US Supreme Court upholds affirmative action

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On Monday, the US Supreme Court issued a ruling upholding affirmative action in principle, while suggesting that racial preferences in college admissions be more narrowly circumscribed. The 7-1 decision in the case of *Fisher v. University of Texas* said that racial preferences could be used to achieve diversity in a university student body if "race-neutral" measures did not suffice.

The ruling remanded the case back to the lower appeals court and ordered it to reconsider its previous ruling, which had rejected the plaintiffs' suit and upheld the existing admissions policy of the university.

The reluctance of the court, including most of its extreme right-wing bloc, to overthrow affirmative action reflects the degree to which the politics of race and gender and programs based on racial preferences have become integral parts of the official ideology and political modus operandi of the American ruling class. At the same time, the court sought to balance retention of affirmative action with opposition from sections of the political establishment generally aligned with the Republican Party.

Associate Justice Anthony M. Kennedy wrote the majority opinion. Because the University of Texas may have used racial preferences instead of "race-neutral" measures, the Supreme Court sent the case back to the Fifth Circuit Court of Appeals for reexamination.

The case arose from the decision by the University of Texas at Austin to deny admission to two white applicants. They filed suit arguing that they suffered discrimination in the admissions process. Because they were denied admission when minority applicants with similar grades and test scores were accepted, the plaintiffs asserted that the university violated their rights under the Equal Protection Clause of the US Constitution.

The university's admissions policy was designed to conform to the legal requirements of the Supreme Court's last affirmative action decision, *Grutter v. Bollinger* (2003), which permitted the University of Michigan Law School to consider race only as a part of an assessment of an applicant's "overall contribution," and only using methods narrowly tailored to creating a diverse educational environment.

In the case decided on Monday, the admissions process consisted of two parts. The first, the Acadamic Index (AI), considered high school grade-point average and standardized test scores. The second took into account more subjective considerations, such as extracurricular activities and work experience, and socio-economic factors such as being raised by a single parent, coming from a non-English-speaking household, or having significant family responsibilities. This second part of the admissions process was called the Personal Achievement Index (PAI).

After conducting a study about the need for racial diversity and attempting to apply the Supreme Court decision in *Grutter*, the university in 2004 added the category of race to the list of "plus factors" in the PIA portion of the admissions process.

In 1997, the Texas legislature had enacted the "Top 10 Percent Law," which guaranteed admission to the prestigious Austin campus to the top ten percent of graduates in each high school in the state. Under this scheme, the top 10 percent of students from predominantly minority high schools could go on to Austin and help form the desired "critical mass" of minority students.

Because of the "Top 10 Percent Law," about 25 percent of freshmen who enrolled in recent years were Hispanic and 6 percent were black. Thirty-eight percent of Texans are Hispanic; 12 percent are black.

The plaintiffs challenged the use of race in the PAI on the grounds that a "race-neutral" method to create diversity, the "Top Ten Percent Law," already existed.

Justice Kennedy wrote that "the reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."

The lone dissenting Justice, Ruth Bader Ginsberg, essentially opposing any narrowing of the parameters of

affirmative action, said the lower court had applied the correct legal standard in assessing the admissions process. She voiced her preference, past and present, for methods of creating diversity that were overtly race-based.

Associate Justice Clarence Thomas, a member of the court's far-right bloc, wrote a lengthy concurring opinion urging the elimination of affirmative action altogether.

Oral arguments took place last October. Many commentators wrote after the oral argument that the Supreme Court was likely to overturn *Grutter* and end racial preferences in college admissions.

Instead, the justices took a great deal of time working out a compromise that would keep affirmative action in place. Seventy-three amicus briefs were filed by a plethora of corporations, non-profits, universities and the US military urging the court to uphold the legality of affirmative action.

Racial preferences in hiring, promotion and college admissions have become entrenched in US politics and the corporate world since President Richard Nixon expanded the policy in the aftermath of the urban rebellions and militant strikes of the late 1960s. He frankly described such policies as promoting a culture of "black capitalism."

The Democratic Party, as it faced the breakup of the old New Deal coalition between the trade unions, minorities and the liberal establishment, and as it abandoned any genuine program of progressive social reform, turned even more aggressively to the politics of race and gender, making it the cornerstone of its appeal to more privileged sections of the middle class, including blacks and other minorities.

Over the ensuing decades, behind a fig leaf of "diversity," the conditions of the broad mass of working people, black and white, have deteriorated while an ever-greater portion of the social wealth has been concentrated in the hands of the thin layers at the very top of the economic ladder. These include highly privileged layers of African Americans and other minorities who help administer the state and big business. Their ascent has coincided with a sharp worsening of the conditions of the broad mass of black workers and youth.

It is no accident that the same Supreme Court that has upheld brazen violations of the US Constitution, such as military tribunals and indefinite detention of alleged terrorists, and handed down one ruling after another undermining workers' legal protections and the ability of the people to sue corporations for malfeasance, has upheld affirmative action.

The anti-democratic character of affirmative action came through most clearly in the appellate brief submitted by the attorney for the University of Texas. Explaining that the school's interest included admitting more minority students from privileged backgrounds, the brief stated: "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."

Banning affirmative action "would forbid the University of Texas from considering such a student's race in a 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."

This open brief for special preferences for privileged youth is of a piece with retired Justice Sandra Day O'Connor's rationale for affirmative action as set forth in her majority opinion in the 2003 *Grutter* case involving the University of Michigan Law School. Arguing that the appearance of diversity was critical in legitimizing the political and corporate elite in the eyes of the pubic, she wrote:

"Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives… In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."