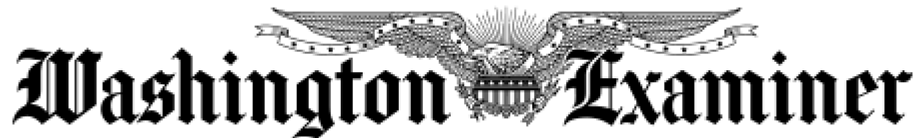

'Diversity' house of cards collapses

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The Supreme Court's ruling against racial preferences in college admissions not only upends the controversial policy but redirects the wider debate about what constitutes a "colorblind society" and how to achieve it. But much remains to be done to heed Chief Justice John Roberts's admonition that "eliminating racial discrimination means eliminating all of it."

The decision, centered on affirmative action policies at Harvard University and the University of North Carolina, severely restricts, even if it doesn't completely ban, the use of racial preferences for purposes of realizing possible educational benefits of "diversity." Harvard and UNC justified their uses of racial preferences by reference to the educational benefits of racial and ethnic "diversity." Rooted in Supreme Court precedent dating back to the 1978 *Regents of the University of California v. Bakke* case, "diversity" had displaced compensatory justice as the main legal justification for racial preferences in educational institutions.

Roberts's majority opinion effectively outlined many of the flaws in diversity preferences, including nebulous goals, reliance on crude racial classifications and stereotypes, and the unconstitutional use of race as a "negative" to disadvantage Asian American applicants, among others. Justice Neil Gorsuch's concurrence correctly pointed out that the cases could have been resolved more easily by relying on the plain text of Title VI of the Civil Rights Act of 1964. Despite some flaws in the majority's reasoning, the decision is an important step forward. But much remains to be done to heed Roberts's admonition that "eliminating racial discrimination means eliminating all of it." Realizing the ideal of colorblind government will require steps that will be difficult for many on the Right as well as the Left.

As the majority justices show, the "diversity" rationale is so full of holes that it can't possibly pass muster under the "strict scrutiny" imposed on the use of racial classifications, a standard that says such preferences are only permissible to advance "compelling" interests, and even then only if "narrowly tailored" to the advancement of those interests. The racial categories into which Harvard and UNC divide up applicants (black, white, Latino, Asian, etc.) are extremely crude, indeed. As Gorsuch pointed out, the "Asian" category "sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population." The other categories are not much better. WASPs, Jews, and immigrants from Bulgaria and Sweden are all equally

“white.” “Latino” includes people from a vast range of nations and cultures. The “narrow tailoring” required by strict scrutiny surely compels a far more nuanced assessment.

As Roberts explained, this kind of lumping also inevitably leads to crude stereotyping, based on the assumption that all members of these broad categories have relatively similar views and backgrounds, different from those of all the other broad aggregates.

The crudeness of the racial and ethnic categories used by Harvard and UNC also undercuts Justice Ketanji Brown Jackson’s dissenting opinion, with its otherwise powerful appeal to the historic disadvantages faced by black people. She is right that black people are on average worse off than white people on various social and economic dimensions and that the legacy of slavery and discrimination is a large part of the reason why.

But even if black people are worse off, on average, that doesn’t mean that all or even most black applicants to elite institutions like Harvard and UNC have suffered greatly from discrimination. Many are relatively affluent members of the upper-middle class. Many others are recent immigrants from Africa or the Caribbean or children thereof. The same point applies to Hispanic beneficiaries of preferences, many of whom are also recent immigrants or children of such. While members of these immigrant groups still sometimes experience racial and ethnic prejudice, the extent of such victimization is far smaller than for victims of the effects of slavery and segregation. Conversely, many of those discriminated against by affirmative action programs themselves come from groups with their own histories of disadvantage and discrimination, most notably Asians and Jews.

If the racial and ethnic categories Harvard and UNC use are nebulous and crude, the same applies to the goal these categories are supposed to serve. As Roberts explained in detail, it is hard to say what is meant by “diversity,” what the educational benefits of it are, and how we can measure whether and to what extent they have been achieved.

Roberts also emphasized that race cannot be used as a “negative” in university admissions. Virtually any use of racial preferences creates negative effects for nonpreferred groups, but in this case, there is also evidence that Harvard specifically tried to restrict the percentage of Asian Americans admitted through the direct application of various devices, including giving them lower “personal” ratings.

As Gorsuch explained in his concurring opinion, the Supreme Court could have simply decided these cases based on Title VI of the Civil Rights Act of 1964, which states that “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.”

The Civil Rights Act makes no exception for racial and ethnic preferences adopted for purposes of promoting diversity, or indeed for any other reason. Harvard, a private institution, is actually covered only by Title VI. It is not constrained by the anti-discrimination provisions of the 14th Amendment, which only apply to government entities, including UNC.

It's true that previous Supreme Court decisions have ruled that Title VI's anti-discrimination standards are identical to those of the 14th Amendment, and a ruling based only on the former would appear to undermine that precedent. The Supreme Court has a strong presumption against overruling statutory precedent. But the racial preferences at issue deviate from the plain text of Title VI so egregiously that overruling statutory precedent would have been justified here.

The majority opinion also largely neglects the long-standing debate over the original meaning of the 14th Amendment. But that vacuum is in large part filled by Justice Clarence Thomas's concurrence. In dissent, Justice Sonia Sotomayor pointed out that Congress enacted seemingly race-conscious measures to help black people in the immediate aftermath of the Civil War and few thought they were unconstitutional at the time. But Thomas, in turn, rightly noted that some of these policies benefited recently freed slaves, not black people as such, and thus did not use racial classifications. Those few that directly targeted black people did so at a time when nearly all African Americans were recently freed slaves, victims of massive state-sponsored discrimination, or both.

In 1860s America, the correlation between race and victimization by severe oppression was close to 100% — close enough to pass even very strict judicial scrutiny. That, obviously, is not true of today's vastly more diverse black population. It is even less true of Latinos and other groups. Thomas also pointed out that several leading supporters of the 14th Amendment did indeed envision it as banning all or virtually all racial discrimination.

The upshot of the exchange over original meaning is that even if the 14th Amendment does not mandate absolute colorblindness, it does create strong presumptions against racially discriminatory policies, and few, if any, current affirmative action programs can overcome them.

While the decisions are an important step forward for colorblindness, much remains to be done to realize that ideal. The majority opinion and Justice Brett Kavanaugh's concurrence play fast and loose with the Supreme Court's previous precedents on affirmative action in higher education, such as *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas II* (2016). They contended the recent rulings are completely compatible with those previous precedents and don't require any significant modification of them. But the dissenting justices effectively pointed out that these precedents give far greater deference to university decision-making on affirmative action policy. The majority would have done better to overrule *Grutter* or at least significantly limit its scope.

And because the Supreme Court did not overrule *Grutter*, universities may still try to engage in more surreptitious racial preferences. It is also likely that many institutions will try to replace explicit racial preferences with seemingly "race-neutral" alternatives that try to target characteristics correlated with membership in a particular racial or ethnic group. Such subterfuges were used on a large scale to try to resist desegregation after *Brown v. Board of Education*. And we already see them in recent efforts to keep down the percentage of Asian students at selective institutions. It will also take much time and effort to curb the extensive use of racial preferences in government contracting.

Conservatives' justified stand against discrimination in admissions must be applied in other contexts, as well. The work of eliminating all racial discrimination cannot be limited to those forms favored by the Left. The Right will also have to clean up its act. Most notably, it will have to stop turning a blind eye to large-scale racial profiling in law enforcement. A 2019 Pew Research Center poll found that 59% of black men and 31% of black women said they have been unfairly stopped by police because of their race. Their perceptions are backed by numerous studies. Sen. Tim Scott (R-SC), a 2024 presidential candidate, has movingly recounted multiple incidents in which he was racially profiled by the Capitol Police. Racial profiling is particularly prevalent in immigration enforcement, where it is even backed by government policy.

While conservatives have long advocated overruling cases like *Grutter*, few focus on the Supreme Court's 1975 ruling in *United States v. Brignoni-Ponce*, which held that federal law enforcement can use "Mexican ancestry" as a relevant proxy for deciding which people to stop and detain in border areas. The appearance of Mexican ancestry likely correlated with being an illegal immigrant. But this kind of use of race-as-proxy is similar to affirmative action, whose defenders have long argued that being black or Hispanic correlates with being a victim of discrimination or a contributor to "diversity." If it is illegal and unjust for university officials to use race or ethnicity as a crude proxy, the same goes for law enforcement.

If critics of affirmative action truly believe it is wrong for the government to discriminate on the basis of race, we cannot ignore that principle when it comes to those government officials who carry badges and guns and have the power to arrest and detain citizens. Otherwise, our position is blatantly inconsistent, and cynics will rightly suspect that our supposed opposition to discrimination is limited to situations in which white people are among the victims, as in the case of affirmative action. Conservatives and others will also have to reckon with the long history of racial and ethnic prejudice as a motivation for immigration restrictions, which persists among some even today.

Despite some shortcomings in the majority's reasoning, the recent rulings reached the correct outcome and point the way to a more just future. But much remains to be done to realize that promise.

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