

FRASER TROTTER



In the first week of November, 2022, the Supreme Court of the United States (SCOTUS) heard oral arguments in two cases that center around the issue of Affirmative Action policies at universities. In each case, the plaintiff is the Students for Fair Admissions, Inc., with one case challenging Affirmative Action policies at Harvard and the other challenging the University of North Carolina. In the wake of the SCOTUS decision ending the federal protection of abortion, many are apprehensive to see how the Court will decide. Although Affirmative Action has been established for quite a while, and receives much support on the liberal side of the aisle, the policy itself faces some legal hurdles by potentially being at odds with the 1964 Civil Rights [Act](#).

In a discussion I had on the subject with Dr. John Aughenbaugh, a political science professor at VCU, he predicted that the case could conceivably have one of four outcomes. The first is that the three “liberal” justices on the Court could convince two of the other six justices to join them in upholding Affirmative Action as being constitutional. This decision would be legally based in the Court’s previous holding that race is a compelling interest in government regulation. The second potential outcome is that the Court tells Congress that the 1964 Civil Rights Act must be rewritten in such a way to allow for race based Affirmative Action. Rewriting the legislation in this case would be tricky given that it is difficult to make certain concessions into the law, but it is at least an easier option than trying to amend the constitution. The third option is to change Affirmative Action policies to focus on socioeconomic status instead of race. This could be the most middle-of-the-road choice, given that it avoids the problematic conflict with the 1964 Civil Rights Act while still having the benefit of giving more opportunities to those who were born with less. One of the primary reasons for Affirmative Action was not only diversity, but to offset the disproportionate amount of minorities that have been born into lower socioeconomic status. The final option the Court could make is the one many find most concerning, which would be declaring race to not be a compelling interest and effectively striking down Affirmative Action altogether. The effect of such a decision would be putting universities back to square one as they try to find a different avenue to move forward while blindly trying to stay on the right side of the Court.

Now, with all of that being said, there is something else that is important to remember in our current era. The vast majority of SCOTUS justices over the last several decades have been appointed by Republican Presidents, but it is only recently that we have really labeled the Court as being truly conservative. Although there are justices on each end of the spectrum that seem to have far left or far right ideologies, others will end up on one side or the other case to case. History has shown us time and again that SCOTUS justices do not always vote the way we think that they will. Presidents have made their best effort to pick the justice they think will carry out their own party's agenda, only to be terribly let down. The more cases the current SCOTUS takes the more of an idea we will have of where each of the justices stands regarding their constitutional interpretation. The outcome of the current Affirmative Action cases may give us more of an insight into where the current Court really stands, at least for the foreseeable future.

