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The Supreme Court Revisits Affirmative Action: The Potential for a Major Decline in Diversity

Affirmative action was conceived amidst the civil rights movement of the 1960s^[1] as an attempt to create more opportunities for people who have been historically disadvantaged based on their race, religion, or sex.^[2] According to the Legal Information Institute, “[a]ffirmative action is defined as a set of procedures designed to; eliminate unlawful discrimination among applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future.”^[3] In accordance with the policy for government employers, many universities and colleges began to adopt similar policies to combat the historical racial discrimination in higher education, having an effect of more than twice as many black students being admitted to elite universities in 1969 than the year before.^[4] Admitting a diverse student body requires educational institutions to consider race as a factor on their applications.^[5] For many, this raised concerns related to the equal protection act in the 14th amendment.^[6] The Supreme Court, however, “has repeatedly ruled in favor of universities' ability to consider the race of applicants, so long as it is one of many factors in an individualized admissions decision.”^[7]

In 1978, in the case of Regents of the University of California v. Bakke, the Court established the constitutionality of affirmative action, allowing schools to consider the race of an applicant a ‘plus,’ thus upholding the compelling interest of having a diverse student body.^[8] In years following, the Court heard more cases related to affirmative action and maintained their holding that affirmative action is constitutional.^[9] The 2003 cases, Gratz v. Bollinger and Grutter v. Bollinger, afforded the Court with the opportunity to define the acceptability of race-based admissions more explicitly.^[10]

The Supreme Court is set to hear two cases this term “concerning affirmative action and race-conscious admissions: one against Harvard University and the other against the University of North Carolina (UNC), both filed by Students for Fair Admissions (SFFA).”^[11] SFFA posits that neither Harvard nor UNC adequately considered race-neutral alternatives to the race-conscious methods currently employed,^[12] an expectation outlined in Grutter.^[13] If the court overrules the constitutionality of affirmative action “it would make it unconstitutional for universities across the country to consider a student’s race as one factor in a holistic admissions review process.”^[14] The effect of ending affirmative action would likely stunt efforts to improve diversity and result in far fewer minority students being admitted to elite universities.^[15] Many companies have offered support for affirmative action and submitted amicus briefs to the court, explaining that limiting diversity at selective universities would create a ripple effect in the workplace.^[16] An amicus brief submitted to the court stated that in order for corporate DE&I efforts to be successful, they rely “on university admissions programs that

lead to graduates educated in racially and ethnically diverse environments.”[17] In other words, putting an end to affirmative action will likely lead to a less diverse, less tolerant work force.

Despite previous rulings, the current conservative majority is likely to reverse the precedent and hold that race-based admissions are unconstitutional, which could lead to the requirement that universities remove race from their applications.[18] Though the overall impact of the impending ruling is unclear, as applicants may still be able to include their racial and ethnic backgrounds in their essays, it will undoubtedly lead to fewer seats for minority students in elite institutions.[19] Additionally, there is concern that by banning affirmative action for educational institutions, employers will soon be faced with the same result, limiting diversity in the workplace. [20] Ultimately, the negative consequences that would result from the Court reversing the precedent of affirmative action’s permissibility would have a significant impact on America’s past, albeit imperfect, attempts to promote diversity and equality. The Court would be amiss to consider a diverse student body an illegitimate governmental interest.

[1] Becky Sullivan, *How the Supreme Court has Ruled in the Past About Affirmative Action*, Npr (Nov. 1 2022, 5:01 AM), <https://www.npr.org/2022/11/01/1132935433/supreme-court-affirmative-action-history-harvard-admissions-university-carolina>.

[2] *What is Affirmative Action and Why Was it Created?*, Hg.org, <https://www.hg.org/legal-articles/what-is-affirmative-action-and-why-was-it-created-31524>.

[3] *Affirmative Action*, Legal Information Institute, https://www.law.cornell.edu/wex/affirmative_action.

[4] Genevieve Carlton, *A History of Affirmative Action in College Admissions*, Best Colleges (Oct. 4, 2022), <https://www.bestcolleges.com/news/analysis/2020/08/10/history-affirmative-action-college/>.

[5] See *Affirmative Action*, National Association of Independent Colleges and Universities, <https://www.naicu.edu/policy-advocacy/issue-brief-index/regulation/affirmative-action>.

[6] *Id.*

[7] Sullivan, *supra* note 1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Kaylin Li, *Supreme Court Hears Affirmative Action Case*, The Tartan (Nov 7, 2022), <http://thetartan.org/2022/11/7/news/court-affirmact>.

[12] *Id.*

[13] Sullivan, *supra* note 1.

[14] *What You Need to Know About Affirmative Action and The Supreme Court*, ACLU (Oct. 31, 2022), <https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court>.

[15] *Id.*

[16] Aris Folley, *With Affirmative Action in Supreme Court Peril, Changes Could Ripple Beyond Schools*, The Hill (Nov. 4, 2022), <https://thehill.com/regulation/court-battles/3718700-with-affirmative-action-in-supreme-court-peril-changes-could-ripple-beyond-schools/>.

[17] *Id.* (DE&I stands for Diversity, Equity & Inclusion)

[18] Sullivan, *supra* note 1.

[19] Enrique Rivera, Matt Ozug & Mary Louise Kelly, *The Supreme Court Could End Affirmative Action, What Could Happen Next?*, NPR (Nov. 4, 2022, 3:38 PM), <https://www.kosu.org/education/education/2022-11-04/the-supreme-court-could-end-affirmative-action-what-could-happen-next>.

[20] Allen Smith, *Companies Urge Supreme Court to Preserve Affirmative Action in Higher Ed*, SHRM (Aug. 5, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/companies-supreme-court-affirmative-action.aspx>.