Why DEI Will Not Die

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INTRODUCTION

Affirmative action is dead and DEI programs are next—that is the consensus, at least, on both the left and right. Indeed, following the Supreme Court's decision in *Students for Fair Admissions v. Harvard*,[1] a chorus of experts and pundits declared the official end of affirmative action,[2] with the left and right disagreeing only on whether this will produce beneficial or harmful results.[3] With affirmative

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1. Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).

2. Indeed, in the days following the decision, many leading publications featured "the end of affirmative action" as the headline. *See, e.g.*, Jelani Cobb, *The End of Affirmative Action*, THE NEW YORKER (June 29, 2023), https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action [https://perma.cc/H2LL-QGAY]; German Lopez, *The End of Affirmative Action*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/briefing/affirmative-action-supreme-court-decision.html [https://perma.cc/BP2Q-FRXD].

3. *Compare* Wilfred Reilly, *The End of Affirmative Action Is Good News for Black and Hispanic Students*, NAT'L REVIEW (July 8, 2023), https://www.nationalreview.com/2023/07/the-end-of-affirmative-action-is-good-news-for-black-and-hispanic-students/ [https://perma.cc/ANA6-Q2N4] *and* Yukong Zhao, *Striking Down Affirmative Action Is a Historic Victory for Asian Americans—and All Americans*, NAT'L REVIEW (July 10, 2023), https://www.nationalreview.com/2023/07/striking-down-affirmative-action-is-a-historic-victory-for-asian-americans-and-all-americans/ [https://perma.cc/3N92-EBAG], *with* Chris Geary, *New Barriers for Community Colleges*, INSIDE HIGHER ED (Oct. 20, 2023), https://www.insidehighered.

action banned, next on the hit list seems to be Diversity, Equity, and Inclusion ("DEI") programs, which similarly discriminate on the basis of race.[4]

As I have explained in various articles, scholars have been predicting the end of affirmative action for nearly 50 years, but each time, they have been wrong.[5] Of course, that scholars have been wrong about affirmative action in the past does not mean they are wrong now. While it is true that these predictions have a "boy who cried wolf" quality, that should not blind us to the possibility that *this time* the wolf may have finally arrived.

There is at least some reason to think that this time is different. While the Court has ruled against affirmative action programs in the vast majority of cases it has heard on the subject, these rulings have been *Janus*-faced, condemning affirmative action as a practice while explicitly leaving pathways for affirmative action to continue in the future. Indeed, this was the case in the creation of the diversity rationale in *Regents of the University of California v. Bakke*,[6] as well as in the extensions of the *Bakke* diversity rationale in *Grutter v. Bollinger*[7] and *Fisher v. University of Texas*.[8] The *SFFA* decision, in rejecting the diversity rationale, represents a stronger repudiation of affirmative action than past Supreme Court rulings on the subject.

Nevertheless, the *SFFA* decision is unlikely to produce the change that many predict. This is partly because of the *SFFA* opinion itself, which does three things in particular to signal that the decision does not mean the end of affirmative action: first, it stops short of actually overruling the *Bakke*/*Grutter* regime;[9] second, it provides an escape route for universities to evade the ban through personal statements;[10] and, third, it severely distorts how affirmative action actually works,

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com/opinion/blogs/higher-ed-policy/2023/10/20/end-affirmative-action-hurts-community-colleges [https://perma.cc/XZ5Y-2D7R], *and* David Velasquez, *What We Lose With the End of Affirmative Action*, EDUC. WEEK (Sept. 1, 2023), https://www.edweek.org/teaching-learning/opinion-what-we-lose-with-the-end-of-affirmative-action/2023/09 [https://perma.cc/5LNX-GYZD].

4. Indeed, if public and private universities may not prefer particular groups in deciding which students to admit, it follows that it is also illegal for public and private employers to have such preferences in recruiting, hiring, and retaining employees. *See, e.g.*, Charles Gasparino, *What SCOTUS' affirmative action ruling could mean for DEI and the business of corporate wokeness*, THE N.Y. POST (July 1, 2023), [https://perma.cc/3MDY-BMQB]; Mike Gonzalez, *With Affirmative Action Gone, Is DEI Next?*, THE HERITAGE FOUND. (July 18, 2023), https://www.heritage.org/progressivism/commentary/affirmative-action-gone-dei-next [https://perma.cc/77FD-23W6].

5. *See, e.g.*, Jesse Merriam, *Beyond the Law: A Four-Step Explanation of Why Affirmative Action Is Here to Stay*, 48 OHIO N.U. L. REV. 95, 96–101 (2021) (recounting instances of erroneous predictions).

6. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12, 20 (1978).

7. Grutter v. Bollinger, 539 U.S. 306, 322–24, 28 (2003).

8. Fisher v. Univ. of Texas, 579 U.S. 365, 376–77 (2016).

9. When the Court rejects a legal enterprise, it does so by explicitly rejecting the precedents that stand for that regime, as the Court did in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) to *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). By not overruling its past affirmative action rulings, the *SFFA* Court signaled that it was unprepared to ban affirmative action altogether. Students for Fair Admissions v. Harvard, 600 U.S. 181, 217–18 (2023) ("SFFA").

10. Although the *SFFA* Court rejected the *Bakke* diversity rationale, it paved an alternative escape route by proclaiming that "nothing in this opinion should be construed as prohibiting universities from

which suggests that the Court is not prepared to grapple with the practical realities involved in eliminating affirmative action.[11]

This is all ground I have covered elsewhere.[12] So, in this Article, I would like to do something different: I would like to explore why, irrespective of both the *SFFA* opinion and the substantive content of affirmative action law itself, DEI programs are not likely to die anytime soon. Understanding the non-doctrinal reasons that caution against predicting the end of DEI programs requires some background on how socio-legal movements effectuate social change through judicial decision-making.

Part I provides this background with an overview of leading political science scholarship on the limits of judicial power in creating social change. Part II applies that background to the movement against DEI and affirmative action. The Conclusion briefly explores why the mood after the *SFFA* opinion should not be one of triumph (within the legal right) or despair (within the legal left), but rather one of consternation (among all of us). That is because the current DEI conflict consists of two growing and accelerating forces headed right for one another, and therefore portends not the demise of DEI but the further denigration of our constitutional order.

I. COURTS AND SOCIAL CHANGE

A significant research area within the study of judicial politics is whether judicial decision-making can create substantial and enduring social change. To many practicing lawyers, judges, and legal scholars (presumably many of the people reading this Article), this may seem like an odd—perhaps even bizarre—area of research. Isn't it obvious that the Supreme Court's decisions have a monumental effect on American politics? Indeed, we celebrate, and even sacralize, civil rights decisions like *Brown v. Board of Education*[13] precisely because of their perceived practical consequences. So, what are political scientists up to in questioning the relationship between courts and social change?

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considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *SFFA*, 600 U.S. at 230.

11. The *SFFA* opinion sought to minimize the impact of its decision by claiming that "[t]hree out of every five American universities do not consider race in their admissions decisions" and noting that "several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright." This misrepresents how affirmative action works, in that the Court ignored how *all* of the nations' leading colleges, universities, and professional schools have expansive affirmative action programs, and how affirmative action has persisted even in the states that have banned affirmative action. *Id.* at 229.

12. *See, e.g.*, Jesse Merriam, *Why Affirmative Action Won't Die*, THE AM. MIND (Aug. 23, 2023), https://americanmind.org/features/beheading-leviathan/why-affirmative-action-wont-die/ [https://perma.cc/7VFL-9J5U].

13. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

A. Courts as a Hollow Hope for Activists

The story begins a little more than 30 years ago when Gerald Rosenberg (a political scientist and law professor at the University of Chicago) wrote *The Hollow Hope: Can Courts Bring About Social Change?*, a groundbreaking book challenging the conventional understanding of the role of courts and lawyers in our political landscape.[14] Rosenberg's argument focuses on three institutional features limiting the power of the American federal judiciary.

First, the U.S. Constitution creates fairly specific and narrow rights that are largely negative (i.e., prohibitory, not affirmative) in nature.[15] Consequently, the federal judiciary's individual-liberty authority is generally confined to telling the government to stop doing a particular thing. This feature of our constitutional order, Rosenberg argues, makes it harder to generate massive social change out of the federal judiciary's decisions. Second, the federal judiciary has limited independence from legislative[16] and executive[17] control; likewise, various jurisdictional doctrines (such as standing, mootness, and the political questions doctrine) constrain the federal judiciary's authority to work aggressively in tandem with social movements. Finally, the judiciary has limited power to enforce its decisions. As President Andrew Jackson, in refusing to obey the Court's ruling in *Worcester v. Georgia*,[18] supposedly said, "John Marshall has made his decision now let him enforce it." While the quote is likely apocryphal, it *could* have been said because it accurately conveys an important feature of American political institutional relations.[19] While governmental officials are rarely as combative as

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14. GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

15. *Id.* at 10. Here, Rosenberg is referring to how, unlike more recently created constitutions, the U.S. Constitution creates no rights to governmental action, such as rights to welfare, housing, and healthcare. Even the rights that courts have created out of the Due Process Clause (the broadest rights-based language in the Constitution) have generally been negative constraints on governmental action, not positive obligations imposed on the government.

16. *Id.* at 10, 13–14. Federal judges are subject to confirmation based on the political preferences of a Senate majority and to removal under congressional impeachment proceedings. Furthering this legislative oversight, the federal judiciary's appellate jurisdiction is subject to congressional authority, so an unpopular decision holds the possibility of Congress stripping federal courts of jurisdiction on that subject.

17. *Id.* The president, of course, nominates federal judges, which means that presidential elections are the biggest factor determining who gets on the federal courts. Federal judges, in turn, often act in ways that are tethered to partisan politics.

18. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

19. Indeed, after the Anti-Federalists criticized Article III by claiming that it insufficiently limited the U.S. Supreme Court's authority, Alexander Hamilton countered by writing, in Federalist 78, that their argument overlooked the extent to which the Constitution made the federal judiciary subordinate to the other two branches. In Hamilton's words, "[w]hoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The judiciary will be the "least dangerous branch" because "[t]he Executive . . . holds the sword of the community," and "[t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." *Id.* In comparison, "[t]he judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take

President Jackson ostensibly was in explicitly pointing to the Supreme Court's limited enforcement power, there are many instances in American history of public and private actors engaging in creative efforts to elude the force of the federal judiciary's decisions.[20]

Based on these three institutional limitations, Rosenberg concludes that courts cannot play a leading role in creating social change. Rosenberg concedes, however, that courts can play an *ancillary* role. For example, courts can remove obstacles to market pressures, thus paving the way for private mechanisms to induce compliance with a judicial decision. Likewise, courts can work in conjunction with other branches in creating change.[21] Nevertheless, in such situations, courts will be relegated to playing a secondary role in creating change; they will not be the principal agents driving the process.

But what about cases like *Brown* and *Roe v. Wade*? Why do we celebrate (or criticize) these decisions, if they are not actually responsible for creating change? It may simply be a question of power and influence. That is, our culture focuses on these decisions merely because of the extraordinary role that lawyers and courts play in the American imagination. But, Rosenberg contends, if we were more honest in simply observing what matters in creating social change, decisions like *Brown* and *Roe* would not be depicted as the centerpiece of their respective political movements. While these decisions may be powerful symbols *representing* change, they are not in fact powerful substantive forces *producing* change.

To illustrate this point, Rosenberg examines the pro-choice and civil rights movements. In doing so, Rosenberg is careful to clarify the movements' ultimate goals. While legal scholars often think of these decisions in doctrinal terms (as if the *Brown* litigation was initiated for the purpose of overruling *Plessy v. Ferguson*[22] and the *Roe* litigation was initiated for the purpose of extending the sphere of privacy rights under the Due Process Clause), Rosenberg points out that this is not how social movements actually conceive of litigation goals. The *Brown* and *Roe* cases were initiated to achieve particular policy outcomes—that is, to make public schools more racially integrated and to make abortions more accessible.

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no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.*

20. The most famous example is Southern resistance to court-ordered integration measures. For a survey of the interplay between the Supreme Court's civil rights decisions and Southern resistance to these decisions, *see* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

21. ROSENBERG, *supra* note 14, at 338. If, for instance, Congress provides incentives for complying with a judicial decision, or penalties for not following a judicial decision, courts can aggressively pursue an agenda in that area. Similarly, courts can provide cover for actors that are already willing to comply with a decision but do not want to deal with the electoral repercussions (in the case of a political actor) or economic consequences (in the case of a private actor).

22. Plessy v. Ferguson, 163 U.S. 537 (1896).

If we view these movements in terms of their specific policy goals, we can see more precisely why Rosenberg believes that *Brown* and *Roe* were ineffective. Indeed, Rosenberg documents how almost no schools that were segregated before *Brown* became integrated in the decade following *Brown*.[23] Rosenberg acknowledges that the analysis is a bit more challenging in the abortion context because abortions did in fact increase immediately after the *Roe* decision. But, as Rosenberg points out, this does not mean the *Roe* decision was actually responsible for increasing the availability of abortions. Before *Roe*, there was already a trend among states to make abortion laws more permissive, and abortions increased at a similar rate immediately before and after *Roe*, so Rosenberg concludes that the *Roe* decision by itself did not have a significant effect on the number of women who were able to get abortions.[24]

The *Hollow Hope* argument sent shock waves through the legal academy, as it disturbed the way we think, on the left and right alike, about the power of lawyers and courts to create social change. Although many legal scholars criticized Rosenberg's argument, Rosenberg held firm, even updating his argument in 2005 to extend it to activism on gay rights and same-sex marriage.[25] While political scientists were generally more sympathetic (perhaps because Rosenberg was not attacking their discipline), many political scientists were still unwilling to accept Rosenberg's argument entirely, as discussed below.

B. Three Critical Features for Courts to Create Social Change

The principal critique among judicial politics scholars is that Rosenberg overlooked the extent to which courts can play a significant role in the process of creating social change, so long as three particular social and political conditions are present.

First, a socio-legal movement needs an effective "support structure." The leading scholar on this subject is Charles Epp, who has documented how courts can create change when they work in an area of law in which there is a network of "rights-advocacy organizations, rights-advocacy lawyers, and sources of financing,

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23. ROSENBERG, *supra* note 14, at 49. Rosenberg points out that desegregation of these schools did not begin until 1964, when Congress passed the Civil Rights Act, which provided, in Title VI, that public schools would lose federal funding if they segregated students on the basis of race. It was the threat of losing federal dollars—not the threat of lawsuits—that precipitated integration.

24. ROSENBERG, *supra* note 14, at 195. Rosenberg argues that *Roe* did not have much of an effect on other factors, such as public opinion on abortion, media coverage of the subject, and financial support for the pro-choice movement, that would lead us to think *Roe* was at the center of increasing the availability of abortion. Abortion did not become a major national issue until a fully developed pro-choice/pro-life dynamic entered American politics, several years after the *Roe* decision. Thus, Rosenberg concludes, it was the politics surrounding abortion, not the *Roe* decision itself, that played the critical role in determining how easy it would be for a woman to obtain an abortion.

25. Rosenberg addressed the same-sex marriage argument in Gerald Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795 (2005). In 2008, Rosenberg updated his book to include a section on gay rights in the second edition.

particularly government-supported financing."[26] Because courts are passive institutions, in that they are limited in their capacity to initiate proceedings and collect information, judicially-administered social change requires a strong strategic litigation infrastructure that focuses on finding sympathetic plaintiffs, filing lawsuits, and submitting amicus briefs.[27]

Second, for courts to effectuate social change, they must operate in concert with a broader political network. That is, the support structures must advance lawsuits in a way that coalesces with an electoral constituency and a political movement that can solidify and broaden the litigation agenda through political action. This political nexus is critical as a matter of both judicial input (*i.e.,* what goes into judicial decisions)[28] and judicial output (*i.e.,* what comes out).[29] As Bruce Ackerman has demonstrated, the landmark civil rights legislation and executive orders that were so critical to the civil rights movement would not have arisen without the coalescence between the *Brown* decision and the emerging coalition between black Southerners and white Northerners within the Democratic Party.[30]

A third critical condition is the existence of a moral framework to substantiate the changed socio-legal landscape. Whenever there is fundamental change in how a legal system deals with a controversial subject, such as abortion and race relations, there will be a backlash that threatens to minimize the scale and scope of the judicial victory. But when there is a compelling moral narrative to substantiate the change, the backlash is more easily overcome through a combination of public and private pressures. Michael Klarman has made this point most forcefully by challenging Rosenberg's thesis on the ground that *Brown* made segregation a moral issue requiring a national solution.[31]

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26. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 3 (1998).

27. The most prominent example here is the story of how the NAACP came to litigate the *Brown* case. The *Brown* story does not begin with Linda Brown, the lead plaintiff, or even Thurgood Marshall, the lead litigator. Rather, it begins roughly 30 years earlier, when the recently formed NAACP was divided on how to structure its agenda. While the organization was generally inclined toward focusing on criminal justice matters, the creation of the Garland Fund in 1922 moved the NAACP toward education and segregation issues. *See* Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 LAW & SOC'Y REV. 275 (2019).

28. By judicial *inputs*, I am referring to the factors that enter into a court's decision to initiate change in a particular area of law. Courts generally do not make dramatic changes in legal norms, especially when the changes would affect controversial areas of social life, unless there is a powerful political movement to support the change.

29. By judicial *outputs*, I am referring to what happens after a court makes such a change in the law. Because courts lack the enforcement mechanisms necessary to ensure that their decisions generate broader change, a movement must also have sympathetic administrative officials and legislative bodies to facilitate the enforcement process.

30. *See* BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION 233–35 (2018).

31. While many Northerners at the time were comfortably living with the illusion that segregation was a distant and relatively harmless relic from the Southern way of life, the violent conflicts following *Brown* revealed the brutality and animosity underlying this order. And when this violence appeared around the clock for the entire nation to watch on television, it was clear that segregation was not a

Below, I will explain why, based on these three features, the movement against affirmative action was doomed to fail.

II. THE MOVEMENT AGAINST AFFIRMATIVE ACTION

Affirmative action may be the only program in American history that has broadened in scope[32] and strengthened in force[33] in the face of growing resistance from state legislatures,[34] federal courts,[35] and public opinion.[36] Why has the movement against affirmative action been so ineffective?

A. Asymmetric Power

A big part of the story has to do with asymmetric legal and political power. For example, in the Supreme Court's first affirmative action case, *DeFunis v. Odegaard*[37] (which the Supreme Court ultimately dismissed on mootness grounds), there were 28 amicus briefs in total. Of these 28 amicus briefs, over 75 percent (22 of 28) supported the University of Washington's affirmative action program, and this group included some of the biggest players in law and

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distant problem but a national problem, requiring a national solution. *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). In my own writing on the subject, I have expanded this to apply to the moral framework that the canonization of *Brown* created—the moral pillars that diversity is our greatest good and discrimination is our greatest evil. Together, these axes of good and evil have come to define our constitutional order. *See generally* JESSE MERRIAM, HOW WE GOT OUR ANTIRACIST CONSTITUTION: CANONIZING BROWN V. BOARD OF EDUCATION IN COURTS AND MINDS (2023).

32. In the early 1960s, affirmative action was limited to the most elite liberal arts colleges and universities, but affirmative action is now a defining feature of all facets of American higher education—public and private, graduate and undergraduate, elite and non-elite. *See generally* Merriam, *supra* note 5.

33. In the early 1960s, elite schools had a roughly 200-point preference for Black applicants, but over the next generation, that preference increased around 50 percent to 310 SAT points. *Compare* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 395 (2005), *with* THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 93 (2009).

34. *See* Jenna A. Robinson, *Did You Know? Eight States Ban Affirmative Action in College Admissions,* THE JAMES G. MARTIN CTR. (Oct. 24, 2019), [https://perma.cc/TDB4-AENU] https://www.jamesgmartin.center/2019/10/did-you-know-eight-states-ban-affirmative-action-in-college-admissions/ (explaining how "[s]ince 1996, nine states have voted to ban the use of affirmative action in college admission: California (1996), Texas (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), and Oklahoma (2012).").

35. The Supreme Court has invalidated almost every affirmative action program it has adjudicated in its 45 years of case law on the subject. *See* Margaret Kramer, *A Timeline of Key Supreme Court Cases on Affirmative Action*, THE N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/affirmative-action-supreme-court.html [https://perma.cc/SCM8-DP3Q].

36. The public has shifted from being split on to overwhelmingly opposing affirmative action. Public opposition to affirmative action is so strong that it is one of the only issues to transcend political party and geographic region, as evidenced in how even a state like California cannot repeal its affirmative action ban. *See* John Gramlich, *Americans and Affirmative Action: How the Public Sees the Consideration of Race in College Admissions, Hiring*, PEW RSCH. CTR. (June 16, 2023), https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring/ [https://perma.cc/SK5Q-HW9R].

37. Defunis v. Odegaard, 416 U.S. 312, 319–20 (1974).

politics.[38] By contrast, only six groups filed amicus briefs in support of DeFunis.[39] Three of these groups represented Jewish interests (DeFunis was Jewish),[40] one represented union interests (AFL-CIO), and two represented business interests (the U.S. Chamber of Commerce and the National Association of Manufacturers).[41] A similar pattern arose in *Bakke,* a case in which "[a] record fifty-eight amicus briefs were filed after the Court granted certiorari."[42] There, 42 defended affirmative action, and only 16 opposed it.[43] Once again, the nation's leading academic voices and institutions filed amicus briefs defending affirmative action.[44]

One reason why conservative voices were so thoroughly outmatched in affirmative action discourse in the 1970s is that no conservative legal support structures existed at this time. It was not until four years after *Bakke*, in 1982, that the first conservative legal support structure, the Federalist Society, was established. While the creation of the Federalist Society certainly normalized constitutional criticism of affirmative action, its creation did not threaten affirmative action as a legal matter because the Federalist Society was created to provide a debating forum for conservative and libertarian lawyers, not to engage directly in legal advocacy the way that liberal support structures like the ACLU and NAACP did. There was no legal support structure dealing with challenges to affirmative action until the Center for Individual Rights ("CIR") was created by Michael McDonald and Michael Greve in 1989.

B. The Center for Individual Rights and the Grutter *Lesson*

CIR has focused on a broad array of issues, but a significant portion of its litigation has involved challenges to affirmative action programs. Even with the creation of CIR, however, legal conservatives remain outmatched in affirmative action cases. For example, when CIR challenged the undergraduate and law school affirmative action programs at the University of Michigan, a record number of amicus briefs were filed in the Supreme Court, and they were overwhelmingly in

38. This included such organizations as the U.S. Equal Employment Opportunity Commission, Harvard University, Harvard College, the Massachusetts Institute of Technology, 70 law school deans, the American Bar Association, the American Association of Law Schools, the Law School Admissions Committee, the American Association of Medical Colleges, and the NAACP. HOWARD BALL, THE BAKKE CASE: RACE, EDUCATION, & AFFIRMATIVE ACTION 34 (2000).

39. *Id.* at 35–36.

40. *Id.* These were the American Jewish Congress, the Advocate Society, and the Anti-Defamation League.

41. *Id.*

42. *Id.* at 77.

43. *Id.*

44. *See, e.g.*, Ronald Dworkin, *Why Bakke Has No Case*, THE N.Y. REV. (Nov. 10, 1977), https://www.nybooks.com/articles/1977/11/10/why-bakke-has-no-case/ [https://perma.cc/7JTZ-WF9Q]; McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America?*, THE ATLANTIC (Nov. 1977), https://www.theatlantic.com/past/docs/politics/race/bundy.htm [https://perma.cc/4HET-9GEV].

favor of affirmative action, even surpassing the rate discussed above in *DeFunis* and *Bakke*.[45]

Moreover, it was not just a matter of *how many* amicus briefs were filed in the Michigan cases; it was even more startling that the biggest power players were *all* on the side of affirmative action. Fortune 500 companies, congressmembers, state governments, and universities argued—nearly uniformly—in favor of affirmative action.[46] According to Neal Devins, "[n]inety-one colleges and universities, as well as every major educational association, filed briefs in support of the university," and "[n]ot one college or university filed a brief opposing affirmative action."[47] Likewise, "twenty-three states and the Virgin Islands joined . . . briefs supporting the university," whereas "[o]nly one state, Florida, filed a brief supporting the petitioner," and even in opposing the methods employed in the University of Michigan's affirmative action program, the Florida brief endorsed affirmative action in general.[48] The federal government was even more lopsided: "one hundred twenty-four members of the House and thirteen Senators joined four briefs supporting the university," and "no member of Congress opposed the University."[49] Even the George W. Bush administration, in submitting a brief for the petitioners, was on the side of affirmative action.[50]

The U.S. military also showed its support for affirmative action. "[A] coalition of former high-ranking officers and civilian leaders of the military (including William Crowe, Bud McFarlane, Norman Schwarzkopf, and Anthony Zinni)

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45. As Neal Devins has documented, "[o]ne hundred two amicus briefs were filed in *Grutter* and *Gratz*," and of these 102 briefs, more than 80 percent were in support of affirmative action (there were "eighty-three supporting the University of Michigan and nineteen supporting the petitioners"). Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 366 (2003).

46. As Charles Lane observed in February 2003, as the amicus briefs were still pouring in, "[a]mong the organizations and individuals who are planning to submit friend-of-the-court briefs supporting the university are several dozen Fortune 500 companies, the nation's elite private universities and colleges, the AFL-CIO, the American Bar Association – and a list of former high-ranking military officers and civilian defense officials." Charles Lane, *U-Michigan Gets Broad Support on Using Race*, WASH. POST, Feb. 11, 2003, at Al. Lane concluded that "this impending flood of briefs shows the degree to which the American establishment has embraced [affirmative action.]" This "show of support planned on Michigan's side is in stark contrast to the 13 briefs that have been filed on behalf of the white students," which "were backed mainly by relatively small conservative public-interest groups."

47. Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 368 (2003).

48. *Id.* at 368, n.1.

49. *Id.* at 367.

50. Indeed, in January, President Bush announced that, while he opposed Michigan's quota system, he "strongly support[s] diversity. . . including racial diversity in higher education." *Remarks on the Michigan Affirmative Action Case*, 39 WKLY. COMP. PRES. DOC. 71 (Jan. 15, 2003). The next day, the Bush Justice Department submitted a brief in favor of upholding *Bakke* and permitting "race to be used as a 'plus factor.'" Linda Greenhouse, *Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003. When the decision was announced, President Bush proclaimed that his position was reflected in Justice O'Connor's opinion by "recognizing the value of diversity on our Nation's campuses." *Statement on the Supreme Court Decision on the Michigan Affirmative Action Cases*, 39 WKLY. COMP. PRES. DOC. 803 (June 23, 2003). Several leaders within the Bush administration likewise celebrated the Court's decision to uphold affirmative action. *See, e.g.*, John M. Broder, *Administration Lawyer Lauds Affirmative Action Ruling*, N.Y. TIMES, June 28, 2003; Press Release, *Department of Education, Paige Issues Statement on Today's Supreme Court Decisions about University of Michigan's Admissions Policies* (June 23, 2003).

joined forces with longstanding supporters of affirmative action,"[51] filing the "military brief," which "figured prominently in both oral arguments and the Court's decision."[52] As Linda Greenhouse wrote after the oral argument but before the opinion was issued, "of the 102 briefs filed in the two cases, this was the one that had grabbed the attention of justices across the court's ideological spectrum."[53] In her *Grutter* opinion, Justice O'Connor explicitly cited both the interests of business and the U.S. military establishment in defending the importance of diversity.[54]

Although CIR recognized the "striking disparity" in elite support for affirmative action, Curt Levey, then the CIR director of legal and public affairs, remained confident in CIR's success because "often the elite and the common man are on two different pages."[55]

This idea that the "common man" can use courts to defeat an elite consensus is inconsistent with the research on the possibility of creating change through courts. That is not to say that public opinion never matters, but when we are talking about creating change through courts, public opinion matters only if it is channeled through a political agenda with the support of an elite network. Based on the research in this area of judicial politics, it seems that even if the Supreme Court had invalidated the University of Michigan Law School's affirmative action program, the decision still would not have spurred meaningful change in affirmative action practices, because when the federal government (including Republican
congressmembers and the Republican president), the vast majority of state legislatures (including those controlled by Republicans), Fortune 500 businesses, and the nation's most elite universities are *all* in favor of affirmative action, a Supreme Court opinion invalidating a particular affirmative action program will not produce widespread change.

C. Anti-DEI Activism and the New Right

An undeniable feature of the legal conservative movement is that it is becoming better organized, particularly in opposing racial preferences. A big factor driving conservative coalescence and coordination on this subject is "wokeness." The "wokeness" movement can be traced to the racial conflicts that arose in President Obama's second term.[56] But, this movement expanded in 2016,

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51. Devins, *supra* note 45, at 369.

52. *Id.*

53. Linda Greenhouse, *Justices Look for Nuance in Race-Preference Case*, N.Y. TIMES, Apr. 2, 2003, at Al.

54. Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003) ("These benefits [of diversity] are not theoretical but real, as major American businesses have made clear" and "[w]hat is more, high-ranking retired officers and civilian leaders of the United States military assert that … [racial diversity] is essential to the military's ability to fulfill its principle [sic] mission to provide national security.").

55. *See* Lane, *supra* note 46.

56. The term "woke" describes a radical left-ward shift in one's racial views, so as to become awakened to how racism permeates American politics and inter-personal relations, even in ways that are

alongside Donald Trump's racially tinged campaign and victory, and then exploded in 2020, as a direct response to the controversy surrounding George Floyd's death, which incited a flurry of DEI programs. Immediately upon taking office in January 2021, President Biden announced extensive DEI initiatives.[57] Over just the last few years, at least 31 states have developed DEI programs, including many "red states." Just about every major college and university in the country now has an extensive web of DEI initiatives and priorities.[58] Similarly, all Fortune 100 companies have developed DEI programs.[59]

The "wokeness" movement has, in turn, produced an "anti-woke" backlash, galvanizing a more organized legal resistance against affirmative action programs and DEI measures. Consider how, since the creation of the Federalist Society, the only big conservative player in the affirmative action arena was CIR, but all of a sudden, in 2014—just as wokeness was emerging as an organized movement—Students for Fair Admissions ("SFFA") formed. And unlike CIR, SFFA was created for the sole and explicit purpose of challenging the legality of affirmative action in higher education. In 2021, several Trump Administration figures, most notably Stephen Miller, organized America First Legal ("AFL"), another conservative public-interest law firm specializing in affirmative action and DEI matters.

The trajectories of SFFA and AFL are strikingly different from CIR's. While CIR employs only a few lawyers and has a budget of roughly $2 million, SFFA has over 20,000 members and "[f]rom 2015 to 2020 . . . SFFA received more than $8.5 million in contributions."[60] SFFA has grown so quickly that it recently created the American Alliance for Equal Rights ("AAER") specifically for the purpose of challenging the legality of DEI programs. AFL has grown even more rapidly. In its first year of existence, "AFL's revenue exploded by

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so subtle that they may be imperceptible to documentation and observation. The focus of "wokeness" is therefore "systemic racism"—that is, the idea that racism does not refer simply to isolated acts of discrimination but to an entire system of governance and private affairs. Under this view, even something explicitly non-racial, such as color-blind university admissions, could be described as racist because of the disparate impact such a policy has in benefiting some groups over others. For more on the origins of "wokeness," *see* Zach Goldberg, *How the Media Led the Great Racial Awakening*, TABLET (Aug. 4, 2020), https://www.tabletmag.com/sections/news/articles/media-great-racial-awakening [https://perma.cc/2NE3-8FQ8], and Zach Goldberg, *America's White Saviors*, TABLET (June 5, 2019), https://www.tabletmag.com/sections/news/articles/americas-white-saviors [https://perma.cc/35QG-N7YT].

57. *See Executive Orders on Diversity, Equity, Inclusion and Accessibility*, U.S. DEP'T OF COM., https://www.commerce.gov/cr/programs-and-services/executive-orders-diversity-equity-inclusion-and-accessibility [https://perma.cc/3DVH-C5HV].

58. This Yale chart is illustrative of how extensive academic DEI programs have become. *Belonging at Yale University Priorities*, YALE UNIV. https://belong.yale.edu/sites/default/files/files/University_Priorities_Final_2022.pdf [https://perma.cc/5QX8-YGQH].

59. Caroline Colvin, *Once Neglected, DEI Initiatives Now Present at All Fortune 100 Companies*, HR DIVE (July 20, 2022), https://www.hrdive.com/news/2022-fortune-companies-dei/627651/.

60. Nia L. Orakwue & Leah J. Tiechholtz, *SFFA Funded by Large Conservative Trusts, Public Filings Show*, THE HARVARD CRIMSON (Oct. 28, 2022), https://www.thecrimson.com/article/2022/10/28/donors-sffa-conservative-trusts/ [https://perma.cc/G95M-TKZ4].

over $38 million, growing from only $6.3 million in 2021 to nearly $44.4 [million] in 2022."[61]

In addition, unlike CIR's opposition to affirmative action in previous periods, AFL and SFFA have worked in concert with a well-connected and powerful political movement—namely, the "anti-woke" movement and a broader coalition known as the "New Right."[62] Over the last several years, in accord with the creation of AFL and SFFA, several New Right candidates have campaigned on anti-woke political platforms.[63] The moral discourse surrounding opposition to affirmative action is shifting as well. Whereas a generation ago criticism of affirmative action was often framed in morally neutral terms, the New Right's criticism is much more moralistic and confrontational, accusing affirmative action proponents of promoting divisive identity politics and of endorsing anti-white as well as anti-Asian racism. Conservative scholars and pundits now regularly question not only whether the government has a compelling interest in promoting diversity but also whether diversity is even a strength at all. This represents a radical departure from when President George W. Bush celebrated the *Grutter* decision for recognizing the moral value of diversity.

With powerful legal support structures, an ascendant political network, and the articulation of an anti-woke moral framework, legal activism against affirmative action is now much more potent. This was fully on display in the *SFFA* briefing. Recall how in past cases, affirmative action supporters outmatched opponents at around a 4:1 rate, and the nation's political, economic, and academic leaders were uniformly in favor of affirmative action. The *SFFA* case, by contrast, represented a notable shift away from this paradigm. There were 93 amicus briefs filed in *SFFA*: 33 contested the legality of affirmative action and 60 defended it.[64] This is in sharp contrast with *Grutter*, where there were 83 briefs defending affirmative action and only 19 opposing the practice. Similarly, *SFFA* was the first affirmative action case in which a significant number of Republican leaders and

61. *America First Legal Foundation Rakes in Millions to Push Radical Agenda,* ACCOUNTABLE (Nov. 17, 2023), https://accountable.us/america-first-legal-foundation-rakes-in-millions-to-push-radical-agenda/#:~:text=AFL's%20revenue%20exploded%20by%20over,a%20raise%20of%20almost%20%2477%2C000 [https://perma.cc/8PVK-TW23].

62. *Id*.

63. For example, in 2021, Glenn Youngkin won a surprise victory in Virginia's gubernatorial race, and many observers have attributed his victory, which flipped the state back to Republican, to his explicitly anti-woke campaign. Meanwhile, the most significant player in Republican anti-woke politics has been Florida's Governor DeSantis. In 2022, Florida passed the Stop Wrongs to Our Kids and Employees Act (also known as the Stop WOKE Act), placing restrictions on how schools and employers engage in racial sensitivity training. The next year, Florida went even further, prohibiting the state's public colleges and universities from funding DEI programs. Governor DeSantis's presidential campaign similarly focused on his anti-woke agenda and record.

64. Ellena Erskine et al., *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUS BLOG (Oct. 29, 2022), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/ [https://perma.cc/3GC5-QS5Y].

Republican-controlled state legislatures came out against affirmative action.[65] That is, again, a radical departure from 20 years earlier, in *Grutter* and *Gratz*, when no members of Congress expressly opposed affirmative action, the only state to oppose Michigan's affirmative action program was Florida (in a brief that largely defended affirmative action), and the Bush Administration similarly defended affirmative action, albeit in relatively narrow terms.

CONCLUSION

So why does this emboldened legal right, in conjunction with the Court's *SFFA* opinion, not augur the end of DEI? Because, as powerful as this movement is becoming, it is still thoroughly outmatched in challenging the core of the nation's power structure. In a nation whose commitment to civil rights has taken on a constitutional status and whose commitment to diversity has taken on a moral, and even quasi-religious, value, defeating affirmative action and DEI programs requires fundamentally altering the constitutional order.

This distinguishes our current moment from past periods of intense conflict over social issues. The Court's *Brown* decision, for example, incited popular resistance and a violent backlash, but it was nevertheless clear that this resistence would end up losing, given that opposition to integration was almost exclusively confined to the South—a region with significantly less political, financial, and media power than the forces pushing for integration. Likewise, although *Roe* gave rise to the pro-life movement, it did not produce the type of conflict we have over DEI today, because the constitutional legitimacy of *Roe* was questioned from the start (which was not the case for affirmative action), and views on abortion have remained remarkably stable over time (whereas views on affirmative action have changed dramatically).[66]

The big obstacle for anti-DEI litigation will be that, in accord with the rise of the civil rights regime, diversity has come to define our national identity. As powerful as the anti-woke movement is, it still lacks the power to alter this feature of our constitutional order. Consider on this point how much work it took for conservatives to mount an organized resistance against DEI initiatives, and how little work it took for liberals to coalesce around DEI programs as a response to the George Floyd protests. While conservatives were much more vocal in the *SFFA* briefing than they were in the past, they were still outmatched by a record number of corporations submitting amicus briefs, all in support of affirmative action.[67]

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65. Indeed, 14 U.S. senators and 68 representatives submitted a brief opposing affirmative action, 20 states expressed their opposition, and a group of Department of Education officials serving in the Trump Administration also came out against affirmative action. *Id.*

66. *See Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), [https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/https://perma.cc/XWU5-ZQB9].

67. *See Historic Number of Corporations File Amicus Briefs in U.S. Supreme Court in Support of College Admissions Policies That Foster Diversity*, LEGAL DEF. FUND (Aug. 1, 2022), https://www.naacpldf.org/press-release/historic-number-of-corporations-file-amicus-briefs-in-u-s-supreme-court-in-support-of-college-admissions-policies-that-foster-diversity/ [https://perma.cc/EG5Y-WVDY].

Likewise, even if the SFFA, AAER, and AFL lawsuits challenging affirmative action and DEI programs are successful, those legal victories will be drops in the bucket, with almost no chance of changing what has become not just a pervasive business, governmental, and academic practice, but also a fundamental feature of our national identity.

While the *SFFA* decision and the ascendant New Right do not augur the end of DEI, they do signal something important—namely, that we are entering an unusual, if not unique, situation in American socio-legal politics. Whereas the socio-legal movements that political scientists study are principally unidirectional in consisting of a collaboration of individuals and organizations agitating for change in a particular political direction, the current DEI conflict features two growing and accelerating forces headed right for one another. The result may be exactly what happens when two powerful currents in the sea collide—a maelstrom.

This maelstrom may be an unavoidable feature of three growing forces in American politics: (1) nationalization, whereby inter-personal conflicts are aggrandized into matters of national political significance, (2) juridicization, whereby these national political conflicts are turned into a series of legal disputes, to be adjudicated and managed by the Supreme Court, and (3) polarization, whereby the resulting socio-legal battles are assimilated into a political platform by the national parties, with each side viewing the other as a political enemy seeking to destroy a fundamental feature of the American constitutional order. If there is a way out of the DEI maelstrom, it will be through these three channels. In other words, if nationalization, juridicization, and polarization continue to animate our republic, it seems almost certain that—for the foreseeable future at least—DEI programs, as well as DEI conflicts, are here to stay.