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U.S. Supreme Court favors ban on race priority

Michigan admissions measure upheld, but for different reasons

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By Eleanor Chute

The U.S. Supreme Court has determined that Michigan voters had a right to approve a state constitutional amendment banning the use of race-conscious preferences as part of the admissions process for state universities.

While the justices agreed 6-2 with the decision issued Tuesday, they did not necessarily agree on the reasons.

The opinion delivered with the judgment of the court was written by Justice Anthony Kennedy, who was joined by two other justices, including Chief Justice John Roberts, who also filed a concurring opinion, and Justice Samuel Alito. Justice Antonin Scalia also filed a concurring opinion, joined by Justice Clarence Thomas. Another concurring opinion was filed by Justice Stephen Breyer.

A dissenting opinion was filed by Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg.

Justice Elena Kagan recused herself.

Ken Gormley, dean and professor at the Duquesne University School of Law, said, "I don't think this changes the landscape very much in the area of racial preferences under the constitution. A plurality decision has less weight, by definition, because there is really not a majority of the court agreeing," he said.

Attorney Olabisi Okubadejo, who is with the Baltimore office of a law firm that represents colleges and universities on civil rights compliance issues, including some in Pennsylvania, said, "It's very clear where the court has come out. The court has said the ban enacted by the voters is OK. What is less clear is exactly why it's OK under the constitution, and it's also not clear what this will mean for future cases."

Mr. Gormley sees some commonality: "The theme that runs throughout it is this is really a matter that must be worked out through the political process."

The decision does not have an immediate impact on Pennsylvania, where there is no such constitutional amendment.

The court's previous rulings allow race to be considered in limited circumstances, including a case decided last summer involving Abigail Noel Fisher and the University of Texas at Austin and a 2003 case involving Barbara Grutter and the University of Michigan at Ann Arbor. The Grutter case permits the use of race as one of many "plus factors" in evaluating an individual applicant.

After that decision, Michigan voters in 2006 approved Proposal 2, which became the constitutional amendment that is the subject of the latest decision.

In his opinion, Justice Kennedy wrote, "The question here concerns not the permissibility of race-conscious admissions policies under the constitution but whether, and in what manner, voters in the states may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."

In her dissenting opinion, Justice Ginsburg stated, "Without checks, democratically approved legislation can oppress minority groups."

Justice Sotomayor noted that, prior to passage of the constitutional amendment, each institution's governing board, nominated by political parties and elected by citizens in statewide elections, could decide the policy. "After more than a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity."

She said the high court's latest affirmative action decision "eviscerates an important strand of our equal protection jurisprudence."

The case is known as Schuette v. BAMN, which is the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary. Bill Schuette is the attorney general of Michigan.

"This case is ultimately about whether students of color in Michigan are allowed to compete on the same playing field as all other students. [On Tuesday], the Supreme Court said they are not," said Mark Rosenbaum of the American Civil Liberties Union, which was also a party to the case.

In a news release, BAMN national chairwoman Shanta Driver called the high court decision "racist."

"This decision," she said, "allows a white majority electorate, state legislature, state courts and other political and legal entities to pass laws that create inequality in political rights and, most immediately, access to higher education."

Others issued news releases in favor of the decision.

Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute think tank, said: "Indeed, this case was so easy precisely because it didn't involve the fraught question of whether states can pursue race-conscious measures in order to achieve (some mythical) diversity. Instead, this case was about the democratic process, and whether voters can rein in the powers of state government."