Affirmative Action Defended/Michigan Initiative Critiqued

Jim Sterba

University of Notre Dame

Two years ago, I wrote a debate book on affirmative action with Carl Cohen published by Oxford University Press. I am a supporter of affirmative action and Carl Cohen of the University of Michigan, as many of you know, is a strong critic of it. I found writing the book to be a wonderful exercise in public deliberation. We each wrote long essays defending our respective views. Carl's essay was a bit longer than mine. We then wrote detailed replies to each other's essays and my reply, which addressed every aspect of Carl's view, was a bit longer than his. Surprisingly, I came away from this exercise seeing considerable common ground between our views. We each held the same individual-based view of remedial affirmative action although we applied our shared view differently. Where we really differed is with respect to our assessment of nonremedial diversity affirmative action.

Interestingly, I think that something similar holds with respect to Prof. Allen's view and my own. Allen and myself both hold individual-based views with respect to remedial affirmative action, particularly where the concern is to compensate for past injustices. Where we primarily differ is with respect to nonremedial diversity affirmative action, particularly where the concern is to achieve the educational benefits of diversity.

Before focusing on the differences in our views, let me note some common ground. Noting this common ground is important because defenders of affirmative action are often criticized for holding views they don't hold or don't need to hold. Drawing attention to this common ground, therefore, increases the basis for agreement between defenders and critics of affirmative action.

Points of Agreement

In his essay "Black and White Together" Allen rejects the view that civil rights provide protections exclusively to so-called disadvantaged minorities. I too reject that view. Civil rights protect us all. In that same essay, Allen rejects the view that "we may

discriminate against a black person yesterday, pay a different black person for the injury today and call it even." I too reject that view at the same time that I defend both remedial and diversity affirmative action. In his book, Habits of Mind, Allen also rejects the view that affirmative action can be justified on the grounds that it is right to wrong others to make up for past injustices. I too reject that view while still defending affirmative action.

Points of Disagreement

Where then do we disagree? Just as in the comparison to Carl Cohen, Allen and I disagree not with respect to remedial affirmative action where we both hold individual-based views, but with respect to diversity affirmative action, which is not remedial-based, but justified in terms of future good consequences.

So where specifically do we disagree with respect to diversity affirmative action? Let me approach our differences using an example Allen uses in this discussion of affirmative action. Allen is in favor of the graduated federal income tax system we have, as am I. Our graduated federal income tax, as you know is a non-remedial-

based practice. It does not purport to remedy past injustices. Rather, it just requires a proportionately higher contribution from the better off in society to pay for the programs and activities of our common government. Now Allen thinks that diversity affirmative action programs are significantly different from a graduated income tax in ways that show how the one is justified but the other is not. How so?

Allen thinks our graduated federal income tax system is fairly well tailored to achieve its objectives whereas diversity affirmative action programs are not. Diversity affirmative action programs attempt to provide the benefits of diversity to their student bodies and they do this by using racial preferences in admissions. So why – according to Allen - is our graduated federal income tax justified while diversity affirmative action programs are not? The short answer for Allen is that diversity affirmative action programs use racial preferences but our graduate federal income tax does not. Here I think we can all agree with Allen that a race-based graduated income tax would not be justified because too many poor whites

would be asked to pay too much in taxes if we required whites to pay proportionately more than blacks and too many rich blacks would be asked to pay too little. But it doesn't follow from this that a race-based diversity affirmative action program would not be justified? Allen needs to show that a non-race-based diversity affirmative action program would work better than a race-based one - just the way a non-race-based graduated income tax system works better than a race-based one. But Allen doesn't even try to show this. Nor do I think that it can be shown.

Consider the evidence. We know that income-based diversity affirmative action programs do not work well because too many poor white kids would qualify and so such programs would not provide the more significant kind of educational benefits that comes from racial diversity. We also know that the percentage plans adopted by such states as Texas do not work well because once the Supreme Court reached its decisions in the Michigan cases the University of Texas admitted that its percentage plan did not work well and that it now wanted to add a race-based program, as it is

doing this academic year. The bottom line is that while a race-based graduated income tax would not work as well as a non-race-based one, the opposite is true with respect to diversity affirmative action Non-race-based affirmative action programs have not worked as well as race-based ones. That we know.

Let me here just cite some of the benefits that race-based affirmative action programs have provided:

In a survey of law students at the University of Michigan and Harvard university 9 out of 10 said discussion with students of other races had affected their views of the criminal justice system (Sterba, 364)

Let me give you an other example. Patricia Gurin of the University of Michigan offers the following example of how blacks can aid the understanding of minority perspectives in a classroom setting. She reports:

> **In one class session, a white woman student who had grown up in a homogeneously white town in Michigan expressed, with considerable emotion, that she was**

tired of being categorized as white. "I'm just an individual. No one knows if I hold similar beliefs to those of other white students just by looking at me. I hate being seen just as white." … An African-American male student who had grown up in a virtually all white city in Connecticut replied as he walked toward her across the classroom. "I just want to be an individual also. But every day as I walk across this campus — just as I am walking across this room right now — I am categorized. No one knows what my thoughts are, or if my thoughts align with other African- American students. They just see me as a black male. And at night, they often change their pace to stay away from me. The point is — groups do matter. They matter in my life and (as he approached the other student whose hand he then took), they matter in your life." There was silence in the room. (Sterba, 314n)

That is the kind of learning experience I has occurred in my classroom from time to time, but only, when through race-based affirmative action, a sufficient number of minority students have been present. Accordingly, it is really difficult to deny the significant educational benefits that minorities admitted through diversity affirmative action programs bring to colleges and universities, especially, but not exclusively, when racial issues are being discussed.

However, Allen has another objection to diversity affirmative action. He thinks that diversity affirmative action is tied to a policy of providing benefits to certain minority groups and so cannot be seen to be part of a general legal strategy of providing benefits or protections to all Americans. To some degree this is to misconstrue the legal history and rationale of diversity affirmative action. Historically, diversity affirmative action provided benefits to different people at different times and by design it always provided benefits to members of the majority group. In 1979, the time of the Bakke decision, affirmative action programs in medical schools

included Asian Americans. Today, affirmative action programs no longer include Asian Americans because normal admissions procedures produce more than enough Asian American candidates to achieve the educational benefits of diversity that Asian Americans provide. In the 70s, a number of Ivy League schools had affirmative action programs for women. Today, such programs are clearly no longer needed. But while it may be admitted that diversity affirmative action has benefited different people at different times and that it always benefits members of the majority, Allen still contends that it isn't a right that all Americans have. All Americans do not have a right to benefit from diversity affirmative action. But nor do all Americans have a right to benefit from legacy preferences or from athletic preferences. But the absence of such a right either to a legacy preference or to an athletic preference or to diversity affirmative action does not show that such programs are not justified. They can still be justified as long as they produce desirable consequences and are themselves grounded in rights that people do have. And this I maintain holds for all three of these preference

programs (legacy preference programs, athletic preference programs and diversity preference programs) all of which need to be considered and evaluated together.

One last observation on Allen's views. In his Habits of Mind, Allen notes approvingly the view of Thomas Sowell of Hoover Institute and Stanford University. Sowell claims that strengthening the recruiting of minorities will "fill the classes." In other words, Sowell is endorsing outreach affirmative action as the appropriate means for achieving racial diversity in our elite colleges and universities and here Allen endorses Sowell's view. Unfortunately, there are two problems with this approach to achieving diversity. First, in elite colleges and universities today, outreach affirmative action, by itself, it would never suffice to produce the desired level of diversity without also relying on other forms of affirmative action. Second, even this minimal form of affirmative action, outreach affirmative action, is ruled out by the Michigan Initiative, just the way it is ruled out by California's Prop 209 according to a recent California Supreme Court decision because, as you probably

know, California's and Michigan's referendums, by design, are virtually identical. This means that Allen's preferred way of achieving diversity would be rendered illegal by the Michigan Initiative. For the same reason, the Michigan Initiative would rule out outreach affirmative action for women. We couldn't take any extra steps to find qualified women candidates in education or elsewhere, even if they turned out to be the most qualified candidates.

So let us take stock here. As I have just shown, neither of Allen's two main two arguments against affirmative action – neither his comparison of affirmative action to a graduated federal income tax nor his rejection of affirmative action because not everyone has a right to it - succeed. Moreover, his endorsement of outreach affirmative action, along with Sowell, puts him in fundamental conflict with his endorsement of the Michigan Initiative. Hopefully, Allen will see that the only reasonable way out of this predicament is for him to give up on the Michigan Initiative and endorse diversity affirmative action. Will he take this

reasonable course of action given the problems with his view? We will only have to wait a moment or two to find out.