



**WMRC Article**

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Supreme Court Decision on  
Affirmative Action Impacts on  
Corporate America

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## United States: Supreme Court Decision on Affirmative Action Impacts on Corporate America

The US Supreme Court ruled on 23 June in support of affirmative action policies employed by institutions of higher education allowing for the use of race as a factor when selecting applicants. This will also influence the hiring policies of corporations in the US.

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| <b>WMRC Perspective</b> |  |
| <b>Significance</b>     | The US Supreme Court on 23 June strongly and unambiguously endorsed affirmative action as a public policy, and the use of race as a factor by institutions of higher learning when weighing the candidacy of applicants. It is the strongest action taken by the court on affirmative action since 1978, and firmly embeds the use of affirmative action into American society.  |
| <b>Implications</b>     | The decision will immediately and directly impact admissions policies and procedures employed by universities and colleges by allowing them to use race as a 'plus factor' when choosing applicants. The decision will indirectly impact the private sector, serving as an informal endorsement of the use of race in the hiring process.  |
| <b>Outlook</b>          | The majority of corporate America has already endorsed and employed the use of affirmative action-like programmes in their hiring practices, but a concern has always existed that the use of race in hiring could be the impetus for lawsuits should a company either not hire enough minorities or fail to hire a non-minority who was more or equally qualified. Although the case applied directly to higher education admissions, the impact of the court's decision will carry over to employers in the private sector and serve to protect them from such lawsuits. |

### Supremely and Perfectly Ambiguous

A debate over the virtues of affirmative action programmes has raged throughout American society since the US Supreme Court's decision in the 1978 landmark *University of California v. Bakke* case that first upheld the use of race in colleges' and universities' admissions policies. However, the Bakke ruling was extremely ambiguous. The court invalidated the University of California Davis School of Medicine's admissions programme in which the school reserved 16 out of 100 slots in the entering class for members of racial and ethnic minority groups, but it also reversed a decision by the California Supreme Court that had barred the use of race in all university admissions programmes. The Bakke decision gave implicit approval to universities to use race as a consideration to some degree, but did not clarify how, since they were not allowed to use specific numbers. The decision not to allow affirmative action to be deemed illegal - though without specifically endorsing it - while narrowing the way in which affirmative action programmes could be applied, left many people scratching their heads as to what do next. In the absence of a clear direction to take, proponents pushed for aggressive affirmative action programmes with undefined quota requirements, while opponents resisted, arguing that just because the court had not outlawed affirmative action, it did not mean it had been legalised. The result was a wide variation in how affirmative action was defined, structured, and applied, setting the stage for an eventual return to the US Supreme Court to obtain a decision that provided a more defined scope that the 1978 decision lacked.

### Affirmative Action on Affirmative Action

On 23 June, the court ruled on two separate cases, one involving the University of Michigan Law School and one involving the University of Michigan undergraduate school, providing what could be considered to be a split decision on affirmative action. The case involving the Law School ruled in the school's favour, upholding the school's policy of using race as a factor when considering applicants for admission. However, the court struck down the undergraduate school's use of a points system in which minorities would be given a certain number of points based on race, which were then factored into their overall admission score. Overall, the decision supports affirmative action programmes and the use of race in selecting applicants, although it specifically rejects the use of quotas or specific, numeric diversity targets. Programmes will only be able to use race as a 'plus factor' and within limits so as not to completely insulate minority students from having to compete with non-minority students. One of the strongest statements in the decision was the court's finding that 'the government has a compelling interest in actively supporting diversity in the education system.' This finding provides an unambiguous endorsement to policies that promote racial and ethnic

diversity within universities, and is a statement that signals broader implications beyond university admissions policies.

### **Diversity is Here to Stay and It will Pay**

The Supreme Court decision applies directly to the admissions policies of colleges and universities across the country, but it will also influence the decision making in the private sector. Sixty-five US companies, 40 of them from the Fortune 500, signed up in support of several *amicus* or 'friend-of-the-court' briefs submitted in support of upholding affirmative action. US Supreme Court Justice Sandra Day O'Connor, the author of the majority opinion, referenced several of the amicus briefs that had been submitted in her opinion. Some legal experts interpret this as her nod to the private sector to continue to employ affirmative action programmes in the workplace. Most corporations have been actively recruiting and hiring racial and ethnic minorities for years in order to a) have a workforce that reflects the marketplace; b) attract the most qualified employees; and c) maintain, at the very least, the appearance of not being discriminatory against minorities, which is, obviously, specifically outlawed. However, one of the fears of employers instituting affirmative action policies in their hiring practices was that their programmes could be challenged in court as discriminating against non-minorities who believe they were turned down for a position for which they were qualified because of their race. Likewise, the same logic applied in the court's ruling against the use of numeric targets for diversity in education institutions would probably be applied to corporations, should they be challenged by a member of an ethnic or racial minority who did not get a job for which he/she was qualified based, in part, on race. Both aspects of the court's decision, the upholding of race as a 'plus factor' and the disallowance of a specific numeric target for diversity, will serve to protect businesses from lawsuits challenging their programmes to promote workplace diversity because it allows them to use race as a factor and with a great deal of latitude.

### **Political Ramifications: Race + Ideology = Controversy**

The Republican party, the party of US President George W. Bush, has traditionally opposed public policies that use race as a factor. The Bush administration submitted briefs urging the court to strike down affirmative action in both of the University of Michigan cases, but President Bush issued a statement following the court's decision applauding the rulings, which has angered the conservative members of the Republican party. However, Bush accepts the reality of the changing demography of the US and how poorly he fared in the last election among minority voters. The nationwide census in 2000 found that 67% of the population is white, 13% African-American, 13% Hispanic, 4.5% Asian/Pacific Islander, and 1.5% American Indian. The shifting demographics are creating powerful new political spheres of influence that no candidate can afford to alienate. Bush's Democratic challengers for the presidency can be expected to highlight Bush's past statements against affirmative action during the upcoming election.

### **Outlook and Implications**

The Supreme Court's decision is historical in the context of race relations in the United States. It provides clear recognition as to the importance of public policies that actively seek to provide opportunities for minorities that they may not otherwise enjoy. However, the opinion written by Justice O'Connor states that she foresees a time in the not-so-distant future, about 25 years from now, when affirmative action policies will no longer be needed because minorities will have become fully assimilated and equal partners throughout society and, thus, remove the need for such policies. This goal may or may not be attained, but in the meantime it is fairly certain that the court's affirmation of the use of race in educational institutions' selection processes will have profound implications on the role of race in US society as a whole. Businesses, for example, are likely to aggressively pursue minority applicants and without undue fear of retributive lawsuits from aggrieved job applicants who were not hired. The court's decision will transform a long-standing policy, which states companies will not discriminate against minorities when hiring employees, into one that supports the development of programmes that actually promote the hiring of minorities, which is a 180° shift in policy. Politically, once the US Supreme Court has spoken, it is *afait accompli* for policymakers, with the exception of those at the fringes. Thus, President Bush, by applauding the court's decision, is cutting his ideological losses in favour of mitigating potential political losses during the next election.

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