US Supreme Court hears oral arguments in affirmative action case

Eric London, Tom Carter
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The United States Supreme Court heard oral arguments October 15 in a legal challenge to Michigan's voter-approved ban on racial preferences in college admissions, called "Proposal 2." The case, *Schuette v. Coalition to Defend Affirmative Action*, is the first to consider the constitutionality under federal law of a state ban on affirmative action.

Proposal 2, which was passed by voters in the 2006 general election by a margin of 58 percent to 42 percent, amended the state constitution to prevent Michigan public colleges and universities from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin" in college admissions.

The day after the passage of Proposal 2, a series of groups brought suit against the law, claiming the amendment violated the equal protection clause of the 14th Amendment to the US Constitution. The suits were eventually drawn together under the umbrella of the Coalition to Defend Affirmative Action.

Litigants include presidents and governing boards of state universities, students and professors at state universities, the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), and the Detroit-based organization By Any Means Necessary (BAMN).

During the arguments last Tuesday, Michigan Solicitor General John Bursch acknowledged that "diversity on campus is a goal that should be pursued," but characterized Proposal 2 as an attempt to "move past the day when we are always focused on race." Bursch argued that the constitutional right to "equal protection of the laws" is not violated by the abolition of racial preferences.

This line was taken up by Chief Justice John Roberts. "You could say that the whole point of something like the equal protection clause is to take race off the table," he said.

In their statements during oral argument, Supreme Court Justices Sonia Sotomayor and Ruth Bader Ginsburg clearly favored striking down Proposal 2. Roberts and Justices Antonin Scalia and Clarence Thomas are considered likely to uphold it. The positions of Justices Steven Breyer, Samuel Alito and Anthony Kennedy are less certain. Elena Kagan recused herself, leaving only eight justices to decide the case.

Schuette case is the latest episode in a protracted legal battle on the question of affirmative action and racial preferences. In a series of decisions issued over the last decade, including in *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas* (2013), the Supreme Court has generally upheld racial preference schemes with certain limited restrictions.

The litigation over affirmative action reflects divisions within the ruling class over the policy of racial preferences. For some four decades, the prevailing consensus within the corporate and political elite has been in favor of using racial preferences for a number of interrelated reasons: to integrate into the political and corporate establishment a thin layer of ethnic minorities so as to stabilize capitalist rule and give the appearance of "democracy" and "diversity," to promote various forms of identity politics and obscure the basic class divisions in society, and to encourage divisions within the working class while carrying out an attack on the working population as a whole.

Affirmative action and identity politics in general have been embraced by the erstwhile liberal establishment and its middle-class ex-radical appendages as the cornerstone of a political orientation that has moved ever more sharply to the right and in opposition to the interests of working people. The living standards of the vast majority of African Americans and other minorities, along with the working class as a whole, have plummeted, while a highly privileged layer of minorities has obtained positions of power and affluence.

President Richard Nixon was amongst the first politicians to call for the cultivation of a layer of "black capitalists" in the late 1960s and early 1970s. The embrace of this basic orientation by the official civil rights organizations represented a marked departure from the program of social and political equality that had animated the civil rights movement of the 1950s and 1960s.

Former Supreme Court Justice Sandra Day O'Connor, writing for the Supreme Court's majority in *Grutter v. Bollinger*, which upheld an affirmative action program at the University of Michigan, acknowledged that the purpose of affirmative action is not social equality, but the nurturing 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 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."

The adversaries of affirmative action on the Supreme Court and in the political establishment oppose it not from the standpoint of social equality, but from the right. This faction, traditionally more aligned with the Republican Party, associates affirmative action with the liberal social reforms of the 1930s and 1960s (Social Security, Medicare, Medicaid, etc.) and sees its abolition as part of the drive to reverse these reforms.

Under Obama, this goal has been embraced by the Democratic Party partisans of affirmative action as well, leaving the differences between the two factions on affirmative action largely a tactical dispute on how best to prosecute the anti-working class offensive.

From a legal standpoint, because the cultivation of a "diverse elite" is not a democratic program, its supporters tie themselves into knots in their attempts to reconcile affirmative action with the democratic language of the US Constitution.

The text of section one of the 14th Amendment, ratified in the aftermath of the Civil War and Lincoln's assassination, concludes: "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The 14th Amendment was not just designed to permanently break up the Southern slavocracy, and with it the system of separate classes of people based on race. At the time, the 14th Amendment was broadly conceived as a measure to place the country on more sound democratic foundations. Instead of being framed in racial categories or granting rights to particular groups, the 14th Amendment expressly applies to "any person." In the 14th Amendment, the word "equal" appears for the first time in any US Constitutional amendment.

Before *Schuette* reached the Supreme Court, the Sixth Circuit Court of Appeals (an appeals court directly beneath the Supreme Court) struck down Proposal 2 on the grounds that it violated the equal protection clause of the 14th Amendment. The judges argued that the proposal creates a "structural burden" on African American students that "undermines the equal protection clause's guarantee that all citizens ought to have equal access to the tools of political change."

In other words, a constitutional amendment that prohibits racial preferences violates the 14th Amendment's implicit constitutional prohibition of racial preferences (!).

Something of the anti-democratic and fundamentally reactionary content of affirmative action was on display in the oral argument of BAMN leader Shanta Driver, who argued that the purpose of the equal protection clause "is to protect minority rights against a white majority."

BAMN's legal brief denounced white Michigan voters for setting up a "model for how to create a new, constitutionally-ratified Jim Crow." The brief described the Michigan proposition as an attempt to protect the white race against the "greatest demographic change the nation has ever faced."

"We are going back to the re-segregation of those schools because of the elimination of affirmative action," Driver declared during oral arguments.

These arguments gave the right-wing justices, including arch-reactionary Antonin Scalia, an opportunity to posture as defenders of the history and purpose of the race-neutral 14th Amendment.

The period following the ratification of the 14th Amendment saw access to public education greatly expanded, both amongst freed slaves and poor and working class whites in the North and the South. At the time, free public education for all was seen by abolitionists and Radical Republicans as a necessary prerequisite for the furtherance of equality.

During the present period, the entire political establishment—including the opponents and supporters of affirmative action—are undermining public education and slashing programs that facilitate access to libraries, universities and culture. In this context, affirmative action establishes a framework within which students compete based on race for limited and diminishing slots in institutions that should be free and open to all.

Michigan has overseen cuts of over $1 billion to public colleges and universities in the past decade, and the state's public universities have seen exorbitant tuition increases that serve to limit working class access to higher education and burden students with debt. Tuition has increased by 218 percent at the University of Michigan since 2000, Michigan State University's tuition has increased 282 percent in the same period, and the figure at Wayne State University has increased by 232 percent.

In contrast to the racialist politics offered up by the supporters of affirmative action, a genuine struggle for social equality is incompatible with attempts to legitimize inequality and poverty by fostering a "diverse elite." What is needed is the building of a mass movement to unite the working class across all racial, national and ethnic lines on the basis of socialist policies, including the provision of free, quality education for all.