



What it Will Take to Make Government Color-Blind

Ilya Somin

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In the Supreme Court's recent ruling against racial preferences in university admissions, Chief Justice John Roberts writes that "[e]liminating racial discrimination means eliminating all of it." It's a great principle. But much remains to be done to realize it.

If we truly want a color-blind government, we will have to go well beyond banning affirmative action in universities. And some of the necessary changes will annoy the political right, as well as the left. The Court's ruling won't immediately eliminate the use of racial preferences in education and elsewhere. And color-blindness cannot be achieved unless and until we also eliminate policies where the government continues to discriminate against racial and ethnic minorities.

Although the Court's rulings against racial preferences at Harvard and UNC are likely to severely constrain such practices in higher education, they may not put a complete end to them, because the majority didn't overrule earlier decisions permitting their use for purposes of pursuing "diversity." In addition, schools may well try to replace explicit racial preferences with supposedly "race-neutral" alternatives that try to target characteristics that correlated with membership in a particular racial or ethnic group. We already see such subterfuges at work in recent efforts to preserve racial preferences for blacks and Latinos, and keep down the percentage of Asian students at selective institutions.

It is also important to remember that higher education is not the only institution that uses affirmative action, and perhaps not the most important. Only a very small percentage of Americans attend highly selective colleges and universities (the kind that typically use racial preferences for affirmative action), and only a small percentage of the latter are either beneficiaries or victims of affirmative action policies.

There are widespread racial preferences in government contracting and in a variety of federal and state government hiring practices and programs. Last week's decisions signal that these

preferences are more vulnerable to legal challenges than previously. But it will take much effort—and, probably, much litigation—to root them out.

Affirmative action in education, government hiring, and public contracting are policies espoused primarily by the political left. But policies favored by many on the right will also need to change if we are going to achieve color-blindness.

The discriminatory government policy that affects the most Americans is probably not affirmative action, but racial profiling by law enforcement. A 2019 Pew Research Center poll found that 59% of black men and 31% of black women say they have been racially profiled by police. Such perceptions are backed by numerous studies. Even powerful politicians are not immune. Black Republican senator and presidential candidate Tim Scott has recounted multiple incidents in which he was racially profiled by Capitol police. Racial profiling is especially prevalent in immigration enforcement, where it is even backed by official government policy—including under liberal Democratic presidents, such as Biden and Barack Obama.

Conservatives and other advocates of color-blindness have long advocated overturning Supreme Court decisions like Grutter v. Bollinger (2003), which authorize affirmative action in some circumstances. But few condemn United States v. Brignoni-Ponce (1975), the Supreme Court decision holding that federal law enforcement can use "Mexican ancestry" as a proxy for deciding which people to stop and detain in border areas.

Defenders of racial profiling argue it's a useful tool because membership in a racial or ethnic group may correlate with criminality. Young black males have higher crime rates than members of most other groups. In border areas, Mexican appearance is likely correlated with being an illegal migrant. 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 wrong for university officials to use race or ethnicity as a crude proxy, the same goes for law enforcement.

While most individual incidents of racial profiling inflict only very modest harm, the cumulative impact is substantial, spreading fear in minority communities and poisoning relations between them and law enforcement. True advocates of color-blindness cannot turn a blind eye to discrimination when the government officials doing it carry badges and guns and have the power to arrest, detain, and sometimes even kill or injure citizens. Otherwise, cynics will justifiably suspect we only oppose racial discrimination when it victimizes whites, as in the case of affirmative action.

Advocates of color-blindness must also confront the difficulties posed by facially neutral government policies that, historically, were enacted in large part for reasons of racial and ethnic prejudice. Exclusionary zoning restrictions on housing construction are a particularly important example, which has cut off millions of people from housing and job opportunities. Many such policies were enacted for the purpose of keeping blacks and other minority groups out of majority-white neighborhoods.

Many immigration restrictions were adopted for similar motives, targeting first the Chinese and other Asian immigrants, and later Eastern and Southern Europeans who were considered inferior to and incompatible with Anglo-Saxons and other northern Europeans. Here, too, racially motivated policies massively impacted millions of people.

Color-blindness doesn't require abolition of all policies that were, at one time, adopted out motives rooted in racial or ethnic prejudice. Among other things, difficult questions are raised by policies that were originally adopted for those reasons, but later perpetuated or extended for other reasons. The same goes for policies enacted for mixed motives.

However, such policies probably do have to go if the evidence shows they would not have been adopted in the absence of a desire to discriminate on the basis of race or ethnicity. The Supreme Court has long held that, if evidence indicates the presence of racist motives in the adoption of a government policy, the burden of proof shifts to the state, which must show it would have adopted the same policy regardless. But, to understate the point, that rule hasn't always been effectively enforced.

I have focused on achieving color-blindness in government because the Constitution, government's monopoly power over various services, and moral principles all impose broader anti-discrimination obligations on state entities than on the private sector. The latter can legitimately engage in a variety of discriminatory policies that government cannot. But, if like many progressives (and, increasingly, some on the right, as well), you believe government and private discrimination are more alike than different, than private institutions will also have to change some of their policies. For example, private employers that have their own affirmative racial preferences must abandon them.

Color-blindness does not, however, require a society where all racial and ethnic groups have similar income levels and occupational profiles. Many differences between groups are due to factors other than discrimination. For example, several Asian groups have much higher incomes than the national average in the US, as is also true of Jews and Nigerian immigrants, among others. It's hard to argue that's because US government policy is somehow biased in favor of Asians, Jews, and Nigerians.

Color-blindness also likely does not require somehow restoring the distribution of wealth and income to what it would have been in the absence of a history of discrimination. Given the enormous counterfactuals involved, it is likely impossible to determine what that distribution would have looked like. Moreover, if large-scale historical injustice have been averted, hardly any of currently existing Americans would have been born in the first place. History would have taken a different course, and the world would be populated by a different set of people. In that limited, but important, sense we are all actually beneficiaries of the great evils of history.

Despite these significant caveats, achieving color-blindness requires a lot more than many might assume. Confronted with the true scope of what must be done, some conservatives and others might recoil, and retreat to the idea that government may use racial preferences, after all, so long as they have a benign purpose. But, of course, that's the very idea underlying affirmative action; defenders of that policy genuinely believe it is essential to achieving racial justice. Moreover,

history shows that seemingly well-intentioned racial and ethnic discrimination can cause enormous harm. The architects of exclusionary zoning and racist immigration policy surely believed they were benefiting society. But they in fact inflicted enormous harm for very little gain.

Ultimately, racial and ethnic discrimination by the state is unjust, because it judges people by morally arbitrary circumstances of ancestry and birth that they have no control over, and because history shows that its harmful effects vastly outweigh any putative benefits. At the very least, there should be a strong presumption against such policies that can be overcome only by overwhelming evidence indicating they create great benefits that could not be achieved by other means. By that standard, affirmative action, racial profiling, exclusionary zoning, and much else are likely to fall short.

*Ilya Somin is Professor of Law at George Mason University, and author of *Free to Move: Foot Voting, Migration, and Political Freedom* and *Democracy and Political Ignorance: Why Smaller Government is Smarter*.*