers?

The issue currently before the Sixth Circuit is not just whether Proposal 2 “restructures the political process along racial lines and places special burdens on racial minorities....”²⁸ Another question should be whether universities are entitled to evaluate and weigh all criteria and admissions considerations with academics in mind—except for specific considerations determined by a majority vote of the general population and excluded based on unknown considerations. This question is even more striking

because the sole consideration controlled by majority vote—diversity—is seen to primarily benefit minorities.

While affirmative-action-focused programs begin by pre-identifying groups that will be “preferred,” diversity-focused programs do not. Similarly, while affirmative action consideration can be given to the first student admitted in any given year, diversity-related considerations can only be made after the majority of the class has been admitted and underrepresented groups identified. A music school’s admission process, for example, can’t predetermine which instruments will be underrepresented, and it’s unlikely anyone would argue the school should “make do” with a single violinist because tuba-playing applicants had higher SAT scores.

Diversity does not “prefer” anyone. Would an admissions policy requiring that no more than two-thirds of incoming classes be of a single gender indicate a preference for male or female students? Would it discriminate against either? Does such a policy benefit the student who doesn’t want to feel outnumbered or the one hoping to get a date? Diversity works to benefit all *students*, even if it might result in some *applicants* with lower SAT scores being admitted over those who did better on the test.

A university does not predetermine who might be preferred by an admissions process seeking a racially diverse student body any more than the music school predicts which year violinists will have poor test scores. To assume the same group will always be given preferential treatment is either outright racism (supremacy) or abject defeatism (societal inequities will never be overcome), neither of which is a premise the authors find acceptable.

A university doesn’t develop a diversity strategy based on the interest of the last student to be admitted versus that of the last one to be declined. Neither is it atoning for a history of discrimination against one group by discriminating against another. It is simply acting in the best academic interests of all admitted students and its own academic standing. Once our own child is accepted, would any of us settle for less?

Final Fairness Questions

Putting affirmative action aside, should a university be able to admit those applicants it believes will create the best possible educational environment for all admitted students, improve the job prospects and performance of those students, and enhance the university’s reputation for excellence? Who wins when admissions policy is instead determined by majority vote? Whose interests are voters weighing and what criteria do they employ that are fairer than the best interests of the individual university and its students? And fairer to whom? ■



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FOOTNOTES

1. *Coalition to Defend Affirmative Action v Regents of the Univ of Mich*, 652 F3d 607 (CA 6, 2011); rehearing en banc granted, opinion vacated, September 9, 2011.
2. Available at <http://milproj.dc.umich.edu/Michigan_Mandate/index.html>. All websites cited in this article were accessed December 13, 2011.
3. Office of Academic Multicultural Initiatives, Univ of Michigan, *Michigan Diversity Report 5*, 10 (2010), available at <<http://www.oami.umich.edu/images/MSS%20DIVERSITY%20REPORT.pdf>>.
4. *Id.*
5. Univ of Michigan, Office of the President, *The Michigan Mandate—A Seven-Year Progress Report 1987–1994*, available at <http://milproj.dc.umich.edu/Michigan_Mandate/pdf/Michigan-Mandate-Progress.pdf>.
6. *Gratz v Bollinger*, 539 US 244; 123 S Ct 2411; 156 L Ed 2d 257 (2003).
7. *Grutter v Bollinger*, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003).
8. *Id.* at 334.
9. *Operation King’s Dream v Connerly*, 501 F3d 584, 591 (CA 6, 2007).
10. Const 1963, art I, § 26.
11. *Coalition to Defend Affirmative Action v Regents of the Univ of Mich*, 652 F3d 607, 631 (CA 6, 2011).
12. University of Michigan Office of Budget and Planning, April 5, 2011.
13. *Gratz*, n 6, *supra*.
14. *Grutter*, n 7, *supra*.
15. From “Official ABA Data” for the 2009–2010 academic year as reported by the Law School Admissions Council (LSAC) at <www.lsac.org>.
16. This is not intended as an endorsement of the U.S. News rankings.
17. See, e.g., *Michigan Diversity Report*, n 3, *supra*.
18. *Grutter*, n 7, *supra* at 333.
19. *Id.* at 328.
20. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 *Harvard Ed R*, 615, 617 (2008).
21. *Id.* at 636.
22. *Id.* at 641.
23. *Id.* at 641.
24. Official ABA Data as reported by the Law School Admissions Council (LSAC) at <https://officialguide.lsac.org/release/OfficialGuide_Default.aspx>.
25. See, e.g., U.S. News and World Report, *Campus Ethnic Diversity Rankings* <<http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity>>; U.S. News and World Report, *Law School Diversity Index* <<http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings>>.
26. See, e.g., Sloan, *California Bar wants ‘U.S. News’ to add diversity as factor in law school rankings*, *Nat’l LJ*, February 17, 2011, available at <<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202482364965&slreturn=1&hblogin=1#>>.
27. *Brown v Board of Education*, 347 US 383, 493; 74 S Ct 686; 98 L Ed 873 (1954).
28. *Coalition to Defend*, n 1, *supra* at 630–631.