

Can Affirmative Action Survive on the World's Campuses?

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In June 2023, the US Supreme Court dealt a lethal blow to affirmative action on the basis of race in colleges and universities. The majority decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, together with *Students for Fair Admissions, Inc. v. University of North Carolina et al.*, found that these institutions' student admission programs, specifically their consideration of race, violate the equal protection clause of the Fourteenth Amendment. This clause declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." Since Harvard is a private university and North Carolina is public, the ruling applies to both public and private higher education nationwide.

This momentous ruling raises the question of whether the United States is part of an international backlash against affirmative action. Michele S. Moses and I argued in our 2014 book *Affirmative Action Matters: Creating Opportunities for Students Around the World* that affirmative action on the basis of race, ethnicity, or gender had expanded around the world. Ten years later, is that trend now waning, or is the United States an outlier?

A global snapshot shows that affirmative action in higher education elsewhere is under threat but still alive, due to constitutional protections and politically driven policy changes. Such changes, however, may undermine affirmative action's primary goal: to combat the worst forms of oppression and discrimination.

Recent developments in other countries with notable affirmative action policies shed light on this shifting terrain. India's Supreme Court approved a constitutional amendment that added to the country's reservations (or admissions quota) system for lower castes a new category of students: poor upper castes. Brazil's legislature approved

continuing affirmative action, one decade after its Supreme Court made it legal in higher education, but many Brazilian institutions target public school students rather than explicitly admitting applicants on the basis of race. And South Africa's constitution recognizes the possibility of fair discrimination, deflecting many legal challenges to affirmative action, yet black students and graduates still struggle to afford higher education and find jobs, making admission alone inadequate.

INDIA'S CHANGING RESERVATIONS

India's long-standing reservations in university admissions, as detailed in my book *Identity and Identification in India*, are for the castes formerly known as untouchables (now Dalits), marginalized tribal communities (Adivasis), and other low castes. The latter qualify only if the applicants also fall under income and wealth ceilings, to exclude the so-called creamy layer. These targeted groups are officially known as Scheduled Castes, Scheduled Tribes, and Other Backward Classes.

The Indian government amended the constitution in 2019 to reserve an additional 10 percent of admissions for another category, "economically weak sections," a label for upper-caste but poor students. In 2022, the Indian Supreme Court upheld this new form of economic affirmative action, which moved away from the reservations policy's initial goal of advancing disadvantaged castes and tribes. This political shift toward reservations based on economic criteria was in line with calls from the ruling Bharatiya Janata Party (BJP) to curtail caste-based policies and appealed to the BJP's upper-caste Hindu base. It may be reminiscent of the US shift to colorblind policies, but in India the original policies for Scheduled Castes and Tribes also persist, in part due to their explicit constitutional basis.

Besides the economically based quotas for upper-caste students, Indian affirmative action has

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expanded in another way. In September 2023, Parliament passed a bill reserving one-third of seats in its lower house and in the Delhi and state legislative assemblies for women. Although women are underrepresented in these bodies, the persistence of caste and religious hierarchies in India means that most of the women elected under the new quotas are likely to be from the more powerful communities: the Hindu majority and, within it, the upper castes. Helping women in this way may undermine the political power of religious and caste minorities.

India's new forms of affirmative action must be seen in the context of the rise of Hindu majoritarian and right-wing politics. The rule of the BJP, in power at the national level since 2014, has included crackdowns on academic freedom. Authorities have arrested student protesters, threatened or fired faculty members for being critical of the ruling party or advocating for the rights and grievances of lower castes or religious minorities (especially Muslims), and restricted or banned research, teaching, or textbooks that do not toe the party line.

Admitting underrepresented students into academic contexts in which their histories, rights, and advocates are marginalized and threatened limits the power of affirmative action to truly achieve equity and inclusion. The spread of state-level legislation in the United States to restrict teaching about racism or sexuality raises similar concerns.

BRAZIL STICKS WITH QUOTAS

In Brazil, some universities voluntarily instituted affirmative action as early as 2001, and the Supreme Court upheld the constitutionality of race-based affirmative action in 2012. Also enacted in 2012, Law 12.711 (known as the quota law) mandated affirmative action in public higher education. Some Brazilian college and university affirmative action policies are explicitly based on race (for students of color and indigenous students); others target public high school students, who were underrepresented (in proportion to their numbers in society) in admissions to the elite public university system.

In this way, Brazil uses the inequalities in secondary education as a means to increase access to tertiary education. This evokes the strategy of using public school attendance as an imperfect

stand-in for race in US states where consideration of race in admissions is already against the law. But the 10-year anniversary of the quota law in Brazil prompted reconsideration of these policies and their future.

Akin to the 2003 US Supreme Court decision in *Grutter v. Bollinger*, which suggested that race-based affirmative action should be phased out in 25 years, Brazil's affirmative action system has a built-in deadline. In Brazil, the deadline is written into the 2012 law itself: the legislation was to be reviewed after 10 years. The National Congress renewed the quota law in August 2023—just two months after the US Supreme Court gutted affirmative action—though still subjecting it to review every 10 years. The Congress also revised eligibility criteria, expanding access for some students, such as *quilombolas*, or descendants of enslaved persons who escaped and settled in distinct communities.

In part, this divergence from the US path may be due to Brazil's decision being handled by the legislature rather than the highest court. Yet support for extending the policy may also be traced to the varied forms of affirmative action at play in Brazil. The quota law for Brazil's top public universities features a 50 percent quota for public high school students, with a preference for those with disadvantaged backgrounds: black, mestizo, indigenous, and poor students. Legislators found it politically difficult to cancel a policy with such a broad range of beneficiaries. As in India and South Africa, a sizable majority of Brazil's population is potentially eligible for affirmative action in higher education.

STILL SEEKING EQUITY IN SOUTH AFRICA

In South Africa, President Cyril Ramaphosa signed an employment equity law in April 2023, setting racial "equity targets" in business hiring. A report issued earlier in 2023 by the government documented a 40 percent unemployment rate for black South Africans, compared with 7.5 percent for whites, illustrating the extreme racial inequality that still characterizes South Africa's economy. But the opposition Democratic Alliance filed a lawsuit in June claiming that the new law is an unconstitutional use of racial quotas—another recent instance of political pushback against affirmative action.

Affirmative action in higher education elsewhere is under threat but still alive.

Notably, litigation against affirmative action in higher education in the United States has echoed legal strategies in South Africa. As Nomfundo Ramalekana of the University of Cape Town has pointed out on the Oxford Human Rights Hub, well-funded conservative organizations rather than individuals have spearheaded anti-affirmative action litigation in both countries, using a divide-and-conquer strategy that pits non-dominant groups against each other. In both countries, organizations put forward a white woman to push back against race-based affirmative action (in *South African Police Service v. Solidarity* in 2014 and *Fisher v. University of Texas at Austin* in 2016). Then they centered people of Asian descent (*Solidarity and Others v. Department of Correctional Services* in 2016 and the Harvard and North Carolina cases in 2023).

As in India and Brazil, constitutional wording and interpretations by the constitutional court in South Africa have been more favorable than in the United States for maintaining affirmative action as a necessary means of achieving equality. The South African constitution prohibits “unfair” discrimination. In other words, any discrimination must be factually justified as fair, but the constitution and the constitutional court recognize that fair discrimination is possible and even necessary in the aftermath of apartheid. The current US Supreme Court conservative majority’s contention that the equal protection clause can and should be used *against* policies to achieve substantive equality is what makes the United States an outlier among these large multiracial/multiethnic democracies.

Some South African universities instituted affirmative action in admissions even prior to government mandates. The post-apartheid Higher Educational Act of 1997 broadly mandated measures for the “redress of past inequalities” in public higher education. The government did not prescribe the exact policies, so public (and some private) colleges and universities have a variety of race-based access programs. These initiatives increase admissions from populations categorized and systematically oppressed under apartheid, especially “black” and “colored” students. In one early pushback against affirmative action, the parents of a rejected medical school applicant of Indian ethnicity brought a 1995 lawsuit against the University of Natal. This tension between racially defined groups has continued into the present.

PERSISTENT BUT WEAKENED

International examples provide varied models for affirmative action that do not explicitly use race. Like some US states, Brazil targets public high school graduates. India is giving more emphasis to indicators of poverty than to caste. Yet race- or caste-neutral policies are simply not as effective at combating the effects of historical and contemporary discrimination, as the dissenting justices in the recent US Supreme Court case pointed out. This can be seen clearly in data from the nine US states that had already banned consideration of race in public university admissions.

Affirmative action in several other countries is expanding rather than contracting—in different arenas (employment, legislatures) and for additional groups (women, the poor). But new categories can compete with the original targeted beneficiaries of policies. Whereas adding quotas for women or poor students who do not suffer from the stigma of racism or casteism may help stabilize political support for affirmative action, adding protected categories may pit minorities against each other and shift opportunities away from the students facing the most severe discrimination.

In the United States, as elsewhere, affirmative action has the greatest impact on elite, selective institutions. Both public and private institutions in all the states are newly subject to the nationwide ban. Yet many colleges are struggling to attract students. These schools have been and will be accepting most applicants regardless of race, so the Supreme Court ruling does not affect them significantly. But it is the elite institutions that open more doors for their graduates.

Elite colleges and universities are pathways to power. Most of the US Supreme Court justices, for instance, have Ivy League degrees. The university admissions policies that are most contested in the countries discussed here are centered at institutions that serve as launching pads for political and economic elites.

The global trend toward de-democratization is also hampering the pursuit of equity in higher education. The United States, India, Brazil, and South Africa were each considered models for diverse democracies, but all of them are now in democratic decline. Even if affirmative action persists, diversity and equity will be difficult to achieve at a time when academic freedoms, inclusive and critical teaching and research, and marginalized racial, religious,

indigenous, gender, or caste groups are under political fire.

Finally, although tuition elsewhere is not as high as in the United States, the costs associated with higher education (fees, housing, supplies, child-care, plus fewer hours for paid work) mean that, even if admitted, students may not be able to afford to attend or may end up saddled with debt. Higher unemployment rates for disadvantaged communities, which are particularly stark in South Africa, can make these costs even more of a practical and psychological barrier to enrollment and graduation.

A global perspective suggests that the recent US Supreme Court ruling does not necessarily foreshadow the end of affirmative action and similar policies designed to increase the number of underrepresented and disadvantaged students in colleges and universities. Unlike their peers in the United States, institutions in South Africa, Brazil, and India can continue their own policies promoting inclusion for underrepresented groups in higher education.

The persistence of affirmative action in these countries is partly due to legal factors (such as more favorable constitutional language and interpretations) and partly due to political factors (such as larger percentages of their populations eligible to potentially benefit). Politically motivated tweaks to policy targets have made affirmative action more palatable to dominant groups. Around the world, however, de-democratization, the costs of completing a college degree, and shifting affirmative action policy targets are watering down the ability of such admissions policies to increase access and equity in colleges and universities for the most disadvantaged students.

Although the continuing need for race-based admissions in the United States is evident, these policies were dealt a body blow by regressive judicial interpretations of equality and insufficient popular support. Yet the persistence of affirmative action elsewhere, despite many challenges, offers alternative models for universities to consider going forward. ■