

Affirmative Action: Implications for Endowments, Foundations, and the Broader Industry

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Affirmative action, a practice used since the 1960s to edge toward equity and address historical and ongoing injustice through higher education attainment, was struck down last month by the Supreme Court of the United States (SCOTUS). The immediate and longer term direct and indirect impacts of this ruling are vast and, in some cases, murky. In response, we've compiled insights into the potential implications of this ruling to educational institutions, foundations, and across the nonprofit asset management sphere.

COLLEGES, UNIVERSITIES, AND INDEPENDENT SCHOOLS

The inability to use race as a factor in admissions will reduce the number of Black, Latino/a, and indigenous students at elite universities, posing a historic challenge, and potential mission risk, for institutions committed to diversity, equity, inclusion and belonging. But there are myriad strategies to hedge that risk given the ruling. As Chancellor Kevin M. Guskiewicz of the University of North Carolina (UNC), defendant in the case, stated, “Our responsibility to comply with the law does not mean we will abandon our fundamental values... our university’s commitment to access and affordability and supporting a culture of belonging for everyone does not change with last week’s ruling.” As described by one of our [recent policy briefs](#), admissions offices can orient strategies toward socio-economically disadvantaged students, especially with low family wealth, and those from segregated neighborhoods that have higher populations of minority students or poorer educational systems.

The ruling also dictates that race cannot be used as a factor for scholarships and financial aid, so educational institutions will be left with narrower opportunities to support diverse students. [UNC](#) and Princeton, for example, have demonstrated that institutions may move to increase support to disadvantaged (in these cases, defined as low-income) students through full-tuition coverage. This is a critical juncture in which boards and investment committees can assess their spending distributions and make space for new programs that meet the moment.

Historically Black Colleges and Universities (HBCUs) could potentially play an even more important role, with the applicant and enrollment pool of Black students seeking an HBCU education likely to further swell. A recent Goldman Sachs [report](#) showed HBCUs provide more social mobility, with half to two-thirds of the endowment assets per student compared with similar non-HBCU schools.¹ However, their endowments, due to historical state and federal underinvestment and alumni contributions constrained by significant racial income and wealth gaps,² may prove to be a

¹ According to the Goldman Sachs report, public HBCUs had 54% fewer assets per student than public non-HBCUs and private HBCUs had 79% less compared to private non-HBCUs.

² [How America Cheated Its Black Colleges, Forbes Magazine, 2022](#)

³ See an [event](#) hosted by National Association of Independent Schools (NAIS) and Enrollment Management Association (EMA) for a nuanced discussion of how federal funding triggers laws around racial discrimination.

⁴ Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. Title VII of the Civil Rights Act, as amended, protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin.

[limiting factor](#) in the ability to serve all incoming students in the ways that better-endowed institutions can.

Although the ruling does not generally apply to independent schools,³ it is possible for future rulings to pose similar restrictions. There have been cases litigated in lower courts related to the use of race in K-12 school programs that reduce barriers to quality education for students of color. A [Virginia case](#) in which parents sued a school that promoted diversity by eliminating the use of standardized test scores, was dropped by lower courts, but some say the Supreme Court could take this issue up as well. In the meanwhile, independent schools, especially those that feed students into competitive higher education institutions, will continue to play an important role in supporting diverse students throughout their education.

Since the ruling, there has been [increased attention](#) surrounding other admissions practices that favor those with certain racial characteristics, namely legacy admissions. Some highly selective schools have [moved](#) to ban the practice, and state [policies](#) are being proposed to do so as well. If court cases are already considering racially biased practices, it is hard to ignore the racial implications of that policy.

FOUNDATIONS

Foundations will also play an outsized role in advancing racial equity and justice. Across the nonprofit sector, a 2022 [report](#) showed that more than half of these organizations have expanded services to Black, Indigenous, or other people of color. Since private and community foundations that don’t take federal funding are not covered by civil rights Title VI and VII⁴ that apply to corporations and higher education, little has changed in foundations’ ability to fulfill that mission.

The only implication of this ruling to foundations is any funding made to diverse individuals with “strings attached.” Legal Scholars [argue](#) this would constitute a contract which could be covered by a federal statute (Statute 1981) that bars the use of protected categories in private contracts. Otherwise, any unrestricted gifts can be made to individuals with race as a factor, including scholarship funding based on one’s racial or ethnic background. Given increased scrutiny across all sectors, experts recommend heightened diligence around tracking gifts, in the event future legal challenges arise.

Unfortunately, according to a [2023 Chronicle of Philanthropy special report](#), overall foundation support for racial justice initiatives seems to be diminishing, after an initial surge in funding after the murder of George Floyd in 2020. With 2022 foundation endowment returns down, and the current state of the market, many foundations are rethinking bold strategies to support racial justice initiatives, many of which will more than likely seek to combat the detrimental impacts of the SCOTUS ruling. This may be a pivotal moment for foundations to consider even deeper investments in racial justice, as opposed to shrinking them to protect endowments. Recently, some foundations, especially those that focus on expanding diversity and opportunity in Higher Education, have been [actively considering ways](#) to continue deepening their work given the SCOTUS ruling.

DEI IN THE WORKFORCE AND BEYOND

While the SCOTUS ruling does not apply to corporations’ decisions specifically, it has fueled scrutiny for private workforce practices. Experts predict an increase in challenges to DEI practices in decisions such as those related to internal recruitment, hiring, and advancement. There is also discussion within the asset management community about [diverse manager programs](#) specifically, and whether those efforts to increase opportunity for all groups will stand against legal challenges. For now, though, [the U.S. Equal Employment Opportunity Commission](#) has confirmed in a statement that DEI and accessibility programs seeking equal opportunity in the workplace remain lawful.

The business case for diversity continues to be a strong contributor to efforts to access and uplift diverse teams and talent, as it increases abilities to tap into innovation, manage risk by recognizing issues through a broader range of views and harnessing broader perspectives toward risk management, and deepen strategic decision-making capabilities.⁵ The ruling may pose practical challenges in accessing a diverse pool of talent from the most competitive schools, so new sourcing strategies, e.g., recruiting from HBCUs, will be even more important. As is the case within higher education, independent schools, and the nonprofit sector broadly, the fallout from this ruling will necessitate more intentional work to maintain the efforts that affirmative action had made more straightforward.

CONCLUSION

While some states are already banning DEI offices and programs, and others move to ban environmental, social, and governance (ESG) considerations in investing more broadly, the SCOTUS ruling is just an additional obstacle being added to the ongoing challenges to the nonprofit landscape. But as many institutions have promptly stated in light of the SCOTUS ruling, their responsibility and commitment to diversity, equity and inclusion, as well as our own, remains steadfast.

5 [Diversity wins: How inclusion matters, McKinsey & Company, 2020](#)

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