Supreme Court reinstates Michigan ban on affirmative action

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The Supreme Court, by a 6-2 vote, reinstated Michigan's ban on racial preferences Monday. The eight justices—Elena Kagan did not participate in the case—wrote five separate opinions, none commanding majority support.

Elimination of all vestiges of affirmative action has been a goal of the extreme right wing for many years. However, there are powerful corporate and military forces within the ruling elite with an active interest in maintaining affirmative action. Racial and identity politics, supported by more privileged sections of the upper middle class, has become an integral component of bourgeois political rule in the United States.

More than a decade ago, in *Grutter v. Bollinger* (2003), the Supreme Court voted 5-4 to uphold the constitutionality of racial preferences in the admissions process at the University of Michigan School of Law to promote "diversity" in student bodies.

The majority opinion, authored by former Justice Sandra Day O'Connor, argued that, "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." Thus, "major American businesses" must have "exposure to widely diverse people, cultures, ideas and viewpoints," and, importantly, the U.S. military requires "a highly qualified, racially diverse officer corps...to fulfill its principal mission."

Some commentators predicted that, given O'Connor's retirement from the Supreme Court, and its shift to the right under the leadership of Chief Justice John Roberts, a ruling would be forthcoming holding that all racial preferences violate the Equal Protection Clause of the Fourteenth Amendment. At the end of last term, however, the Supreme Court ruled 7-1 in *Fisher v. University of Texas* that racial preferences can be used to achieve diversity in a university student body.

Meanwhile, *Grutter* Michigan decision Proposal 2, a ballot proposition to amend the state's constitution by adding a clause that prevents all levels of Michigan government, including its public colleges and universities, from "granting preferential treatment" based on "race, sex, color, ethnicity, or national origin" in admissions, employment or contracts.

Proposal 2 passed in 2006 by a 58 to 42 percent margin.

A coalition of affirmative action proponents—headed by the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN)—filed suit to prevent Proposition 2 from taking effect. The trial court denied BAMN's request for an injunction, but the Sixth Circuit Court of Appeals reversed this decision.

The Supreme Court reversed the Sixth Circuit decision Tuesday in *Schuette v. Coalition to Defend Affirmative Action*, thus reinstating the original trial court ruling that upholds Proposal 2.

Justice Anthony Kennedy wrote the Supreme Court's plurality opinion, joined by Roberts and Justice Samuel Alito. Posturing as a defender of democratic rights, Kennedy wrote: "By approving Proposal 2…the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power," adding, "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."

Although Kennedy affirmed that "consideration of race in admissions is permissible"—in other words, affirmative action can continue—he criticized two Supreme Court precedents striking down reactionary and racist voter-enacted laws on equal protection grounds. The first, *Hunter v. Erickson* (1969), invalidated a voter initiative in response to a municipal ordinance that prohibited racial discrimination in housing. The second, *Washington v. Seattle School District* (1982), overturned a voter initiative that directed a school district to stop busing

students to eliminate racial segregation in primary and secondary schools.

Kennedy's narrow reading of these precedents opens the door to measures such as voter identification and "English only" laws aimed at suppressing the democratic rights of minority groups.

Justice Antonin Scalia penned a concurring opinion, joined by Justice Clarence Thomas—himself a beneficiary of affirmative action—arguing that Kennedy's plurality ruling did not go far enough to rebuke the Supreme Court's "sorry line" of equal-protection precedents that "involves judges in the dirty business of dividing the Nation into racial blocs."

Scalia and Thomas would eliminate altogether prohibitions against laws with "a disparate racial impact…regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court."

Stephen Breyer wrote separately that "the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution." Proposal 2 should be upheld, according to Breyer, because "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving these differences."

Justice Sonia Sotomayor filed an unusually lengthy 58-page dissent, joined by Ruth Bader Ginsburg. Sotomayor did not assert that the absence of affirmative action policies itself violated the Equal Protection Clause of the Fourteenth Amendment. Instead, she argued that a constitutional provision (like Proposal 2) that *prohibits* states or institutions from establishing a preferential admissions process based on race violates the Equal Protection Clause.

"The majority of the Michigan electorate changed the basic rules of the political process...in a manner that uniquely disadvantaged racial minorities," she wrote, thus suppressing "the minority's right to participate on equal terms in the political process." Proposal 2, she argued, now establishes a different political process for creating racial preferences in admissions (requiring a change in the Constitution) than for creating other preferences in admissions.

"Race matters," according to Sotomayor, "because of persistent racial inequality in society," and "for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away."

In essence, Sotomayor sought to place bans on affirmative action policies in the same category as racist laws that disadvantage certain minorities from equal participation in the political process or enforce segregation.

This is a fundamentally antidemocratic argument that has nothing to do with upholding the interests of any section of the working class. Instead, it is aimed at creating a legal amalgam between affirmative action—which benefits a small layer of the more privileged sections of minority populations—with measures that mandate racial equality and nondiscrimination.

Indeed, Sotomayor's own data illustrates how racial preferences in college admissions benefit only a small number of people, primarily minority applicants from middle- and upper-class backgrounds, and does so by denying admission to an equal number of applicants from groups not receiving preferential treatment.

The whole framework of the conflict within the different factions of the ruling class over racial preference policies is reactionary. All factions accept conditions in which access to decent public education is denied to the vast majority of the population of all races. Within this framework, the debate is over what policies best serve the interests of the ruling class, namely whether or not race should be considered to "ensure diversity."

It is notable that there is a significant overlap between the most ardent supporters of affirmative action and the supporters of the Obama administration's assault on the public school system, which has had disastrous consequences for working-class youth, including millions of minority youth.

A progressive solution to the crisis in public education must begin by rejecting this entire framework, and upholding the right of *all young people, of all races*, to high-quality schooling, including primary, secondary and higher education. Only the socialist solution, involving a massive infusion of social resources into public education as part of an overall restructuring of society on the basis of social need, will benefit the broad masses of minority youth, and the working class as a whole.