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What States Can Do to Stop Racial Discrimination

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Abstract

As Dr. Martin Luther King, Jr., proclaimed, Americans want to "live in a nation where they will not be judged by the color of their skin but by the content of their character." Unfortunately, numerous federal and state government programs as well as colleges and universities continue to award grants and contracts, make hiring decisions for public employment, and grant school admissions on a discriminatory basis, favoring certain races and genders and disfavoring others. Several states, however, have amended their constitutions through referenda or initiatives to prohibit state and local governments from discriminating in public employment, contracting, and education (including public universities) on the basis of race, ethnicity, or sex. If that process is not available, then state legislatures should act to ban such discrimination.

> "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."
>
> —U.S. Supreme Court Chief Justice John Roberts[1]

Americans overwhelmingly agree that discrimination on the basis of race, ethnicity, and sex is wrong. This belief holds fast no matter the type of discrimination—whether it is the politically correct version that discriminates against whites and often Asians by giving racial preferences to other racial or ethnic groups like blacks and Hispanics or the type that discriminates against black Americans and was at the heart of the 20th century civil rights struggle.

This paper, in its entirety, can be found at **http://report.heritage.org/lm113**

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Key Points

- Discrimination, in any form, is morally repugnant. It is particularly egregious when practiced by the government and used as a racial spoils system.
- Whatever label such polices are given, be it "goals," "set-asides," "priorities," or "preferences," these laws are discriminatory and provide or withhold government benefits based on skin color, ethnicity, national origin, or gender.
- The U.S. Constitution and federal civil rights statutes outlaw discrimination, yet numerous federal and state government programs award grants and contracts and make hiring decisions for public employment on a discriminatory basis, favoring certain races and genders and disfavoring others.
- Due to determined opposition in Congress, efforts to eliminate such discrimination in federal programs have largely failed.
- Many states, however, have enacted laws that ban any and all forms of discrimination—reforms that should serve as a template for ending discrimination of any kind in American public life.

Americans today want to "live in a nation where they will not be judged by the color of their skin but by the content of their character," which was the vision of Dr. Martin Luther King, Jr.[2]

For example, a June 2013 *Washington Post*/ABC news poll showed that three-quarters of Americans (76 percent) "oppose race-based college admissions." That includes "eight in 10 whites and African Americans and almost seven in 10 Hispanics," as well as "at least two-thirds of Democrats, Republicans and independents."[3] A similar Gallup poll found that two-thirds of Americans "believe that college applicants should be admitted solely based on merit" and that an applicant's racial background should not be taken into account.[4]

The U.S. Constitution and federal civil rights statutes embody this principle of equal protection under the law and outlaw discrimination. Despite these laws, however, numerous federal and state government programs award grants and contracts and make hiring decisions for public employment on a discriminatory basis, favoring certain races and genders and disfavoring others.[5] Many government officials have abused what were supposed to be limited exceptions to remedy past discrimination in order to create a racial spoils system for government jobs and government contracting. Public university officials have likewise embraced admissions policies that discriminate on the basis of skin color and national origin.

Proponents of racial preferences claim that these policies are necessary to remedy past discrimination or because many Americans are inherently biased—an unproven claim that reflects its own racial bias. In the college admissions context, proponents contend that increasing the number of minority students on campus will promote their integration into "high-prestige careers and mainstream society" and will ensure "diversity," which is lauded as required to ensure a cohesive society. But discriminating today against some individuals—women and men who had nothing to do with past discriminatory practices—in order to benefit others who have not suffered from any of these prior discriminatory practices is fundamentally unfair. There is also considerable evidence that such preference policies actually harm the beneficiaries of such discriminatory conduct, making it more difficult for them to succeed and decreasing the number of minority students, for example, who purse professions in science, engineering, and the law.[6]

Such discrimination by government is wrong: Jobs should go to the most qualified, contracts should be awarded to the lowest bidder, and the students who are most able and willing to excel academically should be admitted to taxpayer-funded universities. Yet, due to determined opposition in Congress, efforts to eliminate such discrimination in federal programs have largely failed.

States Push Back: Models for Reform

Many states, accordingly, have pushed back by enacting laws that ban any and all forms of discrimination. Specifically, six states have passed ballot initiatives to amend their state constitutions and prohibit state and local governments from discriminating in public employment, contracting, and education (including public universities) on the basis of race, ethnicity, or sex: California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012).[7]

California's Proposition 209, the California Civil Rights Initiative, was adopted by a 54 percent to 46

1. Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007).
2. Martin Luther King, Jr., "I Have a Dream" speech at Washington, D.C., Civil Rights March (August 28, 1963).
3. Scott Clement, *Wide Majority Opposes Race-Based College Admissions Programs, Post-ABC Poll Finds*, The Washington Post, June 12, 2013.
4. Jeffrey M. Jones, *In U.S., Most Reject Considering Race in College Admissions*, Gallup (July 24, 2013), http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx.
5. *See, for example*, Jody Feder, Kate M. Manuel, and Julia Taylor, Cong. Research Serv. R41038, Survey of Federal Laws Containing Goals, Set-Asides, Priorities, or Other Preferences Based on Race, Gender, or Ethnicity (2011).
6. *See* Amicus Brief of Gail Heriot et al., Fisher v. University of Texas at Austin, Case. No. 11-345 (U.S. Oct. 19, 2011).
7. Washington Initiative 200; Michigan Proposal 2; Nebraska Initiative 424; Arizona Proposition 107; and Oklahoma State Question 759. New Hampshire's legislature passed a statute in 2011, House Bill 623, which prohibits discrimination in recruiting, hiring, promotion, or admission in state agencies and the university system. In a bizarre ruling, the Sixth Circuit Court of Appeals found Michigan's referendum unconstitutional in 2012; that case is currently before the Supreme Court of the United States on appeal. *See* Schuette v. Coalition to Defend Affirmative Action, Case No. 12-682 (U.S.).

percent margin of nearly 9 million voters. Both the California Supreme Court[8] and the Ninth Circuit Court of Appeals[9] upheld this initiative, rejecting claims that it violated equal protection principles. The Ninth Circuit held that there was simply no doubt that Proposition 209 was constitutional since the central purpose of the Equal Protection Clause is preventing official conduct that discriminates on the basis of race. The court also found that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place."[10]

In other words, states are not required to maintain affirmative action or preference programs once they have been put in place and can outlaw all discriminatory treatment. Such action helps achieve the ultimate goal of the Equal Protection Clause: "to do away with all governmentally imposed discrimination."[11]

Model Bill No. 1: Antidiscrimination Statute Based on California's Proposition 209. The voters of every state that has a ballot referendum or initiative process should follow suit and consider passing a state constitutional ban on discrimination by state and local governments. At the very least, state legislatures should consider passing a statute that accomplishes the same goal.

The model bill that follows is based on the language the aforementioned states used in their ballot initiatives, which has proven to be effective, workable, and resistant to court challenge:

Civil Rights Act of 2014

a. 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.

b. This section shall apply only to action taken after the section's effective date.

c. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

d. Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.

e. Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds to the state.

f. For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including any state university or college, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

g. The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing state antidiscrimination law.

h. This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United State Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Model Bill No. 2: Requiring Disclosure of Preferential Policies. Ideally, in states that already have statutes that authorize preferences and dis-

8. Coral Construction, Inc. v. San Francisco, 235 P.3d 947 (Cal. 2010).
9. Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
10. *Wilson*, 122 F.3d at 706.
11. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

crimination, those statutes would be repealed or amended by the state legislature at the same time that this new law is passed. Barring that, however, the following language should be added to the model bill that would repeal such discriminatory government programs: "All statutes, regulations, and local ordinances shall be construed in a manner consistent with this law, and provisions that might be read to authorize preferences or discrimination are hereby repealed or amended to authorize only consideration of factors other than race, sex, color, ethnicity, or national origin."

In a state where it is not possible to outlaw such discrimination—how sad that is, by the way—it should at least be feasible to require public universities to reveal on an annual basis detailed information on whether and how race, color, ethnicity, or national origin is considered in their student admissions process. So long as such discrimination continues, and until it is outlawed by ballot initiative or state legislation, it should at least be made public and narrowly limited in the ways the U.S. Supreme Court has required in a series of cases, including most recently *Fisher v. University of Texas at Austin*.[12] A second model bill would accomplish that goal.

An effective "Sunshine Civil Rights Act of 2014" could read as follows:

Sunshine Civil Rights Act of 2014

Findings: Citizens and taxpayers of the State of _____ have a right to know whether its public institutions of higher education are treating student applications differently depending on the students' race, color, ethnicity, or national origin and, if so, the way in which these factors are weighed and the consequences to the students themselves of doing so. Moreover, the United States Supreme Court has recently set out limitations on such considerations of race, color, ethnicity, and national origin, and it is part of the oversight duty of the State Legislature to ensure that those limitations are being observed and the State is not exposed to expensive litigation.

Section 1. Every academic year, each public institution of higher education shall provide to the State Legislature a report regarding its student admissions process, and this report shall be made publicly available.

Section 2. This report shall begin with a statement of whether race, color, ethnicity, or national origin is considered in the student admissions process (if different departments within the institution have separate admission processes and consider race, color, ethnicity, and national origin differently, then the report shall provide the information required by this report for each department separately).

Section 3. If race, color, ethnicity, or national origin is considered in the student admission process, then the public institution of higher education shall also provide the following information:

a. The groups for which membership is considered a plus factor or a minus factor and, in addition, how membership in a group is determined for individual students;

b. How group membership is considered, including the weight given to such consideration and whether targets, goals, or quotas are used;

c. Why group membership is considered (including the determination of the critical-mass level and relationship to the particular institution's educational mission with respect to the diversity rationale);

d. What consideration has been given to nonpreference alternatives as a means for achieving the same goals for which group membership is considered;

e. How frequently the need to consider group membership is reassessed and how that reassessment is conducted;

f. Factors other than race, color, ethnicity, or national origin that are collected in the admissions process. Where those factors include grades or class rank in high school, scores on standardized tests (including the ACT and SAT), legacy status, sex, state residency, or other quantifiable criteria, then all raw admissions data for applicants regarding these factors, along with the applicants' race, color, ethnicity, and national origin and the admissions decision

12. Fisher v. University of Texas at Austin, 570 U.S. ___ (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); and Gratz v. Bollinger, 539 U.S. 244 (2003).

made by the school regarding each applicant, shall accompany the report in computer-readable form, with the name of individual students redacted but with appropriate links, so that it is possible for the Legislature or other interested persons to determine through statistical analysis the weight being given to race, color, ethnicity, and national origin relative to other factors; and

g. Analysis—and also the underlying data needed to perform an analysis—of whether there is a correlation (i) between membership in a group favored on account of race, color, ethnicity, or national origin and the likelihood of enrollment in a remediation program, relative to membership in other groups; (ii) between such membership and graduation rates, relative to membership in other groups; and (iii) between such membership and the likelihood of defaulting on education loans, relative to membership in other groups.[13]

Section 4. Nothing in this act shall be construed to allow, encourage, or permit preference or discrimination on the basis of race, color, ethnicity, or national origin.

Conclusion

Quite apart from the constitutional and legal prohibitions against it, discrimination in any form is morally repugnant. It is particularly egregious when practiced by the government and used as a racial spoils system. Whatever label such polices are given, be it "goals," "set-asides," "priorities," or "preferences," these laws are discriminatory and provide or withhold government benefits based on skin color, ethnicity, national origin, or gender.

Given the seeming inability and unwillingness of federal officials to eliminate official discrimination and the numerous discriminatory programs that exist in the federal arena, state governments and, particularly, individual Americans should step up and act to eliminate such discrimination at the state and local levels through the referendum and initiative process.

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13. Section 3(g)(iii) is included not only because of the costs to taxpayers but, more importantly, as a result of the problem of ruinous student debt that is likely exacerbated when individuals and institutions are mismatched because of racial preferences and increased student failure rates. *See* Richard Sander and Stuart Taylor, Jr., Mismatch (2012).