US Supreme Court hears oral arguments in affirmative action case

Tom Carter
19 October 2012

The US Supreme Court heard oral arguments on October 11 in *Fisher v. University of Texas*, a prominent case challenging the system of racial preferences in higher education known as "affirmative action."

The arguments presented before the court in favor of affirmative action further exposed the gulf that separates a program for genuine social equality from the essentially undemocratic affirmative action policy. The right-wing justices, for their part, are exploiting the unprincipled character of affirmative action to posture as defenders of equal opportunity while they move to roll back previous democratic and social reforms.

Abigail Fisher and Rachel Michalewicz, both white, were denied admission in 2008 to the University of Texas at Austin (UT). Both young women subsequently filed suit against the university, alleging that they were denied admission based on their race.

Under the state's "Top 10 Percent Law," Texas public high school students who graduate in the top 10 percent of their class are guaranteed admission to the University of Texas at Austin. Roughly 80 percent of students are admitted under the Top 10 Percent Law. The remaining 20 percent are admitted by means of a selective process that the university acknowledges involves racial preferences for certain minorities.

Fisher and Michalewicz maintained good grades as high school students, but were just outside the top 10 percent category. Fisher had a 3.59 grade point average (out of 4.0) and a class ranking of 82nd out of 674 students at her high school (ranking among the top 12 percent).

Michalewicz had a 3.87 grade point average and was ranked 36th out of 355 students (the student ahead of her was in the top 10 percent). Both were active in extracurricular activities and scored higher on the Scholastic Aptitude Test (SAT) admission exam than other applicants who were admitted.

During the oral arguments, the attorney for the University of Texas maintained that the Texas Top 10 Percent law does not result in the enrollment of a sufficient number of minority youth from *privileged* backgrounds, and so affirmative action is necessary to ensure the enrollment of such individuals.

"The African-American or Hispanic child of successful professionals in Dallas who has strong SAT scores and has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class (or attends an elite private school that does not rank) cannot be admitted under the top 10 percent law," the university argued in its brief.

Fisher's position, the university continued, "would forbid UT from considering such a student's race in holistic review as well, even though the admission of such a student could help dispel stereotypical assumptions (which actually may be reinforced by the top 10 percent plan) by increasing diversity within diversity."

Right-wing Associate Justice Samuel Alito seized on the undemocratic content of this position. "Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before," Alito declared. "The top 10 percent plan admits lots of African Americans—lots of Hispanics and a fair number of African Americans. But you say, well, it's—it's faulty, because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds."

Associate Justice Antonin Scalia attacked the University of Texas on the grounds that there is no constitutional method of ascertaining whether a university applicant checked the "correct" race box on his or her application.

These same justices, of course, condone torture, imprisonment without trial, military commissions, life sentences for minors, dictatorial police powers, warrantless spying, the dismantling of the social reforms of the twentieth century and the trampling of the Bill of Rights. They oppose affirmative action from the right, as part of an agenda to weaken or reverse genuine reforms—Social Security, Medicare, Medicaid, civil liberties protections, desegregation—that were enacted under the pressure of mass struggles of the working class.

During oral arguments, the Supreme Court's liberal wing defended the University of Texas affirmative action policy, invoking the Supreme Court's prior decision in *Grutter v. Bollinger* (2003), which narrowly upheld an affirmative action program at the University of Michigan Law School (see "US Supreme Court upholds affirmative action"). The lower federal courts upheld the University of Texas affirmative action policy in Fisher's case on the basis of the precedent set by *Grutter*.

Associate Justice Sandra Day O'Connor, who retired in 2006, wrote the *Grutter* decision for a five-justice majority. That ruling is remarkable for making clear that the purpose of affirmative action is not social equality, but the fostering of a "diverse elite."

"High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security," O'Connor wrote in 2003.

"In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," O' Connor continued, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." Thus, O'Connor and the Supreme Court declared in 2003 that affirmative action was necessary to legitimize a social and political system that promotes social inequality by bringing a privileged minority layer into the top echelons of academia, the military, government, and business.

More than four decades of affirmative action, which was championed and expanded by the Nixon administration under the banner of "black capitalism," have brought no improvement in the economic conditions facing the vast majority of blacks and other minorities. For many, living standards have declined. Quotas and preferences based on race and ethnicity have, however, benefited a narrow layer among African Americans and Hispanics. Their wealth has shot up even as conditions for the working class have worsened. As a result, social inequality among blacks has risen even more sharply than among the general population.

Since the introduction of affirmative action, the Supreme Court has produced conflicting opinions on its constitutionality. Racial preferences and quotas are, from a legal and constitutional standpoint, difficult to square with basic democratic and egalitarian principles.

A program of genuine social equality requires that quality higher education is freely available to everyone, regardless of economic status or other factors such as race, religion or gender. This is the only road to true equality of opportunity. Affirmative action, in contrast, does not provide equal access to higher education for all, but instead maintains the basic status quo while parceling out a small number of available spots at elite universities on the basis of race.

In 2003, the Supreme Court disallowed mechanical "point-based" affirmative action, where a minority applicant receives a numerical bonus to his or application score. However, the Supreme Court did uphold the use of race as part of a "holistic review" of each individual applicant, unless and until the university achieves a "critical mass" of minority students.

Fisher's attorney argued last week that *Grutter* in practice constitutes "an unlimited mandate without end point to just use race to your own satisfaction and to be deferred to in your use of race. That is unacceptable. That is the invasion of Abigail Fisher's rights to equal protection under the law."

The University of Texas at Austin was joined by the Obama administration and a host of third parties who submitted briefs in favor of affirmative action. This group of third parties—called amici curiae, or friends of court—included business associations, lawyers' organizations, civil rights groups and top educational institutions.

The most noteworthy of the amicus briefs in favor of affirmative action was filed by roughly 40 military commanders, who argued: "For the United States military, a highly qualified and racially diverse officer corps is not a lofty ideal. It is a mission-critical national security interest."

The officers' brief, available here, expressly referred to the epidemic of "fragging" in Vietnam that peaked during the years 1969 and 1970. "Bereft of minority officers as support and as a visible proof of overall fairness and that our Armed Forces recognized them as valuable contributors, many black troops lost confidence in the military as an institution," the officers wrote.

The officers' amicus brief noted that the military advantages of "diversity" include "the likelihood that the US military 'knows the enemy' " and "a cultural understanding of the populations in which we may be deployed." In other words, affirmative action helps US imperialism by making the military more adept at occupying other countries and subjugating their populations. The brief cited—twice—the key phrase in *Grutter* that the purpose of affirmative action is "to cultivate a set of leaders with legitimacy in the eyes of the citizenry."

The brief submitted by the Obama administration was almost entirely given over to the argument that affirmative action is in the interests of military-national security. "Officer training programs run by DoD (the Department of Defense) and the Department of Homeland Security (DHS)—including service academies and Reserve Officer Training Corps (ROTC) programs located at civilian institutions such as the University…must produce a racially and ethnically diverse range of graduates who are prepared to lead a multiracial force," the Obama administration argued.

The administration asserted that affirmative action promotes the "Nation's interests in a range of areas—including military readiness, national security, public health, federal law enforcement, global competitiveness, and education . . . ."

It goes without saying that these arguments have nothing whatsoever to do with the standpoint of genuine equality.

The historic fight for social equality cannot be squared with a scheme to legitimize inequality by making select minorities a party to it. What is necessary is an uncompromising struggle to unite the working class across all racial, ethnic, and national lines to destroy inequality and the capitalist system that produces it.

While it appears from the oral arguments that the Supreme Court may decide to weaken affirmative action, the outcome is by no means certain. As the arguments made clear, significant divisions within the ruling class exist with respect to this issue. A decision in the *Fisher* case is expected before June.