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What Congress Can Do to Stop Racial Discrimination

Roger Clegg, Hans A. von Spakovsky, and Elizabeth H. Slattery

Abstract

Discrimination on the basis of race and ethnicity is unconstitutional, unlawful, and morally repugnant. The government should not sort people according to such innate characteristics, yet such criteria often factor into government programs and protections. Jobs should go to the most qualified individuals; contracts should be awarded to the lowest qualified bidders; the students who are most likely to excel academically should be admitted to taxpayer-funded universities; and all should be protected equally from discrimination. A number of states have enacted laws banning all forms of discrimination. Congress should eliminate racial discrimination in federal contracting and employment and federally funded programs, including educational institutions; require disclosure of preferential university admission policies; and limit and clarify when claims of "disparate impact" may be brought.

> "In the eyes of the government, we are just one race here. It is American."
>
> —Supreme Court Justice Antonin Scalia[1]

Discrimination on the basis of race and ethnicity is unconstitutional, unlawful, and morally repugnant. The government should not be in the business of sorting people by such innate characteristics. Yet race and ethnicity often factor into government programs, including even civil-rights protections. An applicant's skin color and national origin, in particular, are taken into consideration in hiring and promoting, admitting students to universities, and awarding public contracts and grants.

Key Points

- The government should not sort people by race or ethnicity, yet such criteria often factor into government programs, including civil-rights protections.
- Whether they are called goals, set-asides, or preferences, such laws are discriminatory.
- Jobs should go to the most qualified individuals, contracts should be awarded to the lowest qualified bidders, students who are most likely to excel academically should be admitted to taxpayer-funded universities, and all should be protected equally from discrimination.
- Limited exceptions have been allowed to remedy specific acts of past discrimination, but bureaucrats have expanded such exceptions to create a racial spoils system.
- Congress should eliminate racial discrimination in federal contracting and employment and federally funded educational institutions and programs, at the least should require disclosure of preferential policies, and should limit and clarify when "disparate impact" claims may be brought.

This paper, in its entirety, can be found at **http://report.heritage.org/lm120**

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Whether they are called goals, set-asides, or preferences, such laws are discriminatory, and the government—especially—should not favor some races over others. The U.S. Constitution and federal law forbid discrimination on the basis of race and mandate that all Americans receive equal protection under the law. Limited exceptions to these requirements have been allowed—in particular, to remedy specific past discrimination—but these exceptions have been abused to create a racial spoils system throughout all levels of government.

A 2011 report by the Congressional Research Service catalogued literally hundreds of government-wide and agency-specific set-aside and preference programs and grants throughout the entire executive branch.[2] The report also noted that its survey was "by no means exhaustive." These discriminatory practices cover the entire gamut of the federal government's activities, from agriculture to banking to defense—even homeland security. Because of these programs, the use of racial and ethnic preferences persists despite the fact that the vast majority of Americans agree that discrimination is wrong and that people should "not be judged by the color of their skin, but by the content of their character."[3] Such programs also cost the American taxpayer a great deal of money since many provide "authority to make noncompetitive awards" of government contracts that do not go to the lowest bidder who is qualified.[4]

Proponents of racial preferences claim that these policies are necessary to remedy past discrimination or because many Americans are inherently biased. But racial preferences are nothing more than government-sanctioned discrimination, and discriminating today against individuals who had nothing to do with past discriminatory practices is wrong: Jobs should go to the most qualified, contracts should be awarded to the lowest qualified bidder, and the students who are most likely to excel academically should be admitted to taxpayer-funded universities.

A number of states have enacted laws banning any and all forms of discrimination. Since 1996, 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 on the basis of race, ethnicity, or sex.[5] In addition to reforms at the state level, Congress should eliminate racial discrimination in federal contracting and employment, as well as federally funded educational institutions and programs.

Federal legislation could take several forms. The following model bills provide a range of approaches to eliminate racial preferences, require disclosure of preferential policies, and limit and clarify when claims of "disparate impact" may be brought.

Banning Racial Preferences: Model Bill No. 1

The most straightforward way Congress could address the problem is by banning racial and other preferences in public employment, education, and contracting, as well as in other federally funded programs and in the civil-rights protections that the federal government affords. Federal law frequently states that the government may not discriminate based on race; thus, Congress could clarify these existing laws, which judges and bureaucrats have distorted, by including a ban on the use of preferences.

Congress should also repeal any existing provisions that authorize preferences or other forms of discrimination, ideally at the same time the new law is passed. Barring that, however, the following language should be added to the model bill: "All statutes, regulations, and agency practices 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, color, ethnicity, or national origin."

1. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J. concurring).
2. *See, e.g.*, 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).
3. Martin Luther King, Jr., "I Have a Dream" speech at the Washington, D.C., Civil Rights March (August 28, 1963).
4. Jody Feder et al., Survey of Federal Laws Containing Goals, 14 n. 25.
5. *See* Roger Clegg & Hans von Spakovsky, *What States Can Do to Stop Racial Discrimination*, The Heritage Foundation Legal Memorandum No. 113 (Feb. 11, 2014).

Civil Rights Act of 2014

Section 1. No agency of the federal government shall discriminate or grant preferences on the basis of race, color, or national origin in employment, education, or contracting, nor require any other person to do so.

Section 2. No instrumentality of any state shall discriminate or grant preferences on the basis of race, color, or national origin in employment, education, or contracting, nor require any other person to do so.

Section 3. 42 U.S.C. § 2000d shall be amended by inserting the phrase "or granted any preference" after the word "discrimination."

Section 4. No person for whom it is otherwise unlawful under federal law to discriminate on the basis of race, color, or national origin shall grant preferences on the basis of race, color, or national origin, and the civil and criminal penalties for doing so shall be the same as for engaging in discrimination on the basis of race, color, or national origin.

Requiring Disclosure of Preferential Policies: Model Bill No. 2

As long as university officials take race and similar classifications into account in admissions decisions, a bill requiring publication of the use of such preferences is necessary. This second bill would require universities that receive federal funding to report annually in detail on whether and how race, color, and national origin factor into the student admissions process.

The Supreme Court has upheld the use of race to achieve the "educational benefits of a more diverse student body" as constitutionally permissible, at least for now, subject to numerous restrictions.[6] Even if some insist that universities should continue to practice racial discrimination in admissions, it should not be done secretly and without taking pains to satisfy the Supreme Court's requirements.

The U.S. Commission on Civil Rights endorsed this approach, including "sunshine" legislation, as a recommendation to the President and Congress in a 2006 report.[7] Likewise, Congressman Steve King (R–IA) introduced similar legislation that would require universities that receive federal financial assistance to disclose data to the U.S. Department of Education on how race, color, and national origin factor into admissions decisions.[8] As Supreme Court Justice Louis D. Brandeis once said, sunshine is "the best of disinfectants."[9]

Racial and Ethnic Preference Disclosure Act of 2014

Findings: (a) Title VI of the Civil Rights Act of 1964 forbids discrimination on the basis of race, color, or national origin by federally funded institutions, which includes nearly all colleges and universities. The United States Supreme Court has set out limitations on such considerations of race, color, and national origin, and it is important to ensure that these limitations are followed. The best way to do this is by requiring schools to make public their use of race, color, and national origin so that federal and state enforcement agencies and private attorneys general can monitor the schools.

(b) Citizens and taxpayers have a right to know whether federally funded institutions of higher education are treating student applications differently depending on the students' race, color, or national origin and, if so, the way in which these factors are weighed and the consequences to the students themselves of doing so.

Section 1. Every academic year, each institution of higher education that receives federal funding shall provide to the U.S. Department of Justice's Civil Rights Division and U.S. Department

6. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2417 (2013); *see also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). The Court has been increasingly skeptical of the continued legitimacy of racial preferences.
7. U.S. Commission on Civil Rights, Affirmative Action in American Law Schools 143 (2006).
8. Racial and Ethnic Preferences Disclosure Act, House Amendment 769 to H.R. 609, 109th Cong. (2006).
9. Louis D. Brandeis, *What Publicity Can Do*, Harper's Weekly (Dec. 20, 1913).

of Education's Office for Civil Rights 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, or national origin is considered in the student admissions process (if different departments within the institution have separate admission processes and consider race, color, and national origin differently, then the report shall provide the information required for each department separately).

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

a. The racial, color, and national origin groups for which membership is considered a plus factor or a minus factor and 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 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 race-neutral 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, 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, and national origin and the admissions decision made by the school regarding those applicants, shall accompany the report in computer-readable form, with the identity of individual students redacted but with appropriate links, so that it is possible for the Civil Rights Division and Office for Civil Rights or other interested persons to determine through statistical analysis the weight being given to race, color, and national origin relative to other factors; and

g. Analysis—and the underlying data needed to perform such an analysis—of whether there is a correlation (i) between membership in a group favored on account of race, color, 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 (and, where applicable, professional examination passage 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.[10]

Section 4. Nothing herein shall be construed as authorizing, allowing, encouraging, requiring, or permitting the use of preferences or discrimination based on race, color, or national origin.

Eliminating Disparate Impact Claims: Model Bill No. 3

The "disparate impact" approach to civil rights enforcement results in race-based preferential treatment—and is often intended to do just that. Therefore, eliminating such claims is another way to help ensure that racial and ethnic preferences are not used.

In brief, an action that results in a racial disproportion is considered to have an illegal "disparate impact" even though the action is neutral on its face, in its intent, and in its application. This is not racial discrimination by any reasonable definition, and it

10. Section 3(g)(iii) is included both because of the costs to taxpayers and, more important, because 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).

forces employers, landlords, schools, and other covered entities either to discard legitimate criteria and selection procedures (for example, a physical or written test for firefighters or police officers) or to avoid disproportions by hiring, leasing, or disciplining (or designing tests and other selection criteria) with an eye to skin color, or both.[11]

Fortunately, most civil rights laws have no such provisions—rather, they prohibit actual discrimination ("disparate treatment")—but they have been expanded to include "disparate impact" through agency interpretation and activist court rulings. As Justice Antonin Scalia has explained, disparate impact "place[s] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[12] Thus, Congress should make clear that laws prohibiting disparate treatment do not extend to mere disparate impact.

Civil Rights Clarification Act of 2014

To amend the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Equal Credit Opportunity Act, the Age Discrimination in Employment Act, the Fair Housing Act, Title IX of the Education Amendments of 1972, the Equal Educational Opportunities Act of 1974, the Age Discrimination Act of 1975, the Immigration and Reform Control Act of 1986, and other Acts of Congress to clarify that certain provisions of such measures prohibit only disparate treatment, not conduct that has a disparate impact on covered persons without disparate treatment, and to clarify that rules and regulations issued under those provisions must not proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Clarification Act of 2014."

SECTION 2. AMENDMENT TO EQUAL PAY ACT OF 1963.

PROHIBITION OF SEX DISCRIMINATION.—Section 3 of such Act (29 U.S.C. § 206(d)) is amended by adding at the end the following new subsection:

"(5) This subsection proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment. No regulation shall be issued to effectuate the provisions of this subsection that proscribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex."

SECTION 3. AMENDMENT OF CIVIL RIGHTS ACT OF 1964.

(a) PLACES OF PUBLIC ACCOMMODATION.—(1) Section 201 of such Act (42 U.S.C. § 2000a) is amended by adding at the end the following new subsection:

"(f) Disparate treatment

"This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin."

(2) Section 202 of such Act (42 U.S.C. § 2000a-1) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or

11. *See* Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, National Legal Center for the Public Interest (Dec. 2001), *available at* http://www.aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf.
12. Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J. concurring).

national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin."

(b) FEDERALLY ASSISTED PROGRAMS.—(1) Section 601 of such Act (42 U.S.C. § 2000d) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the ground of race, color, or national origin and not conduct that has a disparate impact on the ground of race, color, or national origin without disparate treatment."

(2) Section 602 of such Act (42 U.S.C. § 2000d-1) is amended by adding at the end "No such rule, regulation, or order shall be issued to effectuate the provisions of section 601 of this title (42 U.S.C. § 2000d) that proscribes conduct that has a disparate impact on the ground of race, color, or national origin but does not constitute disparate treatment on the ground of race, color, or national origin."

SECTION 4. AMENDMENT TO AGE DISCRIMINATION IN EMPLOYMENT ACT.

PROHIBITION OF AGE DISCRIMINATION.—(a) Section 4 of such Act (29 U.S.C § 623) is amended by adding at the end of the following new subsection:

"(n) Disparate treatment

"This section proscribes conduct that constitutes disparate treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment."

(b) Section 9 of such Act (29 U.S.C. § 628) is amended by adding at the end "No such rule or regulation shall be issued to carry out this chapter that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age."

SECTION 5. AMENDMENT TO EQUAL CREDIT OPPORTUNITY ACT.

CREDIT TRANSACTIONS.—(a) Section 701 of such Act (15 U.S.C. § 1691) is amended by adding at the end the following new subsection:

"(f) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) and not conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age without disparate treatment."

(b) Section 703(a) of such Act (15 U.S.C. § 1691b(a)) is amended by adding at the end the following new subsection:

"(6) No regulation prescribed to carry out the purposes of this subchapter shall proscribe conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) but does not constitute disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)."

SECTION 6. AMENDMENT TO FAIR HOUSING ACT.

FAIR HOUSING.—(a) Section 804 of such Act (42 U.S.C. § 3604) is amended by adding at the end the following new subsection:

"(g) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, familial status, or national origin without disparate treatment."

(b) Section 805 of such Act (42 U.S.C. § 3605) is amended by adding at the end the following new subsection:

"(d) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment."

(c) Section 806 of such Act (42 U.S.C. § 3606) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment."

(d) Section 815 of such Act (42 U.S.C. § 3614a) is amended by adding at the end "No such rule made to carry out this subchapter shall proscribe conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin but does not constitute disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin."

SECTION 7. AMENDMENT TO TITLE IX OF EDUCATION AMENDMENTS OF 1972.

PROHIBITION OF SEX DISCRIMINATION.—(a) Section 901 of such Title (20 U.S.C. § 1681) is amended by adding at the end the following new subsection:

"(d) This section proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment."

(b) Section 902 of such Title (20 U.S.C. § 1682) is amended by adding at the end "No rule, regulation, or order of general applicability shall be issued to effectuate the provisions of section 901 of this title (20 U.S.C. § 1681) that prescribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex."

SECTION 8. AMENDMENT TO EQUAL EDUCATION OPPORTUNITIES ACT OF 1974.

PROHIBITION OF DENIEL OF EQUAL EDUCATIONAL OPPORTUNITY.—Section 204 of such Act (20 U.S.C. § 1703) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of race, color, sex, or national origin but does not constitute disparate impact on the basis of race, color, sex, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the basis of race, color, sex, or national origin but does not constitute disparate treatment on the basis of race, color, sex, or national origin."

SECTION 9. AMENDMENT TO AGE DISCRIMINATION ACT OF 1975.

PROHIBITION OF DISCRIMINATION BASED IN AGE.—(a) Section 303 of such Act (942 U.S.C. § 6102) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment."

(b) Section 304(a)(1) of such Act (42 U.S.C. § 6103(a)(1)) is amended by adding at the end "No general regulation shall be published to carry out the provisions of section 303 of this title (42 U.S.C. § 6102) that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age."

SECTION 10. AMENDMENT TO IMMIGRATION AND REFORM CONTROL ACT OF 1986.

PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.—(a) Section 102(a) of such Act (8 U.S.C. § 1324b(a)) is amended by adding at the end the following new subsection:

"(7) Disparate treatment

"Paragraph (1) proscribes conduct that constitutes disparate treatment on the basis of national

origin or citizenship status and not conduct that has a disparate impact on the basis of national origin or citizenship status without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has disparate impact on the basis of national origin or citizenship status but does not constitute disparate treatment on the basis of national origin or citizenship status."

SECTION 11. APPLICABILITY TO OTHER ANTI-DISCRIMINATION LAWS.

For any and all Acts of Congress that are not expressly amended by this Act, which contain provisions that prohibit discrimination by proscribing conduct that constitutes disparate treatment but do not explicitly state that they proscribe conduct that has a disparate impact on covered persons without disparate treatment, those provisions shall not be construed to proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment, and no regulation shall be issued to effectuate those provisions that proscribes conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

Defense to Disparate Impact Claims: Model Bill No. 4

The "Civil Rights Clarification Act of 2014" discussed above does not include Title VII of the Civil Rights Act of 1964 and Sections 2 and 5 of the Voting Rights Act of 1965 because they explicitly allow disparate impact causes of action. Ideally, Congress should amend those laws to eliminate those causes of action. (Section 2 of the Voting Rights Act uses a "results" test, which is not as bad, but it raises many of the same problems.) At the very least, Congress could amend these statutes to provide defendants with an affirmative defense against disparate impact claims: Where a defendant can demonstrate its nondiscriminatory intent for conduct that resulted in a disparate impact, it should not be liable for discrimination based on a disparate impact claim.

Justice Scalia has suggested such an approach, noting that while disparate impact might be "an evidentiary tool used to ... 'smoke out' ... disparate treatment," existing laws that authorize disparate impact claims "sweep too broadly ... since they fail to provide an affirmative defense for good-faith [conduct]."[13] Indeed, "[i]t is one thing to free plaintiffs from providing an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable."[14]

Good Faith Civil Rights Act of 2014

To amend the Civil Rights Act of 1964, as amended, and the Voting Rights Act of 1965, as amended, to allow nondiscriminatory intent as an affirmative defense in claims brought under those statutes that do not allege disparate treatment.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Good Faith Civil Rights Act of 2014."

SECTION 2. AMENDMENT TO THE CIVIL RIGHTS ACT OF 1964, as amended.

In any action brought under 42 U.S.C. §§ 2000e-2(k), no respondent shall be found liable if it can demonstrate that the challenged practice was neither adopted with the intent of discriminating on the basis of race, color, religion, sex, or national origin nor applied unequally on the basis of race, color, religion, sex, or national origin.

SECTION 3. AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965, as amended.

a. For any allegation or part thereof under 42 U.S.C. § 1973 that does not assert discriminatory intent, no defendant shall be held liable if it can demonstrate that the challenged voting qualification or prerequisite to voting or standard, practice, or procedure was neither adopted with the intent of discriminating on the basis of race, color, or membership in a language minority group nor applied unequally on the basis of race, color, or membership in a language minority group.

13. Ricci, 557 U.S. at 595 (Scalia, J. concurring).
14. *Id.*

b. In any matter or part thereof before the Attorney General or the United States District Court for the District of Columbia under 42 U.S.C. § 1973c in which discriminatory intent is not at issue, the State or subdivision shall not be prevented from enacting or administering any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, if it can demonstrate that in making a change, it lacks an intent to discriminate on the basis of race, color, or membership in a language minority group.

Conclusion

Discrimination is unconstitutional, unlawful, and morally repugnant. The government should not be in the business of sorting people by skin color or what country their ancestors came from and using such classifications to treat some Americans better and others worse in the programs that the government administers and funds and in the civil-rights protections that it guarantees. The Constitution and federal law forbid discrimination on the basis of race and mandate that all Americans must receive equal protection under the law. Government bureaucrats have abused the limited exceptions allowed to remedy specific past discrimination, effectively creating a racial spoils system throughout all levels of government.

Such discrimination by government is wrong: Jobs should go to the most qualified individuals, contracts should be awarded to the lowest qualified bidders, and the students who are most likely to excel academically should be admitted to taxpayer-funded universities. Many states have enacted laws banning any and all forms of discrimination; Congress should follow suit and eliminate all racial preferences and set-asides. At the very least, Congress should require disclosure of preferential policies and should limit and clarify the use of disparate impact claims.

*—**Roger Clegg** is President and General Counsel of the Center for Equal Opportunity. From 1987 to 1991, he was a Deputy Assistant Attorney General in the Civil Rights Division at the U.S. Department of Justice. **Hans A. von Spakovsky** is Manager of the Election Law Reform Initiative and Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. He served as counsel to the Assistant Attorney General for Civil Rights from 2002 to 2005. **Elizabeth H. Slattery** is Senior Legal Policy Analyst in the Meese Center.*