# Minority Rules

## How will the Supreme Court rule in a crucial affirmative-action case?

BY DEBRA S. KATZ AND ABIGAIL COOK-MACK

ON OCT. 15, THE SUPREME Court heard arguments in the next big case on affirmative action: Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN). The case will decide the constitutionality of a Michigan constitutional amendment that banned affirmative-action programs that give "preferential treatment" in government hiring, contracting and higher education.

Michigan voters in 2006 had approved the amendment, known as Proposal 2, which essentially prohibited Michigan's state universities from including race and sex as factors in admission decisions, as well as stopping the state government from using "preferential" hiring. One of the main contributors to the campaign for Proposal 2—deceptively named the American Civil Rights Institute (ACRI)—has sought implementation of such amendments nationwide, notably California's Proposition 209, which prohibits the use of race or sex in public employment, public contracting and public education.

The ban's impact on Michigan's public universities has been staggering. The percentage of black, Latino and Native American student admissions in the University of Michigan's undergraduate program has fallen by a third. Admission rates have fallen even more precipitously in law and medical schools—by 40 to 50 percent in the former and 70 percent in the latter.

The value of diversity that Michigan's schools have lost cannot be overstated. As the Supreme Court acknowledged in the landmark 2003 affirmative-action case Grutter v. Bollinger, "[D]iversity promotes learning outcomes and 'better prepares students for an increasingly diverse workforce and society.'"

Affirmative action is critical to ensuring that schools achieve these crucial goals, as well as build a future that is more just and equitable for individuals who, because of their race and ethnicity, have been denied the promise of full participation in society. Prohibiting affirmative action, whether judicially or legislatively, poses a dangerous prospect for the future of our country.

BAMN, the coalition opposing Proposal 2, challenged its constitutionality. Primarily an organization of school and community leaders, BAMN argues that Proposal 2 strips minority groups of political power, removing their ability to encourage university officials to consider race as a factor in admissions. While alumni may lobby for legacy admission programs and university donors may push for preferential admission of their children, students who might benefit from affirmative action are denied the right to urge public universities to consider race, gender, ethnicity or other such characteristics in their admissions decisions. Thus, BAMN contends, Proposal 2 violates the 14th Amendment's Equal Protection Clause, which, as the court noted in a previous case, guarantees equal access to the political process and prohibits "a political structure that… place[s] special burdens on the ability of minority groups to achieve beneficial legislation."

The 6th U.S. Circuit Court of Appeals agreed, declaring the amendment unconstitutional because "*all* citizens ought to have equal access to the tools of political change."


BAMN and its supporters march on Washington, D.C., in October.

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Its ruling is the opposite of that reached in a similar 1997 case by the 9th U.S. Circuit Court of Appeals. In that case, the court found that California's Proposition 209 did not violate the Constitution, holding that "impediments to preferential treatment do not deny equal protection." Public schools in California are now unable to employ affirmative action, leaving the state universities far less diverse than they should be and denying crucial educational opportunities to racial minorities.

The Supreme Court will now decide which of these two views is correct. Unfortunately, if recent Supreme Court case decisions are any indication, affirmative action may be in serious trouble.

Earlier this year, the court gave a possible sign of how it looks at affirmative action in its Fisher v. University of Texas at Austin (UT) decision. That case involved a white woman applicant who was denied admission to UT and then challenged its affirmative-action program. She maintained that the school's admissions policy violated the 14th Amendment's guarantee of equal protection by allowing consideration of a student's race, among other factors.

Although the court's decision was a narrow one—it did not, as expected, prohibit using race as a factor in admission decisions—it wasn't one to celebrate. Of particular concern, its opinion makes clear that there is dissension within the court over whether equal-protection principles are consistent with affirmative efforts to achieve diversity. Indeed, Justice Anthony Kennedy pointed out that the court's holding was limited because Fisher's lawyers did not ask it to consider the broader question of whether diversity in education remains a compelling government interest.

The court instructed lower courts to consider whether universities can achieve "sufficient diversity without using racial classifications." Consequently, universities now must prove that their affirmative-action programs don't consider race in admissions when "workable race-neutral alternatives" would suffice—a high bar that will undoubtedly chill efforts to insure diverse student bodies.

The Fisher decision, while not sweeping, suggests that a majority of the U.S. Supreme Court does not view affirmative action as essential. And court observers do not think it likely that the justices will be convinced that the 14th Amendment makes unconstitutional those laws outlawing affirmative action. So we may be in store for a decision that both overturns the 6th Circuit decision against Proposal 2 and further opens the door to copycat amendments across the country.

Such a decision could have implications beyond affirmative action. At a time when conservatives have successfully promoted state voter initiatives that strip women of their reproductive rights, limit the ability of labor unions to raise campaign funds or ban same-day voter registration, the stakes of this decision are extraordinarily high. As explained by Erwin Chemerinsky, dean of the School of Law at the University of California, Irvine, and a top expert in constitutional law, civil rights and civil liberties, "This case is about the ability of those opposed to civil rights and women's rights to use the ballot box to destroy gains made by historically disadvantaged communities. It will decide to what extent state constitutional amendments can be used to prohibit permissible affirmative measures."

The court should protect citizens who find themselves in the minority. If it does not, we can expect to see the initiative process put to pernicious and troubling uses for years to come. ■

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