

Affirmative Action Is Dead. What Should Universities Do Now?

The Yale law professor Justin Driver considers the legal arguments for and against the policy, as well as alternative ways to ensure diversity on campuses.

By Michael S. Roth [The New York Times](#) **Sept. 17, 2025**

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Reviewed: THE FALL OF AFFIRMATIVE ACTION: Race, the Supreme Court, and the Future of Higher Education, by Justin Driver

Justin Driver’s compact and insightful new book, “The Fall of Affirmative Action,” appears at a time when the government’s approach to discrimination has shifted dramatically. Back in 2020, Christopher Eisgruber, the president of Princeton University, wrote to his community about the need to continue to root out the “systemic racism” that had plagued his and other institutions of higher learning for generations. Two weeks later, the Trump administration cynically [launched an investigation](#), since the acknowledgment of racism’s persistence suggested that the school might be in violation of civil rights statutes.

At the time, Princeton, like almost every other university of note, publicly aimed to be more open to people from groups that had historically faced discrimination. This meant trying to have a more diverse student body and faculty — a campus that looked less like an exclusive country club and more like the country of which it was a part. That was during the first Trump administration, and after [some pushback](#), the federal government backed down. Now, emboldened by the 2023 Supreme Court decision in Students for Fair Admissions v. Harvard outlawing race-based affirmative action, the government is aggressively punishing schools that practice what it calls “illegal D.E.I.,” with the result that many efforts by small colleges and large universities to create inclusive campuses are now prohibited. In the Supreme Court case, prejudice against Asian Americans in college admissions played a central role in the plaintiffs’ winning argument: Affirmative action policies enabled reverse discrimination. Yet now the main racism of concern to the government appears to be “[anti-white racism](#).”

In “The Fall of Affirmative Action,” Driver, a law professor at Yale University, charts the legal arguments used to criticize and defend affirmative action. He conducts a post-mortem of racial preferences, noting the gains achieved, especially in giving Black students more access to higher education as a conduit to the professions. Between 1970 and 1990, the number of Black lawyers increased more than sixfold, the number of Black doctors tripled and the Black professoriate more than doubled. Last fall, in the wake of the 2023 case, Black student enrollment plummeted [at many schools](#).

The conservative case against affirmative action boils down to a simple argument: If you shouldn’t judge a person because of his or her race, then you should stop using race in admissions decisions. Before 2023, courts had ruled that although this basic principle was sound, it was nevertheless permissible — given the history of racism in America and a university’s goal of having a more diverse student body — to consider race as one of many factors in admissions decisions. The Roberts court,

having heard testimony on the negative effects of this approach, and unconvinced by claims for the benefits of diversity on campus, concluded that “eliminating racial discrimination means eliminating all of it.”

Defenders of affirmative action argued that a commitment to equality requires the acknowledgment of inequality (Justice Sonia Sotomayor), and, as Driver writes, they challenged “the wisdom of constitutional colorblindness in a world suffused with color-consciousness” (Justice Ketanji Brown Jackson).

Driver, who does an excellent job of concisely rehearsing the lawyers’ lines of reasoning in terms that non-lawyers can understand, neatly sums up the difference between how conservatives and liberals have dealt with the constitutional requirement to address racial subordination: “Liberal supporters of affirmative action believe that the programs alleviate racial subordination, and conservative critics believe the programs perpetuate racial subordination.” Neither group, he points out, seems to recognize that the other is using the same notion of legal obligation to make its arguments.

He goes on to describe alternative approaches for creating more diverse campuses, assuming that among schools diversity is a widely shared goal. He notes that even the most conservative justices have been open to admissions practices that would benefit underserved groups, as long as the criterion for inclusion in the group isn’t race. For example, descendants of enslaved Americans might receive preferential treatment, not because they are Black but because their ancestors were horribly mistreated.

Driver recognizes the challenges of implementing such a policy but argues it could be complemented with more straightforward preferences based on economic class, immigration, tribal membership and geography. These would mitigate current practices (such as legacy admissions) that benefit wealthy applicants. Driver knows that “talent is everywhere, but opportunity is not.” Given the current administration’s flagrant protection of privilege, he also knows how difficult it will be going forward to make higher education more of a vehicle for economic mobility than a buttress for inequality.

Until very recently, courts have judged that, as the Supreme Court put it in a 2016 case involving the University of Texas, “deference must be given to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” This concept now seems as antiquated as Eisgruber’s address at Princeton.

Authoritarians use fear to stifle dissent; they make a spectacle of punishing some to ensure the obedience of all. Yet, as Driver writes, “it is precisely when universities are most under siege that they must safeguard their core commitments.” The siege is well underway, and one can only hope that university leaders, faculty members and students will consult this worthy book as they work to ensure that those commitments survive.

THE FALL OF AFFIRMATIVE ACTION: Race, the Supreme Court, and the Future of Higher Education | By Justin Driver | Columbia Global Reports | 276 pp. | Paperback, \$18

