Written by **Bob Adelmann** on April 24, 2014

Supreme Court Upholds Michigan's Ban on Affirmative Action

On Tuesday, April 22, the Supreme Court ruled that Michigan voters who overwhelmingly approved an amendment to their state's constitution back in 2006 banning affirmative action — called "affirmative discrimination" by some — were free to do so as there was no part of the U.S. Constitution that prohibited them from doing so. Its opinion was clear: "A ban on affirmative action through a state constitutional amendment is permissible under the Constitution of the United States."

In simple terms, the Supreme Court ruled that a state may amend its constitution without interference by the federal government. That is a major breakthrough by the Court, which decided to keep its hands off an essentially state matter by a 6-2 vote, with Justice Elena Kagan abstaining, recusing herself from the case due to a conflict of interest. However, the plurality opinion penned by Justice Anthony Kennedy had just enough wiggle room in it to ensure that the issue is far from settled:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters….
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> The [Michigan] electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this nation seeks to put behind it.
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> [But those same] voters might likewise consider, after debate and reflection, that programs designed to increase diversity — consistent with the Constitution — are a necessary part of progress to transcend the stigma of past racism.

Yes, voters might change their minds. If they do they are free to amend their state constitution, once again without federal interference in the matter.

But federal interference in essentially state matters has been going on ever since 1935 with the passage of the Wagner Act, which supposedly eliminated discrimination in the workplace. But it wasn't until President Kennedy expanded the already unconstitutional infringement, by executive order no less, to prohibit discrimination "against any employee or applicant for employment because of race, creed, color or national origin." He followed up that order with another that expanded it still further, declaring that it was the "policy of the United States to encourage by affirmative action the elimination of discrimination in employment." By that executive order, all recipients of federal funds such as grants, loans, and other forms of federal assistance to state and local governments were forced to comply with

his administration's newly announced executive directives.

Lawsuits have kept lawyers on both sides of the issue busy for two generations, often resulting in mixed messages, conclusions, and results. For instance, the Supreme Court ruled that undergraduate public schools in Michigan were free to use affirmative action in giving extra credit for color to its applicants, but a point system denoting just how much credit color was to be counted, instituted by the University of Michigan Law School, was not.

In 2006 Michigan voters had had enough and passed, by 58 percent, an amendment to the state's constitution that bars publicly-funded colleges from granting "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin." Lawsuits resulted in lower courts' decisions declaring the amendment unconstitutional until it was heard by the Supreme Court last October. Its decision on Tuesday was greeted with approbation and scorn from the usual suspects. Michigan's Attorney General Bill Schuette rejoiced: "Our state Constitution requires equal treatment in college admissions, because it is fundamentally wrong to treat people differently based on the color of their skin. A majority of Michigan voters embraced the ideal of equal treatment in 2006, and today their decision was affirmed."

The two dissenting Supreme Court justices were horrified that such an important piece of progressive law to force people to become equal was decimated. In a classic case of dissembling about such use of force to accomplish political ends, Justice Sonia Sotomayor claimed:

> A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities.…
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> Colleges and universities must be free to prioritize the goal of diversity. They must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible.

The discerning reader will note immediately how "must be free" resonates in the mind of the liberal justice. Affirmative action is too important for the Michigan electorate to decide, on its own, just how public school administrations will accept their students. Liberals know better than the electorate! How dare those rubes question us? Those schools must be forced to be free!

Sotomayor has said, "I am the perfect affirmative action baby. I am Puerto Rican, born and raised in the south Bronx. My test scores were not comparable to my colleagues at Princeton and Yale … [using] traditional numbers [from test scores] it would have been highly questionable if I would have been accepted." For that reason alone Sotomayor should have recused herself as well.

Nevertheless reason and common sense prevailed in the decision. Justice Antonin Scalia explained:

> Any law expressly requiring state actors to afford all persons equal protection of the law … does not — cannot — deny "to any person … equal protection of the laws," regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.
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> As Justice Harlan observed over a century ago, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.

The decision sets an important precedent for other citizens in other states seeking a way out from

under onerous and equally unconstitutional federal mandates, orders, and regulations.

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