

# Divided Supreme Court rejects challenge to affirmative action

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On June 23, the US Supreme Court rejected a constitutional challenge to the University of Texas at Austin's affirmative action policy, by implication upholding similar policies in place at universities and businesses around the country.

The *Fisher v. University of Texas* case has its origins in a college application by Abigail Fisher, a white high school student, in 2008. Fisher's attorneys alleged that she was denied admission by reason of the university's affirmative action policy, violating her individual constitutional right to "equal protection," which prohibits discrimination based upon race.

The case was previously before the Supreme Court in 2013, resulting in a decision that affirmative action policies are potentially constitutional but must comply with strict legal standards. However, the Supreme Court did not decide at that time whether the University of Texas at Austin's affirmative action policy met those high standards. (See, "US Supreme Court upholds affirmative action")

The University of Texas at Austin does not use overt racial preferences, such as simply adding points to applications based on racial categories, which would be generally prohibited by prior Supreme Court decisions. However, the university does acknowledge that it has a "race-conscious" admissions policy that takes the applicant's race into account as part of a "holistic" review of the application, with the stated aim of achieving a "critical mass" of minority students in the student body.

Justice Kennedy delivered the Supreme Court's majority opinion in this term's case, dubbed "*Fisher II*," affirming a determination by the Fifth Circuit Court of Appeals that the university's "holistic" review process does meet the high standards imposed by the prior ruling in the case. Kennedy's opinion was joined by justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor.

Samuel Alito, joined by Clarence Thomas and Chief Justice John Roberts, dissented from the majority ruling. The death of extreme right-wing Justice Antonin Scalia in February reduced the number of justices from nine to eight. Meanwhile, former Obama administration solicitor general Elena Kagan recused herself from the case.

The protracted and embittered litigation over affirmative action—and the *Fisher* case in particular—highlights the

policy's central importance to the political, corporate and military establishment.

In the *Fisher* case, the Obama administration explicitly defended affirmative action on the grounds of military necessity, stating in its brief that "the Department of Defense (DoD) has concluded that a broadly diverse officer corps trained in a diverse environment is essential to military readiness," and "a pipeline of well-prepared and diverse officer candidates is therefore an urgent military priority."

The brief referred to the phenomenon of "fragging" during the Vietnam War, when "the disparity between the overwhelmingly white officer corps and the highly diverse enlisted ranks threatened the integrity and performance of the military."

"The absence of diversity in the officer corps also undermined the military's legitimacy," the Obama administration wrote, "by fueling popular perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders."

Another amicus brief was filed on behalf of 36 senior military leaders who defended affirmative action on the grounds that having black officers helped the military recruit from black neighborhoods.

A friend-of-court brief defending affirmative action was filed on behalf of "Fortune 100 and Other Leading American Businesses," which "collectively generate revenues in the trillions of dollars," including American Express, Apple, Microsoft, Exelon Corporation, Walmart, Viacom, Johnson & Johnson and many others.

In their brief, these companies emphasized the "value of diversity in higher education to America's largest companies," which translates into "increased sales revenue, more customers, greater market share, and greater relative profits."

President Obama praised the Supreme Court's decision in statements to reporters at the White House. "I'm pleased that the Supreme Court upheld the basic notion that diversity is an important value in our society," he said. "We are not a country that guarantees equal outcomes, but we do strive to provide an equal shot to everybody."

The reaction in the political and media establishment to the Supreme Court ruling was generally favorable, with the

decision being hailed as a “victory for civil rights.” Harvard law professor Laurence H. Tribe went so far as to declare, “No decision since *Brown v. Board of Education* [desegregating schools] has been as important as *Fisher* will prove to be in the long history of racial inclusion and educational diversity.”

The comparison of the controversy over affirmative action to the struggles against Jim Crow apartheid is grossly inappropriate. There is nothing in the University of Texas at Austin’s admissions policy that remotely resembles a genuine social reform. Indeed, in the decades since the widespread implementation of affirmative action, social inequality has skyrocketed, with conditions for minorities generally worsening with the entire working class, while obscene amounts of wealth have piled up at the heights of society.

Instead, the debate over affirmative action reflects differences within the political establishment about the best methods of containing social discontent.

What is for the moment the majority view in the ruling elite, represented generally by the Democratic Party and the nominally “liberal” wing of the Supreme Court, is that affirmative action is necessary to make the capitalist system appear more “legitimate,” providing the illusion of representation and equal opportunity by including more minorities in leadership positions.

Identity politics, including support for affirmative action, have for decades served as a cornerstone of the Democratic Party’s appeal to more privileged sections of the middle class. In the current iteration of the *Fisher* case, 67 friend-of-court briefs supported the university and its affirmative action policy, with only 16 against.

The word “legitimacy” is a key concept in the debate over affirmative action within the political establishment. The Supreme Court’s majority opinion last week expressly refers to the government’s “compelling interest” in “cultivating leaders with legitimacy in the eyes of the citizenry.” The same phrase, repeated from prior decisions, appears no less than three times in the published document.

In other words, in order to prevent anyone from drawing the conclusion that the social and political system in America is “illegitimate,” the sex or skin color of various leaders can be changed around to make the system appear more “legitimate.”

What is the current minority view, centered around the Republican Party and the far-right wing of the Supreme Court, is hostile to any concession to popular concerns about social inequality, as well as to anything that even remotely resembles a social reform.

When the case was argued before the Supreme Court in December, the late Justice Scalia had infamously suggested that black students should attend “less advanced” and “slower-track” schools where they would not be “pushed ahead in classes that are too fast for them.” (See, “US Supreme Court justice argues black students should attend inferior schools”)

During oral arguments, Scalia belligerently declared that he

was “not impressed by the fact that the University of Texas may have fewer” black students if certain affirmative action policies were discontinued. “Maybe it ought to have fewer,” he said.

The dissent of Roberts, Thomas and Alito, which Alito read from the bench, called the majority’s opinion “affirmative action gone berserk.”

Alito’s dissent, couched in terms of defending “race neutrality,” pointed to numerous inconsistencies in the majority’s position. Alito emphasized the fact that the university’s affirmative action policy does not necessarily benefit poorer or disadvantaged students, instead favoring minority students from already privileged backgrounds, top high schools and wealthier families. Alito highlighted the university’s own revealing argument in 2013 that affirmative action was necessary to benefit the “African-American or Hispanic child of successful professionals in Dallas.”

In other words, affirmative action policies are being pursued that dispense entirely with the notion of assisting students from poorer backgrounds.

On the same day that the Supreme Court decided the *Fisher* case, it held by a vote of 5-3 in the case of *Birchfield v. North Dakota* that police may require that drivers submit to a breathalyzer test without a warrant, while still requiring a warrant for blood tests.

“This court has never said that mere convenience in gathering evidence justifies an exception to the warrant requirement,” Justice Sotomayor wrote in dissent. “I fear that if the court continues down this road, the Fourth Amendment’s warrant requirement will become nothing more than a suggestion.”

The Supreme Court has nearly completed its current term, and is in the process of issuing decisions in the last remaining cases. A decision is expected today in a lawsuit challenging a 2013 Texas law that imposed sweeping restrictions designed to make it impossible for women to obtain abortions. (See, “Texas enacts sweeping abortion restrictions”)



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