

Preferential and Diversification Policies

The concept of a color blind constitution was asserted a century ago by Justice Harlan. As he noted in dissenting from the Court's endorsement of official segregation, "there is in this country no superior, dominant, ruling class of citizens . . . [and] no caste . . . our Constitution is color-blind."²² Although Harlan's sense of constitutional color blindness responded to methodology that subordinated a historically disadvantaged group, the rhetoric has been central to analysis of methods that purport to account for the nation's legacy of discrimination.²³ Richard A. Posner maintains that purportedly benign racial classifications are a source of harm to their intended beneficiaries. Thomas Sowell argues that the basic premises of race-conscious remediation are misplaced. Randall Kennedy contends that racially preferential policies have been effective and that opposition to them is exaggerated. Patricia J. Williams touts the potential of policies calculated to diversify and factor multicultural realities. David A. Straus suggests that the referencing of law to color blindness is delusory.

Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1 (1974)*

II. THE REASONABLENESS OF REVERSE DISCRIMINATION

B. RACE AS A SURROGATE FOR OTHER, NONRACIAL CHARACTERISTICS

For a diversity argument to be convincing, it must identify a differentiating factor that is relevant to the educational experience. It would make no sense to argue that in selecting the entering first-year class a law school should strive for diversity in the height of the students, or in their weight, pulchritude, posture, depth of voice, or blood pressure, or that it should give a preference to (or disfavor) albinos, or people with freckles or double chins. Diversity in these superficial physical respects contributes nothing of value to the legal education of the students. Race *per se*—that is, race completely divorced from certain characteristics that may be strongly correlated with, but do not inevitably accompany, it—is also, and in a similar sense, irrelevant to diversity. There are black people (and Chicanos, Filipinos, etc.) who differ only in

²² Plessy v. Ferguson, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting).

²³ E.g., Fullilove v. Klutznick, 448 U.S. 448, 522 (1980)(Stewart and Rehnquist, JJ., dissenting). See generally City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

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the most superficial physical characteristics from whites—who have the same tastes, manners, experiences, aptitudes, and aspirations as the whites with whom one might compare them (here, white law school applicants). To give such people preferential treatment to the end of increasing the diversity of the student body would be equivalent to giving preferential treatment to albinos—were it not that race is frequently correlated with other attributes that are arguably relevant to meaningful diversity, and albinism is not. The average black applicant for admission is more likely than the average white to have known poverty and prejudice first hand, and his experience, communicated to his fellow students (and teachers) both inside and outside of the classroom, might enrich the educational process.

Race in this analysis is simply a proxy for a set of other attributes—relevant to the educational process—with which race, itself irrelevant to the process, happens to be correlated. The use of a racial proxy in making admissions decisions will produce some inaccuracy—blacks will be admitted who lack the attributes that contribute to genuine diversity—but this cost of using a racial proxy may be less than the cost, which is saved, of having to investigate the actual characteristics of each applicant.

The difficulty with this approach is that it closely resembles and could be viewed as imparting legitimacy to the case for regarding discrimination against racial minorities as proper, because (generally) efficient, from of conduct. There are several possible explanations for the presence of racial and ethnic discrimination. One is sheer irrationality; another is exploitation, another the desire to limit competition. But it may be that most discrimination in today's America can be explained simply by the cost of information. Suppose that a particular racial or ethnic identity is correlated with characteristics that are widely disliked for reasons not patently exploitive, anticompetitive, or irrational. A substantial proportion of the members of the group in question may be loud, or poor, or hostile, or irresponsible, or poorly educated, or dangerously irascible, or ill-mannered, or have different tastes, values, work habits from our own, or speak an unintelligible patois. To be averse to association (in housing, recreation, schooling, or employment) with an individual because he possessed such a characteristic would not ordinarily be regarded as a sign of prejudice. To be "prejudiced" means, rather, to ascribe to the members of a group defined by a racial or similarly arbitrary characteristic attributes typically or frequently possessed by members of the group without pausing to consider whether the individual member in question has that characteristic—sometimes without being willing even to consider evidence that he does not. The extreme bigot applies an irrebuttable presumption that every member of the group has the characteristic that he dislikes. The moderate bigot applies a rebuttable presumption to the same effect—and all of us are at least moderate bigots in some areas of life.

The history of this country contains examples of the unreasoning type of racial and ethnic prejudice, of exploitive discrimination illustrated by the treatment of the American Indian in the nineteenth century and by the enslavement of the black—and of the anticompetitive sort as well (e.g., exclusion of women from various occupations). But, today at least, it may be that most prejudice and discrimination are a product of the cost of making individual distinction with racial and ethnic groups. This is a type of economically efficient conduct similar to a consumer's reluctance to try a new brand, or more generally, to carry the process of searching for products beyond the point where the cost of searching is equal to its benefit in enabling a better purchase to be made. It is perfectly rational for an individual to support the exclusion of Armenians, or Jews, or blacks from his club if his experience, whether first or second hand, is that most or very many members of these groups do not have the charac-

teristics that he likes in a social (or business) acquaintance and there is no scarcity of eligible applicants from other groups.

To say that discrimination is often a rational and efficient form of behavior is not to say that it is socially or ethically desirable. "Efficient" must never be confused with "good" or "right." Moreover, there is an important distinction to be drawn between private discrimination and discrimination that is compelled, practiced, or encouraged by the government, or that is practiced by a monopolist. But I am not interested in the normative basis of antidiscrimination policy. My purpose in noting that much discrimination may be applicable in terms of the costs of information is, rather, to suggest a doubt about the merits of the diversity justification for treating racial minorities preferentially. That justification, it will be recalled, rests on the correlation between racial identity and the possession of characteristics that promote meaningful diversity, and implicitly, therefore, on the cost of ascertaining whether a particular member of the racial group actually possesses the desired characteristic. Could not a policy against hostile discrimination be undermined by a program of benevolent discrimination rooted in the same habit of mind—that of using race or ethnic origin to establish a presumption, in the case of a racially preferential admissions program a conclusive one, that the individual possesses some other attribute as well, that is, some educationally relevant characteristic such as a background of deprivation or a cultural difference? The danger is underscored by the fact that the hostile and the well-disposed discriminators seem to be treating race as a proxy for the same set of characteristics. The characteristics that university admissions officers associate with "black" are the distinctive cultural attributes of many black people who have grown up in an urban slum or in the rural South, and these are the same characteristics that the white bigot ascribes to every black, although he uses a different terminology (e.g., "lazy" rather than "unmotivated").

I am not making the familiar argument that the member of the favored minority is humiliated by being singled out for preferential treatment. He may or may not be. My point is rather that the use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.

This point is reinforced by considering some features of the actual implementation of a policy of racial preference. Here I shall supplement the meager record of the *DeFunis* case with information obtained from discussions with people involved in the law school admissions process. (This will also serve to illustrate why it is incorrect to assume that the next case to reach the Court on the question of racial preference in university admissions will add nothing to what the record of *DeFunis* contains on the question.) To administer a racial-preference program one needs an operational definition of membership in the favored group. The applicant cannot be relied upon to classify himself correctly. The correct racial classification is not always obvious; and since a benefit attaches to membership in particular racial groups, applicants have an incentive to misrepresent their race. Thus admissions officials confront the problem both of determining what constitutes membership in a racial group and of requiring appropriate evidence that an applicant belongs to it. In the case of blacks, it is necessary to determine what percentage of Negro ancestry should be required of an applicant claiming preferential treatment as a black. Additional problems of definition, and also of proof, arise with respect to Chicanos. If the president of Mexico marries an American woman and they have a child who is brought up in the United States, is the child a Chicano? Or is the term meant to imply some connection with life in a barrio? With regard to the problem of proof, Chicanos are less distinctive in

physical appearance than most blacks; and the possession (or lack) of a Spanish surname is not decisive evidence since Puerto Ricans, Spaniards, and Latin Americans other than Mexicans also have Spanish surnames, and since a Chicano might be the product of the union of a Chicano woman and a non-Chicano man. Similar problems exist with respect to American Indians. Many people have some Indian blood without being recognizable as Indian or having a characteristically Indian name. This problem could be avoided by limiting preferential treatment to Indians on reservations, but such a limitation would be difficult to justify to Indians who have recently (or not so recently) left the reservation and may have encountered substantial difficulties in adjusting to life on the outside. A simple solution to all such problems is to delegate the determination of whether an applicant is entitled to preferential treatment to the student association for the group in which he claims membership (the Black Students' Union, etc.), but the dangers of serious abuse in such a course are too great.

My point is not that the administrative problems, and therefore costs, of implementing a program of racial preferences in admissions should be decisive against adoption of such a program. The problems of definition and proof are relevant to the present discussion because they illustrate the distinction between racial or ethnic identity *per se* and the relevant characteristics for which that identity is a proxy. Suppose a family has so little Negro blood that it has been able to pass as white and has done so, suppressing all cultural traits that might betray its "true" identity. The family has a child, who has been brought up as a white but knows that he has some Negro ancestors and who, in applying for admission to law school, claims entitlement to preferential treatment as a black. Should his claim be honored? If it is, is not the law school's action fundamentally similar to the decision of a country club to deny this individual membership on the sole ground that it does not admit blacks? If the admissions committee takes the position that a single black great-great grandparent "makes a difference," if only as a matter of administrative convenience, on what basis could one criticize the country club (or employer, or school board) that reached the same conclusion on the same ground?

Another point that must be considered is that when race is used as a proxy for characteristics thought to be relevant to the educational experience, discrimination against people who have the characteristics, but not the racial identity, results. . . .

I have dwelled so long on the diversity argument for preferential treatment because it is the one argument that seems at first glance not racialistic at all. The argument is not that one race should be preferred over another but that a racial preference will benefit all members of the student body, regardless of race, by enriching the educational experience. Yet if one looks a little more closely at the argument it turns out to rest on a premise fundamentally inconsistent with that of a policy against hostile discrimination, for such a policy, if it is to be effective, requires rejection of administrative convenience as a justification for using racial criteria to allocate benefits or impose burdens.

C. RACIAL PROPORTIONAL REPRESENTATION

Where . . . a racial preference is based squarely, on a desire to increase the proportion of lawyers of a particular race, it is no longer possible to argue about whether the preference is a form of racial discrimination and it is more difficult to find a justification based on educational purposes, or for that matter on anything else. Four principal reasons are offered for attempting to achieve at least approximately proportional racial representation in the legal profession: (1) making amends for past discrimination against the minority group; (2) putting the group where it would have been but for the handicaps imposed on its members by past discrimination; (3)

improving the level of professional service received by the group; and (4) encouraging the aspirations of its members by the provision of suitable "role models." None of these four reasons would be any more persuasive to an objective observer than the sorts of arguments that could be offered for discriminating against racial minorities.

1. The members of the minority group who receive preferential treatment will often be those who have not been the victims of discrimination while the nonminority people excluded because of the preferences are unlikely to have perpetrated, or to have in any demonstrable sense benefited from, the discrimination. Indian reparations may be a distinct case, based on treaty (equivalent to contractual) obligations enforceable by the heirs of the original beneficiaries against the government; also distinguishable, though in my opinion only tenuously, is the use of racial quotas as part of a decree to remedy unlawful discrimination.

2. Many groups are under represented in various occupations for reasons of taste, opportunity, or aptitude unrelated to discrimination. . . .

3. There is no evidence of which I am aware that a substantial number or proportion of minority-group law school graduates will seek in their professional careers to serve the special needs of their minority group rather than follow the normal patterns of professional advancement.

4. The "role model" argument is similarly *ad hoc* and conjectural. So long as a significant number of members of a minority group enter the legal profession and succeed in it (one of the justices of the Supreme Court is black, after all), others will know that it is not closed to them. There is no basis for requiring proportional representation.

The reasons advanced for proportional representation are unimpressive. But more disturbing than the lack of solid intellectual foundations are the implications of the under representation approach for the overall structure of society. The ultimate logic of under representation is that the percentage of members of each minority racial and ethnic group in each desirable occupation, and in each level of achievement within the occupation, should be raised to equality with its percentage of the total population (either of the entire nation, or in some versions, of some region or local area). The proponents of proportional representation do not as yet urge adoption of the standard of perfect equality, but there seems to be no logical point short of it within the structure of their argument. This is true despite their soothing assurance that affirmative action is required only in a period of transition to a society in which, all vestiges of discrimination having been eliminated by affirmative action, society can resume a policy of color-blindness. If, as seems more likely than not, occupational preferences and abilities are not randomly distributed across all racial and ethnic groups, then governmental intervention in the labor markets (and in the educational process insofar as it affects occupational choice and success) will have to continue forever if proportional equality in the desirable occupations is to be secured. Consistently implemented, this sort of intervention would, by profoundly distorting the allocation of labor and by driving a wedge between individual merit and economic and professional success, greatly undermine the system of incentives on which a free society depends.

A superficially attractive variant of the under representation argument is that the demand for minority lawyers is greater at the present time than that for white lawyers, because of the special needs of minority-group members for legal representation and their preference for being represented by members of their own group. But to accept this argument would be once again to embrace the intellectual basis for the

kinds of racial and ethnic discrimination that we do not like, for this argument would justify excluding an individual black, who had greater academic promise than some white applicant, on the ground that prejudice, or other factors, would limit the contribution that the black could make to the profession.

III. THE CONSTITUTIONAL ISSUE

A. PREVIOUS APPROACHES

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A distinct argument for the constitutionality of discrimination in favor of minority groups has been made in a recent article by Professor Ely. He argues, along lines similar to those suggested earlier, that a policy of discrimination, favorable or unfavorable, might be adopted simply because the costs of individualized treatment were thought to exceed its benefits, but that when members of one racial group—such as the white majority of a state legislature—are appraising the costs and benefits of a proposed discrimination against another racial group the comparison is apt to be distorted by conscious or unconscious racial hostility. Hence, he argues, discrimination against a racial minority should be suspect under the Fourteenth Amendment, but discrimination in favor of a minority should not be since it does not involve any danger of majority exploitation of a minority.

There are two fundamental objections to this argument. One—that it misconceives the nature of the political process—I defer for the moment. The other is that it provides a mode of justifying discrimination against racial minorities. Professor Ely accepts the legitimacy of comparing the costs of discriminating against the members of a racial or ethnic minority with the benefits from thereby avoiding the need to make individual distinctions. He only wants assurance that the balance will be accurately struck. He is suspicious that the majority will fail to take adequate account of the costs, or will exaggerate the benefits, of the discriminatory measure, but this suspicion only warrants that the reviewing court satisfy itself that the legislature has in fact assessed the costs and benefits of the discrimination accurately. Suppose the Post Office were able to demonstrate convincingly that blacks had, on average, inferior aptitudes to whites for supervisory positions, that the costs to the postal system of inadequate supervisors were very great, and that the costs of conducting the inquiries necessary to ascertain whether an individual black had the requisite aptitudes were also great in relation to the probability of discovering qualified blacks. It would seem to follow from Ely's analysis that the Post Office could adopt a rule barring blacks from supervisory positions. By condemning only inefficient discriminations, Ely reduces the scope of the Equal Protection Clause to triviality, if I am correct in arguing that most discrimination in contemporary society is caused by the costs of information rather than by irrationality, exploitation, or the suppression of competition.

B. TOWARD AN OBJECTIVE CONSTITUTIONAL PRINCIPLE

In order to determine the constitutionality of racially preferential admissions policies, it is first necessary to derive from the Equal Protection Clause some rule, or principle, or standard for applying the constitutional formula (that no state may "deny to any person within its jurisdiction the equal protection of the laws") to racial discrimination. There are two extreme approaches to the task of constructing a constitutional rule to decide discrimination cases. One is to be guided completely by the specific expressions of intent on the part of the framers of the Fourteenth Amendment. If the scope of the Equal Protection Clause were so determined, *DeFunis*

would have no leg to stand on. So bizarre would discrimination against whites in admission to institutions of higher learning have seemed to the framers of the Fourteenth Amendment that we can be confident that they did not consciously seek to erect a constitutional barrier against such discrimination. But it is equally clear that the framers did not contemplate that the Amendment would compel equal treatment of blacks in public education. The suggested approach to the interpretation of a constitutional provision is, in any event, unsound. The great costs of amending the Constitution counsel for a liberal interpretation of its provisions. A new constitutional amendment should not be needed to prevent states from imposing on blacks forms of discrimination unknown to the framers of the Fourteenth Amendment.

The opposite extreme would be to view the Equal Protection Clause as authorizing the Justices of the Supreme Court to enact into constitutional doctrine their personal values with respect to the society's social questions, such as poverty, racial discrimination, and equality between the sexes. The arguments against the Court's assuming the role of superlegislature have been made so compellingly by others that I shall not discuss this approach to constitutional interpretation.

There remains a middle course, which is to derive from the specific purposes of the constitutional framers a rule that, while sufficiently general to avoid constant recourse to the amendment process, is sufficiently precise and objective to limit a judge's exercise of personal whim and preference. The rule I derive on this basis is that the distribution of benefits and costs by government on racial or ethnic grounds is impermissible. Even though it is frequently efficient to sort people by race or ethnic origin, because racial or ethnic identity may be a good proxy for functional classifications, efficiency is rejected as a basis for governmental action in this context. The government is required to incur the additional costs of determining the individual applicant's fitness to hold a particular job, or patronize a particular facility, or be admitted to one of its educational institutions. To permit discrimination to be justified on efficiency grounds, as would Professor Ely, would not only thwart the purpose of the Equal Protection Clause by allowing much, perhaps most, discrimination to continue, but it would give the judges the power to pick and choose among discriminatory measures on the basis of personal values, for the weighing of the relevant costs and benefits would of necessity be largely subjective.

It is possible to object that the principle which I propose is itself subjective and arbitrary, because it does not explain why only race and ethnic origin, and not all immutable or involuntary characteristics, are subject to the principle. What is the difference between a rule forbidding women to be fighter pilots, premised on a belief that most women are unfit for such an occupation, and a rule forbidding Jews to be fighter pilots, premised on a similar belief? Alienage, nonresidence, height, homosexuality, youth, poverty, and low IQ are some other examples of immutable or involuntary characteristics used as criteria for governmental regulations. On what objective basis can these characteristics be distinguished from genealogy? There are two grounds for distinction. The first is one of necessity: if the constitutional principle were defined in terms of all involuntary characteristics, it would violate the requirement that a constitutional principle bind the judges. Since no one could argue that no involuntary characteristic should ever be used as a criterion of public regulation, the principle would give the judges interpreting it *carte blanche* to pick and choose among groups defined in accordance with one of the involuntary characteristics. Second, the grouping of people by an ancestral characteristic is surely not the same phenomenon as, say, grouping by sex or age. A rule forbidding blacks to work in mines, and one forbidding women to work in mines, and one forbidding children to

work in mines may all be discriminatory, but one must strain to regard them as identical, in the sense that if one is invalid, so, obviously are the others. In contrast, it would be very difficult to distinguish a rule forbidding Chicanos, or Jews, or American Indians, or Italian-Americans to work in mines from a rule forbidding blacks to work in mines. If the last is invalid, so, clearly, are the others.

It remains to consider whether an exception to the rule forbidding discrimination on racial or ethnic grounds can be recognized where the discrimination can be said to be in favor of a racial or ethnic minority, and the race discriminated against is the white race. The exception is inadmissible, because it requires the court not only to consider whether there is discrimination but to decide whether the discrimination harms or hurts a particular racial group, and to weigh the competing claims of different racial groups, and the additional inquiries rob the principle of its precision and objectivity. The Court had no good evidence before it in the *Brown* case that segregated education in fact harmed blacks. The questions critical to the point were not even asked: Would blacks have fared better under a system of no public education (assuming that whites would prefer such a system to integrated public education)? Under a system where students were sorted by IQ? By family income? In later cases the Court stopped asking whether segregation actually hurt the blacks. (Today, of course, some blacks favor segregation.) The antidiscrimination principle is not only more objective, but more compelling, when it is divorced from empirical inquiries into the effects of particular forms of discrimination on the affected groups. The necessary inquiries are intractable and would leave the field open to slippery conjecture. As suggested earlier, a plausible argument could be made that various forms of discrimination nominally against Jews might actually advance the interests of the Jews as a whole, for example by reducing their prominence and visibility in certain areas where the conspicuousness of the Jews may stimulate anti-Semitism. Similar arguments could be made for various forms of conceivably well-intentioned discrimination against blacks (such as "benign housing quotas," or limitations on the migration of blacks from southern to northern states). The Supreme Court would reject such arguments, but not because they are substantially less compelling than the arguments it accepts when it upholds the constitutionality of governmental action. The arguments about the proper characterization of discrimination nominally in favor of racial minorities have a similar elusiveness. Is the position of the whites in this country so unassailable that they cannot be harmed by racial quotas? Or is the impact of such quotas likely to be concentrated on particular, and perhaps vulnerable, subgroups within the white majority? Do racial quotas actually help the minorities intended to be benefited, or harm them by impairing their self-esteem or legitimating stereotypical thinking about race? Are whites entitled to claim minority status when they are a minority within the political subdivision that enacted the measure discriminating against whites? If so, then by parity of reasoning would blacks lack standing to complain about an ordinance discriminating against them enacted by Newark, New Jersey, or Washington, D.C., or other cities in which blacks are a majority of the population eligible to vote? If these are litigable issues, we do not have a constitutional principle but merely a directive that the judges uphold those forms of racial and ethnic discrimination which accord with their personal values.

I contend, in short, that the proper constitutional principle is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. . . .

D. THE ARGUMENT OF EXPEDIENCY

One last "argument" for countenancing preferential treatment is simply its prevalence. It is well known, for example, that law schools offer larger scholarships to outstanding black applicants than to equally qualified, and no more affluent, whites, in order to attract as many black students as possible who are not significantly less well qualified than their white students. This is an example of racial discrimination within the meaning of the concept proposed here. Preferential treatment for American Indians is a deeply embedded feature of our public policy and is contrary to the principle proposed here though perhaps justifiable in light of other principles—such as that of honoring treaty (i.e., contractual) obligations. Racially preferential treatment is becoming widespread in many employment contexts. But all that this amounts to saying is that the form of racial discrimination discussed in this article, only one aspect of which was involved in the *DeFunis* case itself, has become quite prevalent in the few years in which it has been practiced (I again except the Indian situation as a special case). That is not a good reason for affirming its constitutionality, once it is agreed that the *Realpolitik* arguments for legislation, while in general admissible and appropriate, are impermissible to justify infringement of a well defined and specific constitutional principle such as that forbidding racial discrimination.

Furthermore, the impact of eliminating racial preference is easily exaggerated. The preferred groups could be redefined as the underprivileged, the deprived, etc.—classifications not based on race or ethnic origin. The constitutional objection to preferential treatment would thereby be removed, without substantial impairment of the purposes of such treatment. The principal reason for using racial or ethnic criteria is, after all, convenience, and this implies that vindication of *DeFunis's* claim would have created, at worst, some inconvenience for those who seek to use reverse racial and ethnic discrimination to increase the welfare of disadvantaged individuals in our society.

**Thomas Sowell, Weber and Bakke, and the Presuppositions
of "Affirmative Action," 26 WAYNE L. REV. 1309 (1980)***

I. EVOLUTION

The central idea behind "affirmative action" is that it is often not enough to "cease and desist" from some harmful or proscribed activity. Sometimes the future consequences of the past activity must also be proscribed or mitigated. This idea was not new or peculiar to the civil rights issues of the 1960's.

In 1935, the Wagner Act used the identical phrase, "affirmative action," to describe an employer's duty to undo his past intimidation or harassment of union organizers and members, by posting notices of a new policy and by reinstating (with back pay) workers fired for union activity. Otherwise the future effect of past intimidation (physical and financial) would inhibit the "free choice" elections guaranteed by the Act. For the employer merely to cease and desist would not end the future detrimental effects of his past conduct.

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