

JUSTICE JOHN PAUL STEVENS (Ret.)

The Economic Club of Southwestern Michigan

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Michigan and the Supreme Court

This evening I shall say a few words about things that I learned in Michigan, about Michigan law, and about some important Supreme Court cases that arose in Michigan.

My parents had a summer home in Lakeside on the shore of Lake Michigan, where I learned to swim, to play tennis and golf, and because you could then get a driver's license at age 14, I learned to drive a car. And a good many years later I learned to fly a single-engine plane at the Oselka Airport near Three Oaks. Among the other benefits of my summers in Berrien County were a love of fresh peaches, fresh corn and beautiful sunsets. My close friends from Michigan included Phil Upton, a high school classmate who would

be your Congressman's uncle if he had survived a tragic sailing accident on the St. Joe River in 1936. I later became a fraternity brother of Phil's older brother Bob, who was one of the best-liked guys in the Class of 1938 at the University of Chicago.

Turning to the law, I recently learned that the reason Michigan does not have a death penalty is the same as the reason that I have given to support my proposal that the Constitution be amended to abolish capital punishment. The state senator who introduced the bill abolishing capital punishment had participated in an execution of a convicted murderer who later turned out to have been innocent. We now have much more evidence than the Michigan Legislature had in 1864 that our system of justice is not infallible; for that reason every execution poses an unacceptable risk of injustice that cannot be undone.

In 1992 the Supreme Court decided a case challenging the constitutionality of a provision in the solid waste disposal program in Saint Clair County, Michigan, that prohibited private landfill operators from accepting any solid waste that did not originate in the County. I was assigned the task of writing the Court's majority opinion invalidating the county ordinance. Like much of my work at the Court, that task was a learning experience. As a matter of law, I learned that the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site could be viewed either as "sales" of garbage or as "purchases" of transportation and disposal services, but in either case they had an interstate character. As a matter of fact, I learned that the operation of landfills was sufficiently profitable to motivate some businesses to abandon other uses of their property. And specifically, it was while I was working on that opinion that I learned that the Oselka Airport, in Three Oaks, Michigan, where I had

learned to fly a single-engine Cessna 172, had become a garbage dump.

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In the city of Jackson, Michigan the first black teacher in the city's public schools was hired in 1954. Fifteen years later, in 1969, only 3.9% of the public school teachers were African American. In that year the Michigan Civil Rights Commission found that the School Board had engaged in various discriminatory practices, including racial discrimination in the hiring of teachers. As a part of its settlement with the State Commission, the School Board took affirmative action to employ more black teachers and in two years the percentage of blacks increased to 8.8%. In 1971, however, economic conditions required the Board to discharge a number of teachers, and, following settled practice, the teachers with the least seniority were the first to be laid off, which meant that almost all

of the newly hired blacks were fired. Thereafter, the School Board recognized that a freeze on the discharge of minority teachers might be necessary to preserve the benefits of the affirmative action program, but the teachers' union sought to retain the "last hired first fired" rule. Ultimately the parties reached a compromise that prohibited any minority discharges that would reduce their percentage of teachers employed at the time of the layoff. That compromise was accepted by an overwhelming majority of the teachers in six successive collective bargaining agreements.

In 1982, however, when economic conditions once again forced a significant layoff, Wendy Wygant and another recently hired white teacher lost their jobs as a result of the compromise. They brought suit in Federal District Court, alleging that their discharges violated the Equal Protection Clause of the Constitution. The District Court and the Court of Appeals rejected their claims, holding that the racial

preferences granted by the School Board need not be justified by a finding of prior discrimination but were permissible as an attempt to remedy societal discrimination by providing "role models" for minority school children.

In 1985, the Supreme Court granted the white teachers' petition for certiorari. During the week before the oral argument of the case, I had a meeting with my good friend Lewis Powell in his office to discuss another matter. As I was leaving, I made the observation that at long last during the following week we were going to hear an easy case involving an affirmative action issue. He agreed with my assessment of the difficulty of the case, but neither of us realized that we did not agree on how the case should be decided. Indeed, neither of us expected the case to produce so many opinions. As the Headnote to the case explained:

"On certiorari, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that the layoffs were in violation of the equal protection clause. It was also agreed by five members of the court that the equal protection clause does not require a public employer's voluntary affirmative action plan to be preceded by a formal finding that the employer has committed discriminatory acts in the past."

There were three opinions supporting the result: Justice Powell's lead opinion, joined by Chief Justice Burger and Justice Rehnquist, and separate opinions by Justice White and Justice O'Connor: there were two dissents - an opinion by Justice Marshall, joined by Justices Brennan and Blackmun, and my solo dissent. In his opinion Justice Powell correctly noted that in its earlier cases "the Court has insisted upon some showing of prior discrimination by the governmental unit

involved before allowing limited use of racial classifications in order to remedy such discrimination." 476 U.S., at 274. In his dissent, Justice Marshall argued that the record contained sufficient evidence of prior discrimination to justify accepting the compromise between the Union and the School Board, and that a remand for further evidence would make it possible to develop an adequate record that would fully justify a race-based remedy. My dissent took a fundamentally different approach. I argued that "it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of entitlement to jobs as a remedy for sins that were committed in the past, I believe we should first ask whether the Board's action advances the public interest in educating children for the future." I then

explained why I believed that an integrated faculty would benefit the entire student body rather than merely providing role models for minority students.

Seventeen years after the Court's decision in the *Wygant* case, Justice O'Connor wrote the Court's opinion in another five-to-four decision involving another affirmative action program in a Michigan educational institution. In her opinion upholding the affirmative action program in the University of Michigan Law School, after acknowledging that "some language" in prior opinions "might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action" (539 U.S., at 328), she explained why student body diversity in a law school is a compelling state interest. In that explanation she relied on a friend-of-the-court brief filed by two Washington lawyers, Carter Philips and Virginia Seitz, on behalf of high-ranking retired officers and civilian leaders of the United States

armed forces. After my retirement from the Court, I wrote to Carter Philips asking if there was any truth in the rumor that Gerald Ford had played a role in the decision to file that brief. Taking pains to make sure that he did not breach any attorney-client privilege, Carter's response acknowledged not only that Ford was the "but-for" cause of the brief's preparation and filing, but also that President Ford had been the first person to suggest that former military officers as a group had a very important message to present to the Court.

Three aspects of that message merit special comment - its legal reasoning, its historical context, and the prestige of its authors. As Justice O'Connor acknowledged in her opinion for the Court, there was a good deal of language in the Court's earlier opinions that had suggested that remedying past discrimination was the only permissible justification for race-based governmental action. Rather than discussing any need

for - or indeed any interest in - providing a remedy for past sins, the military brief concentrated on describing future benefits that could be obtained from a diverse student body. The authors of the brief did not make the rhetorical blunder of relying on a dissenting opinion to support their legal approach, but they effectively endorsed the views that I had unsuccessfully espoused in the *Wygant* case.

The brief recounted the transition from a segregated to an integrated military. Within a few years after President Truman's 1948 Executive Order abolishing segregation in the armed forces, the enlisted ranks were fully integrated. Yet, during the 1960's and 1970's they were commanded by an overwhelmingly white officer corps. The chasm between the racial composition of the officer corps and the enlisted personnel undermined military effectiveness in a number of ways set forth in the brief. For instance, the brief recounted how, during the Vietnam War, racial

tension in the military was exacerbated by an officer corps that was only three percent African American. In time, the leaders of the military recognized the critical link between minority officers and military readiness, eventually concluding that "success with the challenge of diversity is critical to national security." They met that challenge by adopting race-conscious recruiting, preparatory, and admissions policies at the service academies and in ROTC programs. The historical discussion did not merely imply that a ruling that would outlaw such programs would jeopardize national security, but also that an approval of Michigan's programs would provide significant educational benefits for civilian leaders.

The identity of the 29 leaders who joined the brief added impressive force to their argument. Fourteen of them - including men like Wesley Clark and Norman Schwarzkopf - had achieved 4-star rank. They were all thoroughly familiar with the dramatic differences

between the pre-1948 segregated forces and the modern integrated military. President Ford, who also rendered heroic service during World War II, played the key role in selecting them.

Writing for the Court, Justice Sandra Day O'Connor quoted from and embraced this argument from the brief:

" '[T]he military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.' . . . To fulfill its mission, the military 'must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.' . . . We agree that '[i]t requires only a small step from this

analysis to conclude that our country's other most selective institutions must remain both diverse and selective.' . . . Effective participation by members of all racial and ethnic groups in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S., at 331-332 (alterations in original).

Given the fact that Gerald Ford played a central role in the filing of the military brief, it is certainly reasonable to conclude that he shared the views that the Court adopted in that case.

I have always been especially proud of the fact that he selected me to fill the vacancy on the Court when Bill Douglas resigned and particularly admire his decision to pardon Richard Nixon even though he must have been aware of the fact that that decision might result in his defeat in the 1976 Presidential election.

Thank you for your invitation to return to Michigan
for this event, and for your attention.