The Proliferation of State Statutes Using Racial and Ethnic Classifications

by Shawn Nevill and Roger Clegg

The Federalist Society for Law and Public Policy Studies

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Introduction

Classifications along racial and ethnic lines have long been criticized by those who favor equal treatment before the law. Indeed, the civil rights movement of the Twentieth Century was fought primarily to destroy the racial and ethnic classifications that existed in many statutes, and the stigmas that those statutes created. Statutes that disfavor minority groups have been invalidated by courts or repealed by legislatures; however, numerous statutes have been created in their place that assert preferences for one race or ethnicity over others, often in the form of "affirmative action" programs.

In 2004, the Center for Equal Opportunity published a survey undertaken by the Federalist Society for Law and Public Policy Studies (hereinafter referred to as the "survey"), compiling the racial and ethnic classifications found in state statutes throughout the country. The survey, available at www.ceousa.org, identified all statutes on the books in every state that use racial or ethnic classifications. Each statute was categorized and placed into one of several broad categories corresponding to the subject matter of the statute, along with a brief description of the content of the statute.

The survey found 656 statutes in 35 states that use racial or ethnic classifications. The worst states were Louisiana, California, and Arkansas, with 25, 23, and 18 statutes, respectively. The following states had no statutes with racial or ethnic classifications: Florida, Nevada, North Carolina, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

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This paper will discuss and analyze many of the various statutes cited in the survey. Each section in this paper will roughly correspond with the main subject headings used in the survey. The subjects will be analyzed in accordance with the common themes and approaches that emerged from the survey. Particular consideration will be given to statutes that seem overtly unlawful or controversial. In addition, attention will be given to those statutes that stand out from the others as unusual or particularly interesting.

Public Contracting

Affirmative action programs often involve the subject of public contracting. Accordingly, preferential treatment in public contracting has been one the most controversial and often litigated subjects by those who oppose affirmative action. The survey cites to a great number of statutes that govern contracting between a state and private parties. Several common approaches emerge from the various statutes. One approach is to set goals for minority involvement in contracting and require state authorities to try to meet those goals. The most common approach, however, involves the states setting aside a fixed number of contracts, or a fixed percentage of the value of all contracts, for minority-owned businesses. Several states use an approach that encourages the state to contract with minority-owned businesses, but falls short of setting quotas that would require a certain number of contracts to be set aside for minority-owned businesses. One such state is California, a state which has by popular vote now amended its constitution to prohibit discrimination on the basis of race or ethnicity. (California's contracting statutes remain on the books, however. They require that a contractor placing a bid on a public contract report whether or not it is a certified minority-owned business. Contracting/California/335.[**] Furthermore, bidding prime contractors are encouraged to submit a "business enterprise utilization plan" when submitting a bid that will specify which subcontractors the prime contractor intends to use. Contracting/California/335. Prime contractors are encouraged to submit business enterprise

[**] For the reader's convenience, all statutes in this white paper are cited using a form that directly references the Federalist Society survey. For example, "Contracting/Alaska/317" references statute number 317 in the survey, which is an Alaska State statute falling under the subject of "Contracting."

utilization plans that will meet statewide goals of having at least 15 percent of its subcontractors be certified minority-owned businesses. Contracting/California/337. Once a contract is awarded to a prime contractor, it is required to make a good faith effort to award subcontracts in accordance with its business enterprise utilization plan. Contracting/California/337. Further, another California statute requires that state community colleges award contracts in accordance with California's goal of awarding at least 15 percent of the value of all contracts awarded to minority-owned businesses. Contracting/California/349.)

While some states use "goal-oriented" approaches to encourage minority business contracting, others use minority business "outreach" programs. For example, Michigan requires its state transportation commission to create incentives for firms to mentor minority businesses and increase information programs to assist minority-owned businesses in competing for public highway contracts. Contracting/Michigan/407. Thus, when a highway is constructed in Michigan, taxpayers pay for not just the highway itself, but also for programs assisting minorities to compete for the contracts to build the highway. Oregon takes an interesting approach by requiring its agencies to "aggressively" make public contracts available to minority-owned businesses. Contracting/Oregon/421. Such an approach establishes a vague standard upon which an agency is required to act, while sending a strong indication of Oregon's desire to give preferential treatment to minority-owned businesses.

As noted, the most common approach to awarding public contracts to minorities is to set aside a certain number of contracts, or to set aside a certain percentage of the value of all public contracts, for minority-owned businesses. For instance, Massachusetts reserves five percent of all capital facility project contracts for minority- and women-owned businesses. Contracting/Massachusets/405. Similarly, Missouri reserves ten percent of all public highway and transportation contracts for minority-owned businesses. Contracting/Missouri/411. Ohio's public contract set-aside program even goes so far as to require that not only five percent of the value of all contracts be set aside for minority-owned businesses, but also that prime contractors award at

least five percent of all subcontracts to minority-owned businesses and purchase seven percent of materials from minority- and women-owned businesses. Contracting/Ohio/417.

The state of Louisiana has also taken an aggressive approach to giving preferential treatment to minority-owned businesses in the area of awarding public contracts. First, the state has a set-aside program where ten percent of contracts worth less than one million dollars in value are set aside for minority-owned businesses. Contracting/Louisiana/389. Further, when a certified minority-owned business places a bid on a public contract, the state must award the contract to that business if its bid is within the lowest ten percent of all bids or within ten thousand dollars of the lowest bid. Contracting/Louisiana/383. Another statute credits minority-owned business proposals with an additional ten "points" in a bidding system designed for awarding consulting contracts. Contracting/Louisiana/385. Finally, every prime contractor performing under a public contract must award at least ten percent of its subcontracts to minority-owned businesses. Contracting/Louisiana/379.

Such set-aside programs increase the public cost of financing projects whenever a minority-owned business is selected over an otherwise more competitive bidder. For example, under the Missouri statute that reserves transportation contracts for minority-owned businesses, a highway built by a minority contractor will cost the state more money whenever a more competitive non-minority-owned business was available to build the highway. Moreover, set-aside programs essentially subsidize minority-owned businesses at the expense of taxpayers. Hence, public funds are used to make up the difference between what a less competitive minority-owned business bids and what a non-minority-owned business bids for a public contract. Finally, under these set-aside programs, an otherwise competitive minority-owned business may submit a less competitive bid on a contract, hoping to be awarded the contract based on its minority-owned business status. In this case, such a business would be receiving a windfall at the taxpayer's expense even though it was perfectly capable of submitting a competitive bid had there not been a set-aside program.

Business

The greatest number of statutes that the survey cites fall under the heading of “business.” These statutes in a diverse range of ways give preferential treatment to racial and ethnic minorities. Some of the statutes merely describe broad policy objectives of a particular state in relation to minority-owned businesses. Other statutes create agencies and outreach programs to assist minority-owned businesses in various ways. Still others regulate small business loans and other forms of financial assistance provided to minority-owned businesses. Finally, several statutes create set-aside programs to help minority-owned businesses.

As noted, some statutes listed under the heading of “business” make broad policy statements. For example, Illinois declares that as a matter of public policy the state should “encourage the continuing economic development of minority and women-owned and operated businesses.” Business/Illinois/129. South Carolina takes a similar approach by stating “it is in the state's interests to assist these [minority-owned] businesses to develop fully.” Business/South Carolina/311. Finally, a Maryland statute declares that minority-owned businesses should be favored for use on construction projects. The constitutionality of these statutes might depend on how seriously bureaucrats charged with applying these vague standards take them. Such statements of public policy might be vulnerable to constitutional challenge if treated as binding by state agencies.

Many states set up an agency or department dedicated in some way to minority business affairs. A good example is Kansas’s Office of Minority and Women Business Development, the duties of which include assisting the development of minority-owned businesses in the state, aiding in educational programs related to development, and recommending legislation to advance the interests of minority businesses. Business/Kansas/141. Likewise, Maryland has created an Office of Minority Affairs, charged with advising the governor on matters affecting minority-owned businesses. Business/Maryland/189. Missouri’s Minority Business Advocacy Commission is authorized to “initiate aggressive programs to assist minority businesses.”

Business/Missouri/227. A New York agency is required to institute programs to help minority-owned businesses market their products to consumers. Business/New York/255. While such agencies and departments would have vague mandates, they may be legally vulnerable nonetheless because they assist certain businesses at the expense of all others.

One approach taken by some states is to create outreach programs to help minority-owned businesses in various ways. One way in which these programs help minority-owned businesses is by serving as a repository of information designed to help minority-owned businesses succeed. Business/Mississippi/235. Such information can include information relating to other programs and services available to minority-owned businesses. Business/Massachusetts/299. Other statutes create outreach programs intended to help share information relating to contracting opportunities with minority-owned businesses. Contracting/Michigan/407. A program that informs a minority-owned business about contracting opportunities may virtually eliminate the need for such a business to educate itself about those opportunities. Thus, such a program will give to a minority-owned business a valuable asset not available to other businesses.

An aggressive way in which states give preferential treatment to minority-owned businesses is through the granting of loans and other forms of financial assistance. For example, Colorado gives priority consideration to minority-owned businesses for certain loans. Business/Colorado/89. Similarly, Connecticut requires a regional corporation to give priority to financial assistance applications filed by a minority-owned business. Business/Connecticut/97. Illinois takes a somewhat different approach by employing separate criteria when making loans for minority-owned businesses. Business/Illinois/131. Finally, New York provides a bonding guarantee assistance program that will provide financial backing to help minority businesses secure a bond for construction projects. Business/New York/261. Many of the programs within this category would be constitutionally challengeable as applied. In particular, the Illinois statute

which applies a different set of criteria depending on the race of those that own the business may be quite vulnerable upon strict scrutiny review.

The most constitutionally suspect way in which states provide preferential treatment towards minority-owned businesses is through set-aside programs. These programs set aside a certain percentage of investment dollars or contracts for minority-owned businesses. One example is New Jersey, which requires its Casino Reinvestment Development Authority to set aside twenty percent of its funds for investment in minority-owned businesses. Business/New Jersey/243. In another statute, Mississippi requires its agencies to set aside five percent of their purchasing budgets for purchases from minority-owned businesses. Business/Mississippi/231. Set-aside programs such as those cited in the survey create a quota-like requirement that a state spend a fixed amount of public funds on minority-owned businesses. Besides being legally challengeable, business set-asides may be bad public policy because they require public funds to be spent where they might not be needed. For example, the New Jersey statute requiring investment in minority-owned businesses might require public funds to be invested in companies that need the funds much less than other businesses not labeled as “minority-owned.”

Board Membership

A large proportion of the statutes cited in the survey relate to minority representation on boards, commissions, and other administrative bodies. The subject of preferential treatment in board and commission appointments has never been litigated at the federal level. The various statutes cited in the survey took diverse approaches to accomplishing the goal of minority representation on boards and commissions; some require explicit numerical quotas, for instance, while others require the consideration of race as a factor for appointment to a board or commission. Moreover, the survey also points to instances where the nature of the board or commission itself may be constitutionally suspect.

The survey indicates that states often employ race or ethnicity as a factor in determining the makeup of a given board or commission. For example, an Illinois statute that is typical of the

approach taken by many states requires an economic development commission to "maintain a level of minority membership equal to or greater than the proportionate level of the minority population which exists within the area of operation of the Commission." Board Membership/Illinois/37. Thus, the commission must at least reflect roughly the racial composition of the population within the commission's jurisdiction. Similarly, Kentucky requires that appointments to "every board, commission, [or] council . . . reflect reasonable minority representation of the membership." Board Membership/Kentucky/51.

Some states place an express numerical quota on minority representation on boards and commissions. Such quotas may leave these statutes considerably vulnerable to a constitutional challenge. The survey indicates that the state of Arkansas stands out as having a significant accumulation of quota-setting statutes. For example, there is a strict requirement that at least one member of the state athletic commission be of a minority race. Board Membership/Arkansas/21. Moreover, at least one member of Arkansas's Student Loan Authority must be from a minority race. Membership/Arkansas/19. As for Arkansas's Apprenticeship Training Advisory Committee, five seats are reserved exclusively for persons representing the minority and female workforce. Membership/Arkansas/17.

Although Arkansas has the most quota-setting statutes relating to board appointments on its books, it is certainly not alone. Iowa reserves a place on a commission for adult offender supervision specifically for a member of a minority group. Board Membership/Iowa/39. Similarly, Nebraska requires one of the five members of its parole board to be a minority and one member from its health care council to be a minority. Membership/Nebraska/65, 69. Finally, South Carolina mandates that a full four seats out of seven be allocated to members of minority groups in its State Commission for Minority Affairs. Board Membership/South Carolina/71. Statutes such as these demonstrate an unambiguous legislative directive that certain seats be reserved for a person based on race or ethnicity.

Other statutes cited in the survey relating to board membership use language that is somewhat vague. Michigan, for example, requires cities and counties making appointments to advisory boards to “ensure that minority persons and women are fairly represented." Board Membership/Michigan/59. Such a statute does not require a fixed quota of any sort, nor does it give any further guidance as to how to “fairly represent” minorities. Georgia took a similar approach in a statute relating to appointments to the Board of Juvenile Justice. That statute requires that appointments be made with a view towards achieving minority representation. Board Membership/Georgia/29.

The survey not only found statutes relating to board membership that are a cause for concern, but also found boards and commissions that, by their very existence, may pose questions of constitutionality or at least may give rise to criticism. For example, Illinois created a Business Enterprise Council for Minorities, Females, and Persons with Disabilities charged with promoting the interests of businesses owned by minorities, females and the disabled. Board Membership/Illinois/31. Similarly, South Carolina created a State Commission for Minority Affairs to accomplish the goal of promoting minority interests. Board Membership/South Carolina/71. Likewise, Louisiana created a commission whose purpose is to “develop, plan and implement programs to provide an opportunity for participation by qualified minority-owned businesses in public works.” Board Membership/Louisiana/161. Agencies such as these that condition the assistance they offer on race or ethnicity raise obvious legal and policy problems. Furthermore, the budgets for these agencies are paid for with limited public funds that could be spent on less divisive and controversial programs.

Education

For several decades, preferential treatment in the area of education has been a focal point for criticism of affirmative action programs. Accordingly, most of the well-known and influential cases that have been brought challenging affirmative action programs involve the subject of education. The survey points to many instances where state law provides for preferential

treatment in this area. Most of the statutes cited can be generally grouped into two categories: those relating to the recruitment of minority teachers, and those relating to financial aid and scholarships.

The task of hiring and retaining the most qualified teachers to instruct the nation's children and college students is certainly of great importance. But, the survey discovered many statutes that compromise this task by elevating race and ethnicity as an important or even determinative factor in programs to hire and retain teachers. For instance, Indiana has set up a scholarship fund to encourage and promote minorities to teach at schools in Indiana. Education/Indiana/489. A Kentucky statute requires the state board of education to set up a program to increase the number of minority teachers so that the percentage of minority teachers is proportional to that of the student population. This Kentucky statute even goes so far as to enlist guidance counselors, requiring them to encourage minority students to seek a career in education. Education/Kentucky/499.

Arkansas takes a particularly active approach to recruiting and retaining minority teachers. The state has established a Minority Teacher Recruitment Advisory Council with seats reserved specifically for minority commissioners. Education/Arkansas/435. Another statute provides that all school districts with more than five percent minority enrollment must put in place a minority teacher and administrator recruitment plan. Similar to Kentucky's approach, the Arkansas recruitment plans must emphasize encouraging minorities to pursue a career in education. Education/Arkansas/433. Moreover, Arkansas requires all state-supported colleges and universities to develop a plan to encourage the retention of minorities as students, faculty, and staff. Education/Arkansas437. Finally, Arkansas has set up a scholarship program to award full scholarships to minority individuals declaring an intention to serve in the teaching field.

Other interesting approaches to attracting and retaining minority teachers include Minnesota's program to give minority-teacher hiring incentives to districts that have a minority student enrollment of ten percent or more. Under this program, any minority individual who has

not taught before in Minnesota is eligible to receive benefits under the incentive program. Education/Minnesota/513. Taking another interesting approach, Connecticut has a statute that provides for a statewide system of education centers that not only promote efforts to recruit and retain minority teachers, but also collects and analyzes data relating to the reduction of racial, ethnic, and economic isolation. Education/Connecticut/455. Collecting and analyzing data might not be problematic on its own, but such data might be used to promote future programs that employ preferential treatment.

The survey indicates that states often employ preferential treatment programs not just in the recruitment of educators, but also in the distribution of financial aid to students. As already indicated above, some states grant scholarships to minority students pursuing a career in education as a means to recruit minority teachers. Other examples include Illinois, which offers an "Equal Opportunity Scholarship" to "students" pursuing a career in education. Education/Illinois/483. The title of the scholarship may be deceptive, however, as not everybody has an equal opportunity to receive it; the term "students" is defined as applying only to racial minorities and women. Education/Illinois/484. Missouri takes a similar, but less misleading, approach to offering scholarships to recruit minority teachers by granting one hundred renewable scholarships to minority students pursuing a career in teaching. Education/Missouri/517.

Not all of the financial aid awards that are aimed at minority groups are for the purposes of encouraging minorities to pursue a career in teaching. The survey cites to numerous statutes that require that financial assistance, in one form or another, to be given to minority students and college faculty members. One approach is for a statute to give general guidelines for the distribution of financial aid funds with a racial or gender preference. For example, a Connecticut statute requires that a specific percentage of the financial aid funds allocated to each college be given to minority students. Education/Connecticut/459. Another example is the Kansas ethnic minority scholarship program, which offers scholarships only to those of an ethnic minority.

Education/Kansas/491. Kansas has also put in place a similar minority fellowship program, which also grants fellowships to those of an ethnic minority. Education/Kansas/497.

Many of the statutes create scholarships and fellowships for those concentrating in a particular field of study. One particularly interesting example is an Illinois statute that creates a Real Estate Research and Education Fund. This fund was established to advance education in the real estate industry. Of the $125,000 in annual funds to be distributed under the program, $15,000 is set aside exclusively for those of a racial minority who wish to pursue a career in real estate. Education/Illinois/487. Another example is a Delaware program for funding ethnic minority and female students in pursuing an undergraduate degree in engineering or applied science. Education/Delaware/465. Finally, Missouri established a Minority and Underrepresented Environmental Literacy Program. Under this program, Missouri's department of natural resources may give scholarships to minority students who pursue a degree in "environmentally related courses of study." Education/Missouri/515.

With the soaring costs of a college education, there can be little doubt that there is an increased need for financial aid for all students, regardless of race or ethnicity. But the need for funds to pay for college is a not race or ethnicity specific problem. Accordingly, it can be argued that as a matter of public policy it is fundamentally unfair—and illegal—for a state to direct that these desperately needed financial aid funds be awarded on the basis of race or ethnicity.

Health

The survey cited numerous statutes that indicated preferential treatment in the area of health-care. The vast majority of the statutes under this heading fall into two categories. First, many statutes relate to minority outreach health-care programs or other programs related to the treatment and survey of minority-specific health problems. The second category of statutes relates to the recruitment of minority health-care professionals.

Many states have programs of various sorts that provide health-care outreach to minority populations. One example is North Dakota, which provides a health-care outreach program to

those “underserved” by other health-care programs, including “minority groups.” Health/North Dakota/594. Other statutes require state agencies and health departments to compile research and make recommendations in accordance with the results of the research. For example, Louisiana created a Minority Health Affairs Commission that is charged with, among other duties, examining issues relating to health and social services for minorities in the state. Health/Louisiana/608-610.

Nebraska attempts to achieve its goal of providing minority-specific health-care by giving preferential treatment in the allocation of health care funds. One Nebraska statute requires nearly half of the annual budget for public health-care programs to be reserved for minority health-care programs. Health/Nebraska/620. Another statute, which applies where there are more than 75,000 minority inhabitants in a district, distributes the reserved funds among the different minority health centers in that district in accordance with a fixed allocation rate. Health/Nebraska/618. Finally, another Nebraska statute appropriates $700,000 to be spent annually on grants to improve “ethnic and racial minority health.” Health/Nebraska/622.

Several states have statutes that encourage the recruitment of minority health-care providers. One such state is California, which established a Health Professions Career Opportunity Program for the purpose of encouraging and assisting minority students to pursue health care careers. Health/California/586. (This race-specific focus was presumably invalidated by Proposition 209.) Similarly, an Indiana statute requires the state department of health to “develop and implement an aggressive recruitment and retention program to increase the number of minorities in the health and social services professions.” Health/Indiana/598.

Conclusion

The survey clearly indicates that a large number of states have statutes that give preferences on the basis of race or ethnicity. These statutes cover a broad spectrum of subjects from public contracting to education. It is hoped that the survey and this paper will promote awareness of the proliferation of these laws. Through this awareness it is hoped that racial

preferences can ultimately be eliminated in all areas of the law. The use of racial and ethnic classifications is presumptively unconstitutional, divisive, and unfair; it is bad economic and social policy.

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The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

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