

IMPACT OF MICHIGAN AFFIRMATION ACTION RULINGS ON PUBLIC EDUCATION

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OPERATOR: Good morning. And welcome to this conference call on the impact of the Michigan cases to public education.

At this time, for opening comments and introductions, I would like to turn the call over to Elaine R. Jones, President and Director-Counsel of the NAACP Legal Defense and Educational Fund.

ELAINE JONES: Thanks, all of you, for joining in.

At the NAACP Legal Defense and Educational Fund, we have been engaged in promoting affirmative action since the beginning, and defending it for the last 15 or 20 years that it has been under attack in this country by the far right.

This is the eve of the 50th anniversary of *Brown v. Board of Education*, the U.S. Supreme Court decision that made it clear that desegregated public education was a must in this country and was constitutionally mandated.

It is fitting that the Michigan decision comes down on the eve of *Brown* because it supports the same principle in the area of higher education.

Affirmative action is a very important tool in the effort to achieve diversity. Race neutral means of doing it are just not successful or as successful.

It is important to keep in mind the stipulation in the Michigan cases by all concerned that the African American and Latino students at the University of Michigan are qualified to be there and that this case is not about their merit or their qualifications.

In my view, this decision is one of the most important in the last 25 years. The court spoke on the subject of affirmative action in higher education in 1978 in the *Bakke* case. But it was Justice Powell's lone opinion, which was not explicitly joined by any other Justice, on the issue of affirmative action that enabled us to prevail on the issue in that case. He emphasized the importance of diversity.

The *Michigan* decisions give a ringing affirmation of Justice Powell's diversity rationale.

LDF also believes that remediation is a second leg upon which diversity can be supported because of the historical exclusion and discrimination in higher education throughout the country, at Michigan as well as many other universities.

Ted ?

TED SHAW: Well, I also want to thank everyone for joining us today. I want to add to what Elaine said by articulating two things, first about the Michigan decisions and then second, talking about Michigan's connection in the long chain of civil rights cases that began before *Brown* but certainly included *Brown*, since we're coming up on the 50th anniversary of *Brown* next year.

Also, there's a connection with respect to the ideology of these cases and the parties who are adversaries in them that I want to underscore.

First, let me say that in spite of the spin that we've heard and seen from the moment the Michigan decisions were announced, the Michigan decisions represent in their totality a definitive win for the advocates of diversity and affirmative action—period.

I realize that these cases are being characterized as a split decision. Technically that's right, to the extent that the undergraduate policy was not upheld. But at the end of the day, that's a detail and there isn't even a lot of devil in that detail.

The university will have to go back and adjust its policy. And even though the undergraduate policy may have been defensible, it was clear even before the cases came down that it was going to have a more difficult time than the law school policy.

At the end of the day, affirmative action stands on firmer ground today than it did before these rulings for the reasons that Elaine talked about, specifically that Justice Powell's opinion was being assaulted because it was the lone opinion of Justice Powell and it wasn't clear that the four justices in what's called the Brennan Group explicitly endorsed his rationale, even though implicitly it seemed they did. That issue has been laid to rest. Now we are clear that there is a majority in the Supreme Court that has ruled in a way that has adopted Justice Powell's reasoning.

The opponents of affirmative action are spinning the decision in a way that is intended to create doubt among college administrators, admissions officers and others. They are really attempting to intimidate the colleges and universities from doing what the Supreme Court said they could do. But at the end of the day, when spin is done, when they stop spinning and come to the point where their heads are clear, it remains true that they did not achieve what they intended to achieve, which is an outright ban on the consideration of race in admissions and a ruling that the use of affirmative action in higher education is unconstitutional.

The connection between the Michigan cases and *Brown* is more than the fact that the Michigan cases represented two of the most important civil rights cases since *Brown*. The opponents of affirmative action have cited the colorblind principle, which the civil rights litigators and advocates in the day of *Brown v. Board of Education* also seemed to articulate. The connection between *Brown* and the Michigan cases is that the Michigan cases and affirmative action represented the vehicle by which to keep the promise of *Brown* alive and in play, and to open the doors of educational opportunity and to keep them open. *Brown* did it. It opened the doors. The Michigan cases threatened to close those opportunities down, at least as they applied to higher education. And we must be clear that the rhetoric of colorblindness is not the appropriate focus. The question isn't whether we're colorblind. The question is whether we do justice in a world in which we still see massive inequities as a result of our long history of segregation and discrimination.

So those who supported affirmative action in the Michigan cases are the ideological and intellectual descendants of the advocates in *Brown v. Board of Education* for desegregation.

ELAINE JONES: Now the institutions of higher education and universities must go forward, and look at the blueprint—the roadmap—that Justice O'Connor laid out in her opinion in *Grutter*. Justice O'Connor's opinion at page 19 really talks in terms that we as Americans can understand about the value of education today. She cited *Brown*. And she said on that page that, "This court has long recognized that education is the very foundation of good citizenship," which is a quote from *Brown*. And then she says, "For this reason, the diffusion of knowledge and opportunities through public institutions of higher education must be acceptable to all individuals, regardless of race or ethnicity." So, there is a relationship between *Brown* and Michigan right there in Justice O'Connor's opinion.

TED SHAW: We call upon institutions of higher education not to be intimidated by the Center For Individual Rights and these other organizations, which are threatening to sue them if they pursue affirmative action. We also are going to monitor not only what institutions are doing and nurture the partnerships we have with them, but we also will be monitoring what the CIR and other organizations are doing.

They are hoping that they can defeat the forces that support affirmative action by also taking this into the

arena of public opinion and into the ballot initiative process. We don't suffer any illusions. These folks are not going to go away. But we have won a very significant victory and we will be prepared to meet them wherever they attempt to narrow the opportunities for African Americans, Latinos and other people of color.

ELAINE JONES: I just want to add one more thing. We are pretty clear what a program that complies with this Court's decision and *Bakke* looks like. Ted was part of the faculty committee that designed the admissions process that incorporated affirmative action at the University of Michigan Law School, which was upheld by the Supreme Court two days ago. Now we thank you for your attention, and we are happy to take your questions.

RON DZWONKOWSKI, "DETROIT FREE PRESS": Mr. Shaw, there had been some expectation, I think, at least in our paper, that had the CIR prevailed in this case that their next step would have been to challenge *Brown v. Board of Education* on some basis. Do you anticipate such a challenge? What is your feeling about the status of that as the law of the land?

TED SHAW: I don't know if CIR would be so bold as to challenge *Brown* on its face. In fact, I think, as I understand it, they are more comfortable trying to wrap themselves in *Brown* by appropriating its meaning and redefining it. But as a practical matter, what many of these organizations on the right that have been fighting affirmative action and other race-conscious measures have been doing—and I'm not only referring to CIR—is undermining *Brown*. For example, we have had a case down in South Carolina—Rock Hill, South Carolina—in which a school board's attempt to take into account the segregative effect of the location of a new school, as opposed to placing it in a desegregated area, was challenged by individuals who claim that that was a color-conscious action and therefore illegal and unconstitutional. So even attempts to desegregate are being challenged by many on the right as race-conscious. That's the kind of atmosphere that we find ourselves in.

I think that CIR is more likely to try to focus on looking at what colleges and universities are doing in a number of ways, but I also think to some extent that they are going to have to regroup and figure out what they can and cannot do. They're certainly talking with a lot of bravado now, but I think some of this is exactly that. But they're going to come at us again in one way or another.

I think the Supreme Court, however, is an unlikely forum for them for some time, even though some on the right are now talking about a Supreme Court appointee when a vacancy occurs who is explicitly opposed to affirmative action. We'll have to fight that fight when and if it comes.

RON DZWONKOWSKI: One other question. One of the things that was indicated in Justice O'Connor's opinion was that, in an ideal world, 25 years from now affirmative action would no longer be necessary. And in an ideal world that might be a nice thing. But what in the view of either of you would need to happen between now and the next 25 years for affirmative action to not be necessary? How do we have to change things?

ELAINE JONES: Well, several years ago Bill Coleman, an LDF Board co-chair emeritus and a member of the *Brown* legal team, testified before Congress on the Civil Rights Act of 1991. This same question came up: When will we no longer need affirmative action? He had a tremendous footnote in there. He said affirmative action would no longer be necessary when the corporate boardrooms in this country more nearly reflected the population. He talked about leadership—educational and corporate leadership. He talked about political leadership. Look at the U.S. Senate and who's in there. He talked about all aspects of society across the board in which you will have not a few individuals who we point to and say, "Well, look, we've accomplished something," but real integration of meaningful opportunity. And we all know what that picture looks like.

What has happened over the past 25 years since *Bakke* is that from 1981 up until the present the years have been spent fighting affirmative action. It's been 25 years since *Bakke*, but we haven't had 25 years of enforcement. What we had throughout the '80s was the Justice Department weighing in, trying to re-segregate the elementary and secondary schools. We fought that battle for eight years. And then after that

the far right got funded on the litigation side, and they've been challenging affirmative action. We've spent untold resources the past eight or nine years defending against all these attacks.

RON DZWONKOWSKI: So one of the things we might need over the next 25 years is to let affirmative action work.

ELAINE JONES: That's right.

TED SHAW: Well, let me add though that affirmative action actually has worked to a great degree over the last 25 years, and all one has to do is look at the Bok and Bowen book, *The Shape of the River*, which reflects that truth. But I also would add that the opinion that Justice Ginsburg writes in the *Gratz* case lays out a lot of the statistics that reflect the continuing reality of the inequality in this country, particularly for African Americans, that is the requisite for affirmative action. And Justice O'Connor in her opinion said explicitly that race, unfortunately, still matters. The court recognized that. I don't think there's anybody in this country who would prefer—or who would be happier—to see the end of the need for affirmative action than those of us who are here at the Legal Defense Fund. Our whole mission is the end of racial discrimination. But the massive inequality that we see, in spite of all the important progress we've made since *Brown*, demonstrates that the work is still not done, and that, I think, at the end of the day, is the core underlying reason that Justice O'Connor and the other four justices went the way they did. They know that the work isn't done. Whether we say the justification is diversity or remediation or a combination of the two, affirmative action is still necessary. And the opinion, I think, reflects that.

GREG STANFORD (ph), MILWAUKEE JOURNAL SENTINEL: I have a couple of questions. First, does this ruling affect scholarship programs or other special programs aimed at students of color? Does this ruling give a shield to those programs or not? And, sir, do you have any idea what number of selected colleges use point systems like the one that was used at the University of Michigan undergraduate college?

TED SHAW: Well, first, with respect to the second question, the answer is no. We don't know how many of those institutions exist, but those who do, obviously, need to be busy at the drawing board right now to adjust that and change that. But with respect to the first question, scholarship programs are not explicitly covered by these opinions. However, when *Hopwood v. University of Texas Law School* was decided in the Fifth Circuit, the Texas Attorney General did end all scholarship programs, and to an extent he relied upon *Hopwood* to do that. *Hopwood* has now been overridden and it seems to me that that issue should be revisited. I would expect that as they threatened, there may be some challenges to scholarship programs, and it's going to be important that they be defended. But it's also important that they be crafted in a way that makes them defensible. It would be a sad day if we came to the point where scholarships for minority students that improve their chances to be successful in higher education were to be illegal and unconstitutional.

We fought that fight unsuccessfully in the mid-Atlantic states in the *Podberesky* case that involved the University of Maryland, but I think that we're going to see some more skirmishes on that front also.

RONALD ROACH (ph), BLACK ISSUES IN HIGHER EDUCATION: The question I have focuses on some of the pronouncements I've heard from the opponents of affirmative action. They've said that in states such as Texas, where there's been race neutral means tried, and have had some success or not in achieving racial diversity, that they might begin to look at places like that, begin to look at their race conscious admissions processes. Would that be a violation of the law, you know, as defined by this decision? Is that your perspective? Or how do you see this issue?

TED SHAW: Well, it reflects the shamelessness of the opponents of affirmative action who are making these statements in the aftermath of this decision. As a legal matter, one of the reasons that the Supreme Court took the Michigan cases was to resolve a conflict between the circuits. The federal Court of Appeals is, as you know, divided into circuits. And if their rulings are not consistent with one another, that's one of the reasons the Supreme Court decides to review a case, to resolve the conflict. The Fifth Circuit, which includes Texas, Louisiana, and Mississippi, had decided the *Hopwood* case and said that affirmative action was unconstitutional, that diversity was not a compelling state interest, and that race could not be taken into

account. The Court of Appeals for the Sixth Circuit, which includes Michigan as well as the Ninth Circuit, which includes Washington—the University of Washington law school was sued—came out the other way on this issue. The Supreme Court has now definitively ruled, and that ruling has impact in the Fifth Circuit, as it does in the rest of the country, and it allows Texas and all institutions to engage in affirmative action. And Justice O'Connor made clear that the requirement of narrow tailoring does not require that all race central measures be attempted before affirmative action is allowable. And so, again, this is an attempt to intimidate institutions from doing what the Supreme Court has ruled they can do.

ELAINE JONES: In this ruling, the far right lost. They lost. There is no legal basis for this sort of threat. It is an attempt to hold on to what they thought they had won.

TED SHAW: Yes, it's an attempt to win by threat what they could not win and did not win in the Supreme Court.

ELAINE JONES: Exactly. So they want to hold on to Texas' retreat from affirmative action, which Texas had done in the wake of the *Hopwood* case. But now, with this Supreme Court ruling, *Hopwood* is no longer good law. Texas can really go back to an affirmative action plan that's similar to the one at the University of Michigan Law School that the Supreme Court upheld.

RONALD ROACH (ph): What was it that Justice O'Connor said about that requirement?

TED SHAW: Justice O'Connor said that it was not necessary that institutions try all and every race neutral means before they use affirmative action. Obviously, if there's a race neutral means available that's effective, and just as effective, then that's preferable. We believe that. But I don't think there's much debate, including among the people down in Texas and elsewhere that have tried percentage plans, that that's a second best alternative. It's not as effective as having race conscious affirmative action. And, as Justice O'Connor also recognized, the use of percentage plans doesn't do a thing for the graduate and professional school level.

ELAINE JONES: The language in Justice O'Connor's opinion says that narrow tailoring does not require exhaustion of every conceivable race neutral alternative.

DAVID WESTPHAL, MCCLATCHY NEWSPAPERS: In the same spirit of your approaching this issue in a broad swath, looking back 50 years, and I suppose with Justice O'Connor's looking in the other direction, a 25 year timeframe going forward, as stated in her opinion, I'm wondering what either of you thinks will be the upshot of this opinion. Will it kind of kick off a new round of institutions implementing affirmative action policies? And for that matter, perhaps the private sector as well? Or do you think that it comes at the time of some political movement in the other direction, and will not have a huge impact on moving toward a period where there is a race neutral environment?

TED SHAW: I don't know that it's going to kick off a new round of race conscious measures. I think it is more likely to allow institutions that have been concerned about affording educational opportunity and other kinds of opportunity to African Americans and other people of color who historically have been excluded from those opportunities to continue to do what they have been doing. And if one looks at the range of the *amici* briefs that obviously were very influential in these cases, one sees that this has become part of the fabric of the United States, that even though we continue to struggle with race, and we are certainly uncomfortable as a nation about our struggle with race, we know that we have to continue to engage in that struggle. So I think that institutions are likely to continue to do what they have been doing, but also they have more clarity on how to do it. You know, the important thing is this: the clock has not been turned back, to use the cliché. That's what was at stake. And the court was unwilling, when it walked right up to it, to turn that clock around. And that was certainly the right decision.

DAVID WESTPHAL: And if I might, just going back to the earlier question, Do you think the 25-year timeframe is a valid one?

TED SHAW: Well, I don't know that there's anything magic about 25 years. I mean it certainly is a hope, and I think we can all join in that hope. I think we have to see where we are in 25 years, and we'd all like to be there. Let me put it this way: The inequity that we see, the problems that we're dealing with, we only began to address these issues with *Brown v. Board of Education*. And really, it took another 15 years before we began to get serious about doing that. It's very difficult to undo the effects of hundreds of years of racial subordination, which have intergenerational effects, reflected in so many ways, as Justice Ginsburg's opinion in *Gratz* points out. It's very difficult to undo that in a short period of time. We'd like to be there in 25 years. Let's see where we are and let's recommit ourselves to working hard to remedy racial inequality. If the critics of affirmative action put their energy into doing that, instead of fighting under the premise that the victims of racial discrimination and inequality in this country are the 90 percent or so of white individuals who hold most of the corporate jobs and the 80 percent of the white students who are at the University of Michigan and elsewhere, I think we might make some progress.

ELAINE JONES: I just want to say that we certainly will not do it in 25 years if we follow the same path we followed this past 25. We have had some successes, but we've been fighting it. We've spent so much time fighting it. If we spend the next 10, 15 years up and down in the courts, trying to cast doubt on what the Supreme Court has clearly said, that continues to set us back and we don't address ourselves to the task. People talk about color blindness. Everybody knows that we are not color blind in this country.

If somebody sees me walking down the street and is asked to identify me, the first thing they're going to say is "black" or "African American." The second thing they'll say is "female." I mean we are not color blind. We are far from it. We don't resolve these issues by pretending they do not exist.

TONYAA WEATHERSBEE , THE FLORIDA TIMES-UNION (ph): A while back, I wrote a column about a book called "The Assault on Diversity," by Lee Cokorinos (sp). What I found particularly riveting was the background on The Center for Individual Rights. They got a lot of their seed money from the Hudson Institute, which from what I can tell has been trying to prove from years back that blacks are inferior to whites.

My question is, What can you do or what have you been trying to do to expose that to the public because I'm sure a lot of people don't know about it?

TED SHAW: Well, I wrote the foreword to the book. I think the book is a real eye opener. I think people can in good faith disagree with us on affirmative action. But, the people who are driving this assault, the CIR, and the Institute for Justice, and Ward Connerly's organization, the Civil Rights Institute—the people who are identified in the book—are in fact part of an effort that is well informed, well-funded, and hooked into a tradition and history which includes the Eugenics Movement.

Now, some people hear this and they immediately say, "Well, that sounds like conspiracy theory to me." I encourage people to read the book because it really sets forth where these people are coming from. And the extreme right's reaction to the Michigan decisions, if you read the book, shouldn't be surprising because these are folks who are not really concerned with either fact or history.

They have an agenda and they have figured out how to pursue that agenda in a way that they think insulates them from being called who and what they are. And, I leave for others the task of drawing the conclusions about who and what they are. But, read this book and it takes you there. It exposes where they're coming from.

ANN LOLORDO (ph), "BALTIMORE SUN": Ann Lolordo (ph) with the "Baltimore Sun." I wonder if Ted and Elaine could look beyond the university campuses to see the effect that the decisions might have in the greater community, in the work place, and so forth.

ELAINE JONES: Yes. I think it has a reaffirming effect across the country in different spheres in the business community. Sixty-five corporations signed on to friend of the court briefs talking about how important a diverse workforce is in a global marketplace, and they were joined by the military academies.

A lot of different institutions weighed in talking about the importance of diversity and affirmative action used to achieve that diversity.

In this, the beginning of the 21st century, we've made progress but we have not yet arrived. So, I think it's very important that these rulings reaffirm the direction so many institutions have taken to be inclusive.

ANN LOLORDO (ph): Ted, do you want to add anything?

TED SHAW (ph): Well, I know that if we had lost these cases that the other side was prepared to spin that into a defeat for affirmative action in other spheres. Technically, of course, the decisions do not apply to anything else than higher education. But certainly, the fact that corporate America, the military, others filed briefs in these cases reflected their concern about what was at stake for them as well as in higher education.

So, as Elaine said, I think that these decisions really reaffirm their ability to pursue policies and practices which guarantee that opportunities will open up for people of color.

GREG STANFORD (ph), THE MILWAUKEE JOURNAL SENTINEL: In his dissent, Justice Clarence Thomas specifically cited Frederick Douglass as his authority, citing a speech in which Douglass said, talking about the so-called Negro problem, that "the answer is to do nothing with us." How do you respond to that?

TED SHAW: I will tell you that that aspect of Justice Thomas' opinion is no surprise. We fully expected that Justice Thomas would marshal some quotation from an African-American historical giant like Frederick Douglass. And, one can find a lot among the speeches of Frederick Douglas that we could cite but I'm not sure that's a useful exercise. Let me just say that obviously people pay attention to Justice Thomas beyond the fact that he is a Supreme Court Justice because he's an African-American Supreme Court Justice and he talks about these issues.

But that, to me, simply underscores the significance of diversity or the importance of diversity. It doesn't cut the other way. Justice Thomas, we respectfully disagree with him. And, I underscore respectfully. You know, he has as much right to be as conservative in his views as anyone else on that court or elsewhere, and he is. We'd love to get his vote. We didn't. It was not a surprise. We respectfully disagree with him.

ELAINE JONES: I would have loved to have been surprised, however.

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