THE ARGUMENT FOR FACULTY DIVERSITY: RECOMMENDATIONS AFTER *TAXMAN v. BOARD OF EDUCATION*

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I. INTRODUCTION

The subject of affirmative action sparks intense emotion across our country.[1] During the 1996 presidential elections, the topic resurfaced as Republican candidate Bob Dole called for its reevaluation[2] and California citizens passed a state constitutional amendment to eliminate racial hiring preferences.[3] President Bill Clinton responded by stating "Mend it, don't end it,"[4] and vowed to fight the California measure.[5] President Clinton's stance on affirmative action is not surprising, considering history and the case of *Taxman v. Board of Education*.[6]

In May 1989, factors such as budgetary problems forced a public high school in Piscataway, New Jersey to reduce its teaching staff by one.[7] The Township of Piscataway Board of Education (the Board) narrowed its decision to two teachers in the Business Department.[8]

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1. *See*, *e.g.*, Adam Pertman, *National Battle Brewing on Rights: California Vote, Suits Highlight Divisions*, BOSTON GLOBE, Nov. 17, 1996, at A1.
2. *See* Jill Zuckman, *Dole Backs California Measure Against Hiring Preferences*, BOSTON GLOBE, Oct. 29, 1996, at A22.
3. *See* Robert Pear, *The 1996 Elections: The States—The Initiatives*, N.Y. TIMES, Nov. 7, 1996, at B7.
4. Dave Lesher, *Affirmative Action Fades as GOP Issue in California*, L.A. TIMES, June 13, 1996, at A1.
5. *See* David G. Savage, *U.S. Details Its Opposition to Prop. 209 in Court Case*, L.A. TIMES, Jan. 30, 1997, at A18.
6. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).
7. *See id.* at 1551.
8. *See id.*

The Board thoroughly compared both teachers and found they had identical seniority, equivalent evaluations, and similar volunteer work at the school.[9] The Board retained Debra Williams, an African-American,[10] and terminated Sharon Taxman, a white teacher.[11]

The Board chose not to use its normal, random process[12] in the decision, but rather invoked its affirmative action policy because "Ms. Williams was the only Black teacher in the Business Department."[13] The Board instituted its affirmative action plan voluntarily in 1975.[14] The Board did not adopt the plan in response to prior discrimination or minority underrepresentation in the Piscataway Public School System.[15] Instead, the Board designed the plan to be invoked only in instances involving candidates of equal qualifications.[16]

Arguing that retaining Ms. Williams promoted diversity, the Board defended its decision by emphasizing the benefits of bringing students into contact with people of different cultures and backgrounds.[17] However, the United States Justice Department sued the

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9. *See id.*

10. *See id.*

11. *See Taxman*, 91 F.3d at 1551.

12. The normal procedure would have been to use a coin flip. *See The Right Pick in Piscataway*, WASH. POST, Mar. 7, 1995, at A17.

13. *Taxman*, 91 F.3d at 1551.

14. In December 1975, the Piscataway Board adopted an "Affirmative Action Program to Eliminate Discrimination on the Basis of Sex, Race, Religion or National Origin," which included a "Statement of Purpose":

> The Piscataway Township Board of Education believes that each student is entitled to equal educational opportunity and that all qualified persons are entitled to equal employment opportunities. The affirmative action program is a set of specific procedures to which the Board of Education commits itself to apply every good faith effort. The objective of these procedures is to provide equal educational opportunity for students and equal employment opportunity for employees and prospective employees.
>
> The basic purpose of the program is to make a concentrated effort to attract women candidates for administrative and supervisory positions and minority personnel for all positions so that their qualifications can be evaluated along with other candidates. In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended.

Taxman v. Board of Educ., 832 F. Supp. 836, 838 (D.N.J. 1994), *aff'd*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

15. *See Taxman*, 91 F.3d at 1550.

16. *See id.*

17. *See id.* at 1551–52.

Board under Title VII[18] in the United States District Court for the District of New Jersey.[19] The Justice Department, whose suit was filed during the presidency of George Bush, argued that nonremedial affirmative action plans are prohibited by Title VII.[20] Taxman intervened in the action, claiming that her termination violated both Title VII and the New Jersey Law Against Discrimination (NJLAD).[21] The district court agreed, holding the Board liable under the NJLAD and Title VII for discrimination on the basis of race.[22]

When the case reached the United States Court of Appeals for the Third Circuit,[23] the Justice Department, by this time headed by Bill Clinton's appointees, switched sides and requested permission from the Third Circuit to file an amicus brief on the Board's behalf.[24] The court refused the request,[25] but Attorney General Jan

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18. Section 2000e-2(a) of Title VII states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

19. *See Taxman*, 832 F. Supp. at 837.

20. *See id*. at 838.

21. *See id.* at 837. The New Jersey Law Against Discrimination provides:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> (a) For an employer, because or race, creed, color . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge or require retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

N.J. STAT. ANN. § 10:5-12 (West 1993).

22. *See Taxman*, 832 F. Supp. at 851. The district court granted partial summary judgment to Taxman and the United States, holding the Board liable under both Title VII and the NJLAD. *See id.*

23. Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

24. *See* R. Philip Deavel, *Birmingham's Employment Discrimination War: A Clarion Call for Strict Meritocracy in Government Employment*, 38 A.F. L. REV. 197, 208–09 n.40 (1994).

25. The court considered the United States' change in position "as a motion to withdraw as a party, which we granted." *Taxman*, 91 F.3d at 1552. Following the death

et Reno continued to defend the change in position, stating that "it is important to make clear that diversity is a factor that employers can consider in developing voluntary affirmative action plans."[26]

Although the Board argued Title VII does not prevent an employer from making employment decisions that use race as a factor,[27] the Third Circuit affirmed the district court's decision.[28] *Taxman* is significant because of its narrow interpretation of Title VII, which could drastically reduce the scope of affirmative action. Voluntary affirmative action plans created for reasons other than to remedy prior discrimination or in response to an underrepresentation of minorities[29] could be abolished completely. Further, the *Taxman* opinion dismisses the idea that diversity in education is a goal that would justify the use of race as a factor under Title VII.[30]

On October 31, 1996, the Board filed a petition for certiorari to the Supreme Court.[31] While the Court reviewed the petition, it invited the Solicitor General to file a brief expressing the Justice Department's views.[32] Shifting positions yet again, the Clinton administration urged the Court not to hear the *Taxman* case.[33] The administration noted that the Third Circuit "incorrectly decided an issue of broad national significance," but changed its stance for fear of a

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of Judge William Hutchinson, the appeals were reargued on November 29, 1995. *See id.* at 1549. Before issuing a decision, the court requested a reargument en banc. *See id.* at 1579. The en banc decision is the basis for this Note.

26. Deavel, *supra* note 24, at 209 n.40 (quoting *Reno Defends Justice Department Switch in New Jersey School System*, 1994 Daily Lab. Rep. (BNA) 173, at D-5 (Sept. 9, 1994)).

27. *See Taxman*, 91 F.3d at 1559.

28. *See id.* at 1567. In striking down the Piscataway plan, the Third Circuit held nonremedial affirmative action plans per se invalid. *See id.* at 1550.

29. Although Ms. Williams was the only African-American in the Business Department, African-Americans were not underrepresented as a whole. *See* Linda Greenhouse, *Administration Backs off White Teacher's Dismissal*, N.Y. TIMES, June 6, 1997, at B4 (stating that "[t]he professional staff at the high school had a greater proportion of black members — 14 out of 176 — than existed in the area's qualified labor pool").

30. *See Taxman*, 91 F.3d at 1567. Although the court "applaud[ed] the goal of racial diversity," it could not "agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures." *Id.*

31. Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

32. *See* Piscataway Township Bd. of Educ. v. Taxman, 117 S. Ct. 763, 763 (1997).

33. *See* Joan Biskupic & Peter Baker, *Administration Shifts Stand on Diversity Case*, WASH. POST, June 6, 1997, at A1.

defeat at the Supreme Court.[34] The Court granted certiorari on the final day of the 1997 term, "laying the groundwork for a major debate over affirmative action."[35]

However, less than two months before scheduled oral arguments, the Board settled its case with Sharon Taxman.[36] Fearing a defeat at the High Court, a civil rights coalition headed by the Black Leadership Forum agreed to pay 70% of the $433,500 judgment.[37] Although the settlement marked the end of the *Taxman* case, it is only a matter of time until the Supreme Court addresses whether Title VII limits racial considerations to instances involving past discrimination.

This Note will begin by tracing the Supreme Court's analysis of affirmative action cases in the context of Title VII, education, and diversity. This analysis will include finding the origin of the concept of diversity as an essential ingredient in education. The Note will then turn to the Third Circuit's analysis in *Taxman*, explaining and analyzing the decision of the Third Circuit. Finally, the Note will demonstrate that the Board's actions were within the legislative intent of Title VII, that the majority misapplied precedent in finding the Piscataway affirmative action plan violated Title VII, and that faculty diversity should be recognized as a valid goal under both the Equal Protection Clause and Title VII, thus justifying its use as a factor to consider in affirmative action plans.

II. HISTORICAL OVERVIEW[38]

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34. *Id.*

35. Linda Greenhouse, *Justices, Ending Their Term, Agree to Hear a Big Affirmative Action Case*, N.Y. TIMES, June 28, 1997, § 1, at 9. After the Court granted certiorari, the Clinton administration changed its stance yet again and urged the Court to uphold the Third Circuit's ruling. *See White House Reverses on Firing Based on Race*, ST. PETERSBURG TIMES, Aug. 23, 1997, at 3A. However, the administration decided against using the case to hold "that all non-remedial, race conscious employment decisions are prohibited." *Id.*

36. *See Settling on Affirmative Action*, N.Y. TIMES, Nov. 22, 1997, at A22.

37. Rev. Jesse Jackson stated that "I helped to raise money to get the case settled, because I think that this case would have been misused to destroy the remedy that has been making America better and more inclusive." *CNN Capital Gang Sunday* (CNN television broadcast, Nov. 24, 1997).

38. Included in this section are affirmative action cases arising under both the U.S. Constitution and Title VII. Although these claims involve different standards of review, and the *Taxman* case deals with a Title VII challenge, the included Equal Protection cases are relevant in their analysis of affirmative action programs addressing diversity and education.

A. *Regents of the University of California v. Bakke*

The United States Supreme Court first addressed the constitutionality of benign race discrimination in the seminal case of *Regents of the University of California v. Bakke*.[39] In *Bakke*, a white prospective student sued the University of California at Davis Medical School, arguing that the school's admissions policy improperly used race as a determining factor.[40] The school utilized a set-aside quota, reserving sixteen places for minority students in each incoming class.[41] A split Court held that the admissions policy was unconstitutional,[42] but also held that the school could use race as a factor in admissions decisions.[43]

Specifically, four Justices found the school's admissions policy constitutional,[44] and four Justices found that the policy violated Title VI of the 1964 Civil Rights Act.[45] Although Justice Powell found the policy in question unconstitutional, he did not reject the possibility that other admissions policies based on diversity could be constitutional.[46] The four Justices who found the school's policy constitutional joined this aspect of Justice Powell's opinion.[47] Justice Powell stressed that

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39. 438 U.S. 265 (1978).

40. *See id.* at 269–70.

41. *See id.* at 275. The medical school had two separate admissions programs for entering classes. *See id.* at 272–73. In the regular admissions program, students having a grade point average below 2.5 on a 4.0 scale were automatically rejected. *See id.* at 273. Approximately one out of six applicants were then invited to an interview and rated on a scale of 1 to 100 by the interviewers and four other members of the admissions committee. *See id.* at 273–74. The full committee then offered admission to qualified candidates on a "rolling" basis. *See id.* at 274.

The special admissions program, on the other hand, was headed by a separate committee, in which a majority of the committee members were minorities. *See id.* If an applicant indicated on her application form that she was a member of a "minority group," the application went directly to the special admissions committee. *See id.* These "special candidates" did not have to meet the 2.5 grade point average requirement and were not evaluated against the general applicants. *See id.* at 275.

42. *See id.* at 320.

43. *See id.* at 318.

44. *See id*. at 324–26. Justices Brennan, White, Marshall, and Blackmun concurred in the judgment in part and dissented in part.

45. *See Bakke*, 438 U.S. at 408, 421. Justice Stevens authored an opinion, in which Chief Justice Burger and Justices Rehnquist and Stewart joined, which concurred in the judgment in part and dissented in part.

46. *See id.* at 315–20. Justice Powell provided the swing vote in the *Bakke* decision.

47. *See id.* at 326 (plurality opinion).

> the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [the school] from any consideration of the race of any applicant must be reversed.[48]

Justice Powell believed that students benefit from "a diverse student body," and that using race as a *factor* in school admissions policies is legitimate and constitutional.[49] On the other hand, a school, like the University of California in *Bakke*, could not employ a strict quota affirmative action program to achieve diversity.[50] Essentially, Justice Powell deemed unconstitutional the school's process of eliminating nonminority students from certain seats at Davis Medical School.[51]

To illustrate an acceptable method of considering race as an admissions factor, Justice Powell compared the University of California's affirmative action plan with that of Harvard College.[52] The Harvard plan did not utilize a rigid quota system, but allowed the admissions department to "tip the balance" in certain cases because "diversity adds an essential ingredient to the educational process."[53] Further, the Harvard plan was not limited to racial diversity.[54] Instead, the program also considered nonracial, cultural diversity.[55]

It is unclear whether the four Justices who found the affirmative action policy constitutional agreed with Justice Powell's argument in favor of diversity.[56] In a footnote, they explained that "[w]e also agree . . . that a plan like the `Harvard' plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering

48. *Id.* at 320.
49. *Id*. at 311–12.
50. *See id*. at 320.
51. *See Bakke*, 438 U.S. at 319–20.
52. *See id.* at 316. Justice Powell supplied an appendix to his opinion that outlined in detail the admissions program at Harvard College. *See id.* at 321–24.
53. *Id.* at 322–23.
54. *See id*.
55. *See id.*
56. *See id.* at 326 (plurality opinion).

effects of past discrimination."[57]

Regardless of the four Justices' intent, it is Justice Powell's diversity theory that has captured the attention of the legal community.[58] As a plurality opinion, the *Bakke* decision left many questions unanswered, and exemplified the Justices' differing views on the volatile subject.

B. *United Steelworkers v. Weber*

The following year, the Court analyzed the constitutionality of another affirmative action plan in *United Steelworkers v. Weber*.[59] There, Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America entered into a collective bargaining agreement that reserved fifty percent of the job openings in an in-plant craft-training program for African-American employees.[60] Kaiser would keep the plan in effect until the percentage of African-American craft-workers reached a level comparable with that of the percentage of African-Americans in the local labor force.[61]

In the past, Kaiser had hired only craft-workers with past craft experience.[62] And, since African-Americans had long been barred from craft unions, they could not attain the necessary experience.[63] This fact, combined with Kaiser's suspect hiring practices, produced a noticeably low number of African-American employees and craft-workers.[64] So, in 1974, Kaiser implemented the affirmative action plan and in the first year alone, Kaiser selected seven African-Americans to fill thirteen new craft-trainee positions.[65]

Brian Weber, a white male who had attempted to participate in the craft-training program, filed a class action suit under Title VII.

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57. *Bakke*, 438 U.S. at 326 n.1 (plurality opinion).

58. *See*, *e.g.*, Judith C. Areen et al., *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 163 (1989) (declaring 29 constitutional scholars' belief that "Justice Powell . . . cast the tie-breaking vote in favor of the view that the University's and society's interest in diversity justified racial preferences in education").

59. 443 U.S. 193 (1979).

60. *See id.* at 197–98.

61. *See id.* at 198.

62. *See id.*

63. *See id.*

64. *See id*. at 198, 210. In fact, although the labor force in the area was 39% African-American, Kaiser employed less than 15% African-American employees, and less than 2% African-American craft-workers. *See id.* at 198–99, 210.

65. *See Weber*, 443 U.S. at 199.

Weber alleged that Kaiser's affirmative action plan discriminated against white employees,[66] since Kaiser passed him over in favor of several African-American employees with less seniority.[67] The district court agreed with Weber's claim and entered judgment for the plaintiffs.[68] The court held that only the judiciary could implement affirmative action programs, and that it was beyond the reach of private employers under Title VII.[69]

The Fifth Circuit affirmed the district court's decision, but based its decision on different reasoning.[70] The court decided that an affirmative action plan could be legally utilized by a private employer if its goal were to remedy its own prior discrimination.[71] Because Kaiser had not created the plan in response to its own prior employment discrimination, but to a general discrimination in the area, the Fifth Circuit held that the plan was unconstitutional.[72]

The Supreme Court reversed, holding that the Kaiser plan's purposes "mirror[ed] those of the statute" and did not "unnecessarily trammel the interests of the [non-minority] employees."[73] In reaching its conclusion, the Court analyzed the legislative history of Title VII and retraced the reasoning for Congress's enactment of Title VII.[74] The Court found racial injustice, African-Americans'

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66. *See id.* at 193.

67. *See id.* at 199.

68. *See id.* at 200.

69. *See* Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 767 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

70. *See Weber*, 443 U.S. at 200.

71. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 225 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

72. *See id.* at 225–26.

73. *Weber*, 443 U.S. at 208. The Court also stated:

> The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."
>
> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

Id. (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

74. *See id.* at 201–04.

limited position in the economy, and the presence of occupations closed to African-American workers as bases for the enaction of Title VII.[75] The Court therefore concluded that Congress did not intend to prohibit private employers from utilizing affirmative action plans aimed at eliminating such past discrimination.[76] The Court stated that

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[77]

Weber argued that a literal interpretation of Title VII prohibited the Kaiser plan.[78] He asserted that courts should not allow private employers to engage in racial discrimination solely because a person is white.[79] Weber reasoned that since the court would prohibit the Kaiser plan if it were aimed to discriminate against African-Americans, it should analyze a plan benefitting African-Americans on the same terms.[80]

However, the Supreme Court stressed that "a thing may be within the letter of the statute and yet not within the statute, because [it is] not within [the statute's] spirit nor within the intention of its makers."[81] This so-called "spirit" of Title VII provided more insight to the Court than the actual language in the statute. The Court, speaking through Justice Brennan, distinguished between *requiring* and *permitting* voluntary affirmative action programs.[82] The Court reasoned that if Congress had intended to limit all affirmative action programs, it would have explicitly proclaimed that

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75. *See id.* at 202–04.

76. *See id.* at 204.

77. *Id*. at 204 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

78. *See Weber*, 443 U.S. at 201. *Weber* relied on *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 278–79 (1976), which held, under a literal interpretation of Title VII, that the statute protects all persons from certain forms of racial discrimination.

79. *See Weber*, 443 U.S. at 201.

80. *See id*.

81. *Id.* at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457 (1892)).

82. *See id.* at 205–06.

employers are neither *required* nor *permitted* to utilize benign racial discrimination.[83] Such a strict interpretation though would defeat the goals leading to the enaction of Title VII.[84]

Although the Court refused to "define in detail, the line of demarcation between permissible and impermissible affirmative action plans," the Court clearly established that such plans were not impermissible under a literal interpretation of Title VII.[85] Even though Kaiser had not implemented the plan in response to the company's own prior discrimination, the Court still found the plan legal.[86] The Court would utilize this analysis when determining the legality of another Title VII affirmative action program in *Johnson v. Transportation Agency, Santa Clara County*.[87]

C. *Johnson v. Transportation Agency, Santa Clara County*

In *Johnson*, the Supreme Court again was faced with determining the statutory validity of an affirmative action plan under Title VII.[88] The *Johnson* case concerned a gender-based affirmative action program in the Santa Clara County Transportation Agency.[89] Since female employees were underrepresented in the Agency, and held largely "traditional female jobs," the County Transit Board of Supervisors implemented an affirmative action program.[90] The Board stated that the "mere prohibition of discriminatory practices [was] not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."[91]

Essentially, the program would not call for strict quotas, but would seek to attain the long-term goal of a balanced work force that adequately reflected the number of potential female employees in the area.[92] The Board realized, however, the difficulty in reach

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83. *See id*. at 205.
84. *See id.* at 207.
85. *See Weber*, 443 U.S. at 208.
86. *See id.* at 209.
87. 480 U.S. 616 (1987).
88. *See id.* at 619.
89. *See id.* at 620–21.
90. *See id.* at 621. In fact, 76% of the female employees held positions as office or clerical workers. *See id.*
91. *Johnson*, 480 U.S. at 620.
92. *See id.* at 621–22. Furthermore, the affirmative action plan allowed the District

ing these long-term goals, but believed the plan would address short-range goals that would be annually adjusted.[93] More importantly though, the Agency would only consider gender as a factor in evaluating candidates for positions in which women were underrepresented.[94]

In December 1979, the Agency sought an employee for a road dispatcher position.[95] Women did not hold any of the 238 positions in that job category at that time.[96] The Agency narrowed the applicant pool to seven eligible candidates, including Diane Joyce and Paul Johnson.[97] Although Johnson had received a higher score based on prior work experience and the first interview, the Agency ultimately chose to promote Joyce.[98]

Johnson sued under Title VII, alleging that the Agency's decision produced unlawful gender discrimination.[99] The district court held that the indefinite nature of the plan failed to satisfy the criteria outlined by the Supreme Court in *Weber*.[100] The Ninth Circuit, however, reversed, holding that the lack of an express termination date did not render the plan per se invalid when it sought to attain a balanced work force.[101] The Supreme Court affirmed.[102]

The Court recognized its analysis in *Weber* as controlling, so it analyzed the *Johnson* case based on the *Weber* "test."[103] Once again, though, the Supreme Court refused to rely on the plain language of the statute, but looked to the legislative intent of Title VII.[104] The

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Board to use the gender of a *qualified* candidate as only *one factor* in reaching its decision. *See id.* at 620–21.

93. *See id*. at 622. The plan sought to achieve a work force consisting of 36% female skilled craft workers. *See id.*

94. *See Johnson*, 480 U.S. at 620–21.

95. *See id*. at 623.

96. *See id.* at 621.

97. *See id.* at 623–24.

98. *See id.* at 623–25. After the Agency analyzed prior work experience and the first interview, Johnson received a score of 75 and Joyce received a score of 73. *See id.* at 623–24. The other five eligible candidates also received scores above 70. *See id.* at 623.

99. *See* Johnson v. Transportation Agency, Santa Clara County, 770 F.2d 752, 754 (9th Cir. 1985), *aff'd*, 480 U.S. 616 (1987).

100. *See id*.

101. *See* Johnson v. Transportation Agency, Santa Clara County, 748 F.2d 1308 (9th Cir. 1984), *amended by* 770 F.2d 752, 756–57 (9th Cir. 1985), *aff'd*, 480 U.S. 616 (1987).

102. *See* 480 U.S. 616, 640 (1987).

103. *See id*. at 631.

104. *See id.* at 627–30. Justice Brennan, writing for the majority, stated that "[s]uch

Court noted that Congress did not seek to amend Title VII after the *Weber* decision.[105] And while the Court recognized that this inaction did not necessarily signal congressional approval, it believed such silence had significance.[106]

In examining the affirmative action plan at issue, the Court first addressed whether the use of gender as a factor was a valid consideration based on an underrepresentation of women.[107] The Court did not determine what amount of underrepresentation would be necessary to permit an affirmative action plan in all cases, but did find that the decision to promote Joyce based on a plan seeking to balance the work force in "traditionally segregated job categories" satisfied *Weber*.[108]

Next, the Court addressed whether the affirmative action plan "unnecessarily trammeled the rights of male employees."[109] Since the Agency deemed seven employees eligible and qualified for the promotion in question, the Court reasoned that Johnson could not have had a true expectation interest in the promotion.[110] Thus, because the plan acted as only one factor in the employment consideration and did not deny Johnson the opportunity to have his qualifications compared to others, the plan did not deny any legitimate expectation.[111]

D. *Wygant v. Jackson Board of Education*

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a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." *Id.* at 642.

105. *See id.* at 629 n.7. As support, the Court cited Congress's passage of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), in response to the holding and reasoning of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See Johnson,* 480 U.S. at 629 n.7.

106. *See Johnson*, 480 U.S. at 629–30 n.7.

107. *See id.* at 631.

108. *See id*. at 637.

109. *See id.* In supporting the Agency's use of gender as one factor in its employment decision, Justice Brennan favorably compared the plan to the Harvard plan cited by Justice Powell in *Bakke*. *See id.* at 638 (citing 438 U.S. 265 at 316–19). See *supra* notes 50–53 and accompanying text for a discussion of the Harvard plan.

110. *See Johnson*, 480 U.S. at 638.

111. *See id.*

Between the *Weber* and *Johnson* decisions, the Supreme Court, in *Wygant v. Jackson Board of Education*,[112] examined the validity of an affirmative action plan that favored nonminority teachers over minority teachers with less seniority.[113] In 1972, the Jackson Board of Education and Jackson Education Association negotiated a layoff provision, favoring the retention of minority educators, in their collective bargaining agreement.[114] When the Board subsequently implemented the plan, the terminated, nonminority teachers sued in federal court.[115]

The district court upheld the constitutionality of the plan, applying a test of reasonableness in evaluating the plan.[116] Affirming the district court's decision, the Sixth Circuit cited precedent supporting the use of affirmative action plans to alleviate racial imbalances in the workforce.[117] The Supreme Court, however, reversed.[118]

In a 5-4 decision, the Court found that the plan violated the Equal Protection Clause.[119] In his majority opinion,[120] Justice Powell examined whether a school board may provide racial preferences in termination decisions in accordance with the Equal Protection Clause.[121] Although the Court asserted that prior discrimination had to prompt action, the Court chose not to analyze this issue.[122] Instead, the majority found that the layoff provision of the collective bargaining agreement was not a legally justified means of accomplishing a compelling governmental purpose.[123] Justice Powell stated that courts should apply a strict scrutiny standard,[124] not the rea-

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112. 476 U.S. 267 (1986).

113. *See Wygant*, 476 U.S. 267, 272 (1986).

114. *See id.* at 270.

115. *See id.* at 272.

116. *See* Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1201–02 (M.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

117. *See* Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

118. 476 U.S. 267, 284 (1986).

119. *See id.* at 278, 295.

120. Justice Powell delivered the judgment of the Court, in which Chief Justice Burger and Justice Rehnquist joined. Justices O'Connor and White concurred in the judgment and filed separate opinions.

121. *See Wygant*, 476 U.S. at 273–84.

122. *See id.* at 277–78.

123. *See id.* at 283.

124. "Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 280 (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)).

sonableness test the Sixth Circuit advocated.[125] Stressing the extreme burden a layoff places on the affected individual, Justice Powell implied that layoffs may never be used in affirmative action plans.[126]

Justice O'Connor wrote a concurring opinion, specifically disagreeing with Justice Powell's idea of a *per se* rule eliminating racially based layoff provisions in affirmative action plans.[127] Justice O'Connor implied that a layoff provision may be an appropriate means to protect an affirmative action goal, but did not reach this decision because she believed that the hiring goals the Board utilized were not justified.[128] Citing the *Bakke* decision in support of diversity in the classroom,[129] O'Connor stated that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently `compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[130]

E. *Metro Broadcasting, Inc. v. FCC*

Although not dealing with an interpretation of Title VII or a race-conscious program in an educational context, the Supreme Court, in the 1990 case *Metro Broadcasting, Inc. v. FCC*,[131] addressed whether the Federal Communications Commission could utilize racial preferences to promote broadcast diversity.[132] The

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125. *See id.* at 279.

126. *See id.* at 282–84. Justice Powell concluded the analysis by declaring:

> We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Id. at 283–84 (footnotes and citations omitted).

127. *See Wygant*, 476 U.S. at 293–94 (O'Connor, J., concurring in part and concurring in the judgment).

128. *See id.* at 293–94.

129. *See id.* at 286.

130. *Id.* (citing *Bakke*, 438 U.S. at 311–15).

131. 497 U.S. 547 (1990).

132. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), subsequently overruled *Metro Broadcasting* in terms of the test applied in determining an affirmative action plan's validity. *Adarand* established a strict scrutiny standard in examining benign racial classifications. *See id.* at 227. However, the *Adarand* dissent stressed that this

affirmative action plan at issue involved two policies that the Federal Communications Commission had adopted.[133] In the first policy, the FCC gave preferences to minority-owned firms when considering applications for new radio or television stations.[134] The second policy became known as the "distress sale" program.[135] That policy provided that a radio or television station could transfer its license, when under FCC scrutiny, to an agency-approved minority group before the FCC had decided the matter.[136] The Supreme Court upheld both policies, concluding that racial preferences enhance broadcast diversity.[137]

The Court found that minority ownership in the broadcasting industry would produce more variation and diversity in programming.[138] The Court believed this diversity was an important governmental objective.[139] Therefore, the Court bowed to the FCC's judgment.[140]

Writing for the majority,[141] Justice Brennan cited Justice Powell's argument in *Bakke* which stated that "greater admission of minorities would contribute, on average, to the `robust exchange of

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holding would not preclude a finding that diversity may be a valid governmental interest, therefore justifying benign racial classifications. *See id.* at 258 (Stevens, J., dissenting).

133. *See Metro Broad.*, 497 U.S. at 552.

134. *See id.* Essentially, the FCC gave the preference in the form of a "plus" that it considered as a factor in determining which stations would receive new licenses. *See id*. at 556. "The plus [was] awarded only to the extent that a minority owner actively participate[d] in the day-to-day management of the station." *Id*. at 557.

135. *See id.* at 556–57.

136. *See Metro Broad.*, 497 U.S. at 557.

137. *See id.* at 600.

138. *See id.* at 566–68.

139. *See Metro Broad.*, 497 U.S. at 567–68.

140. *See id.* at 569. Justice Brennan explained that:

> Although we do not "`defer' to the judgment of the Congress and the Commission on a constitutional question," and would not "hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity" to equal protection principles, . . . we must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity.

Id. (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)).

141. Justice Brennan wrote the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. *See id.* at 550.

ideas.'"[142] The Court recognized that each minority enterprise would not necessarily promote this goal of diversity, but there was also no guarantee in *Bakke* that affirmative action programs in education would necessarily promote diversity by forcing the interaction of minority and nonminority students.[143] However, Congress found that "the American public [would] benefit by having access to a wider diversity of information sources."[144]

In a concurring opinion, Justice Stevens also hearkened back to Justice Powell's *Bakke* opinion.[145] Justice Stevens stated that "[t]he public interest in broadcast diversity — like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school — is in my view unquestionably legitimate."[146] The *Metro Broadcasting* Court, however, did not unanimously accept this interpretation of *Bakke*.[147]

Justice O'Connor dissented because she believed precedent did not support using racial preferences to ensure diversity in broadcasting.[148] Referring to the Court's recent decision of *City of Richmond v. J.A. Croson Co.*,[149] O'Connor stated that "[w]e have recognized that racial classifications are so harmful that `[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility.'"[150] It is unclear whether O'Connor's opinion signals the end of *Bakke*'s goal of diversity or if it simply refuses to acknowledge diversity as a governmental objective in broadcasting.[151]

These cases leave the state of affirmative action in a quandary. If affirmative action programs may be implemented only in remedial instances, then the goal of diversity accepted in *Metro Broadcasting*

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142. *Id*. at 579 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (opinion of Powell, J.)).

143. *See id.* at 579–80.

144. *Id.* at 568 (quoting H.R. CONF. REP. NO. 97-765, at 45 (1982)).

145. *See Metro Broad.*, 497 U.S. at 602 n.6 (Stevens, J., concurring).

146. *Id.* at 601–02 (footnotes and citations omitted).

147. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. *See id.* at 602.

148. *See id.* at 603 (O'Connor, J., dissenting).

149. 488 U.S. 469 (1989).

150. *Metro Broad.*, 497 U.S. at 613 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 493).

151. *See infra* notes 298–303 and accompanying text.

is invalid. Furthermore, where does this leave *Bakke*? These were some of the questions the Third Circuit faced in *Taxman v. Board of Education*.[152]

III. THE TAXMAN *COURT*

A. The Majority

Judge Carol Mansmann, writing for the majority in *Taxman*, began by acknowledging that the issue of the case was "whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference" in furtherance of "racial diversity."[153] The court cited *Weber* for the proposition that "Title VII's prohibition against racial discrimination is not violated by affirmative action plans which first, `have purposes that mirror those of the statute' and second, do not `unnecessarily trammel the interests of the [non-minority] employees.'"[154] Because the court held that the Board's affirmative action plan failed to satisfy either "prong" of *Weber*, the Third Circuit affirmed the district court's decision.[155]

The court began analyzing the legality of the Board's affirmative action program by exhaustively reviewing the *Weber* decision.[156] Recognizing that, before *Weber*, the Supreme Court had construed Title VII as an absolute bar against discrimination, Judge Mansmann acknowledged that the decision did not denounce all voluntary affirmative action plans.[157] Judge Mansmann concluded that the test was whether the plan's purpose "`mirror[ed] those of the statute' and . . . did not `unnecessarily trammel the interests of the [non-minority] employees.'"[158]

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152. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

153. *Id.* at 1549–50.

154. *Id.* at 1550 (quoting United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)).

155. *See id.*

156. *See id.* at 1553–55.

157. *See id.* at 1553 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), and McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976)).

158. *Taxman*, 91 F.3d at 1554–55 (quoting *Weber*, 443 U.S. at 208). Although the *Weber* Court permitted the affirmative action plan in that case under the two requirements stated by Judge Mansmann, the Court specifically refused to demarcate the line between permissible and impermissible affirmative action plans. *See supra* text accompanying note 83.

The *Taxman* court then turned to the later Supreme Court case of *Johnson v. Transportation Agency, Santa Clara County*.[159] Noting that the *Johnson* court cited *Weber* as controlling authority, Judge Mansmann analyzed the *Johnson* Court's usage of *Weber*'s "two-prong test."[160] Although the *Johnson* Court allowed the use of the voluntary affirmative action plan at issue, the *Taxman* court was more concerned with *how* the *Johnson* Court reached its decision.[161]

After presenting the relevant case authority on affirmative action programs under Title VII, the court next turned to an analysis of the legislative intent of Title VII.[162] The court stated that "Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force."[163] Judge Mansmann stressed the importance of this second primary goal, and reasoned that because Congress enacted Title VII to eliminate both *per se* and unwritten discrimination, affirmative action programs can survive under the Act's anti-discrimination mandate.[164] However, any deviation from the literal language of the Act must be made based on Congress's intent.[165]

Combining the legislative intent of Title VII with the *Weber* and *Johnson* decisions, the court applied these factors to the Board's affirmative action program.[166] The *Weber* and *Johnson* plans were both validated "because the Supreme Court . . . found a secondary congressional objective in Title VII that had to be accommodated — i.e., the elimination of the effects of past discrimination in the

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159. 480 U.S. 616 (1987).

160. *See Taxman*, 91 F.3d at 1555–56.

161. *See id.* at 1556. Again, the Supreme Court refused to "set forth a quantitative measure for determining what degree of disproportionate representation in an employer's work force would be sufficient to justify affirmative action." *Id.* Although the Supreme Court specifically stated that its analysis was not a dispositive measure in determining the outcome of future cases, the *Taxman* court uses the analysis of the *Weber* and *Johnson* cases as controlling tests. *See id.* at 1557.

162. *See id.* at 1556–58.

163. *Taxman*, 91 F.3d at 1557. The court noted that the first purpose was "set forth in section 2000e–2's several prohibitions," while the second purpose was "revealed in the congressional debate" that accompanied the passing of the act. *See id*.

164. *See id.*

165. *See id.* at 1558.

166. *See id.* at 1557–58.

workforce."[167] Because Congress never recognized diversity as a Title VII objective, the Board violated the Act by terminating Sharon Taxman's employment.[168]

The court then rejected the Board's attempt to show legislative intent, including diversity, through other authority.[169] First, the court refused to accept the Board's claim that the 1972 amendment to Title VII was meant to cover the situation at issue.[170] Second, the Board argued that Fourteenth Amendment caselaw supports the goal of diversity in race-based employment decisions.[171] More particularly, the Board relied on equal protection cases arising in an educational context and the *Metro Broadcasting* case.[172]

The *Taxman* court, however, refused to accept this argument.[173] In doing so, it stated that "*Bakke*'s factual and legal setting . . . [is] so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in *Bakke* to guide us."[174] And the court also found *Metro Broadcasting* to "have no application here."[175]

Finding nothing in the Board's arguments to take the analysis outside the statutory interpretation, the court reiterated that the Board's affirmative action plan was not within the legislative intent or the *Weber* and *Johnson* holdings.[176] Although the court "applaud[ed] the goal of racial diversity, [it could not] agree that Title VII permits an employer to advance that goal through nonremedial

167. *Taxman*, 91 F.3d at 1558.

168. *See id.* The court analyzed *why* the concept of diversity is outside the congressional intent of Title VII later in the opinion. *See supra* notes 28–29 and accompanying text.

169. *See Taxman*, 91 F.3d at 1558–63.

170. *See Taxman*, 91 F.3d at 1558–59. In 1972, Title VII was amended to cover public and private academic institutions. *See id.* at 1558. The *Taxman* court, after reviewing the Senate committee's explanation for its recommendation, believed that Congress "neither addressed nor embraced" the concept of racial diversity as a goal of the amendment. *Id.*

171. *See id.* at 1559–63. The Board relied on the *Johnson*, *Wygant*, *Bakke*, and *Metro Broadcasting* cases as support for this argument. *See id*. at 1559–61.

172. *Taxman*, 91 F.3d at 1561–63.

173. *See id*. at 1562–63.

174. *Id.* at 1562.

175. *Id.* at 1562–63. The court believed that "[t]he diversity interest the Court found sufficient under the Constitution to support a racial classification had nothing whatsoever to do with the concerns that underlie Title VII." *Id.* at 1563.

176. *See id.* at 1563–64.

discriminatory measures."[177] Therefore, the court held that the Board violated Title VII when it terminated Sharon Taxman.[178]

B. The Sloviter Dissent

While the majority analyzed the Board's employment decision in terms of a strict affirmative action plan, Chief Judge Dolores Sloviter began her dissent by questioning whether the case actually involved affirmative action as it has come to be generally understood.[179] Rather, Chief Judge Sloviter felt the issue was whether Title VII *requires* a school board to make an employment decision between two equally qualified candidates with a coin toss or lottery.[180] Because she believed that Title VII *permits* employers in educational institutions to have such discretion, Chief Judge Sloviter dissented.[181]

Noting that the court was not faced with a constitutional claim, Chief Judge Sloviter stressed that the Board's actions must be measured against the same standard applied to a private school under Title VII.[182] Sloviter then reiterated the facts, leading to Taxman's termination.[183] Through the testimony of various Board members and the Director of Personnel, she emphasized that the affirmative action policy did not bind the Board in its decision.[184] Rather, it was the desire to have a diverse faculty that led to the Board's implementation of the plan.[185]

The majority labeled this desire to have a diverse faculty as a Title VII violation as a matter of law.[186] However, Chief Judge

177. *Taxman*, 91 F.3d at 1567.

178. *See id*.

179. *See Taxman*, 91 F.3d at 1567 (Sloviter, C.J., dissenting). Chief Judge Sloviter defined the general understanding of affirmative action as "preference based on race or gender of one deemed `less qualified' over one deemed `more qualified.'" *Id.*

180. *See id*.

181. *See id.* at 1567–68. Chief Judge Sloviter was joined in her dissent by Judge Lewis and Judge McKee. *See id.* at 1567. Judge Lewis and Judge McKee also wrote separate dissenting opinions, as did Judge Scirica.

182. *See id.* at 1568. Therefore, the Board's actions would not be analyzed under the more stringent Equal Protection Clause. *See id*.

183. *See Taxman*, 91 F.3d at 1568–69 (Sloviter, C.J., dissenting).

184. *See id.* at 1569.

185. *See id*.

186. *See id. See supra* notes 176–78 and accompanying text.

Sloviter observed that no precedent supported such a finding.[187] Although the plain language of Title VII might suggest otherwise,[188] the Supreme Court had never "interpreted the statute to preclude consideration of race or sex for the purpose of insuring diversity in the classroom as *one of many* factors in an employment decision . . . ."[189] In fact, the Supreme Court had upheld the voluntary affirmative action plans in the only two cases examining such plans under Title VII.[190]

The majority presented the *Weber* and *Johnson* cases in terms of their "test" of the validity of employers' voluntary affirmative action plans.[191] However, Chief Judge Sloviter emphasized that the Supreme Court strayed from the plain language of Title VII in *Weber* and *Johnson*.[192] Further, no language in either case established a clear test of the validity of such plans.[193]

Chief Judge Sloviter acknowledged that the Court implemented the *Weber* and *Johnson* plans to "remedy imbalances caused by past discrimination."[194] However, this did not mean that every plan that did not share these goals violated Title VII.[195] The Supreme Court stressed in *Weber* that its holding did not demarcate the boundaries of an employer's discretion when utilizing affirmative action programs.[196] Further, *Johnson* did not attempt to create such bound-

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187. *See Taxman*, 91 F.3d at 1569 (Sloviter, C.J., dissenting).

188. *See id.* See *supra* notes 162–64 and accompanying text for a discussion of the majority's review of Title VII.

189. *Taxman*, 91 F.3d at 1569 (Sloviter, C.J., dissenting).

190. *See id.* Referring to the *Weber* and *Johnson* decisions, Sloviter also noted that those cases were deemed valid even with the more stringent scrutiny imposed by the Equal Protection Clause. *See id.*

191. *See supra* text accompanying notes 158 and 160.

192. *See Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting).

193. *See id.*

194. *Id.*

195. *See id.* The *Weber* Court stated that:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."

Id. (quoting United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)).

196. *See id.* In Justice O'Connor's concurring opinion, she argued that affirmative action plans imposed under Title VII must be utilized only to remedy past discrimination. *See Johnson*, 480 U.S. at 649. However, Chief Judge Sloviter noted that Justice

aries.[197]

Despite agreeing with the majority that Congress created Title VII to eliminate both discrimination *per se* and the ramifications of prior discrimination, Chief Judge Sloviter did not believe Congress was "turning a blind eye toward those social forces that give rise to *future* discrimination."[198] She argued that the statute was a broad, forward-looking law designed to combat future patterns of discrimination.[199] Citing Justice Stevens' opinion in *Wygant* for the proposition that diversity in the classroom serves as a deterrent to future patterns of discrimination,[200] Chief Judge Sloviter noted the irony in the majority's conclusion that the Board's decision ran afoul of Title VII.[201]

Turning her attention to the Board's use of caselaw interpreting the Equal Protection Clause in this Title VII case, Chief Judge Sloviter noted statements in *Bakke* and *Wygant* that recognized the advantages of diversity in education.[202] In *Bakke*, Justice Powell argued that a diverse student body creates a "robust exchange of ideas,"[203] and that the ability to select teachers is an "`essential' element of academic freedom."[204] And, in *Wygant*, Justice O'Connor specifically distinguished the goal of providing role models from "`the very different goal of promoting racial diversity among the faculty,' explicitly leaving open the possibility that the latter goal

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O'Connor's vote was the sixth supporting the majority and not crucial to the Court's holding. *See Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting). Therefore, "[i]t follows that her narrow reading should not be read as constituting the view of the Court." *Id.* at 1570–71.

197. *See Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting).

198. *Id.* at 1571 (emphasis added).

199. *See id.* Citing the House Report of the Civil Rights Act, Sloviter recognized that the Act was intended to eradicate the "causes and consequences" of discrimination. *Id.* (quoting H.R. REP. NO. 88-914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (emphasis omitted)).

200. *See id.* at 1572. Justice Stevens believed "[i]n the context of public education, 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." *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting)).

201. *See Taxman*, 91 F.3d at 1572.

202. *See id.* at 1573.

203. *Id.* (quoting *Bakke*, 438 U.S. at 312); *see supra* notes 49–51 and accompanying text.

204. *Taxman*, 91 F.3d at 1573 (Sloviter, C.J., dissenting).

might be sufficiently compelling to pass muster."[205]

Chief Judge Sloviter next addressed whether the layoff of Taxman created a greater responsibility on behalf of the Board that would preclude voluntary affirmative action.[206] While accepting that a layoff's consequences differ greatly from a failure to promote or hire, she did not believe Taxman had a "legitimate and firmly rooted expectation" of keeping her job.[207] The majority relied in part on *Wygant*, which found that layoffs create too great a burden on affected employees.[208] However, Chief Judge Sloviter pointed out that the minority teachers the Board retained had *less* seniority than their nonminority counterparts.[209] Furthermore, it was the Board's implementation of the affirmative action plan that created their termination.[210] Without such a plan, the nonminority teachers would have had zero percent chance of being fired.[211]

In this case, Taxman did not have a similar unequivocal assurance that she would retain her job.[212] Second, the teachers were equal in seniority and had comparable qualifications.[213] Finally, the Board was not bound to impose the affirmative action policy.[214] It was only used as a factor after evaluating numerous other elements.[215]

Because promoting diversity in an educational context can be an

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205. *Id.* (quoting *Wygant*, 476 U.S. at 288 n.* (O'Connor, J., concurring)). Sloviter pointed out that this aspect of Justice O'Connor's opinion, when combined with the four dissenting Justices, provided a majority who believed that the goal of diversity in the classroom could be an acceptable basis for an affirmative action plan. *See id.*

206. *See id.* at 1574. The only two affirmative action cases that dealt with Title VII (*Weber* and *Johnson*) both concerned a failure to promote. *See supra* text accompanying notes 67 and 95–98.

207. *Taxman*, 91 F.3d at 1574 (Sloviter, C.J., dissenting) (quoting *Johnson*, 480 U.S. at 638).

208. *See id.*

209. *See id.*

210. *See id.* Therefore, the burden caused by implementing the plan was raising the probability of a "layoff from zero to one hundred percent." *See id.*

211. *See id.*

212. *See id.* Sloviter argued that Taxman's burden by the use of the affirmative action plan (raising the risk of layoff from fifty percent to one hundred percent) differed from the burden in *Wygant* (raising the risk of layoff from zero percent to one hundred percent). *See id.*

213. *See Taxman*, 91 F.3d at 1568, 1575 (Sloviter, C.J., dissenting).

214. *See id.* at 1575.

215. *See id.* This was actually the first instance in which the policy had been used in a layoff decision. *See id.*

acceptable basis for an affirmative action plan, Chief Judge Sloviter argued that educators should determine what level of diversity is appropriate.[216] Therefore, she believed that the Board's actions were legally within Title VII.[217] Returning to the question presented at the beginning of her dissent, Chief Judge Sloviter concluded by reiterating that "while Congress explicitly provided that Title VII should not be interpreted to *require* any employer to grant preferential treatment to a group because of its race, Congress never stated that Title VII should not be interpreted to *permit* certain voluntary efforts."[218]

IV. CRITICAL ANALYSIS

The *Taxman* decision leaves many old questions unanswered, and raises new ones as well. For example, did the Supreme Court establish a clear test for the validity of affirmative action plans under Title VII in *Weber* and *Johnson*? Second, what exactly was the legislative intent behind Title VII, especially in terms of future discrimination? And finally, is the goal of faculty diversity a compelling state interest, justifying its use in affirmative action plans under both constitutional and Title VII analysis?

A. The Board's Action Under Title VII

The *Taxman* majority incorrectly interpreted *Weber* and *Johnson* as demarcating a specific test concerning the validity of affirmative action plans under Title VII. Furthermore, the court incorrectly represented the legislative intent of Title VII, especially in terms of future discrimination.

1. Weber *and* Johnson

The *Weber* decision typifies the confusing signals the Court has provided regarding the validity of affirmative action plans.[219] Al

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216. *See id.* "The Board's action is an attempt to create an educational environment that will maximize the ability of students to address racial stereotypes and misconceptions born of lack of familiarity." *Id.*

217. *See Taxman*, 91 F.3d at 1576 (Sloviter, C.J., dissenting).

218. *Id.* at 1576 (citing *Weber*, 443 U.S. at 205–06) (Sloviter, C.J., dissenting).

219. *Compare* Laurence H. Tribe, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711 (1989), *with* Charles

though the *Taxman* court interpreted *Weber* as establishing a clear, two-pronged test,[220] the *Weber* Court expressly stated that it was not creating a definitive barometer.[221] Rather, the factors described seem to provide support for the affirmative action plan in *Weber* being permissible.[222]

Nevertheless, eight years after the *Weber* decision, the Court examined another Title VII affirmative action plan under the same reasoning.[223] The Court in *Johnson v. Transportation Agency, Santa Clara County* followed the *Weber* "test" as if it created boundaries in analyzing affirmative action plans.[224] The *Johnson* Court examined whether the plan had a purpose mirroring the statute and did not "unnecessarily trammel" the rights of the nonminority employees.[225] In doing so, the Court limited the possibility of successful affirmative action plans under Title VII and seemingly adopted a test for the legality of these plans, contrary to the limiting language in *Weber*.

The *Taxman* majority interpreted the *Weber* and *Johnson* decisions as defining the test of the validity of the Piscataway Board's plan.[226] Because the plan failed both "prongs" of the test, the Third Circuit deemed it invalid.[227] The majority refused, however, to heed the limiting language in precedent.[228] Justice Brennan cautioned in *Weber* that "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans."[229] Justice Stevens echoed these statements in his *Johnson* concurrence, emphasizing that "the opinion does not establish the permissible outer limits of voluntary programs."[230]

Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.: *A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989).

220. *See Taxman*, 91 F.3d at 1550.

221. *See Weber*, 443 U.S. at 208.

222. In her dissent, Chief Judge Sloviter recognized the illogical proposition that "every affirmative action plan that pursues some purpose other than correcting a manifest imbalance or remedying past discrimination will run afoul of Title VII" when *Weber* explicitly cautioned to the contrary. *Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting).

223. *See Johnson*, 480 U.S. at 627–40.

224. *See id.* at 630.

225. *See id.*

226. *See Taxman*, 91 F.3d at 1553–57.

227. *See id.* at 1550.

228. *See Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting).

229. *Weber*, 443 U.S. at 208.

230. *Johnson*, 480 U.S. at 642 (Stevens, J., concurring).

In fact, it was not the "test" in *Weber* and *Johnson* that caused the controversy, but the upholding of an affirmative action plan in apparent violation of the plain meaning of Title VII.[231] The *Weber* Court analyzed the legislative intent of the Act,[232] found the plan at issue to be within the spirit of the statute,[233] and produced reasons supporting the plan's validity.[234] The Court upheld the affirmative action plan, stretching the interpretation of Title VII.[235]

Justice Rehnquist dissented, arguing that the *Weber* majority "elude[d] the clear statutory language" and was "flatly prohibited by the plain language of Title VII."[236] Along the same vein, Justice Scalia stressed in his *Johnson* dissent "to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe. . . . *Weber* disregarded the text of the statute, invoking instead its `spirit.'"[237] The *Taxman* majority refused to recognize the magnitude of this statutory extension, instead focusing on the purported "test."[238]

Even if the Court had demarcated the line of permissible affirmative action programs in *Weber* and *Johnson*, the Third Circuit should have found the Board's plan valid. The *Taxman* majority determined that the affirmative action plan unnecessarily trammeled the interests of the nonminority employees.[239] Stressing the increased burden of a layoff as compared to a failure to hire or promote, the majority questioned whether affirmative action plans involving layoffs could ever be found valid.[240] However, Sharon Taxman had no true expectation interest in preserving her job.[241] If

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231. *See* Bernard D. Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); *see also* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 303–04 (1989).

232. *See Weber*, 443 U.S. at 202–07.

233. *See id.* at 201–02.

234. *See id.* at 208.

235. *See id.* at 209.

236. *Id.* at 222, 228 (Rehnquist, J., dissenting).

237. *Johnson*, 480 U.S. at 670 (Scalia, J., dissenting) (citing United Steelworkers v. Weber, 443 U.S. 193, 201 (1979)).

238. *See Taxman*, 91 F.3d at 1554–55.

239. *See id.* at 1564–65.

240. *See id.* at 1564. The court adopted the proposition in *Wygant* that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Id.* (quoting *Wygant*, 476 U.S. at 283).

241. *See Taxman*, 91 F.3d at 1574 (Sloviter, C.J., dissenting).

the Board had used the coin flip that had been used to settle similar disputes in the past, Taxman only had a fifty percent chance of retaining her job.[242] Furthermore, the racial preference was only one factor and could not have influenced the decision had Taxman's qualifications been greater.[243] Finally, the plan did not bind the Board; instead, it chose to use the plan based on a legitimate goal.[244] Therefore, the Third Circuit should not have found that the plan unnecessarily trammeled the interests of the nonminority employees.

The *Taxman* court next addressed whether the goals of the Board's plan mirrored those of Title VII.[245] Upon examination of the legislative intent of Title VII and previous interpretations of the statute, this aspect of the *Taxman* decision is also flawed.

2. *Title VII Analysis*

As Chief Judge Sloviter pointed out in her *Taxman* dissent, the majority found "the Board's decision to include the desire for a racially diverse faculty among the various factors entering into its discretionary decision . . . a Title VII violation as a matter of law."[246] However, the Supreme Court has not strictly followed the plain meaning of Title VII in assessing the legality of employment decisions that consider race or sex.[247] In *Weber* and *Johnson*, the Supreme Court extended the reach of Title VII by looking beyond the literal meaning of the statute.[248]

The *Weber* Court analyzed whether the affirmative action plan's purposes "mirrored" those of the statute by looking at both the legislative history and historical context of Title VII.[249] Before the *Weber* decision, it was unclear whether race and sex were permissible factors to consider in making employment decisions.[250] *Weber* changed

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242. *See id.*

243. The Board's president, Paula Van Riper, stated, "If one were more senior than the other, it would have ended right there." *Piscataway*, *supra* note 12, at A17.

244. *See supra* text accompanying note 13.

245. *See Taxman*, 91 F.3d at 1556–57.

246. *Taxman*, 91 F.3d at 1569 (Sloviter, C.J., dissenting).

247. *See supra* notes 231–37 and accompanying text.

248. *See Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 644 (Stevens, J., concurring).

249. Title VII prohibits employment discrimination on the basis of race and sex. *See supra* note 18.

250. According to the plain language of the statute, considering race or sex in employment decisions would violate Title VII. *See* 42 U.S.C. § 2000e-2(a) (1994).

the interpretation of Title VII by recognizing that the statute sought "the integration of blacks into the mainstream of American society."[251] Title VII not only attempted to create neutrality in the workforce, but also sought to produce equal employment opportunities for everyone.[252] By solely eliminating the discriminatory practices utilized by employers, it arguably would not drastically improve minority and female participation in employment.[253]

The *Johnson* Court did not even address language in the legislative history in connection with the plan at issue.[254] Instead, the Court accepted the extension of Title VII detailed in *Weber*, and then considered the plan in terms of the "mirroring" language of *Weber*.[255] Because the plan was consistent with the broad goals of Title VII, the *Johnson* plan did not violate the statute.[256]

In *Taxman*, the court thoroughly examined the reach of Title VII, recognizing that:

> Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force.[257]

The court then declared that a non-remedial affirmative action plan cannot satisfy Title VII analysis because its purposes do not mirror those of the statute.[258] Therefore, the plan violated Title VII.[259]

The *Taxman* court refused to consider the possibility that Congress also enacted Title VII to combat future discrimination in the workplace. The Civil Rights Act of 1964 and Title VII have been called "fundamentally forward-looking legislation,"[260] and were enacted to "eliminat[e] all of the causes and consequences of racial and

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251. *Weber*, 443 U.S. at 202.
252. *See Taxman*, 91 F.3d at 1571 (Sloviter, C.J., dissenting).
253. *See Johnson*, 480 U.S. at 620.
254. *See id*. at 631.
255. *See id.* at 632–34.
256. *See id.* at 641–42.
257. *Taxman*, 91 F.3d at 1557.
258. *See id.* The *Taxman* court was "convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute . . . ." *Id.*
259. *See id.* at 1558.
260. *Taxman*, 91 F.3d at 1571 (Sloviter, C.J., dissenting).

other types of discrimination against minorities."[261] Limiting affirmative action plans under Title VII to remedial programs hinders the true goal of equal opportunity and the assimilation of minorities in the workplace.

If this interpretation of Title VII were to stand, a private employer without past discriminatory practices could never take race into account in an employment decision. The employer could not use racial diversity as a factor if it had not personally discriminated against minorities in the past, even in an attempt to combat future discrimination. This interpretation will have an especially significant impact on education. Although affirmative action plans that redress the effects of past discrimination are inspiring, the plans should not be limited as such. Racial diversity in education enlightens and inspires our youth, and contests the attitudes that lead to future discrimination. Quoting the Senate Report of the 1972 amendments to Title VII, the Third Circuit stated, "[t]o permit discrimination here [among faculty and staff] would, more than any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination."[262]

B. Diversity as a Compelling State Interest

The Court should recognize faculty diversity as a valid goal under the Equal Protection Clause and Title VII, and justify its use as a factor to consider in affirmative action plans. Public policy arguments, child development studies detailing the benefits of diversity in education, supporting language in prior Supreme Court cases, conflicting opinions of Justice O'Connor, and the possibility of differing standards for education and contracting cases support the contention that faculty diversity is a valid goal.

1. Child Development and Public Policy

261. *Id.* (emphasis omitted) (quoting H.R. REP. NO. 914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393).

262. *Taxman*, 91 F.3d at 1571–72 (quoting S. REP. NO. 415, at 12 (1971)).

The argument in favor of diversity in education is not novel, and has been widely debated since Justice Powell's opinion in *Bakke*.[263] Due to *Bakke*'s graduate-school setting, however, Justice Powell's diversity argument has been largely limited to higher education.[264] Although a laudable goal, diversity in higher education should not be the sole instance in which educators can implement affirmative action plans to further diversity. Limiting the reach of diversity to higher education would fly in the face of logic and child development studies.

A child has already experienced significant development by the time she reaches a university, and a diverse student body at college will impact a student differently than if she had been part of a diverse student body since elementary school. In elementary school, a child has not completely developed, and is more susceptible to, and influenced by, outside factors. Whereas a university student has often formulated beliefs and opinions about race and religion, an elementary student has yet to confront these issues. Diversity exposes and introduces a student to an education not found in textbooks.

Assessing the benefits of diversity to students is often difficult due to the frequent unreliability of studies.[265] Educational researchers have noted that "[r]esearch on diversity is by its nature sensitive, prone to undetected bias, and open to multiple interpretations."[266] Therefore, without a uniform set of evidentiary findings, courts have difficulty reaching uniform decisions.[267]

It is undisputed, however, that faculty can impact student behavior and attitudes.[268] Combining the value of diversity with a

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263. *See*, *e.g.*, Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 106.

264. In addition, although this Note addresses diversity in the context of race, the Author recognizes that diversity can also include other elements. *See*, *e.g.*, Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059 (1996).

265. *See* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1363 (1996).

266. *Id.* (quoting Daryl G. Smith et al., *Introduction to Studying Diversity: Lessons from the Field*, *in* STUDYING DIVERSITY IN HIGHER EDUCATION 1, 5 (Daryl G. Smith et al. eds., 1994)).

267. The district court in *Hopwood v. Texas*, 861 F. Supp. 551, 571 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932, 941–43 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), even solicited the testimony from deans of law schools regarding the value of a diverse student body.

268. *See* Helen S. Astin & Jeffrey M. Milem, *The Changing Composition of Faculty*,

teacher's influence, school boards across the country have looked for ways to increase the number of minority educators.[269] One possible solution is hiring a full-time minority recruiter.[270] Because utilizing a full-time employee strictly for the recruitment of minority teachers is expensive, school boards have been reluctant to regularly create such a position.[271]

A more drastic measure involves implementing a court-ordered diversity program.[272] In Boston, for example, District Judge W. Arthur Garrity, Jr. directed schools to improve representation of the city's diversity in their faculties.[273] But such instances of judicial action are rare, and one cannot expect them to serve as the sole means of achieving diversity.

Affirmative action programs that use race as a factor effectively encourage diversity without compromising teaching quality. Such programs recognize and address the benefits of diversity, but do not exclude certain classes based on their race. One of the most popular arguments against affirmative action is that it forces the hiring or retention of "unqualified" minorities in favor of "qualified" non-minorities. However, schools can implement the use of racial preferences as a factor in furtherance of diversity without unnecessarily trammeling the rights of "qualified" non-minorities. For example, the *Taxman* case involved two candidates equal in ability. The

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25 CHANGE 21, 21 (1993) (citing Alexander W. Astin, *How Are Students Affected by Multiculturalism?*, 25 CHANGE 44 (1993)).

269. *See* Susan Jacobson, *School District Is Looking at More Cultural Diversity*: *The Teaching Corps Should Reflect the Student Body in its Makeup of Minorities*, *a Leader Says*, ORLANDO SENTINEL, Sept. 23, 1994, at 1; Nancy Polk, *Seeking Teachers as Diverse as Their Students*, N.Y. TIMES, Nov. 15, 1992, § 13CN, at 1; Ernest Portillo, Jr., *Poway Schools Offer Affirmative Action Plan*, SAN DIEGO UNION TRIB., Apr. 20, 1993, at B2; Stan Simpson, *School System to Work to Diversify its Staff*, HARTFORD COURANT, July 20, 1994, at B7.

270. *See*, *e.g.*, Jacobson, *supra* note 269, at 1 (explaining Osceola County's efforts to hire minority teachers, including the possibility of adding a full-time recruiter); Polk, *supra* note 269, at 1 (detailing Connecticut's struggle to achieve ethnic diversity, which led to the hiring of a part-time affirmative action officer used to recruit minority applicants in the town of Greenwich).

271. Charles V. Willie, a professor of education and urban studies at Harvard University, believes that "seldom do school systems on their own assume responsibility for diversifying their teaching and administration staff." Luz Delgado, *Some School Faculties Reflect Little Diversity*, BOSTON GLOBE, June 26, 1994, at 1.

272. *See id.*

273. *See id*. Judge Garrity's order was issued in 1974, during the height of the desegregation movement. *See id.*

Board recognized the advantages of a diverse faculty, and tipped the scales based on this factor.

The determination of the benefits of a diverse faculty is best left in the hands of the educators and school administrators.[274] In Justice Stevens' *Wygant* dissent, he acknowledged 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."[275] The *Taxman* decision will seriously impede innovative school board policies affirming and encouraging the benefits of faculty diversity. Rather than questioning these policies, we should applaud them.

2. *Language in Prior Cases*

Arguments in favor of diversity as a compelling state interest began with Justice Powell's opinion in *Regents of the University of California v. Bakke*.[276] Justice Powell argued that since students benefit from a diverse student body, a school could use race as a factor in making admissions decisions.[277] The goal of diversity, however, would not automatically justify an affirmative action program.[278] Because the University of California employed a strict quota system, the plan could not satisfy constitutional concerns.[279] And, the educational benefits derived from diversity would not supersede constitutional violation.[280]

However, according to Justice Powell, using race *as a factor* to promote diversity would be constitutional.[281] Diversity, he explained,

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274. Since the Supreme Court granted certiorari on June 27, 1997 in the *Taxman* case, the nation's largest teachers union has declared its support of preferential hiring of women and racial minorities in furtherance of diversity. *See* Robert Greene, *NEA Renews Affirmative Action Stance*, BOSTON GLOBE, July 5, 1997, at A3.

275. *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting).

276. *Bakke*, 438 U.S. at 314.

277. *See id*. at 321.

278. The fact that diversity will not automatically justify affirmative action is evident in the Court's striking down the University of California's admissions program. *See id.*

279. *See id.* at 318.

280. The highly publicized case of *Hopwood v. Texas*, 78 F.3d 932, 941–43 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), incorrectly questioned whether Justice Powell's diversity argument represented the majority of the *Bakke* Court. In *Hopwood*, the Fifth Circuit held that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional." *Id.* at 945–46.

281. *See supra* text accompanying note 49.

leads to a "robust exchange of ideas."[282] This reasoning was not limited to the student body as Justice Powell specifically noted the importance in determining "who may teach."[283]

Justice Powell's argument in favor of diversity resonated seven years later in Justice Stevens' dissenting opinion in *Wygant v. Jackson Board of Education*.[284] Justice Stevens recognized "that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous `melting pot' do not identify essential differences among the human beings that inhabit our land."[285] Therefore, a school board could "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."[286]

Justice Stevens reiterated these beliefs the next term in his concurring opinion to *Johnson v. Transportation Agency, Santa Clara County*.[287] Analyzing the affirmative action plan under Title VII in accordance with the *Weber* decision, Justice Stevens questioned whether a plan must be implemented only in response to prior discrimination.[288] Justice Stevens argued that in certain instances it is more important to look to the future and "forward-looking considerations."[289] Justice Stevens concluded by stressing that "[t]he Court today does not foreclose other voluntary decisions based in part on a qualified employee's membership in a disadvantaged group."[290]

Arguments for diversity as a factor in educational affirmative action programs, therefore, have support in public policy, child development studies, and language of the Supreme Court. However, the Court has not adopted this reasoning as law. In fact, most scholars agree that the Court has limited the reach of affirmative action since *Bakke*.[291] However, this limitation does not necessarily

282. *Bakke*, 438 U.S. at 312 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
283. *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).
284. *Wygant*, 476 U.S. at 313–20 (Stevens, J., concurring).
285. *Id.* at 315 (Stevens, J., dissenting).
286. *Id*.
287. 480 U.S. 616, 642–47 (1987) (Stevens, J., concurring).
288. *See id.* at 646–47.
289. *Id.* at 647.
290. *Id.*
291. See *supra* note 132 for an example of such cases.

signal the Court's disapproval. Rather, the apparent contradiction could be due to the distinction in education and contracting cases.[292] By analyzing the seemingly contradictory opinions of Justice O'Connor, this distinction becomes clear.

3. Justice O'Connor

In *Wygant*, Justice O'Connor wrote a separate concurring opinion that arguably displayed her support for diversity in education.[293] Lower courts upheld the affirmative action plan in *Wygant*, based on a "role model" theory.[294] Justice O'Connor distinguished "the goal of providing role models" from "the very different goal of promoting racial diversity among the faculty."[295] Citing Justice Powell's opinion in *Bakke*, Justice O'Connor noted that "a state interest in the promotion of racial diversity has been found sufficiently `compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[296]

Justice O'Connor again wrote a separate concurring opinion the following term in *Johnson*.[297] Analyzing the plan under Title VII, Justice O'Connor stated that an evaluation of the legality of an affirmative action plan under the Act would be no different than what the Constitution required.[298] Turning to the plan at issue, Justice O'Connor concurred in the judgment because the plan considered gender as a factor only in the overall employment decision.[299]

After seemingly accepting the idea of using diversity as a factor in justifying affirmative action programs, Justice O'Connor refused to extend this reasoning to the broadcasting industry in *Metro Broadcasting, Inc. v. FCC*.[300] Justice O'Connor cited *City of Richmond v. J.A. Croson Co.* for the proposition that "racial classifications are so harmful that `[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of ra-

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292. *See* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1754 (1996).

293. *See Wygant*, 476 U.S. at 284–94 (O'Connor, J., concurring).

294. *See id.* at 288.

295. *Id.* at 288 n.*.

296. *Id*. at 286 (citing *Bakke*, 438 U.S. at 311–15)

297. *See Johnson*, 480 U.S. at 647–57 (O'Connor, J., concurring).

298. *See id.* at 649.

299. *See id.* at 655–56.

300. *See Metro Broad.*, 497 U.S. at 602–31 (O'Connor, J., dissenting).

cial inferiority and lead to a politics of racial hostility.'"[301] Further, Justice O'Connor stated that "increasing the diversity of broadcast viewpoints is clearly not a compelling interest."[302] She thought "[i]t is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."[303]

Justice O'Connor's apparently contradictory viewpoints can be reconciled. Indeed, scholars have suggested that the difference can be found in the distinction between education and contracting cases.[304]

4. Education vs. Contracting Cases

Judge Scirica, in his *Taxman* dissent, felt "constrained to express [his] disagreement because [he] believe[d] education presents unique concerns."[305] Courts have long given broad discretionary power to educators, and deferred to the decisions of teachers and educators. Although this decisionmaking power is not infinite, it is unique.

Some have argued that the unique nature of education creates a necessary split between the two most popular affirmative action domains: contracting and education.[306] While contracting "set-aside" programs often allow minority firms to achieve "a piece of the action" in government business, educational "affirmative action brings young adults from diverse backgrounds together into a democratic dialogue where they will learn from each other."[307] These very different goals could explain Justice O'Connor's chameleonic nature.

Scholars argue that Justice O'Connor's opinions are actually "quite similar to Justice Powell's approach in *Bakke*: When the government looks *solely* at race and admits people only because of their skin color, it violates equal protection."[308] An educational application that utilizes race as a factor, however, allows an admissions department or school board to consider the value of diversity as one of nu-

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301. *Id.* at 613 (quoting *Croson*, 488 U.S. at 493).

302. *Metro Broad.*, 497 U.S. at 612 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 493).

303. *Id.* at 612.

304. *See* Amar & Katyal, *supra* note 292, at 1761–67.

305. *Taxman*, 91 F.3d at 1576 (Scirica, J., dissenting).

306. *See* Amar & Katyal, *supra* note 292, at 1745.

307. *Id*.

308. *Id.* at 1764 (emphasis in original).

merous factors in assessing an individual.[309] Governmental set-aside programs, on the other hand, do not afford the same luxury.[310]

Proponents have also argued that race could also be used as a factor in contracting set-aside programs, and essentially "diversify" an industry.[311] While the possible success of these programs is disputed,[312] it is difficult to argue that the goals of diversity cannot be realized in education. Teachers directly influence and interact with students who attend school to receive an education. Acknowledging the impact of a teacher on a student, schools' affirmative action plans based on faculty diversity should achieve their desired goals.

Further, some stress that the goal of diversity could be reconciled with a strict scrutiny analysis.[313] In fact, Justice Powell's *Bakke* opinion "explicitly applied strict scrutiny and yet endorsed Harvard-style affirmative action in education."[314] Therefore, the Court could recognize the benefits of faculty diversity under both a constitutional and a Title VII analysis without unnecessarily expanding the reach of affirmative action.

V. CONCLUSION

On June 27, 1997, the Supreme Court granted certiorari in the case of *Taxman v. Board of Education*.[315] Speculation immediately arose that the conservative Court was attempting to further limit the reach of affirmative action.[316] In what promised to be "the lightening rod in a stormy national debate,"[317] the *Taxman* case revealed the diverse viewpoints on affirmative action that exist in our society.

Because of many factors unique to the case and the unclear

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309. *See id.*

310. *See id.*

311. *See* Amar & Katyal, *supra* note 292, at 1776.

312. Amar and Katyal believe that the "heroic or impossible assumption" of mingling between firms would have to occur for this program to succeed. *See id.* Although this statement neglects to consider the benefits of minority firms as role models to others, that argument is beyond the scope of this Note.

313. Amar & Katyal, *supra* note 292, at 1771.

314. *Id*.

315. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

316. *See* Judy Peres, *Clinton Diversity Plan Faces Erosion; Supreme Court Agrees to Hear Case of a Race-Based Layoff*, CHI. TRIB., June 28, 1997, at 4.

317. Petition for a Writ of Certiorari at 13, Taxman v. Board of Educ., 65 U.S.L.W. 3354 (U.S. Oct. 31, 1996), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

"test" in analyzing the validity of affirmative action plans under Title VII, it is difficult to predict how the Court would have resolved the *Taxman* case.[318] For example, the Court could have followed the assumption in *Wygant* that layoffs place too heavy a burden on affected non-minorities, and abolished the use of affirmative action programs in layoff decisions.[319] On the other hand, the Court could have recognized diversity as a valid goal under Title VII, which would have ramifications on hiring and promotions. Moreover, the Court could have also refused to acknowledge diversity within a single department as an acceptable goal, because African-Americans were not underrepresented as a whole at Piscataway High School.[320] Finally, the Court could have acknowledged the distinction between education and contracts, and recognized the goal of diversity in this unique circumstance.

The Supreme Court — when again faced with the issue of faculty diversity — can utilize the benefits of a diverse student body and faculty without expanding the reach of affirmative action by acknowledging the unique concerns of education and recognizing faculty diversity as a valid goal under the Equal Protection Clause and Title VII. Education guides future generations, and it is imperative that we expose all students to the similarities and differences of races and cultures.

318. For a discussion of the settlement in the *Taxman* case, see *supra* notes 36–37 and accompanying text.

319. This decision by the Court probably would not have reached the question of whether diversity is a valid goal in circumstances regarding hiring and promotions, and therefore it would have left that question unanswered.

320. *See supra* note 29.