

THE COLORADO CIVIL RIGHTS INITIATIVE: SEPARATING FACT FROM FICTION

The opponents of the Colorado Civil Rights Initiative have attempted to spread disinformation about the measure. This paper discusses three of the major distortions: First, that CoCRI will ban all affirmative action; second, that CoCRI is not needed because there really are few if any programs in Colorado that grant preferences on the basis of race, ethnicity, or sex; and, third, that CoCRI should not be passed so long as racism and discrimination still exist in Colorado. None of these assertions is true.

I. CoCRI and “Affirmative Action”

Its opponents may not like it, and were happy to resort to any means necessary in an unsuccessful attempt to stop it, but the Colorado Civil Rights Initiative will be on the ballot November 4. So the people of Colorado will be deciding whether the state and state entities (for instance, public universities) should be allowed to use affirmative action in their employment, contracting, and education programs, right?

Well, not exactly. The phrase “affirmative action” needs to be defined first. It’s an ambiguous term, and the opponents of CoCRI try to use the term’s ambiguity to hide what is really at issue.

There is much affirmative action that CoCRI would not only allow but actually support and even require.

When the term was first used in the civil rights context--in an executive order signed by President Kennedy in 1961--it meant taking positive steps, proactive measures (affirmative action, get it?) to make sure that racial discrimination was not occurring. The idea was that the employers covered had to do more than just give lip service to nondiscrimination: They had to make sure that no one in their companies was discriminated against, and they had to communicate that policy, and enforce it, and root out the discrimination and discriminators that were already there.

CoCRI does not ban that sort of affirmative action by the state. In fact, it requires it.

Another meaning of the term “affirmative action” is casting a wide net--that is, recruiting far and wide, and making sure that everyone knows that he or she is welcome to apply for a job or a college or a contract, regardless of race, ethnicity, or sex. You don’t just recruit at suburban high schools, but in the inner cities, too. You advertise in a wide variety of media, including minority-oriented media. You don’t just rely on an old-boy network, but reach out to everyone.

CoCRI does not ban that sort of affirmative action either.

Then there is affirmative action that gives special consideration to some folks, but not on the basis of race, ethnicity, or sex. For instance, perhaps an employer makes special accommodations for the disabled. Or perhaps a college has a special scholarship for students who are the first in their families to go to college, or who come from impoverished backgrounds. Or perhaps a city decides that it wants to set aside a certain percentage of its contracting for new firms, or small firms, or locally-owned firms.

Those programs are perfectly consistent with CoCRI, too, because they have nothing to do with race, ethnicity, or sex. People who are disabled, or who are the first in their families to go to college, or who are poor--all of them come in all colors and both sexes.

That fact of the matter is, then, that there is only one kind of affirmative action that will be outlawed by the Colorado Civil Rights Initiative: treating people differently--some better and some worse--because of their skin color, or what country their ancestors came from, or whether they are male or female. This is the kind of affirmative action that Harvard professor Nathan Glazer called "affirmative discrimination."

This kind of discrimination is not a good way to fight discrimination--it is just more discrimination. The best way to fight discrimination and to overcome the effects of past discrimination is by enforcing the laws we already have on the books that make discrimination illegal. And programs to help disadvantaged people are fine, but they ought to be open to all such people, regardless of skin color.

Voters should bear in mind that frequently the victims of politically correct discrimination are not just white males--in fact, *anyone* can be the victim. The Center for Equal Opportunity in recent years has seen so-called affirmative action programs that discriminate against every racial and ethnic group and both men and women. The latest wrinkle is universities that decide they have "too many" women and start discriminating against them. But Asians have for even longer frequently been the victims of racial preferences in university admissions; the California Department of Transportation now wants permission from the U.S. Department of Transportation to discriminate not only against whites but also against Latinos in contracting; one company was recently ruled to have violated the civil-rights laws because it was discriminating against African-Americans on the grounds that "blacks were over-represented and whites were under-represented" in a particular context; and so forth.

As America becomes increasingly multiracial and multiethnic, it becomes increasingly divisive and unworkable to pick winners and losers on the basis of color. The Census Bureau tells us that soon no race will be a majority, after all. A desire to guarantee a predetermined, politically correct amount of diversity just doesn't justify discrimination.

So what's at issue is not all "affirmative action" but only a particular kind of affirmative action: whether it should be unlawful for the government to "discriminate

against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.”

That quote, by the way, is what CoCRI actually says. Those are the words that voters will be voting on, not the distortions of those words by CoCRI’s critics.

II. Are There Preferential and Discriminatory Programs in Colorado?

The opponents of CoCRI sometimes assert that there are few if any preferential or discriminatory programs in Colorado--that the initiative is a solution in search of a problem. Hardly.

We note at the outset, though, that it seems odd for them to make this claim since, if it were true, it shouldn’t matter to them one way or another whether it passes. Furthermore, even if there were no such programs now, it would not hurt to keep them from starting, and so passing the CoCRI would still make sense. It’s not as if preferences and discrimination are unheard of--that no university weighs race or ethnicity, that no city grants contracting preferences, that no police department has de facto hiring quotas. To the contrary, these are all common problems, and an ounce of prevention would be worth a pound of cure. It’s on the ballot, after all, so why not pass it?

In any event, the fact is that there are plenty of education, employment, and contracting programs in Colorado that do indeed discriminate or grant preferential treatment on the basis of race, ethnicity, or sex. This paper will now give some examples, but these are just examples; we are confident that there are even more problems out there.

Let’s start with education. The University of Colorado acknowledged on July 24 that it weighs race and ethnicity in its admissions decisions.

<https://www.cu.edu/content/cu-completes-assessment-potential-impact-colorado-civil-rights-initiative> A CEO study a decade ago documented as best we could with the data we had the weight given these considerations, not just at CU but throughout Colorado public higher education; it appeared to be considerable.

<http://www.ceousa.org/content/view/513/100/> As Charles L. King, a professor at CU-Boulder, recently wrote, this study “showed that majority applicants for admission to CU who made higher scores than minority applicants were not, repeat, not being admitted as students.” <http://www.coloradodaily.com/news/2008/aug/04/your-take-equal-rights-for-all-amendment-46-46/> When we asked the Colorado Commission on Higher Education for its cooperation in doing a followup study this year, it refused, even though it had cooperated during our earlier study and even though we offered to pay them for its time. Was it afraid of what we might find as this issue went before the voters?

All of this, by the way, is just undergraduate admissions. What CEO has also found recently is that frequently the degree of preference is even worse in professional school admissions--for example, and especially, law school admissions. And, indeed, at the University of Colorado the law school has admitted to us that it weighs race,

ethnicity, and sex in its admissions decisions, and the University has generally acknowledged that it weighs race and ethnicity in admissions at the “graduate levels.”

Nor does the discrimination involve only admissions. The University of Colorado also admitted that it has around 100 scholarships that discriminate on the basis of race. <https://www.cu.edu/content/cu-completes-assessment-potential-impact-colorado-civil-rights-initiative> Jessica Peck Corry, executive director of the CoCRI campaign, has experienced other racially segregated programs on the CU campus http://www.i2i.org/main/article.php?article_id=694; she has additional evidence that this discrimination is ongoing. Other campuses besides CU have discriminatory scholarships as well; for instance, we found over two dozen of them just at the University of Northern Colorado. <http://www.unco.edu/ofa/scholarships/>

And that’s just higher education. Frequently there are problems in K-12 education as well.

In terms of programs, Manual High School in Denver has apparently encouraged only minorities to participate in its pre-collegiate development program. As Jessica Peck Corry has warned, “A better route is to base participation in such programs on the very real economic disadvantage too many kids at Manual face.”

Many school systems have over the years even assigned students to schools on the basis of race. The Supreme Court recently struck down such programs in Seattle and Louisville, but Louisville is trying to get around that by making assignments on the basis of socioeconomic status--and then smuggling race into the definition of socioeconomic status. This could happen to a school district in Colorado, too, if it hasn’t already.

So there’s plenty of discrimination to be concerned about in Colorado education. Let’s turn next to contract discrimination.

In the contracting area, preferences can be found at the state or local (municipal or county) level, and Colorado is no exception. A state statute here sets up a “minority business office” and a “minority business fund,” and the City and County of Denver weigh race, ethnicity, and sex in contracting decisions, too.

In addition to education and contracting, CoCRI would also ban discrimination and preference in employment.

Here again, the initiative is needed if for no other reason than to bring Colorado’s public universities into line. Those familiar with higher education issues of course know that universities are obsessed with achieving a politically correct racial and ethnic mix--a.k.a. “diversity”--on their faculties, and it would be extraordinary if schools in Colorado were any different, and if they did not put a heavy thumb on the scale in order to achieve it.

Just consider the job ads themselves, publicly placed, taken from just one day's posting recently on *The Chronicle of Higher Education*. One concludes, "In order to assist Colorado State University System in meeting its affirmative action responsibilities, ethnic minorities, women, and other protected class members are encouraged to apply and to also identify themselves." Can you make it any clearer than that? Or, "Front Range Community College has a strong commitment to the principles of diversity and welcomes responses from women, minorities, and persons with disabilities." Why specify some groups and not others? Or, "CMC [Colorado Mountain College] is an EOE committed to diversifying its workforce." Not to hiring the best qualified people, or to nondiscrimination, but to "diversifying." Likewise, "Mesa State College is an Affirmative Action, Equal Opportunity Employer, committed to a culturally diverse staff and student body."

But, as noted, pointing out that universities engage in employment discrimination is to state the obvious. The City of Denver makes pretty clear on its website that it tries to get its numbers right in hiring in its sheriff's department. It has posted a newspaper article that discusses how the city council was told that "the city has aggressive goals to beef up minority representation." It has "assigned a full-time recruiter to target black job candidates." <http://www.denvergov.org/Portals/338/documents/DSDDiversity.pdf> It certainly sounds like the city is hiring not strictly on the merits, but with a careful eye to increasing the numbers of some colors and, necessarily, holding down the number of other colors. To the extent that this is required by federal court orders or regulations, of course, the city has no choice, and CoCRI would allow it; but to the extent and at the point in time when the discrimination goes beyond this, CoCRI would--rightly--end it.

Likewise, the Colorado Springs website says that it aims to "sustain a diverse workforce" <http://www.springsgov.com/SectionIndex.asp?SectionID=17> and that "[d]iversity adds significant value" <http://www.springsgov.com/Page.asp?NavID=2390> to it. Now, there is certainly nothing wrong with diversity, but inevitably those employers who aim to achieve it rather than simply hire and promote the best qualified individuals end up compromising on the principle of nondiscrimination.

The City of Aurora's website, similarly, includes a "Community Partnership Plan" which says that the city needs "to include more minorities, women, and disabled in the City's workforce" and, in particular, that it will try "to hire individuals who are representative of the community into jobs that require significant contact with these communities." http://www.auroragov.org/AuroraGov/Departments/Human_Resources/CityofAuroraCommunityPartnershipPlan/index.htm But does this latter point mean that, if a job deals mostly with white people, you get a preference if you're white?

That question is not as fanciful as it may sound. Consider the city's "Equal Employment Opportunity Plan," dated August 2, 2007, which is a great example of bean counting to the nth degree for every racial, ethnic, and gender group in every job category. <http://www.auroragov.org/stellent/groups/public/documents/article-publication/033511.pdf> Page 32 states: "There are 43 White/Males in the City's

Administrative Support category. This represents 8.96% of City employees in this category. The community workforce availability is 27.00%. This reflects an underutilization of 18.04%.” Apparently it is intolerable that there be only 9% of some group in a job category if its fair share is 27%. So the EEOP states this “Objective”: “Increase representation of White/Males in the Administrative Support category to more appropriately reflect the available workforce by taking affirmative recruitment actions to attract White/Male applicants in this category for positions in the City.” In particular: (1) “The City of Aurora will continue to proactively recruit White/Male applicants for positions in the Administrative Support category in order to reflect the available workforce”; (2) “The City will advertise in the local media to attract White/Males to positions in the Administrative Support category”; (3) “The City will attend career fairs to attract White/Males to positions in the Administrative Support category”; and so on.

Now, the point isn’t that White/Males should not have been included in the bean counting. If you’re going to bean-count, you ought to include everyone. But you shouldn’t be bean-counting at all. If you do, with an eye to ensuring that there is never “underutilization” for any group in any job category, you will inevitably end up giving a preference to some because they are members of particular groups and discriminating against others because they belong to other groups.

So, to say that CoCRI is not needed because there are no discriminatory programs in the state is as false as saying that it will end affirmative action programs that are truly nondiscriminatory.

III. CoCRI and Societal Discrimination: A Logical and a Legal Fallacy

Finally, we also discuss briefly a common legal fallacy in the opponents’ most frequent argument against CoCRI, namely that preferential programs are still needed because racism and sexism still exist in our society.

But before we even get to the legal fallacy, it ought to be obvious that there is a logical fallacy here. After all, there will always be racism and sexism in society--and, by the way, both men and women, and people of all colors, can be racist and/or sexist. The question is whether we have so much of it and all in one direction that the best way to fight it is through institutionalized discrimination in the other direction. And the answer, in 2008, is clearly no: The best way to fight discrimination is through the vigorous enforcement of the laws we have on the books banning such discrimination--laws which have dramatically transformed American society in a remarkably short period of time.

And the argument fails not only on logical grounds, but on legal grounds as well. This is because the Supreme Court has flatly rejected “societal discrimination” as a justification for racial preferences. The first opinion, in this regard, was Justice Powell’s famous deciding vote in the *Bakke* case. When the Supreme Court has narrowly upheld preferences--for instance, in the University of Michigan cases--it has been on grounds other than societal discrimination. So it is very odd that the opponents of CoCRI are

justifying the continued existence of such preferences on the basis of a rationale that is, both logically and legally, a complete nonstarter.

One last, logical and legal point: Even if you think that there is some justification, some benefit for preferences, you have to weigh that against their costs. And, while the benefits are dubious as a matter of both logic and law, the costs are endless and irrefutable.

Let's consider the costs of racial and ethnic discrimination, just in the context of university admissions: It is personally unfair, passes over better qualified students, and sets a disturbing legal, political, and moral precedent in allowing racial discrimination; it creates resentment; it stigmatizes the so-called beneficiaries in the eyes of their classmates, teachers, and themselves, as well as future employers, clients, and patients; it fosters a victim mindset, removes the incentive for academic excellence, and encourages separatism; it compromises the academic mission of the university and lowers the overall academic quality of the student body; it creates pressure to discriminate in grading and graduation; it breeds hypocrisy within the school; it encourages a scofflaw attitude among college officials; it mismatches students and institutions, guaranteeing failure for many of the former; it papers over the real social problem of why so many African Americans and Latinos are academically uncompetitive; and it gets the state and schools involved in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to establish group membership.

The same list could be repeated, with minor changes, when we talk about racial and ethnic preferences in other contexts (like employment and contracting), and when we talk about preferences based on sex. So, logically and legally, when you compare their high costs to their nonexistent benefits, preferences on the basis of race, ethnicity, and sex are impossible to justify.