The Atlantic

IDEAS

The Supreme Court's Next Targets

The conservative majority is likely to overturn major precedents this term—not just *Roe*.

By Adam Harris

Darren McCollester / Getty

MAY 19, 2022, 7:43 AM ET

About the author: *Adam Harris is a staff writer at* The Atlantic.

Following the Supreme Court's leak of a draft decision overturning *Roe v. Wade*, many Court-watchers and pundits have pointed to same-sex marriage and access to contraceptives as rights now potentially at risk. And while in the long run the logic set forth in *Dobbs v. Jackson Women's Health Organization* could undermine those precedents, the Court may eviscerate other major areas of law far sooner—in fact, with cases on its docket this current term. Notably, the Court may soon declare the use of race in college admissions—affirmative action—illegal, and it may also massively constrain the power of the federal government to protect the environment.

The questions at hand in each case—*Dobbs*, *Students for Fair Admissions v. Harvard*, and *West Virginia v. Environmental Protection Agency*—differ. But they all raise issues that have been the targets of conservative legal scholars for decades, and they will now be decided by a right-wing Court with seemingly little commitment to its own precedents.

The use of race in admissions has been permissible in the eyes of the Court since 1978, when Justice Lewis F. Powell Jr. delivered his opinion in *Regents of the University of California v. Bakke*. Allan Bakke, who was white, argued that he had been denied entry into UC Davis's medical school because of its affirmative-action program, which reserved 16 of the 100 seats in each class for minority students—though the school contended that his age (35) and average test scores had more to do with his rejection. Powell ruled that race could be used in admissions in concert with a host of other factors—including grades, extracurricular activities, and test scores—to build a class, because diversity was an important interest of the state's. As such, his decision was not about righting historical wrongs, but about diversity for the benefit of the entire campus community. Over the next 40 years, the decision was upheld time and again.

Read: What happens when a college's affirmative-action policy is found illegal

In 2014, Students for Fair Admissions, a nonprofit founded by Edward Blum, which represents a group of anonymous Asian American students, filed a lawsuit against Harvard claiming that its admissions process discriminated against the students because of their race. The case slowly snaked through the legal system before a district-court trial in 2018. "The future of affirmative action is not on trial," Adam Mortara, the lawyer for SFFA, said during his opening statement. But as the challenge wore on—with the district judge ruling in favor of Harvard, and an appeals court doing the same—the thin veil that it was not an attack on race-conscious admissions fell.

SFFA explicitly pointed to one of the most recent cases that upheld affirmative action: *Grutter v. Bollinger*. "*Grutter* should be overruled, as it satisfies every factor that this Court considers when deciding to overrule precedent," SFFA said in a filing to the Supreme Court. "It was wrong the day it was decided, has spawned significant negative consequences, and has generated no legitimate reliance interests"—a legal term referring to people who have taken actions based upon the statements of others, including the courts.

The lower courts' decisions and decades of precedent should lead the Supreme Court to side with Harvard in *Students for Fair Admissions v. Harvard*, David Hinojosa, the director of the Educational Opportunities Project at the Lawyers' Committee for Civil Rights Under Law, told me. And despite the draft *Dobbs* opinion, he's trying to have faith that the Court will rule in Harvard's favor. "But we're also mindful that courts can and do veer off course. We're hoping this is not one of those times, which certainly should not be, but that's a reality we have to consider."

RECOMMENDED READING

4 Rules for Identifying Your Life's Work
ARTHUR C. BROOKS

The Amateur Radio Operators Preparing for the Worst
JENNIFER HACKETT

American Shoppers Are a Nightmare
AMANDA MULL

Perhaps with even less public awareness, the Court may also decimate the federal government's power to make regulations that protect the environment. In *West Virginia v. Environmental Protection Agency*, which challenges the EPA's ability to regulate carbon emissions, the Court could invoke what is known as the non-delegation doctrine—a theory that effectively says Congress cannot easily empower the executive branch to figure out the details of regulatory policy.

Read: There's no historical justification for one of the most dangerous ideas in American law

"The doctrine sort of appeared here and there, in state courts, very intermittently in the 19th century," Julian Davis Mortenson, a professor at the University of Michigan Law School who studies delegation and the relationship between Congress and the executive branch, told me. Its use was most prominent during the height of resistance to New Deal policies, in the 1930s. But it has long been roundly rejected by justices since—including the originalist Antonin Scalia, who wrote in a 2001 opinion that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"

Still, Mortenson told me, having studied the current justices closely, "There are five people who said things like 'The non-delegation doctrine in the 1936 way—that had real teeth, and restricts how broad delegations can be to the government—should be a thing again, and we're going to be happy to go along with the case.'" The Court could, of course, rule in a way that affects only this one agency rule, but it's possible that the justices will take a much bigger swing, making any meaningful federal environmental regulation essentially impossible.

These cases haven't received the same level of attention as *Dobbs*, and they fall outside the privacy issues adjacent to abortion, but they are no less consequential. And if the Court overturns these areas of long-settled law, millions of people's lives will be affected, for generations to come.