Supreme Court green-lights Michigan ban on affirmative action

By Michael Doyle

April 22, 2014

WASHINGTON — The Supreme Court on Tuesday accorded voters more leeway to challenge affirmative action, as justices upheld a Michigan measure that bans preferential treatment in college admissions based on race or ethnicity.

In a highly anticipated but deeply fractured decision, the court said it lacked the authority to interfere with the political decision made by Michigan voters in 2006 when they amended their state's constitution.

"Courts may not dis-empower the voters from choosing which path to follow," Justice Anthony Kennedy wrote. "The Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power."

The court's ruling effectively gives the green light to voters in other states who may want to ban affirmative action. It does not force such a ban, though, and leaves intact past rulings that race may be considered in college admissions. In essence, the ruling lets the affirmative action war proceed on individual state battlefronts.

"This case didn't involve the fraught question of whether states can pursue race-conscious measures," said Ilya Shapiro, senior fellow at the libertarian Cato Institute. "Instead, this case was about the democratic process and whether voters can rein in the powers of their state government."

Six justices agreed with the court's conclusion that sustains the Michigan measure.

Only Chief Justice John Roberts Jr. and Justice Samuel Alito, though, fully agreed with Kennedy's reasoning, restricting the potential reach of the plurality decision. Kennedy himself, moreover, emphasized the limits of the ruling.

"It is important to note what this case is not about," Kennedy stressed. "It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education."

Instead, Kennedy said, the decision is about letting states proceed with "innovation and experimentation" that encourages "greater citizen involvement in democratic processes."

Conservative Justices Clarence Thomas and Antonin Scalia joined in a separate concurring opinion that argued against affirmative action itself. Liberal Justice Stephen Breyer, an affirmative action supporter, wrote his own concurring opinion offering other reasons to support Michigan voters.

Liberal Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented.

"We are fortunate to live in a democratic society," Sotomayor wrote. "But without checks, democratically approved legislation can oppress minority groups."

Affirmative action advocates likewise decried the ruling, with Kary L. Moss, executive director of the American Civil Liberties Union of Michigan, saying it "will result in Michigan continuing to lose students and faculty of color to states that have the flexibility to consider the whole person before them."

Total enrollment of African-American students at the flagship University of Michigan campus fell from 7 percent to 4.7 percent between 2006 and 2012, university records show. Latino student enrollment at the school fell from 4.9 percent to 4.3 percent of the total during the same period.

During the 2005-2006 school year, the University of Michigan enrolled 1,833 African-American students and 1,214 students identified as Hispanic. This school year, undergraduate enrollment includes 1,226 African-American students and 1,164 Latino students.

The falloff in minority student enrollment occurred after Michigan voters in 2006 handily approved an amendment to the state's constitution that prohibits the granting of preferential treatment in public education, government contracting and public employment based on race, sex, ethnicity or national origin. White voters largely supported the measure, while African-American voters overwhelmingly opposed it, election surveys showed.

"The people of Michigan concluded that not having affirmative action in higher education was the best policy for the state," Michigan Attorney General Bill Schuette argued in a legal brief. "Nothing in the Constitution bars the people of Michigan from making that choice."

The Michigan language resembles that of California's Proposition 209, adopted in 1996. Key supporters of the California measure, including former University of California Regent Ward Connerly, championed the Michigan measure as well.

While Georgia and four other states joined a brief supporting the Michigan ballot measure, California Attorney General Kamala Harris rallied five other states and the District of Columbia to a brief supporting the benefits of diversity. Separately, University of California officials argued that the state's Prop. 209 banning race-based admissions had slashed minority student enrollment.

At the flagship University of California, Berkeley, campus, 1,065 African-American undergraduates were enrolled in the 1999-2000 school year. These included some students admitted prior to Prop. 209 taking effect. During the 2012-2013 school year, only 628 African-American students were enrolled.

The court's plurality decision Monday, though, largely sidestepped the costs and benefits of affirmative action, focusing instead on the political process.

"Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues," Kennedy wrote.

Sotomayor countered that the state's constitutional amendment put affirmative action supporters at a unique disadvantage. While those proposing other changes in Michigan college admissions policies, such as more preference to athletes or children of alumni, can lobby the university trustees, affirmative action advocates must re-amend the state's constitution.

Justice Elena Kagan recused herself from the Michigan case because of her past work as the Obama administration's solicitor general.

The decision returned the court to a perennial conflict that justices effectively ducked last term. The court in June avoided a sweeping decision in a case challenging University of Texas admissions procedures, as the justices opted to send the matter back to a lower appellate court for further review.

The Michigan case further underscored significant changes in the court itself.

In 2003, then-Justice Sandra Day O'Connor wrote a 5-4 decision upholding the consideration of race in University of Michigan Law School admissions. O'Connor has since retired, replaced by Alito. The conservative chief justice who dissented from the 2003 decision, William Rehnquist, has since been replaced by Roberts.