

Understanding the Legal Attacks on Racial Health Equity Programs

Tuesday, October 22nd, 1:00PM ET | 10:00AM PT

Ways to Engage



Click the "Live Transcript" button
to enable closed captioning



Use Zoom Q&A
to ask questions



Use Zoom chat feature for questions,
comments and reactions



Webinar recording will be sent
to all registrants

Meet Today's Speakers

Moderator



Philip M. Alberti, PhD
Founding Director, AAMC Center
for Health Justice
**Association of American
Medical College**



Arielle Humphries
Assistant Counsel
Legal Defense Fund



Amalea Smirniotopoulos
Senior Policy Counsel and
Co-Manager of LDF's Equal
Protection Initiative
Legal Defense Fund



Pilar Whitaker
Special Economic
Justice Counsel
Legal Defense Fund

Understanding the Legal Attacks on Racial Health Equity

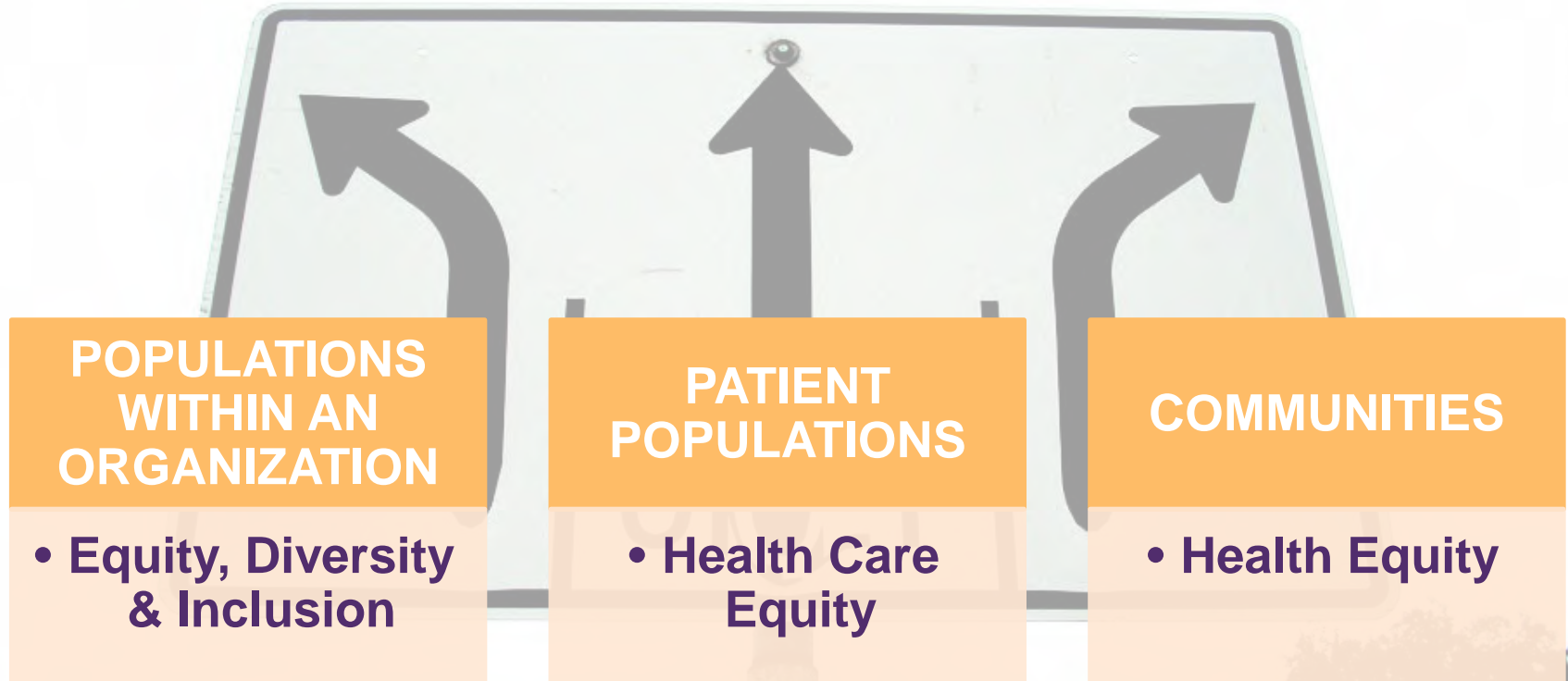
Philip M. Alberti, PhD
Senior Director, Health Equity Research & Policy
Founding Director, AAMC Center for Health Justice
October 2024

A wooden boardwalk made of light-colored planks winds through a lush, green dune landscape. The path curves from the foreground towards the background, surrounded by tall grasses and low-lying vegetation. In the distance, sand dunes are visible under a clear sky.

**Health equity is the goal.
Health justice is the path.**

www.aamchealthjustice.org

Equity “3 Ways”



Alberti PM (2022) “Opinion: To Boost Equity, Medical Care Must Act at the Organizational, Population and Policy Levels”, *US News & World Report*.

Health equity is the state in which everyone has a **fair and just opportunity** to attain their highest level of health

<https://www.cdc.gov/nchstp/healthequity/index.html>

Opinion | Ben Carson: Moving our focus from equality to equity won't defeat racism. It's another kind of racism.

By Ben Carson

April 18, 2021 at 4:51 p.m. EDT

“Rather than equality of opportunity, equity would mandate equality of outcome. This goal is not only un-American — it is impossible to attain.”



Health equity means every community has
and provides the **vital conditions and
services** we all need to thrive.

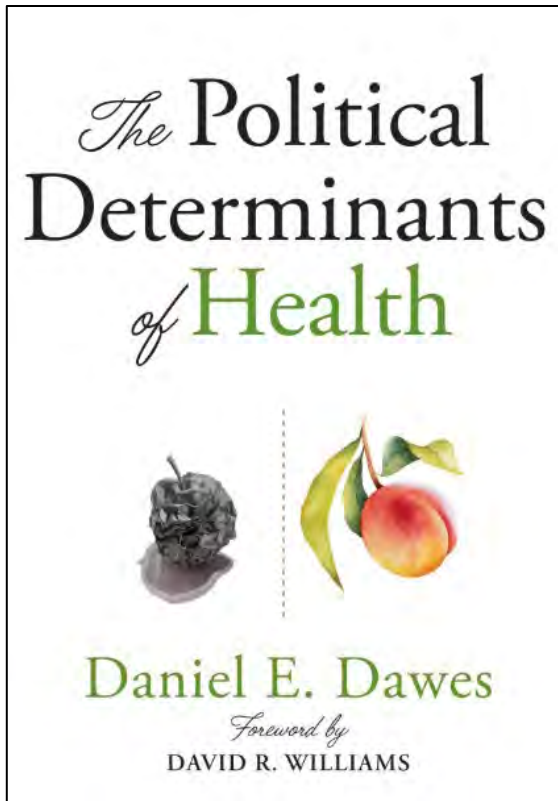
Mass Incarceration



- Money
- Power
- Prestige
- Voice
- Beneficial Social Connections
- Information

Alexander, Michelle. *The New Jim Crow : Mass Incarceration in the Age of Colorblindness*. New York: New Press, 2010.

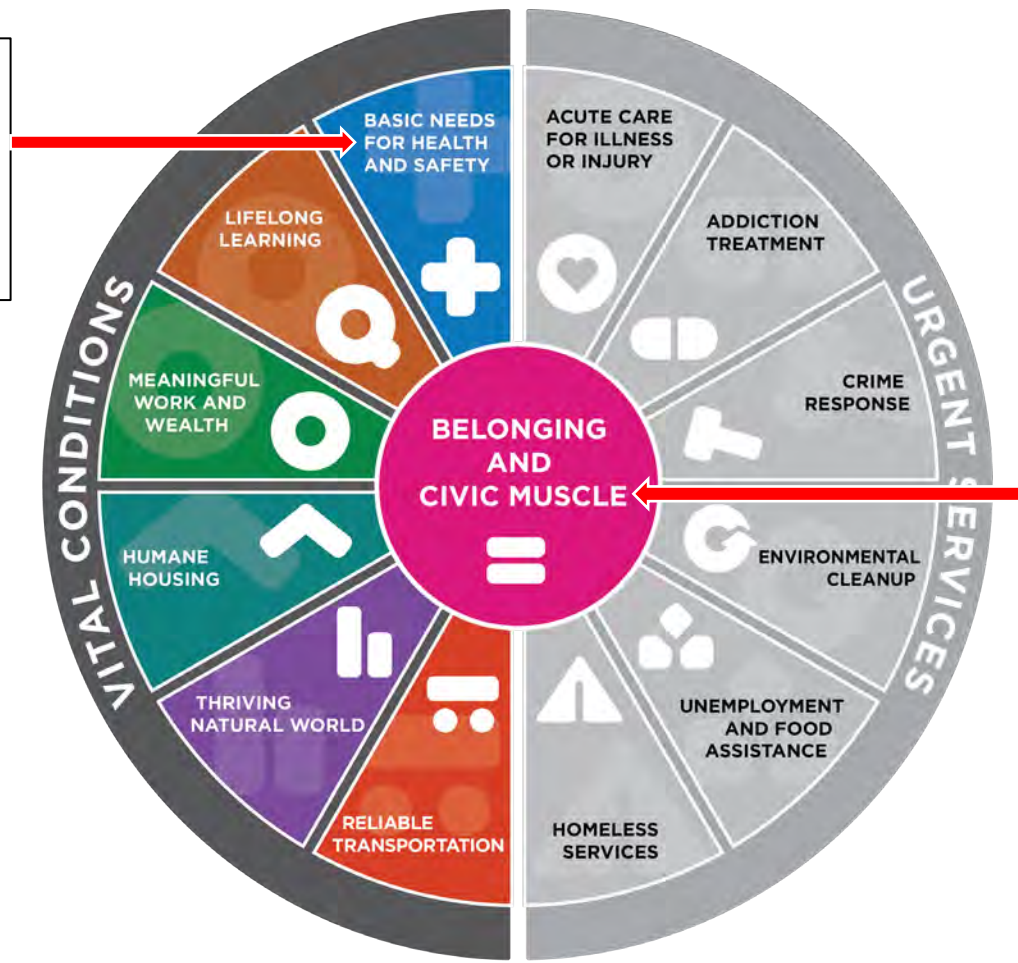
Link, B. G., & Phelan, J. (1995). Social Conditions As Fundamental Causes of Disease. *Journal of Health and Social Behavior*, 80–94.



- Sexism → Reproductive Health Restrictions
- Racism → Voting Rights Restrictions
- Heterosexism → “Don’t Say Gay” Laws
- Cissexism → Gender Affirming Care Restrictions
- Classism → Work Requirement Policies

**Gender Affirming
Care restrictions**

**Reproductive
Care restrictions**



**“Don’t Say Gay”
Voting
restrictions**

HEALTH

Anti-Racist, Anti-Discriminatory

JUSTICE

**Community
Wisdom &
Multisector
Partnerships**

**Research →
Policy Action**

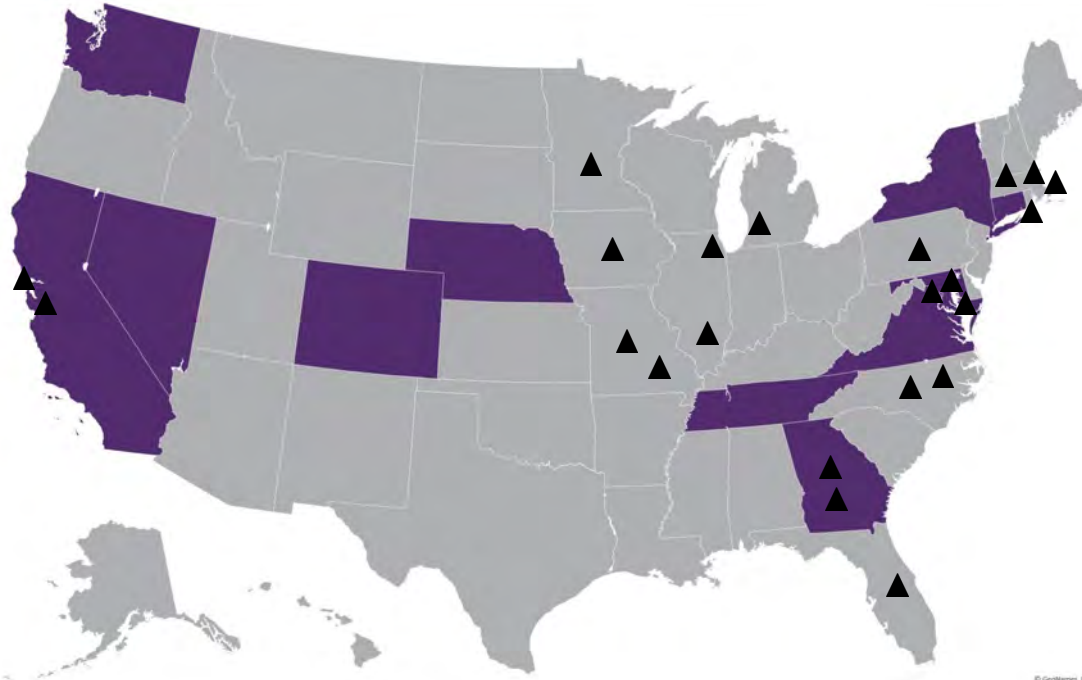
Benfer, E “Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice” (2015) American University Law Review, Vol 65, Issue 2

The Process is as Important as the Product

Racial Justice and Health Equity: Public Perspectives on Reparations in America

aamchealthjustice.org/resources/policy/reparations

Established reparation actions in 11 states and 22 localities across the United States



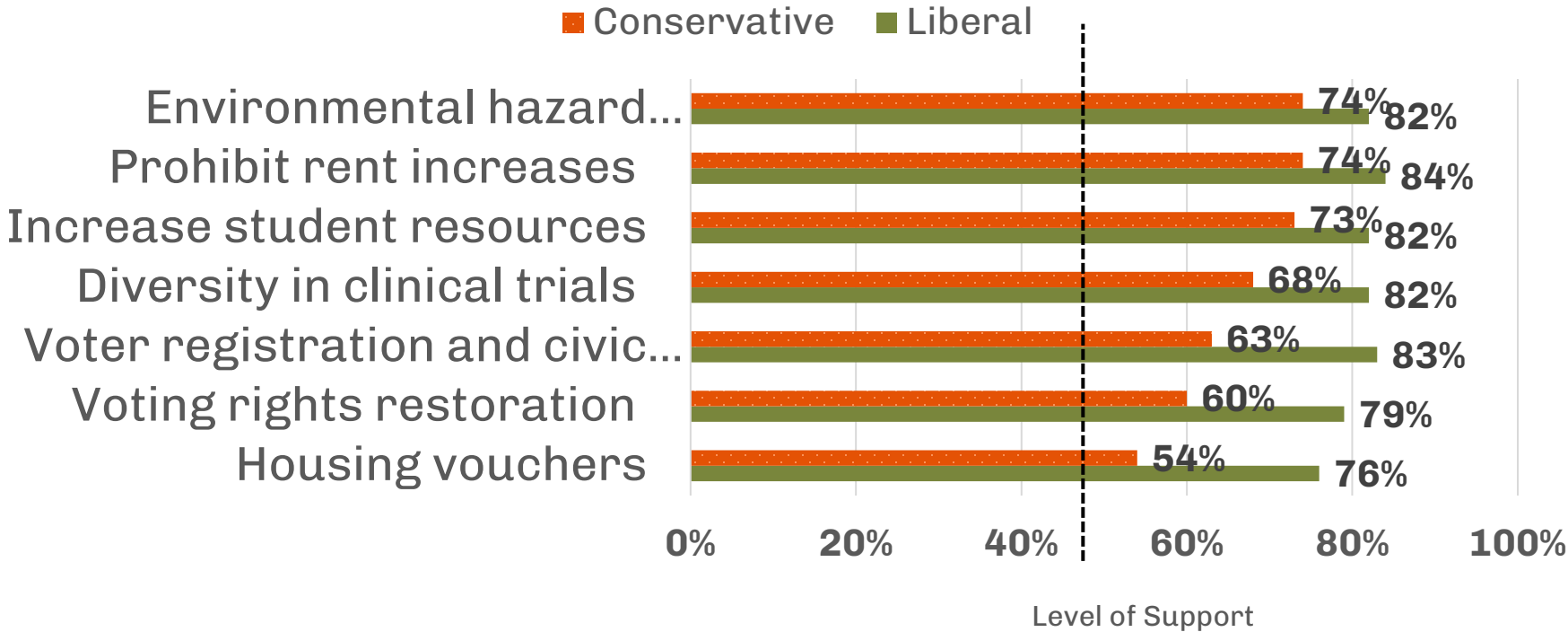
1. Alameda County, California
2. Amherst, Massachusetts
3. Asheville, North Carolina
4. Atlanta, Georgia
5. Baltimore County, Maryland
6. Boston, Massachusetts
7. Detroit, Michigan
8. Evanston, Illinois
9. Fulton County, Georgia
10. Greenbelt, Maryland
11. High point, North Carolina
12. Iowa City, Iowa
13. Kansas City, Missouri
14. Northampton, Massachusetts
15. Philadelphia, Pennsylvania
16. San Francisco, California
17. South Bend, Illinois
18. St. Louis, Missouri
19. St. Paul, Minnesota
20. St. Petersburg, Florida
21. Washington DC
22. Wilmington, Delaware

Source: Original Analyses conducted by Policy Team at AAMC Center for Health Justice, information current as of March 6, 2024.

California Reparations Report Policies

1. Funding to increase civic engagement and voter registration activities for high school students
2. Restoration of voting rights for formerly incarcerated individuals
3. Requirements for landlords to accept housing subsidies and vouchers
4. Increased public school funding for student needs and educational programs
5. Funding for environmental hazard-exposure screenings
6. Financial support to assist voluntary participation in clinical trials
7. Prohibition on rent increases on run-down apartments or those in need of repairs

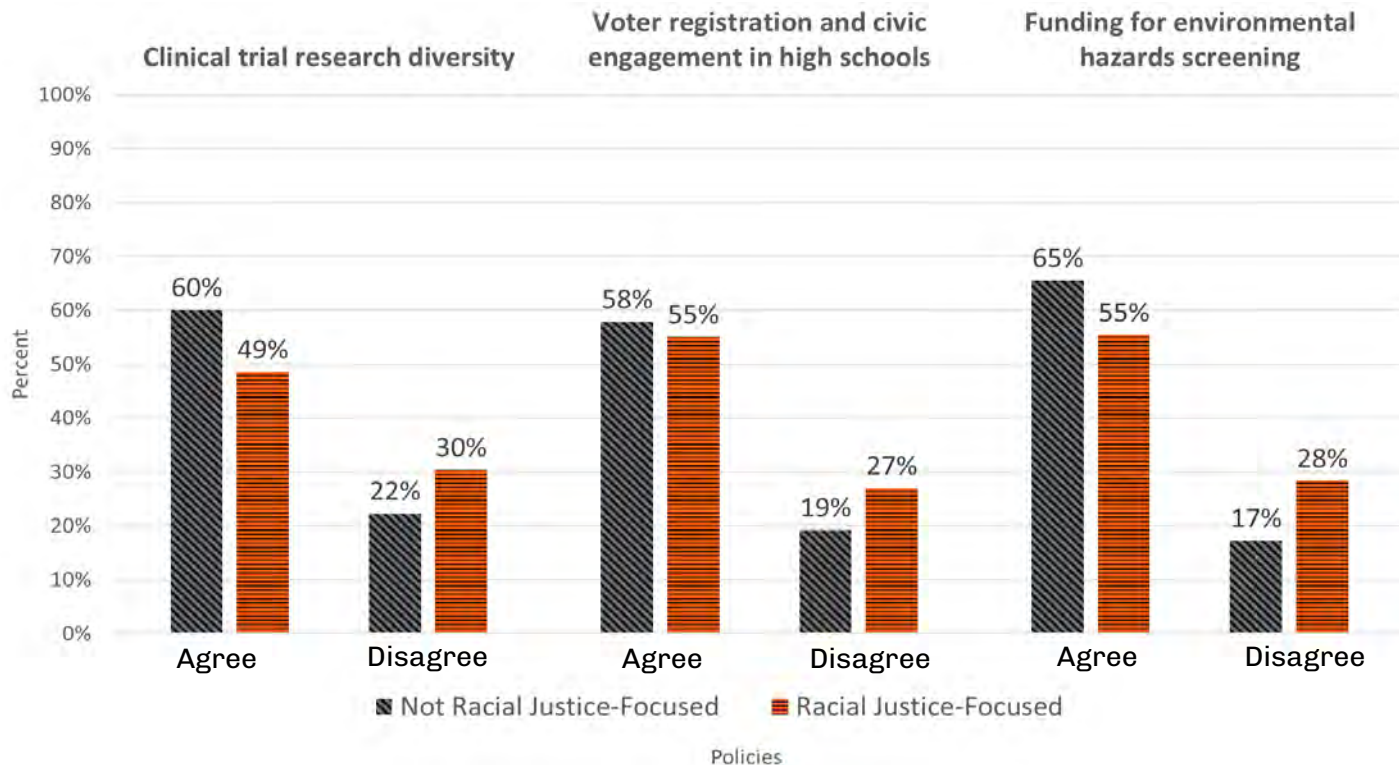
A majority of US conservatives and liberals support policies in California's reparations report



Source: Morning Consult online poll of 10,019 adults. Data weighted to approximate a nationally representative sample based on gender, age, education, race, and region. Note: Self-identified ideology

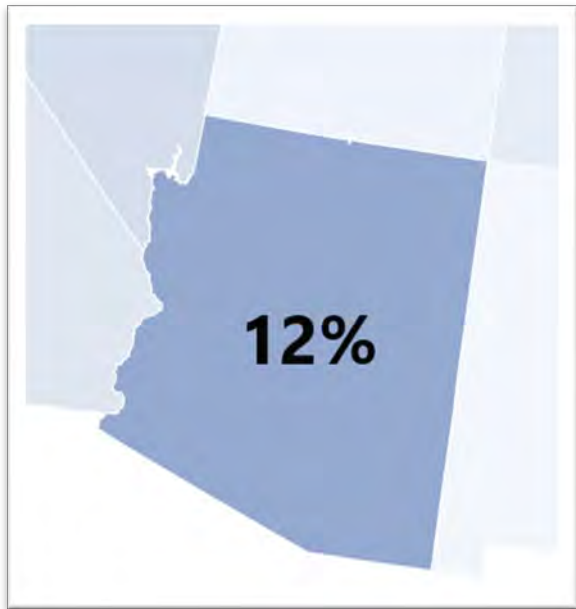


Overall, the agreement with a reparation policy is lower when it is presented with a “racial justice-focused” implementation

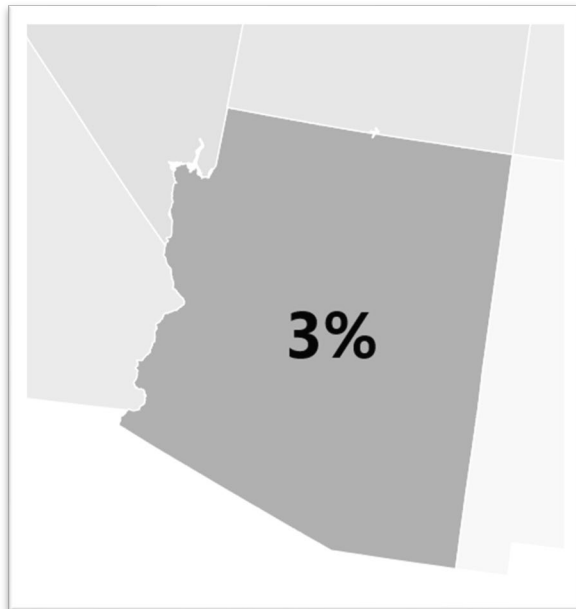


Source: Morning Consult online poll of 10,019 adults. Data weighted to approximate a nationally representative sample based on gender, age, education, race, and region.

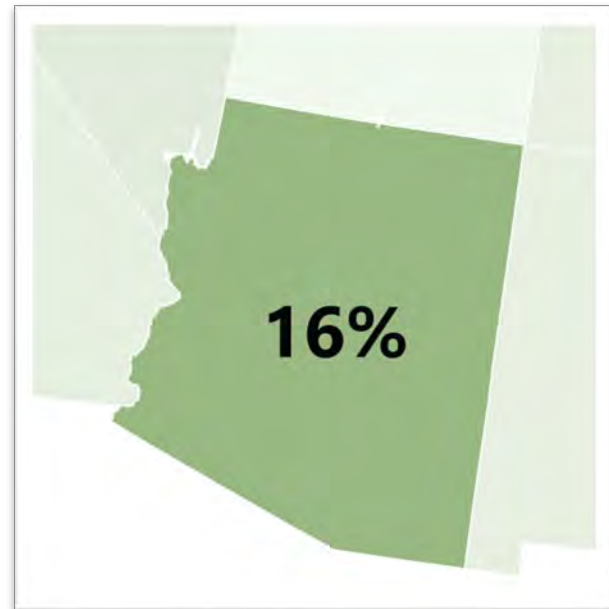
Differences in support for racial justice-focused versus not racial justice-focused implementation in Arizona



Clinical trial research diversity



Voter registration and civic engagement in high schools



Funding for environmental hazards screening

Racial Justice and Health Equity: Public Perspectives on Reparations in America



Across the country and across ideologies, there is majority support for select policies presented in California's landmark reparations report. But U.S. adults are less likely to agree with implementing such policies when racial justice is an explicit goal.

aamchealthjustice.org/resources/policy/reparations

How do advocates for racial, social, and economic justice enlarge the tent without hiding or watering down the movement's principles and goals?

UNDERSTANDING THE LEGAL ATTACKS ON RACIAL HEALTH EQUITY PROGRAMS

Arielle Humphries, Pilar Whitaker,
& Amalea Smirniotopoulos

LDF **QUAL** PROTECTION
INITIATIVE



KEY TERMS

RACE-CONSCIOUS VS. RACE-NEUTRAL

Race-conscious programs explicitly consider race as a factor in decision-making and are subject to heightened scrutiny.

Race-neutral programs do not explicitly consider race as a factor in decision-making and are generally lawful unless they are irrational or have an unjustified disparate impact on particular racial groups.

AFFIRMATIVE ACTION

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld a program that reserved 50% of the openings in in-plant training programs for Black employees.

The Court held that the program, which involved an explicit consideration of race in an employment decision, was lawful because it was designed to break down patterns of racial segregation and did not unnecessarily trammel the interests of white employees.

DEIA PROGRAMS

DEIA programs come in a variety of forms and can include sexual harassment, antidiscrimination, and implicit bias trainings; affinity groups; targeted recruiting; and mentoring.

DEIA programs do not involve quotas and typically do not involve making hiring, promotion, pay, or other decisions based on race or other protected characteristics.

UNDERSTANDING LEGAL CHALLENGES

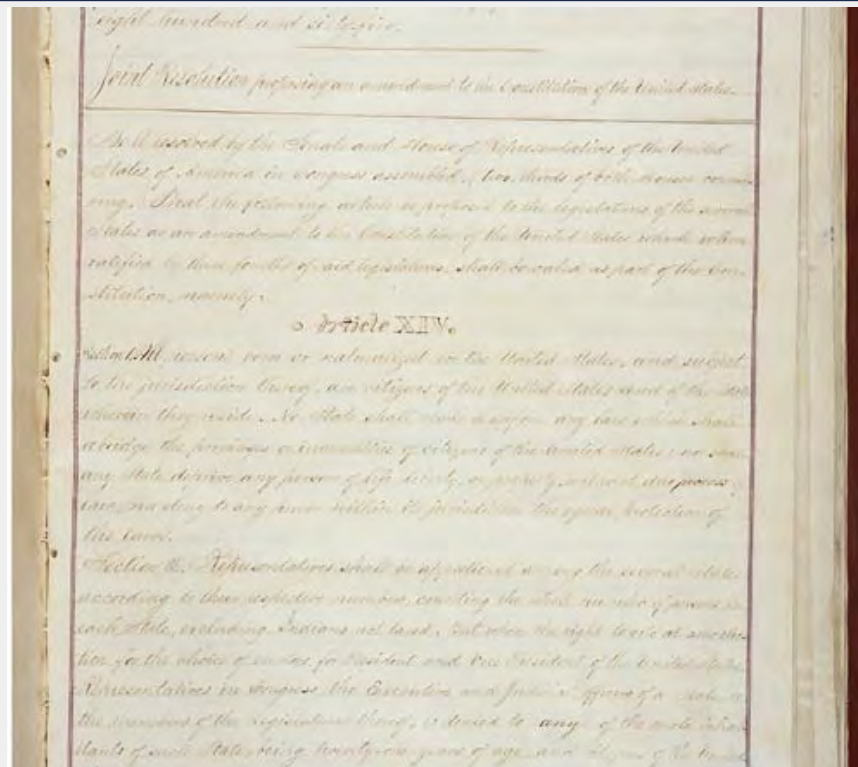
- Is this in court?
- Which court made the decision?
- What did the court decide?
 - Standing
 - Statutes and standards
 - Preliminary decision vs. final decision

HOW DID WE GET HERE?

14th Amendment

Equal Protection Clause

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor **deny to any person** within its jurisdiction **the equal protection of the laws.**



FEDERAL ANTIDISCRIMINATION LAWS

Title VI of Civil Rights Act

- Program or activity is defined broadly.
- Private parties can only bring disparate treatment claims.
- Government agencies can bring both disparate treatment and disparate impact claims.

“No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

FEDERAL ANTIDISCRIMINATION LAWS

Title VII of Civil Rights Act

- Applies to covered employers across sectors.
- Private parties can bring disparate impact and disparate treatment claims.

“It shall be an unlawful employment practice for an employer...to discriminate against any individual...because of such individual’s race, color, religion, sex, or national origin....”

FEDERAL ANTIDISCRIMINATION LAWS

Section 1981

- Prohibits racial discrimination against all racial groups.
- Only applies to cases of disparate treatment.

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts”

FEDERAL ANTIDISCRIMINATION LAWS

Section 1557

- Prohibits discrimination on basis of race, color, national origin, sex, age, or disability.
- HHS issues rules pursuant to this statute.
- Cross-references Title VI.

“An individual shall not ...be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance”

BRIEF LEGAL HISTORY

Race-Conscious Programs for Government Contracts

City of Richmond v. J.A. Croson Company (1989)

- Strict scrutiny applies to race-conscious state and local government programs

Adarand Constructors, Inc. v. Peña (1995)

- Strict scrutiny applies to race-conscious federal government programs

BRIEF LEGAL HISTORY

Affirmative Action in Higher Education

1978: *Regents of the University of California v. Bakke*

2003: *Grutter v. Bollinger* and *Gratz v. Bollinger*

2013: *Fisher v. U.T. Austin (Fisher I)*

2016: *Fisher v. University of Texas (Fisher II)*

Students for Fair Admissions (“SFFA”)

The Supreme Court Held:

1. Harvard and UNC’s race-conscious admissions policies were unlawful in violation of the Equal Protection Clause and Title VI.
2. Harvard and UNC’s stated educational benefits of diversity were insufficiently measurable to be a compelling government interest.
3. Racial categories used in the admissions policies were imprecise and arbitrary, and it was stereotyping to assume that a person’s race could influence their perspective or identity. However, applicants could discuss how race affected their lives.





What *SFFA* Did NOT Do:

1. The Court did **not** decide anything about when the government or organizations that receive federal funding can consider race *outside of higher education admissions or to advance interests other than the educational benefits of diversity*.
2. The Court did **not** decide anything about when private companies and other non-governmental organizations that do not receive federal funds can consider race.
3. The Court did **not** decide anything about when public or private entities can use race-neutral means to achieve racial equity.

WHAT ARE THE PRIMARY GOALS OF THE OPPOSITION?

DELEGITIMIZING RACIAL HEALTH EQUITY EFFORTS

Denying the existence of racial health disparities:

“ CMS asserts without evidence that significant and persistent inequities in healthcare outcomes exist today for certain demographics.”

Denying the existence of Social Determinants of Health:

“ By hijacking the medical relationship between a healthcare provider and his or her patient to include ‘structural factors,’ the well-being of the patient is no longer the primary focus. This is a dangerous precedent for CMS to set. Individual health should always be the main priority in the healthcare system.”

Rejecting demographic data analysis:

“ CMS wants to collect a wide-variety of personal data from patients to categorize individuals with heightened social risk or demographic characteristics with associations to poorer outcomes. . . . Such stratification threatens the individualized treatment that healthcare is supposed to provide.”

CHILL LAWFUL CONDUCT

Stop medical boards and groups from requiring diversity training

Eliminate cultural competency training

Prevent microaggressions and discrimination reporting

Prohibit the collection of demographic data

Chill Lawful Conduct By Filing Meritless Complaints And Broaden The Impact of Legal Rulings To Various Contexts

**Use of anonymous plaintiffs
who claim they would be
willing to apply to programs
but have never actually
attempted to apply.**

Co-opt and Ultimately Render Civil Rights Statutes and Regulations Meant To Protect Systemically Marginalized Groups Ineffective

Project 2025

- End our ability to address policies and practices that are neutral on their face but have an unfair discriminatory effect.
- Hide discrimination by preventing data collection.
- Rescind current Section 1557 guidance concerning sexual orientation and gender identity
- Limit enforcement of sexual orientation and gender identity discrimination in the Section 1557 regulation and prioritize compliance with the First Amendment, RFRA, and federal conscience laws in any case implicating those claims.
- Explicitly interpret Section 1557 not to include sexual orientation and gender identity discrimination.
- Weaponize the federal government's civil rights enforcement agencies and direct them to attack state and local governments, employers, and other private parties who are trying to remove barriers to opportunity in their own institutions.
- Use disability rights laws in situations involving reproductive justice.

WHAT IS THE CURRENT STATE OF PLAY?

Where Anti-DEI Legislation Has Been Proposed

The Chronicle of Higher Education is tracking **86** bills in **28** states and the U.S. Congress. Since 2023,

86

have been introduced.

14

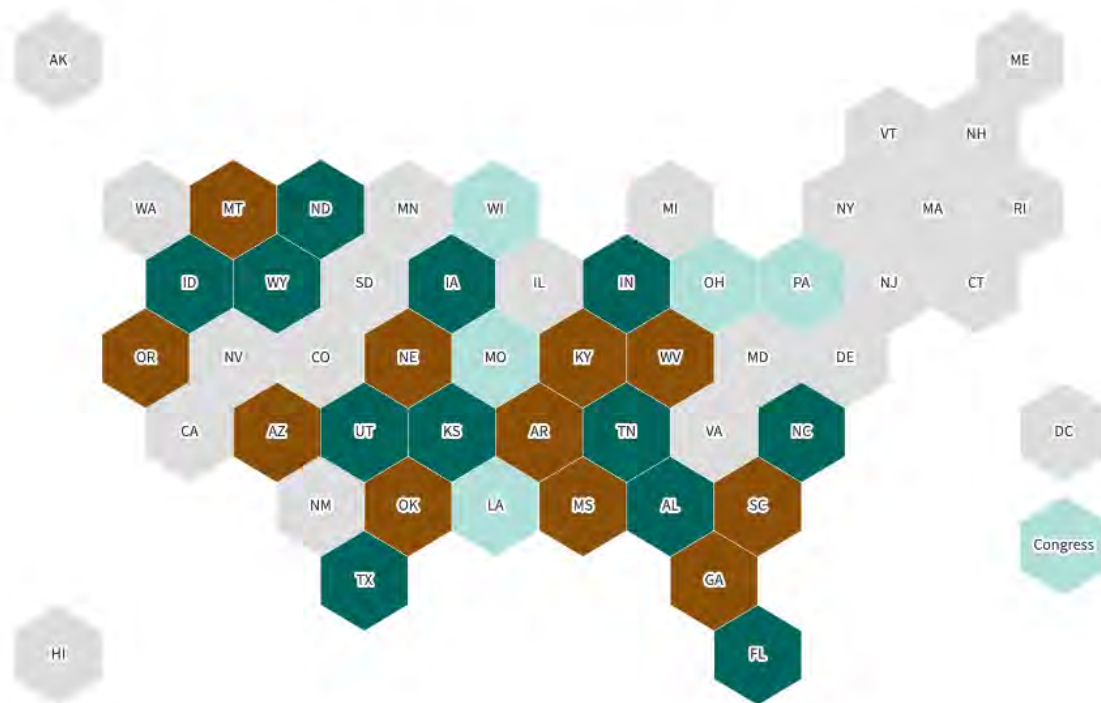
have final legislative approval.


14

have been signed into law by a governor.

54

have been tabled or failed to pass.



 For a more detailed look at each of these bills, see *The Chronicle of Higher Education's* [DEI Legislation Tracker](#).

STATES WITH LAWS THAT POSITIVELY IMPACT RACIAL HEALTH EQUITY WORK

California

- California SB 464
 - Healthcare provider training to address health disparities.
- CA A 1204
 - Requires hospitals to prepare and annually submit an equity report. Also requires hospitals to prepare and submit a health equity plan to reduce disparities

Arkansas

- Ark. Code § 6-5-801 et. seq
 - Health care student summer enrichment program for underrepresented student populations.

Five states have laws requiring at least some health care workers to take implicit bias training—California, Maryland, Michigan, Minnesota, and Washington

<https://www.ncsl.org/health/health-disparities-legislation>

RECRUITING/ PROFESSIONAL DEVELOPMENT

Do No Harm v. Pfizer:

Challenge to Pfizer's fellowship program to increase diversity among workforce at Pfizer. Plaintiffs alleged violations of Section 1981, Title VI, Section 1557, and New York State laws.

Case was dismissed on standing grounds. Do No Harm is seeking *en banc* review.

Do No Harm v. Vituity:

Alleged that physician practice group that sought to recruit Black physicians by offering a \$100,000 signing bonus violated Section 1981 and Section 1557 of the Affordable Care Act.

Parties settled, and Vituity now operates a program that provides a "forgiveness loan of up to \$100K to new physicians from underrepresented communities who have actively addressed healthcare disparities and discrimination."

RECRUITING/ PROFESSIONAL DEVELOPMENT

Do No Harm v. Health Affairs:

Alleged that Health Affairs fellowship program for American Indian/Alaskan Native, African American/Black, Asian American, Native Hawaiian and other Pacific Islander, and Hispanic/Latino violated Title VI, Section 1557 and D.C. Human Rights law.

Parties settled, and Health Affairs now operates the Health Equity Fellowship for Trainees (HEFT) “with the purpose of increasing the quantity and quality of manuscripts published on the topic of health equity, while cultivating future equity research leaders.”

ACCESS TO HEALTHCARE PROFESSION

● State Scholarships

Do No Harm v. Eddling: Challenge to Minority Healthcare Scholarship offered by the Arkansas Minority Health Commission.

Parties agreed to terminate scholarship unless it was administered in race-neutral manner, and the state withdrew the scholarship altogether.

LDF Legal
Defense
Fund

● Medical School Scholarships

OCR complaints against University of Pittsburgh School of Medicine's and Baylor University's School of Medicine's Scholarship for Underrepresented Minorities in Medicine that limited eligibility to African Americans, Hispanics, Native Americans, Native Hawaiians/Pacific Islanders, and Native Alaskans

Both schools settled, agreeing to remove the racial eligibility criteria. However, the University of Pittsburgh notes that "[a]pplicants should have an interest in diversity in medicine initiatives." Baylor's Program is clear it is meant to "promote a diverse and engaged workforce."

● Pre-Health Programs

OCR complaint against the University of Minnesota for a pre-health student pathways program for students who identify with one or more of the following: from a rural community, first-gen, economically disadvantaged, and/or from a racial or ethnic population that is underrepresented in the health professions.

University removed racial eligibility requirements, but still offer the program to first-generation college students and economically disadvantaged students.

PATIENT CARE

OCR Cleveland Clinic Complaint:

Alleges that the minority stroke program housed within the Cleveland Clinic's general Stroke Program and the Minority Men's Health Center are discriminatory.

The complaint alleges that these programs violate Title VI because they create "a racial dichotomy under which patients are prioritized and cared for, and displacing the otherwise laudable goal of helping humanity equally, without regard to one's race." This case is under investigation.

Khatabi v. Lawson: Plaintiffs alleged that a California state law requiring medical education courses to include implicit bias training violates their right to free speech under the First Amendment.

The district court dismissed the case as having failed to state a plausible First Amendment claim.

Mississippi v. Becerra: CMS' payment model that incentivizes provider anti-racism plans as a quality improvement activity. Plaintiffs alleged violations of the APA and the Medicare Access Act.

The district court found the plaintiffs lacked standing to bring the case, but is permitting limited discovery to allow Plaintiffs to establish standing.

Californians for Equal Rights Foundation v. City and County of SF, et. al: Challenge to the Abundant Birth Project's provision of \$1,000 per month to Black and Pacific Islander pregnant people in San Francisco for the duration of their pregnancy and the first two months of the baby's life. The lawsuit alleges that this program violated the U.S. and California Equal Protection Clauses and Title VI because it is limited to Black and Pacific Islander pregnant people.

There have been no orders issued in this case

WHAT DOES THIS MEAN FOR HEALTH EQUITY WORK?

KEY TAKEAWAYS

- The law governing health equity programs has not changed.
 - Several legal challenges have failed because the plaintiffs could not show that they were injured.
 - Race-neutral programs are still lawful.
 - Race-conscious programs will continue to receive additional scrutiny.
- Nevertheless, opponents of civil rights have been able to change behavior without changing the law.

WHAT CAN WE DO TO PROTECT HEALTH EQUITY WORK?

RECOMMENDATIONS— EQUITY FOR PATIENTS

- Increase language and physical accessibility
- Foster cultural competency
- Seek out providers and staff who have experience with and dedication to working with underrepresented populations

RECOMMENDATIONS— EQUITY FOR PROVIDERS

- Build robust pipelines
- Establish aspirational goals
- Foster an inclusive work environment
- Support Employee Resource Groups and mentorship programs

RECOMMENDATIONS—FOR PATIENTS AND PROVIDERS

- Communicate the value of ensuring equal access to the profession and health care
- Collect data on the need for health equity programs and how they improve health outcomes, as well as on discrimination against patients and providers
- Conduct an equity audit to identify and document problems and formulate targeted efforts to remediate them
- Modify the application process for research and other funding
- Advocate internally and externally for continued investments in health equity work
- Diligently comply with anti-discrimination laws

LEARN MORE

<https://www.naacpldf.org/equal-protection-initiative/>

QUESTIONS?

How to Stay Connected

The strength, insight, resilience and belonging of our community defines our success. We're so glad you're here and hope you'll join us!

Sign up to stay up-to-date on the latest gatherings, updates, events and advocacy opportunities.

[Subscribe To Our Newsletter](#)

Support this work!

Scan the QR code below to donate to HECC or visit donorbox.org/support-HECC



Thank you!