

Any day now, the Supreme Court could strike down race-based affirmative action in college admissions an outcome that would represent a dramatic setback for racial equality in the United States. What should schools do in response? Some advocates have proposed giving preference to applicants with low socioeconomic status, regardless of race for example, students whose parents have low levels of wealth. Because African Americans tend to have less wealth than white Americans, the thinking goes, wealth-based affirmative action would still give a boost to Black students.

But wealth-based preferences are not an adequate substitute for race-based affirmative action. Not only will they fail to achieve the level of Black student enrollment that proponents promise; they also will exclude deserving middle-class Black students. And they won't account for the historical harms that made affirmative action necessary in the first place. Regardless of the Court's ruling, university administrators should not give up on race-based affirmative action; they should dare to keep employing it, in hopes of mounting future legal challenges and with a willingness to accept legal consequences for their civil disobedience.

Several of the justices on today's Supreme Court take the fanciful position that inequality can be attacked only by ignoring the race of its victims. Advocates of wealth-based affirmative action embrace this hope. But my books, *The Color of Law and Just Action* (co-authored with Leah Rothstein), demonstrate that America needs race-specific remedies to redress race-specific crimes.

African Americans today still suffer from the effects of unlawful and unconstitutional public and private policies of the past that were explicitly designed to maintain them in a subordinate status. These policies were so powerful that they continue to keep Black college applicants at a disadvantage. Median Black household wealth is, at most, 13 percent of the white median. This gap is largely attributable to federal policies that, in the 20th century, denied subsidies for homeownership to African Americans. White families, meanwhile, received government support that allowed them to accumulate equity as their homes appreciated in value; much of this equity was then bequeathed to subsequent generations. Hispanic and Asian Americans, as well as members of other groups, were also sometimes disfavored, but public and private discrimination against them was less harsh, diminished much sooner, and was less consistent.

The argument in favor of wealth-based affirmative action was articulated earlier this year in a Slate article by three academics Peter Dreier, Richard Kahlenberg, and Melvin Oliver. They wrote that by giving preference to students on the basis of their low household wealth rather than their race, colleges and universities can still "preserve important gains in racial diversity." The authors focus on wealth instead of income, they note, because the racial wealth gap is larger than the racial income gap.

For one of these authors, Kahlenberg, class-based preferences are not a second-best alternative following a potential Court defeat of race-based preferences; he is part of the plaintiff team that challenged the admissions policies of Harvard and the University of North Carolina in the two affirmative-action cases before the Court this term.

[ Richard D. Kahlenberg: The affirmative action that colleges really need]

Proposals like that of Dreier, Kahlenberg, and Oliver are flawed on two counts.

First, low-wealth admissions preferences will not achieve the racial diversity that proponents expect. They seem to forget that in this country, there are many more white Americans than African Americans overall. Although a larger share of the Black population is low-wealth than the share of the white population in that status, the potential pool of low-wealth applicants will still have a much larger number of white than Black students. According to the most recent Federal Reserve data (2019), only 31 percent of youths from households in the bottom quarter of the national wealth distribution (net worth of \$12,400 or less) are Black. If students in the bottom half of the wealth distribution (net worth of \$121,700 or less) were given preference in admissions, an even smaller share of the low-wealth eligible applicants 24 percent would be Black.

Black students might be expected to be overrepresented in any wealth-based affirmative-action program because their overall share of the population of 17-year-olds the age at which students typically apply to college is only 15 percent. But much, if not all, of this apparent advantage could disappear because of the ongoing effects of residential segregation.

Compared with those in poor white households, poor African Americans are more likely to live in places with higher poverty levels, more pollution-spewing industry, greater overcrowding, lesser-quality retail outlets, more exposure to violence and the trauma of discriminatory policing, fewer markets selling fresh food but more fast-food outlets, fewer bank branches but more payday lenders charging exorbitant interest rates, and less access to transportation for better job opportunities. Among 17-year-olds, African Americans are nearly five times as likely as white Americans to be incarcerated in juvenile-detention facilities or adult prisons on any given day. This concentration of disadvantages results in schools that are overwhelmed by students' social and economic challenges. Students in these schools are less likely to have grades and test scores that make them eligible for competitive colleges compared with white students from families in similar economic circumstances.

Poverty among low-income white households also tends to be more episodic, while Black poverty is more sustained. During the Great Recession, Black homeownership rates fell faster and later recovered more slowly than white homeownership rates, with greater declines in home equity. More Black than white homeowners relocated to poorer neighborhoods. We can't expect low-wealth Black students to apply for college at the same rates as low-wealth white students under these circumstances.

[ From the September 2021 issue: This is the end of affirmative action]

The second flaw in wealth-based affirmative action is that even if it resulted in more Black students, it would exclude middle-class Black youths whose families' multigenerational experience of discrimination and exclusion still leaves them at a disadvantage compared with their white peers. About half of all Black children are from families in the Federal Reserve's low-wealth category. But the other half are not, including the 26 percent of Black households in the next-to-bottom quartile (net worth more than \$12,400, but less than the national median of \$121,700). Many Black households in that quartile are among the 45 percent of African Americans who are homeowners but who generally have less equity in their property than the 75 percent of white Americans who own homes.

Many predominantly middle-class Black communities are adjacent to low-income areas, and they tend to have higher poverty rates than places where middle-class white people reside. As a result, middle-class Black children are more likely to attend under-resourced schools than economically similar white children, and they are more often subject to discriminatory police practices such as "stop and frisk." They also are more frequently exposed to, and sometimes pulled into, petty criminal and violent behaviors. Students from these middle-class Black neighborhoods who avoid such temptations are more likely than low-wealth Black students to be academically competitive, and they deserve affirmative action.

The level of economic inequality in America is unacceptable. But college-admissions preferences cannot aim to reform the entire lopsided social structure. That's a job for economic policy. What higher-education recruitment and affirmative action for African American youth can reasonably achieve is something more modest: helping those from the lowest economic quartile be the first in their family to attend community or state college, and helping typical youth from the middle two quartiles compete for admission to more selective institutions.

Of course, there are low-wealth families with children who excel, and middle-wealth families whose children don't. But typical academic achievement of children at the low end of the socioeconomic scale is considerably below that of children at higher end. Proposals like Dreier, Kahlenberg, and Oliver's would leapfrog the most disadvantaged Black youth into elite environments, skipping over Black middle-class students whose families' multigenerational experience of discrimination and exclusion leaves them at continuing disadvantage. Policies focused on low-wealth students, deferring to the Supreme Court's insistence on race-blindness, will miss these promising young people.

[ Drew Gilpin Faust: The blindness of "color-blindness"]

In a 2013 Wall Street Journal op-ed, Kahlenberg asserted that in America, "unequal opportunity is increasingly

associated with class rather than race" (my emphasis). The reality is that opportunity is associated with both class and race. De-emphasizing race, as Kahlenberg and others argue for, only gives cover to opponents of racial justice, allowing them to point to the support of race-blind liberals as proof that opposition to affirmative action advances civil rights.

Kahlenberg also has justified his opposition to racial preferences by noting that they antagonize white people, and thus can impede the formation of majority coalitions to pursue economic programs that would benefit all races and ethnicities. He's correct. For hundreds of years, racial justice has antagonized many members of, if not most of, the white population. Desegregating lunch counters antagonized white people; desegregating buses antagonized white people; desegregating schools antagonized white people (and still does). The best hope for creating interracial alliances is not to downplay race. It's to educate Americans of all races about the causes of Black disadvantage and our obligation to address it.

If the Supreme Court deems race-based affirmative action unconstitutional, protesting the Court's decisions or accepting inferior substitutes for race-based affirmative preferences won't be sufficient. Admissions officers at competitive universities should continue to pursue affirmative action for Black applicants as they build a stronger case for it.

In the late 1850s, Republicans led by Abraham Lincoln called on Americans to disregard the Supreme Court's Dred Scott decision by taking continuous action to protect the freedom of runaway slaves and to enforce free African Americans' citizenship rights, both of which the Court's ruling had prohibited. Lincoln anticipated that every act of defiance, each with its own set of facts, would lead to new litigation that might generate dissenting opinions. These would cascade to an ultimate reversal of Dred Scott by a Supreme Court that finally came to recognize that the decision had been contrary to the Constitution. In more recent history, abortion opponents spent 40 years passing law after law that openly defied *Roe v. Wade*, which eventually culminated in the *Dobbs* decision that reversed it.

[ From the October 1957 issue: Dredd Scott a century after]

University presidents should have no less courage. They should continue to implement race-specific affirmative action, in defiance of the Supreme Court.

In 1978, the Court ruled that colleges could consider race in college admissions only for the purpose of ensuring diversity in an entering class. Affirmative action for African Americans, in other words, was permissible because it enhanced the educational experience of white students. Civil-rights advocates bought into this argument. But the real reason we need affirmative action is that it is an important part of our society's ability to remedy the effects of past discrimination effects so powerful that they continue to depress applications from Black students today.

University presidents who defend their affirmative-action programs on these grounds will offer lower-court judges and dissenting justices a new opportunity to support affirmative action as a legitimate remedy for past harms. In a future we cannot now foresee, they might inspire Supreme Court justices to reject the race-blind ideologies that are currently an obstacle to reform. In the meantime, by continuing to implement race-based affirmative action, colleges can help narrow the racial inequality that so strongly persists in our society.