

STEVENS, JOHN PAUL (1920-)

By

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Appointed to the Supreme Court by President Gerald Ford in 1975, Associate Justice John Paul Stevens for a time seemed destined to be one of the Supreme Court's most vigorous opponents of affirmative action. Ultimately, however, as a result of an expressed deference to *stare decisis* (case law precedent) and evolving views concerning the value of race- and gender-conscious measures, Stevens became one of the Court's strongest defenders of such measures. According to Georgetown University law professor Girardeau Spann, "In addition to Justice Stevens, the other three justices who make up the present court's liberal affirmative action block—Justices Souter, Ginsburg, and Breyer—have voted to uphold each affirmative action program they have considered in a constitutional case." (Spann 2000, 161)

Born to an upper-class family in Chicago, on April 20, 1920, Stevens attended Northwestern University Law School. After law school, Stevens, a World War II veteran, was selected for a prestigious Supreme Court clerkship with Justice Wiley Rutledge. After his clerkship, he returned to Illinois and entered private practice, specializing in antitrust law. In 1970, he was appointed to the U.S. Court of Appeals for the Seventh Circuit by President Richard Nixon, where he earned a reputation for writing well-worded judicial opinions. With five years' experience on the Seventh Circuit Court of Appeals, he was elevated to the Supreme Court by President Gerald Ford.

A year after Stevens's appointment, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court considered whether Title VII of the Civil Rights Act of 1964 and section 1 of the Civil Rights Act of 1866 (42 U.S.C. § 1981) prohibited private employers from discriminating against white persons. Justice Stevens joined in Thurgood Marshall's opinion for the Court, which, after reviewing the legislative histories of the two statutes, concluded that both protected whites from discrimination in employment.

Two years later, Stevens partially concurred in the judgment that struck down the race-conscious admissions policy in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). Stevens, however, declined to reach the constitutional issue addressed in varied opinions by the remainder of the Court, for he found it "crystal clear" that Title VI of the Civil Rights Act of 1964 prohibited all race-conscious affirmative action at institutions receiving federal funds. In reaching that conclusion, Justice Stevens relied on the *McDonald* decision. But he also explored at length the legislative history of the 1964 Civil Rights Act, emphasizing that individual fairness was the focus of both Title VI and Title VII, and indicating that he would consider it equally

clear that Title VII prohibited all race-conscious affirmative action in employment. More generally, the opinion reflected strong disapproval of practices that disadvantage individuals because of race, regardless of the race of the person disadvantaged.

The following year, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Court considered whether Title VII prohibits all race-conscious affirmative action in employment. Justice William Brennan's majority opinion explored Title VII's legislative history, concluding that the statute had been intended to encourage voluntary measures to abolish traditional patterns of racial segregation and hierarchy. The Court therefore found that, notwithstanding *McDonald*'s holding that Title VII prohibits discrimination against white persons, the statute does not prohibit all private, race-conscious affirmative action plans aimed at eliminating conspicuous racial imbalances in traditionally segregated job categories.

Justice Stevens did not participate in consideration of *Weber*, though, as discussed below, he would later reveal that, consistent with his opinion in *Bakke*, he believed that *Weber* was wrongly decided. Moreover, the following year, dissenting from the Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448, 523-24 (1980), which upheld congressionally-mandated minority set-asides for federally-funded construction projects, Stevens revealed that he continued to disapprove strongly of any distinctions based on race. Reflecting on the potential harm of racial classifications to the body politic, he noted that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals," and suggested that a serious effort to define racial classes by objective criteria would require study of the racial classification laws of Germany's Third Reich. After observing that "racial classifications are simply too pernicious to permit any but the most exacting connection between justification and classification," he went on to serially discuss and reject each of the proffered justifications for the set-aside program at issue. Thus, as of 1980, no member of the Court seemed more opposed to race-conscious measures than Justice Stevens.

The Court did not again consider an affirmative action case until 1984. That year, in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, the Court overturned a district court's modification of a race-conscious consent decree in a Title VII action to restrain a city from implementing a layoff in a manner that would reduce the minority representation among firefighters. The Court merely found that the district court had exceeded its authority in modifying the decree. At the time, however, the Court had not yet addressed the issue of whether a court could order race-conscious relief for a Title VII violation. In particular, it had not considered whether the last sentence of Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), precluded a court from ordering race-conscious relief to persons who were not themselves victims of discrimination (though the courts of appeals to consider the matter had been unanimously of the view that it did it not). While not specifically reaching that issue, Justice Byron White's opinion for the Court nevertheless based its decision in part on an interpretation of the sentence that precluded such relief, thus calling into question a standard remedy for findings of broad violations of Title VII.

Although Stevens concurred in the judgment, he wrote a separate opinion noting that, in his view, "the Court's discussion of Title VII is wholly advisory." He appeared to share the majority's view that Section 706(g) would preclude a court from awarding the type of race-

conscious relief at issue in the case. But he maintained that the same limitation would not apply to what parties could voluntarily do in a consent decree. As of that date, the view that parties could agree to race-conscious action as a Title VII remedy was the position most accepting of affirmative action that Justice Stevens had yet expressed.

But he would go rather farther two years later. In *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), the Court considered the constitutionality of a collective-bargaining agreement of a public school system that prevented the school system from laying off minority teachers in numbers that would decrease the minority representation among teachers. The Court found that, unless the provision were directed at correcting discrimination by the governmental unit involved, the racial classification was not sufficiently narrowly tailored to survive constitutional scrutiny.

Stevens dissented in the case. Observing that “in our present society, race is not always irrelevant to sound government decisionmaking,” he maintained that rather than focusing on whether the affected minority teachers were entitled to positions because of past discrimination, the inquiry should first address whether the policy advanced the public interest in educating children for the future. Reasoning that “it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty,” Stevens stated that he would uphold the program.

In addition to being the first instance in which Stevens indicated that he would uphold a racial classification, his *Wygant* dissent would also be his first articulation of the type of forward-looking justification for racial classifications that would underlie much of his reasoning in affirmative action cases in the ensuing years. Even before the *Wygant* decision was issued in May 1986, however, there had been at least one indication (apart from the *Stotts* concurrence) that Stevens’s view of affirmative action was changing. In February 1986, the court heard argument in *Sheet Metal Workers’ International Association v. EEOC*, 478 U.S. 421 (1986), a case that, in the context of court-ordered race-conscious hiring goals for a Title VII violation, squarely raised the issue of whether Section 706(g) of Title prohibited a court from ordering race-conscious relief benefiting persons who were not actual victims of discrimination. The Reagan Administration took that position that the section did prohibit such relief, maintaining that the issue had been resolved in *Stotts*. While Stevens had appeared to accept that interpretation of Section 706(g) in his *Stotts* concurrence (though not agreeing that the Court had properly reached the issue), during oral argument in *Sheet Metal Workers*, Stevens pressed the government’s counsel for an acknowledgment that the language of Section 706(g) did not on its face require that interpretation. Five months later (six weeks after *Wygant*), when the Court issued its opinion upholding the hiring goals in *Sheet Metal Workers*, and specifically finding that Section 706(g) did not preclude such relief, Justice Stevens joined in every part of Justice Brennan’s opinion for the Court. That same day, in *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), Stevens joined in Brennan’s opinion upholding affirmative action provisions of a consent decree and finding that regardless of any limitations Section 706(g) might impose on the powers of a court to order race-conscious relief, the provision does not apply to consent decrees.

The following year, in *United States v. Paradise*, 480 U.S. 149 (1987), the Court upheld a court-ordered requirement that blacks receive 50 percent of promotions to Alabama State Trooper corporal positions, finding that the measure was permissible under the Equal Protection Clause because it served a compelling governmental interest in the elimination of past discrimination and was narrowly-tailored to serve that purpose. Stevens concurred in the judgment, but he wrote a separate opinion, maintaining that in contrast to measures imposed by a governmental entity where a strong presumption exists against the measure, there exists no such presumption against race-conscious measure imposed by a district court to remedy a proven constitutional violation. Relying on school desegregation jurisprudence, he maintained that district courts had broad discretion to fashion remedies for such violations without having to satisfy the requirement that the measure be “narrowly tailored to achieve a compelling governmental interest.” Thus, on this occasion, Stevens for the first time showed himself to be even more accepting of race-conscious measure than those other members of the Court that generally approved of race-conscious measures, at least in situations where the measure was intended to correct a constitutional violation, situations he termed to be “dramatically different” from the “response to a past societal wrong” that he believed was at issue in *Fullilove*.

The same year, in *Johnson v. Transportation Agency, Santa Clara Cnty*, 480 U.S. 616 (1987), the Court reaffirmed its holding in *Weber* that Title VII did not prohibit race- or gender-conscious measures to eliminate conspicuous imbalances in the labor force. Stevens concurred in the result, but he did so solely on the basis that the case was controlled by *Weber* and his respect for stare decisis, making clear that he believed that *Weber* had been wrongly decided and had itself been contrary to both the legislative intent of Title VII and the prior construction of the statute in *McDonald*. Yet while concurring solely on the basis of the *Weber* decision that he maintained had been erroneous, Justice Steven went to argue for an expansive interpretation of that precedent. Arguing that there was no reason why an employer should have to determine whether his past practices might constitute an arguable violation of Title VII, Stevens went on to suggest that there might be a wide range of forward-looking rationales to justify such measures. Quoting from a law review article, he suggested that improving the quality of education, as well as “improving [an employer’s] services to minority communities, averting racial tension over the allocation of jobs in a community, or increasing the diversity of the workforce, to name but a few examples,” might justify such measures in appropriate circumstances.

Two years later, in *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court struck down the Richmond, Virginia’s minority set-aside in a decision that suggested that governmental entities would have great difficulty justifying race-conscious measure of any sort that did not directly address past discrimination by the governmental entity. Stevens concurred in the result, but took issue with the premise that racial classifications are never permissible except as a remedy for a past constitutional violation. He maintained that sound governmental decision-making should also take into account a racial classification’s impact on the future, as with, for example, consideration of the benefits of an integrated faculty. He joined in the judgment, however, because he did not regard set-asides to serve forward-looking ends, and, citing the dangers of stereotypical thinking and the potential stigma to beneficiaries of racial preferences, he concluded by quoting at length from portions of his dissent in *Fullilove* that had been so critical of such measures.

The next affirmative action case considered by the Court was *Metro Broadcasting, Inc. v. FCC*, 597 U.S. 547 (1990), in which the Court upheld the congressionally mandated race-conscious preferences in the distribution of broadcast licenses. Justice Stevens joined in Justice Brennan's opinion for the majority that found that congressionally sanctioned "benign" racial classifications were subject only to intermediate scrutiny, but he also filed a concurrence to emphasize that the Court's ruling "squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong," and to endorse "this focus on the future benefit" of such measures. While observing that race may be legitimately taken into account by a governmental entity only in extremely rare circumstances, he indicated that, in addition to promoting diversity in broadcasting, integrating police forces and promoting diversity in public school faculties and student bodies of professional schools were among those rare circumstances.

By the time the Court considered the next affirmative action case, Justice Stevens was the only member of the *Metro Broadcasting* majority still on the Court. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), a much-changed court struck down a congressionally-mandated program giving general contractors incentives to hire "socially and economically disadvantaged individuals" as subcontractors where a race-based presumption was used in identifying such individuals. In reaching that result, the Court rejected the *Metro Broadcasting* precedent and for the first time applied the strict scrutiny standard to congressionally-mandated race-conscious measures. Steven filed a vigorous dissent. The dissent partly relied on the stare decisis effect of *Fullilove* and *Metro Broadcasting*. But it also argued at length concerning the differences between racial classification intended to benefit a minority group and those that were intended to disadvantage or stigmatize a minority group. The dissent presents a striking contrast to the *Fullilove* dissent in which Justice Stevens first articulated his views as to the wisdom and morality of racial classifications intended to benefit minority groups.

In 2003, in possibly Stevens's last affirmative action cases he also aligned himself as being firmly in favor of affirmative action in the landmark cases *Gratz v. Bollinger*, 123 S. Ct. 2144, 2003 U.S. LEXIS 4801 (2003), and *Grutter v. Bollinger*, 123 S. Ct. 2325, 2003 U.S. LEXIS 4800 (2003). His strong support of affirmative action in these cases (as part of the majority in *Grutter* and dissenting in *Gratz*) illustrates his evolution on the issue of affirmative action and his strong support of affirmative action today.

See also [in this Encyclopedia] *Adarand Constructors, Inc. v. Peña*; Brennan; William Joseph; *City of Richmond v. J.A. Croson Co.*; Civil Rights Act of 1866; Civil Rights Act of 1964; *Firefighters Local Union No. 1784 v. Stotts*; Ford, Gerald Rudolph; *Fullilove v. Klutznick*; *Gratz v. Bollinger/Grutter v. Bollinger*; *Johnson v. Transportation Agency, Santa Clara County*; *Local 28 of the Sheet Metal Workers' International Association v. EEOC*; *Local No. 92, International Association of Firefighters v. City of Cleveland*; Marshall, Thurgood; *Metro Broadcasting, Inc. v. FCC*; Reagan, Ronald; *Regents of the University of California v. Bakke*; Title VI of the Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1964; *United States v. Paradise*; *United Steelworkers of America v. Weber*; White Byron Raymond; *Wygant v. Jackson Board of Education*.

FURTHER READING: Funston, Richard Y., 1992, "Stevens, John Paul," in *The Oxford Companion to the Supreme Court of the United States*, edited by Kermit Hall, New York: Oxford University Press; Popkin, William, 1989, "A Common Lawyer on the Supreme Court: The Opinions of Justice Stevens," *Duke Law Journal* 1989 (November):1087-1139; Sickels, Robert Judd, 1988, *John Paul Stevens and the Constitution: Search for Balance*, University Park: Pennsylvania State University Press; Schauer, Frederick, 1996, "Symposium: Perspectives on Justice John Paul Stevens," *Rutgers Law Journal* 27 (spring):543-561.