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IT IS TIME TO END RACE-BASED "AFFIRMATIVE ACTION"

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No one can deny that "black" people have endured considerable mistreatment throughout their history in America—enslavement, denial of the right to vote, segregated from the rest of society, forced to perform the most menial of jobs, denied the right to use public accommodations such as lunch counters and restrooms, denied access to public education, and discriminated against in the housing market.

As a black man born in Leesville, Louisiana, in 1939, I have experienced first-hand many of the conditions described above. From my experience, I can attest to the fact that racial discrimination is profoundly humiliating and represents the most fundamental denial of one's humanity, especially in a nation founded on the principle that every person is endowed by our Creator with certain unalienable rights, among which are "equal" creation. The right to engage in the "pursuit of happiness" rings hollow when one is denied the benefits of what America has to offer, especially when that denial is of one's personal freedom and individual liberty.

For much of the twentieth century, our nation was engaged in a tumultuous struggle over the issue of "civil rights." This struggle was prompted by the fact that black people had been denied the right to equal treatment, despite the proclamation that "all men are created equal" in the eyes of our government. It was appropriate for President John F. Kennedy to sign an Executive Order (10,925) in 1961 to promote "affirmative action" as a means of ensuring that every American would be treated equally "without regard" to race, color or creed.[1] It was not the purpose of that Executive Order to simply substitute one group for another in the discrimination game.

We often forget that at the core of the American way of life is a profound sense of decency. As Americans, we are fundamentally decent

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1. Exec. Order No. 10,925, 26 F.R. 1977 (1961).

people who want to do the right thing whenever we are confronted with a choice between right and wrong. Sometimes, we make mistakes in terms of how our government deals with its citizens. Nonetheless, we constantly move forward toward that "more perfect union."

It was in recognition of this sense of national decency that Dr. Martin Luther King, Jr. urged the American people to "live out the true meaning of your creed," as he led the effort to purge our nation of the oppressive conditions that confronted black people prior to and during that tumultuous period known as the "civil rights movement."

The response to Dr. King and his eloquent vision of a nation where the color of a person's skin would not be a determining factor in that person's pursuit of happiness was clear and resounding: passage of the *Civil Rights Act of 1964*.[2] This *Act* guaranteed that every American citizen would be treated "equally" in the public arena "without regard" to his or her race, skin color or national ancestry.

During this civil rights struggle, President Kennedy said, "Race has no place in American life or law." Some thought that passage of the *Civil Rights Act* and its promise of a "colorblind" America would pave the way for an American society that would be true to this vision. Such was not to be. Almost from the beginning of this supposed "colorblind" era, many of those who had participated in the civil rights movement began to argue for the adoption of policies that would make "race" more – not less – of a factor in American life.

The quest for racial integration, for example, resulted in little children of all races being bused out of their neighborhoods into schools across town for the sake of integration. Teachers and principals could only be hired if they had the same racial characteristics as the students who comprised the racial majority of the school hiring them. Soon, educational quality of neighborhood schools began to suffer. In addition, a host of policies and programs were enacted to address "institutional racism."

To "level the playing field," policies of equal opportunity and nondiscrimination were replaced by "affirmative action." In its original form, affirmative action was intended largely to ensure that black people would not be the victims of racial discrimination. Over time, however, those policies were expanded to include "women and minorities." Ironically, "minorities" often even included illegal immigrants, who receive the benefit of in-state tuition at many American public universities, thanks to the generosity of the American taxpayers.

More than anything else, however, the period immediately following passage of the *Act* was one in which the spirit of "We Shall Overcome" was

2. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964).

replaced by a pervasive sense of black entitlement and lack of acceptance of personal responsibility for one's own success.

Over the years, throughout America, governments at all levels have evolved a system of "affirmative action" that systematically discriminates against American citizens because of their race and skin color instead of treating them equally "without regard" to those factors. Instead of "civil rights" being expanded to include black people, the term has been redefined to exclude whites, and often Asians, in academic settings.

In 1978, the United States Supreme Court ruled in the case of *Bakke v. University of California* that racial quotas were unconstitutional.[3] That was good! But, the Court also ruled that race could be used as "one of many factors" to achieve "diversity." That was bad! The *Bakke* decision legitimized racial discrimination in higher education admissions and unleashed a new era of pursuing "diversity," which became little more than an excuse to discriminate.

Like "affirmative action" (race preferences), "diversity" has such a noble ring to it. Yet, it is a very dangerous practice to allow the government to pick "winners" and "losers" in college admissions, employment and public contracting on the basis of one's skin color, "race," ethnic background, national origin or sex. Nonetheless, the poison of "affirmative action" and "diversity" worked their way into all levels of the blood stream of American public policy.

For several years, many Americans complained about the implications and effects of race preferences, but the concept seemed virtually untouchable. But, in 1995, the Board of Regents of the University of California approved my recommendation to eliminate all policies that granted "preferential treatment" (different standards) on the basis of race, sex, color, ethnicity or national origin.

On November 6, 1996, the voters of California applied this prohibition against race-based preferential treatment to all government agencies in California when they approved Proposition 209 by a margin of 55-45. This initiative was a mirror image of the *Civil Rights Act of 1964,* because of its command that all citizens be treated equally "without regard" to race and skin color instead of treated differently because of those factors.

Proving that Proposition 209 was no fluke, the voters of the State of Washington, in 1998, approved Initiative 200 (I-200) by a margin of 59-41. I-200 was identical in language to Proposition 209.

In 1999, our attention was directed to the State of Florida, where we tried to qualify the Florida Civil Rights Initiative (FCRI) for the statewide ballot, only to have the Florida Supreme Court prevent us from doing so. A

3. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

half-way success to our attempt resulted when Governor Jeb Bush, who opposed FCRI, signed an Executive Order ("One Florida") that provided a considerable part of what was being sought by FCRI.

Since the passage of Proposition 209 and I-200, efforts to get the president of the United States and the Congress to address the issue of race preferences have been in vain. For reasons of political correctness and their ostensible support of government engineering to achieve "diversity," former President Clinton and President Bush rejected pleas to resolve the issue of race preferences and to return America to the colorblind ideal enunciated in the *Act.*

Absent presidential and congressional action, it has been a constant hope that the United States Supreme Court would render a decision holding that race preferences violate the equal protection clause of the Fourteenth Amendment to the Constitution as well as the *Civil Rights Act of 1964.* Having this hope become a reality seemed to be imminent when the Court heard the two cases involving race preferences at the University of Michigan (UM): the case of Jennifer Grazt v. University of Michigan involved undergraduate admissions, and Barbara Grutter v. University of Michigan involved the UM Law School.[4]

Many have characterized Michigan as the preference capital of the nation. At UM, the system of discrimination based on race and skin color was so egregious that UM employed a "matrix" that ranked student applicants on the basis of race and other factors and assigned extra points on the basis of their race.[5] An overwhelming majority of Americans were outraged upon learning of this matrix.

Instead of ruling that race preferences were unconstitutional, however, the Court ruled on June 23, 2003, that "diversity" was so compelling that race preferences could be used to achieve it without there being any violation of the Constitution. In her decisive vote in favor of race preferences, Justice Sandra Day O'Connor commented that she hoped there would no longer be any need for such preferences in 25 years.[6]

The *Gratz* and *Grutter* decisions sanctioning the use of race preferences represented a radical departure away from the concept of merit and consigned America to an indefinite future of government-sanctioned race discrimination. Accordingly, when I received a call following the Court decision from Jennifer Gratz – the young woman who courageously sued the University of Michigan – to assist her in getting an initiative similar to Proposition 209 passed in her home state of Michigan, I responded affirmatively.

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4. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).
5. *Gratz,* 539 U.S. at 245–47.
6. *Grutter,* 539 U.S. at 309.

After months of harassment of our signature gatherers and endless legal challenges by several defenders of race preferences, the Michigan Civil Rights Initiative (MCRI), on January 10, 2005, turned in 508,222 signatures to qualify MCRI for the statewide ballot of November 7, 2006. This was the largest number of signatures gathered for any constitutional amendment in the history of Michigan.

The language of MCRI reflects the colorblind language of the *Civil Rights Act of 1964* and the vision of Dr. Martin Luther King, Jr. that no American should be discriminated against because of their skin color. To have any meaning, whites must enjoy the same protection of nondiscrimination as blacks.

Here is the basic operative clause of MCRI: "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." Included in "the state" are state government, cities and counties, school districts, special districts and all public universities in Michigan; in short, all agencies of government supported by the taxpayers.

Opponents of equal treatment for all, including the NAACP, big labor, big automakers, government and university officials who make up what has become a race industry, realize that the battle to preserve or end preferences in Michigan has strong national implications. The stakes became especially high when the Supreme Court announced in June of 2006 that it would hear two cases that reopen the question of whether it is constitutional to use race preferences in the pursuit of racial "diversity."

No matter what the voters of Michigan decide on November 7, 2006, the issue of "affirmative action" will not die with the outcome of the election involving the Michigan Civil Rights Initiative (Proposal 2). The reason is that race preferences have become so deeply lodged in the body politic of our nation that, like a cancer, its poison will remain for years to come. Michigan is merely one extremely important surgery to eradicate it.

For the past ten or eleven years, there has been a concerted effort to end this system of discrimination that comes in the form of minority contracting set-asides, quotas in employment, as well as preferences and double standards in college admissions. Treating Americans differently because of their "race" or their skin color was determined to be morally and legally wrong in the first half of the twentieth Century. Giving illegal immigrants of Mexican descent preferential treatment over American citizens because the former qualify as a "minority" is a practice that is incomprehensible in its insanity.

For the sake of our nation, we have no choice but to muster the resolve to end these policies. Not twenty-two years from now, but NOW. Even as our nation increases its intolerance of discrimination against black people,

preferences become more ingrained, and the rationale for them is expanded and made more outrageous. In Michigan, the female governor, the female United States Senator, the highest paid public university president in the nation, and Detroit's female chief of police shamelessly promote preferences for women in the name of "leveling the playing field."

Are these policies temporary? Will there ever come a time when the perceived beneficiaries will cooperate in the elimination of preferences based on race, gender and ethnicity? Not in a million lifetimes, if we heed the words of Kwame Kilpatrick, mayor of Detroit, who said, "We will have affirmative action today. We will have affirmative action tomorrow. We will have affirmative action forever." This statement is reminiscent of George Wallace and his proclamation about racial segregation.

The right to equal treatment by one's government is not some policy decision to be balanced against other policy considerations. We can debate whether the maximum personal tax rate should be thirty-three or some other percent. There should be no debate about the question of whether every American citizen is entitled to equal treatment by one's government. The principle of "equality" is central to personal freedom.

"Life, liberty and the pursuit of happiness" ring hollow when the government limits one's ability to compete and to be rewarded for competing solely on the basis of one's skin color or "race." To oppose equal treatment is to support preferential treatment for some and discrimination against others. Those who oppose MCRI and similar ballot initiatives necessarily oppose the *Civil Rights Act of 1964,* because the principle and language of each are virtually identical.

What is so troubling about the campaign that has taken place in Michigan is the fact that Michigan's entire political, business, and labor establishment has united in opposition to MCRI and to support preferences. A broad coalition of elites operating under the name of "One United Michigan" is represented by liberal activist Dave Waymire, who says this bipartisan coalition is proof Michigan still thinks racial discord is a central fact of American life. Racial preferences are essential, he says, "because otherwise people won't understand each other. Government preferences force people to mix."

When the rationale supporting preferences is one of "forcing people to mix" – and this rationale is embraced by the pillars of American society – then we know that America is headed in the wrong direction. My concern is buttressed by the opposition of a major gubernatorial candidate who says: "I do not support this ballot initiative. With our terrible job situation, we must look for ways to unify and provide equal opportunity for all people in our state – especially improving educational opportunities for all children – and must not distract our focus from the tough issues we face to make our state great again. I am particularly concerned that this initiative may have

the unintended consequence of negatively impacting programs aimed at helping women in education."

Since when is the pursuit of equal treatment before the law a "distraction?" Since when is the principle of equality for every American citizen to be compromised because of its "unintended consequence?" Since when do women need help in education, with nearly every campus in America, except for males-only schools, having student bodies in which women comprise the majority and are outperforming men by a considerable margin? How does an initiative that forbids "discrimination" and "preferential treatment" conflict with the goal of providing "equal opportunity for all people" in Michigan?

"Affirmative action" has survived long past its life expectancy only because it has developed a cadre of individuals and organizations who are so heavily invested in its immortality that, like the die-hard segregationists, they simply refuse to let it go without a bitter fight. The fact that it represents a betrayal of one of our nation's basic civic values, namely a nation in which all of its citizens are of equal value in the eyes of the government; the fact that it is producing radically diminishing returns on the investment that is made into it; the fact that a growing list of individuals perceive themselves to be victims ("reverse discrimination") of this perverse system – none of this matters to its protectors. Such is the way of all things perverse.

These are the circumstances that have propelled the movement to end what began as a noble endeavor, but which has tragically gone very wrong.

Editor's PostScript:

> On November 7, 2006, the people of Michigan voted and by an overwhelming margin affirmed the belief that the citizens of Michigan should be judged by the content of their character and not by the color of their skin. The 58% to 42% victory in Michigan serves as a vindication to all those who believe that progress towards racial reconciliation and harmony will not be achieved by segregating people into racial categories and discriminating among them based on these categories. This victory also serves as a reminder of the amount of work that remains in convincing the remaining 42% of the rightness of a color-blind Constitution.