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More Sunshine

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The principal use that the Center for Equal Opportunity (CEO), a think tank that works to promote a colorblind society, has made of state freedom of information act requests is to get information from public universities about the way that race and ethnicity are weighed in student admissions. That includes documents that shed light on "affirmative action" and "diversity" policies, and admissions data. CEO—through the work of Althea Nagai and the late Robert Lerner—has used the latter data as the basis for numerous studies that have documented how heavily race and ethnicity are weighed in student admissions. Those studies can be found on the CEO website.[1]

CEO has also used federal Freedom of Information Act (FOIA)[2] requests to see how the U.S. Department of Education's Office for Civil Rights (OCR) has handled its enforcement of civil rights laws—principally Title VI of the 1964 Civil Rights Act—that make it illegal to discriminate on the basis of race and ethnicity in federally funded programs (which would include nearly all universities). We have been particularly interested in how OCR has dealt with admissions discrimination and with racially exclusive programs for students (for example, scholarships and recruitment "job fairs").

In our view, the use of FOIA in this context has many salutary effects and no bad ones. We do not believe that racial discrimination in admissions is sound

[1]See http://www.ceousa.org/affirmative-action/affirmative-action-news/education, and scroll down.

[2]Freedom of Information Act, http://www.foia.gov/.

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policy, and it is good to shed as much light as possible on the practice—especially since schools invariably hide and sometimes deliberately mislead the public and potential students about how heavily race and ethnicity are weighed. Even if such policies are favored, it is hard to understand why they should be kept secret, particularly at public universities, and especially when there is a federal law that generally makes it illegal for taxpayer money to be spent on discriminatory programs. While the Supreme Court has, unfortunately, left the door ajar—for now—and allowed some weight to be given to race and ethnicity, it has limited the circumstances when it is allowed, and so FOIA requests like ours are also a good way to ensure that those decisions are being followed.

Unless "academic freedom" includes the right to discriminate on the basis of race in secret, our FOIA requests do not hinder academic freedom.

If, however, there are FOIA abuses in other, nonracial contexts, we could accomplish much of what we want without FOIA by means of other legislation we have proposed (at the state or, preferably, the federal level). This legislation would require universities that receive taxpayer funding to report annually in detail on whether and how race, color, and national origin factor into the student admissions process.

Again, the Supreme Court has upheld the use of race to achieve the "educational benefits that flow from a diverse student body" as constitutionally permissible, at least for now, subject to numerous restrictions.[3] 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.[4] Likewise, Representative Steve King (R–IA) has 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.[5] We are hoping that such a bill will be introduced in the Senate as well. It would be interesting to hear politicians explain why they are voting against a bill that would end secret and

[3]Grutter v. Bollinger, 539 U.S. 306 (2003).

[4]U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools: A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C., June 16, 2006* (Washington, DC: U.S. Commission on Civil Rights, 2007), http://www.usccr.gov/pubs/AALSreport.pdf.

[5]Racial and Ethnic Preferences Disclosure Act, House Amendment 769 to H.R. 609, 109th Cong. (2006).

illegal racial preferences.[6] And, as Supreme Court justice Louis D. Brandeis once said, sunshine is "the best of disinfectants."

Finally, I must note that all of this would be unnecessary if schools would just treat people without regard to skin color or their ancestors' country of origin. And if a state's public schools won't voluntarily honor this principle, then the people in that state should require them to do so.

[6]For more details, and for the draft legislation itself, see Roger Clegg, Hans A. von Spakovsky, and Elizabeth Slattery, "What Congress Can Do to Stop Racial Discrimination," The Heritage Foundation, Legal Issues, Legal Memorandum #120, April 7, 2014, http://www.heritage.org/research/reports/2014/04/what-congress-can-do-to-stop-racial-discrimination. Scroll down to the heading, "Requiring Disclosure of Preferential Policies: Model Bill No. 2."