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Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications for Race-Conscious Measures

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I. INTRODUCTION

The Third Circuit Court of Appeals, sitting *en banc*, decided *Taxman v. Board of Education of the Township of Piscataway*,[1] in August 1996. Eight judges agreed that the Board of Education of Piscataway Township, New Jersey violated Title VII of the Civil Rights Act[2] by using race, in accordance with its affirmative action policy, to break a tie between two teachers in the Business Department at Piscataway High School when determining which teacher

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1. 91 F.3d 1547 (3d Cir. 1996) (en banc).

2. 42 U.S.C. § 2000e et seq. (1994). In relevant part, 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 . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
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> 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).

to lay off.[3] A strong dissent by Chief Judge Sloviter was joined by two other Court of Appeals judges.[4] The majority decision is remarkable in its breadth, concluding that Title VII permits race-based decision-making only for the narrow purpose of remedying the present effects of past discrimination.[5] This reading of Title VII strongly implies that Title VII may limit a public institution's race-based decision-making beyond the limitations imposed by the Equal Protection Clause of the Fourteenth Amendment.[6] Not one Supreme Court Justice has ever articulated this position before. In fact, the Court in *Johnson v. Transportation Agency*[7] concluded that Title VII gave greater latitude to public employers to use race-based voluntary affirmative action measures than did the Equal Protection Clause.[8] In *Taxman*, the Board of Education petitioned for certiorari, which the Supreme Court granted on June 26, 1997.

A number of curious happenings demonstrate the political importance of the case. These include the amount of press coverage accorded to the case,[9] the remarkable settlement that avoided Supreme Court review[10] and the flip-flopping of the United States government's position on the case.[11]

The case, which was scheduled for oral argument in January, 1998, settled on November 21, 1997.[12] Remarkably, civil rights organizations, in particular, the Black Leadership Forum, concerned that the case could make bad precedent and virtually abolish af-

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3. The Board of Education voted to retain Debra Williams, the only Black teacher in the Business Department at Piscataway High School and to lay off Sharon Taxman, her White counterpart, to whom Williams was equal in seniority and qualifications. *See Taxman*, 91 F.3d at 1551.

4. *See id.* at 1567.

5. *See id.* at 1560 ("[S]ocietal discrimination alone will not justify a racial classification . . . evidence of prior discrimination . . . must be presented . . . .").

6. *See id.* at 1559.

7. 480 U.S. 616 (1987).

8. *See id.* at 630.

9. *See* Malcolm Gladwell, *Testing the Limits of Affirmative Action*, Wash. Post, Sept. 25, 1994, at A4, *available in* 1994 WL 2441447; *see also* Associated Press, *Supreme Court to Take up Affirmative Action Issues*, Chi. Trib., Sept. 28, 1997, *available in* 1997 WL 3593357 (discussing how the *Taxman* case awaited Supreme Court Justices at the start of the new term).

10. *See* Joan Biskupic, *Rights Groups Pay to Settle Bias Case*, Wash. Post, Nov. 22, 1997, at A1, *available in* 1997 WL 14714386.

11. *See* Associated Press, *White House Reverses on N.J. Diversity Case*, Chi. Trib., Aug. 23, 1997, *available in* 1997 WL 3581168.

12. *See* Biskupic, *supra* note 10, at A1.

firmative action programs, contributed significant funds to settle the case.[13]

The role of the federal government in this case was also unique. Originally the United States Equal Employment Opportunity Commission (EEOC) filed the suit against the Board of Education, alleging race discrimination in violation of Title VII, but Sharon Taxman intervened. Both the EEOC and Taxman filed motions for partial summary judgment, which the district court granted. On the issue of damages, the jury awarded over $144,000 to Sharon Taxman.

The Board of Education appealed to the Third Circuit Court of Appeals. The United States, shifting sides, moved to file a brief supporting the position of the Board of Education, stating that it could no longer support the judgment of the trial court. The Court of Appeals permitted the United States to withdraw as a party, but denied the government's motion to file an amicus brief on appellant's behalf.[14]

The Third Circuit affirmed the lower court's judgment. The Board of Education petitioned for a writ of certiorari; the United States Justice Department filed a brief in opposition to the petition for certiorari. On June 27, 1997 the United States Supreme Court granted the writ of certiorari.[15] The Solicitor General of the United States filed a Brief for the United States as Amicus Curiae in which the government argued for affirmance of the Court of Appeals holding, but took issue with the court's reasoning that all non-remedial, race-conscious employment decisions are illegal under Title VII.[16]

At the announcement of the settlement I felt contradictory emotions: relief and disappointment. I was relieved that there would be no opportunity for the Supreme Court to abolish affirmative action. I was doubly disappointed, however, because I believed

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13. The Black Leadership Forum contributed $300,000 of the total settlement of $433,500. *See* Abby Goodnough, *Financial Details are Revealed in Affirmative Action Settlement*, N.Y. Times, Dec. 6, 1997, at B5, *available in* 1997 WL 8015411.

14. *See* Joint Appendix at 29, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679).

15. *See* Piscataway Township Bd. of Educ. v. Taxman, 117 S. Ct. 2506, 2506 (1997).

16. *See* Brief for United States as Amicus Curiae Supporting Affirmance at 4, Piscataway Township Board of Education v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

that *Taxman* presented an opportunity for the Supreme Court to eschew the broad simplistic approach to affirmative action that the Fourth,[17] Fifth[18] and now, the Third, Circuit Courts of Appeals had taken. If given the opportunity to decide an affirmative action case, the Supreme Court, I believed, would not deal a mortal blow to affirmative action, but would arrive at a middle ground that opponents and proponents of affirmative action could accept.

It was with this mindset that I approached this project. My role as a participant in this project was twofold. First, I was to assume that *Taxman* had not settled and that the Court had overturned the Third Circuit's decision. Based on this assumption, I was to write the Court's opinion, overturning the Third Circuit Court of Appeals decision and any concurring or dissenting opinions. While writing the opinions, I tried to anticipate how the Justices would decide the case without interjecting my own views into the opinions. I have reviewed the record and briefs of the parties and amici and the affirmative action cases decided by the Supreme Court under Title VII and the Equal Protection Clause, parsing each Justice's view toward affirmative action. I have tried to be faithful to each Justice's view toward affirmative action, procedural issues, employment discrimination, and education law.

My second contribution to the project was to write this commentary, explaining the choices I faced. This assignment gives me leeway to examine how this case looks through the eyes of a Supreme Court Justice and to discuss my own views concerning its substance and procedure. Besides piquing my interest as a legal scholar, this task also raised pedagogical issues about teaching future lawyers. For a short time, I stepped into the shoes of a Supreme Court Justice to see what strategies were successful and unsuccessful. I will try to share with my readers those perspectives as I go along.

A number of fascinating issues arose. They included questions concerning the facts of the case, the respective burdens of proof, summary judgment law, the proper interpretation of Title VII, the interplay between Title VII and the Equal Protection Clause, the various meanings of "remedial" purpose, whether a non-remedial purpose was sufficient for race-based decision-making under Title

17. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).
18. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

VII, whether employment discrimination law differs in an educational setting, whether a layoff rather than a hiring decision would make a difference affecting the outcome, the changing political focus of the federal courts and institutional competence.

Although any one of these matters would provide substance for a separate law review article, I will attempt briefly to address these issues and to raise questions that I hope others will develop.

II. FACTUAL AND PROCEDURAL ISSUES

After discovery, the Board of Education moved for summary judgment under Federal Rule of Civil Procedure 56.[19] The United States and Sharon Taxman both cross-moved for partial summary judgment on liability and the parties stipulated to the factual record. The federal district court denied the Board of Education's motion and granted the motion of Sharon Taxman and the United States. The court then held a jury trial on damages.

The parties stipulated that both Ms. Taxman and Ms. Williams were equal in seniority and qualifications. The lower courts assumed these facts when making their rulings. Oddly, the brief for Sharon Taxman before the Supreme Court argued, however, that Ms. Taxman was better qualified than Ms. Williams.[20] Although as a Supreme Court Justice I could not consider factual arguments raised for the first time before the Supreme Court, I found these arguments both unsettling and confusing. It appeared that Sharon Taxman may have had more experience teaching upper level business courses than Ms. Williams, but these facts were not a part of the record.[21] I was concerned that the attorney for Ms. Taxman was trying to influence the result by bringing up facts that the Supreme Court should not consider. I was also concerned

19. Federal Rule of Civil Procedure 56 provides in pertinent part: "A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in the party's favor . . . ." Fed. R. Civ. P. 56.

20. *See* Brief for Respondent at 2 n.2, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

21. It also appears that Debra Williams had a graduate degree, but Sharon Taxman did not, raising the question once again whether they were equal. *See Winners and Losers in Piscataway*, Wash. Post, Dec 8, 1997, at A18, *available in* 1997 WL 16222802.

that perhaps the case before the Supreme Court did not represent the true facts.

Another unusual factual issue arose from representations made in the Petitioner's Reply Brief on the Merits. Although all of the facts relied on by the lower courts stated that the Board of Education had considered the school district's affirmative action policy when making its decision to retain Ms. Williams, the Petitioner's Reply Brief argued that the Board of Education may not have acted pursuant to the affirmative action policy.[22] I found this argument odd since it seemed to contradict all of the evidence on the record. Moreover, I tried to consider the petitioner's lawyers' strategy for making this point. Evidently, the lawyers were uncomfortable defending the affirmative action policy itself because it was somewhat general and amorphous and contained no specific end-date.[23] This failure could harm their client since the Court in *United Steelworkers of America v. Weber*,[24] upheld the affirmative action plan, in part, because it was a temporary mea-

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22. *See* Petitioner's Reply Brief on the Merits at 17, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

23. The policy states:

PISCATAWAY TOWNSHIP BOARD OF EDUCATION

Piscataway, NJ
Policy 4111.1
AFFIRMATIVE ACTION—EMPLOYMENT PRACTICES

PURPOSE:

This policy ensures equal employment opportunity and prohibits discrimination in employment because of sex, race, color, creed, religion, handicap, domicile, marital status or national origin. 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.

BASIC POLICY:

The Superintendent of Schools shall implement a program of equal employment opportunity and affirmative action. This program shall be an integral part of every aspect of employment including upgrading positions, demotions, transfers, recruitment, recruitment advertising, layoffs, benefits, selection for training, promotions and tenure.

Joint Appendix at 269, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679).

24. 443 U.S. 193, 199, 209 (1979) (upholding an affirmative action plan under Title VII that set up a training program entitling 50% of the participants to be Black and 50% White instead of solely using seniority for entrance requirement).

sure.[25] The Board of Education attempted instead to defend the particular decision in the case. Although this may have been a viable strategy in the earlier stages of the litigation, its adoption before the Supreme Court raised questions in my mind.

These questions were heightened by the procedural posture of the case and the burdens of persuasion and production in an affirmative action case. In *Johnson v. Transportation Agency*,[26] the Court held that the familiar *McDonnell Douglas*[27] approach applies to affirmative action cases.[28] Under *McDonnell Douglas*, the plaintiff proves a prima facie case by raising an inference of discrimination; the burden of production shifts to the defendant to "articulate a nondiscriminatory rationale" for its employment decision; finally the burden of production shifts back to the plaintiff and merges with the ultimate burden of persuasion to prove that the employer's articulated reason is a pretext for discrimination.[29]

In the affirmative action context, the Court has adapted this method by requiring the plaintiff to prove a prima facie case by demonstrating that the defendant took race or gender into account.[30] Next, the burden of production shifts to the employer to raise its affirmative action plan as a legitimate non-discriminatory reason for its actions.[31] Finally the burden of production shifts back to the plaintiff and merges with the plaintiff's ultimate burden to prove that the employer's reason is pretextual.[32] The plaintiff could prove "pretext" by demonstrating that the employer had not operated in response to a valid affirmative action plan.[33]

Although *Johnson* does not clarify this point, presumably, pretext in the affirmative action context can be proved in at least two ways: 1) by demonstrating that the plan itself is invalid because its purpose is illegitimate or it unduly trammels the interests of nonminorities, or 2) by demonstrating that although the plan as writ-

25. *See id.* at 208-09.
26. 480 U.S. 616 (1987).
27. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
28. *See Johnson*, 480 U.S. at 626-27.
29. *Id.* For a thorough explanation of the *McDonnell Douglas* approach, see Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 214-21 (1993).
30. *See Johnson*, 480 U.S. at 626-27.
31. *See id.*
32. *See id.*
33. *Id.*

ten is valid, it is invalid as applied in the case.[34] This raises another question. What if the plan as written is overly broad, but is legal as applied?

Here the School Board could argue that even if the policy as written would not generally be valid, it is valid as applied. This argument may succeed here because the record undisputably shows that Taxman's layoff represented the first time that the Board of Education had invoked the affirmative action policy in an individual personnel decision. In other words, although the plan is general and amorphous, and may grant excessive discretion to the Board of Education, the Board has judiciously exercised its discretion by invoking the plan only in this one case. Under *Johnson*, it would be the plaintiff's burden to prove that the policy as applied is illegal.

There is a serious question, however, of whether the *McDonnell Douglas* method should apply to affirmative action cases when it does not comport with the other uses of the *McDonnell Douglas* framework. *McDonnell Douglas* is used to prove discrimination by the indirect method, where there is circumstantial evidence of discrimination, but no direct evidence of discrimination.[35] In the affirmative action context, the plaintiff will usually have direct evidence that a protected characteristic was the reason for the employment decision. In this case, for example, the Board of Education sent a letter dated May 22, 1989, to Sharon Taxman, telling her that it had decided to "rely on its commitment to affirmative action as a means of breaking the tie in seniority entitlement in the secretarial studies category."[36] This letter is direct evidence that the Board of Education considered race when making its layoff decision. Under Title VII if there is evidence, direct or otherwise, showing that the protected characteristic is a motivating factor in the employment practice, the defendant is normally liable for discrimination.[37] The court may limit a defendant's liability to attorneys fees and injunctive relief if the defendant shows that it would have made the decision in the absence of the illegal rea-

34. *See, e.g., id.* at 630-31.

35. *See* McGinley, *supra* note 29, at 213-17.

36. Joint Appendix at 153, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679).

37. *See* 42 U.S.C. § 2000e-2(m) (1994).

son.[38] This provision, however, added to the Act in 1991, should not be applied to affirmative action cases.[39] Congress passed this provision in response to *Price Waterhouse v. Hopkins*[40] to expand upon the rights of plaintiffs who prove that a defendant considered gender or race when making an employment decision.[41] It was not, however, intended to limit voluntary affirmative action policies in any way.[42]

Because of the Congressional purpose in passing this section, it would distort the law to apply it to cases where the employer relied in good faith on an affirmative action policy to make the employment decision. By the same token, however, requiring the plaintiff to bear the burden of proving the invalidity of the plan, as written or as applied, is inconsistent with the other uses of *McDonnell Douglas* and may make little sense. Reliance on a valid affirmative action plan resembles an affirmative defense that the employer should plead and prove because the employer has better access to the information about the plan and the decision-making process.

Possibly because of the confusing state of the law in this area, the question of the burdens did not arise in the parties' briefs. I assumed, therefore, that *Johnson*'s discussion about burdens of persuasion and production was still good law under Title VII. Thus, Justice O'Connor's mock opinion relies, in part, on this burden and on the procedural posture of the case—decided on a summary judgment motion brought by the party with the burden of persuasion. Presumably, this burden should be a very heavy one.[43]

I was further troubled by Petitioner's argument that the respondent had switched positions before the Supreme Court. According to Petitioner, the trial court had viewed the Respondent's

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38. *See* 42 U.S.C. § 2000e-5(g) (1994).

39. Moreover, it appears that the parties did not rely in any way on this provision in this case.

40. 490 U.S. 228 (1989).

41. For a discussion of the legislative history and purpose of this provision, see Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 Conn. L. Rev. 145, 187-93 (1993).

42. Amendments to the Act were not intended to affect affirmative action. *See infra* note 62.

43. For a discussion of burdens of production and persuasion in a Title VII case where a Rule 56 motion is filed, see McGinley, *supra* note 29, at 203.

motion for partial summary judgment as raising a question of law testing whether an affirmative action policy with a non-remedial purpose could *ever* be legal under Title VII.[44] For this reason, the trial court imposed limitations on the Board of Education's presentation of factual disputes and the court did not consider the facts that were in the record.[45] For example, the Petitioner argued that a diverse faculty reduced discrimination against minority students in schools.[46] The trial judge ignored this proffer, concluding that even if factually supported, the purpose the petitioner gave for considering race—a diverse faculty—was illegal.[47]

Although the plaintiff had argued in her motion for partial summary judgment that the lower court should grant the motion as a matter of law, before the Supreme Court she faulted the Board of Education for failing to present facts justifying its interest in maintaining a diverse faculty.[48] These arguments raised questions about the fairness of the procedures in the lower court and whether a full factual record could render a different result. I believe for three reasons that Justice O'Connor might conclude that more factual development is necessary: 1) her discussion of the burdens in *Wygant v. Jackson Board of Education*,[49] 2) her definition of "strict scrutiny" in *Adarand Constructors, Inc. v. Pena*,[50] which seems to assume the necessity of factual findings by the district court and 3) the social science research presented in amicus curiae briefs by the National Education Association and American Council on Education concluding that a more diverse faculty reduces stereotyping and discrimination against minority students.[51]

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44. *See* Petitioner's Reply Brief at 3-4 & n.6, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

45. *See id.*

46. *See id.* at 6-8.

47. *See id.* at 3-4 & n.6; Piscataway Township Bd. of Educ. v. Taxman, 832 F. Supp. 836, 848 n.9 (1993).

48. *See* Petitioner's Reply Brief at 6-7, *Taxman* (No. 96-679).

49. 476 U.S. 267, 292-93 (1986).

50. 515 U.S. 200, 225-37 (1995).

51. *See* McGinley, *Mock Opinions*, *infra* pp. 248-50 (citing research used in Justice Ginsberg's concurring opinion).

III. TITLE VII AND THE EQUAL PROTECTION CLAUSE

The Third Circuit Court of Appeals decided that it was illegal under Title VII to take race into account when making an employment decision unless the purpose of the decision was to remedy the present effects of past discrimination.[52] Because the Board of Education's justification for its race-based decision was to create and maintain a diverse faculty, and not to remedy discrimination, the Board, according to the Court of Appeals, violated Title VII when it selected Ms. Taxman over Ms. Williams for layoff.[53] This conclusion rested on the nature of Title VII and on a narrow view of *Weber* and *Johnson*, limiting the permissible use of race to the correction of a manifest imbalance in the workplace caused by discrimination.

This holding invited the Respondent's argument before the Supreme Court that Title VII imposes limitations on race-based decisionmaking that exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment.[54] To support this position, respondent made a curious argument contrasting *Griggs v. Duke Power Co.*[55] with *Washington v. Davis.*[56] While it is true that under the disparate impact theory Title VII protects minorities and women in some instances better than the Equal Protection Clause does, respondent distorts the purpose of Title VII, *Griggs*,

52. *See* Taxman v. Board of Educ. of the Township of Piscataway, 91 F.3d 1547, 1550-51 (3d Cir. 1996) (en banc).

53. *See id.*

54. Up until recently, there was little question that the Equal Protection Clause permitted some race-based practices for reasons other than the remedying of past discrimination. That assumption was based in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (stating that diversity in the student body of a higher educational institution was a compelling state interest). However, in *Hopwood v. Texas*, 78 F.3d 932, 941-44 (5th Cir. 1996) the Fifth Circuit Court of Appeals held that Powell's opinion, because it was not joined by any other Justice, does not represent the Supreme Court's view of the Equal Protection Clause and that only a remedial purpose will be a compelling state interest under the Equal Protection Clause. According to *Hopwood*, the policy must remedy past discrimination committed by the institution employing the affirmative action policy. *See id.* at 952. The Supreme Court has yet to address this issue.

55. 401 U.S. 424 (1971).

56. 426 U.S. 229 (1976). *See generally* Brief for Respondent at 11, 19 n.30, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679 (discussing the Court's holdings in *Griggs* and *Davis*).

and the affirmative action caselaw to conclude that this protection extends to white "victims" of affirmative action plans.

IV. *GRIGGS V. DUKE POWER CO.* AND *WASHINGTON V. DAVIS*

Griggs held that Duke Power was liable for using a high school diploma and the results of standardized tests as hiring criteria for jobs at the power plant because they produced a disparate impact on Black applicants, and the employer could not show that the criteria were a business necessity.[57] In *Davis,* the Court declined to extend the *Griggs* disparate impact analysis to a claim brought under the Equal Protection Clause. Instead, it held that a violation of the Equal Protection Clause required a showing of discriminatory intent.[58] Here, the Respondent used this difference to argue generally that Title VII imposes greater limitations than the Equal Protection Clause on an employer creating an affirmative action plan. I find this argument troubling.

While it is true that *Griggs* imposes greater limitations on an employer's actions than *Davis*, neither of these cases deals with voluntary affirmative action plans. Moreover, the courts have traditionally applied the disparate impact analysis adopted in *Griggs* to cases brought by women and minorities, not to "reverse discrimination" suits.[59] *Griggs* permitted the use of disparate impact analysis, noting the historic inequality in the public segregated schools in North Carolina and a substantially lower graduation rate for Blacks than for Whites.[60] Ironically, in *Griggs*, it seems, the Court endorsed the disparate impact analysis precisely to remedy "societal discrimination," whereas the more recent affirmative action cases decided under the Equal Protection Clause *do not permit* the use of race-based preferences to remedy societal discrimination.[61]

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57. *Griggs*, 401 U.S. at 431-32.

58. *See Davis*, 426 U.S. at 236-39, 240-42.

59. My research has unearthed only one case applying disparate impact analysis to a policy having a negative impact on Whites. *See* Craig v. Alabama State Univ., 804 F.2d 682, 685 (11th Cir. 1986) (applying disparate impact analysis to policy disadvantaging Whites in a formerly all Black institution). *Craig* is unique because it was brought against a "Black institution" and the power rested in the hands of Blacks. Scholars have questioned whether disparate impact should ever be used to challenge policies having an impact on Whites. *See* Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 415-16 (4th ed. 1997).

60. *Griggs*, 401 U.S. at 430 & n.6.

61. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986). While it is true that *Griggs* is not a race-based decision, because disparate impact

Although there is a serious question of whether the legislature passing Title VII would have endorsed *Griggs*,[62] the result is consistent with the legislative purpose of improving the economic condition of Blacks given the historical context in which Title VII was passed. Moreover, subsequent amendments to Title VII, enacted in 1991, have codified the *Griggs* ruling.[63] When doing so, Congress explicitly stated that it did not intend to affect legal voluntary affirmative action plans.[64]

Disparate impact analysis demonstrates that Title VII may be more protective of the interests of women and minorities while simultaneously generally forbidding discrimination against Whites. Although this seems like a contradiction, there were at least two statutory purposes behind Title VII, equal opportunity to all persons—a color blind purpose—and securing employment for Blacks—a purpose best carried out through race-conscious means.[65] In fact, *Griggs* led, at least in part, to the adoption of the affirmative action plan that was challenged in *Weber*. With *Griggs* and Executive Order 11246 directing the Secretary of Labor to require government contractors to assure adequate representation of women and minorities through affirmative action, Kaiser faced potential liability and loss of business through government contracts. As a result, Kaiser and the Steelworkers union devised the affirmative action training plan that was later upheld in *Weber*.[66]

As the application of disparate impact analysis only to female and minority classes demonstrates, Title VII *does* permit differential treatment of members of certain defined protected classes. It permits more beneficial treatment to minorities in the area of disparate impact analysis. It permits more beneficial treatment to members of protected classes under the affirmative action cases as well. This permission recognizes the historical context of the une-

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analysis has been applied only to employment policies burdening minorities and women, it is essentially a race-based theory. Thus, it cannot be distinguished from race-conscious affirmative action measures.

62. For the best analysis I have seen of the legislative intent and purpose of Title VII of the 1964 Act and an excellent explanation of how *Griggs* came about, see William N. Eskridge, Jr., Dynamic Statutory Interpretation 13-80 (1994).

63. 42 U.S.C. § 2000(e) et seq. (1994).

64. *See* 137 Cong. Rec. S7024 (daily ed. June 4, 1991) ("Nothing in the amendments . . . shall be construed to affect . . . voluntary employer actions for work force diversity, or affirmative action or conciliation agreements . . . .").

65. *See* Eskridge, *supra* note 62, at 28.

66. *See id.* at 24.

qual treatment of women and Blacks in this country, a context that the legislature responded to by enacting Title VII. Under *Griggs*, there is a good argument that Title VII permits race-based decision-making pursuant to affirmative action plans that would be unconstitutional if challenged under the Equal Protection Clause. One of the justifications for relaxed scrutiny of affirmative action plans has been the need to relieve the employer's dilemma between defending a discrimination suit under *Griggs* and a reverse discrimination suit in response to a voluntarily adopted affirmative action plan.[67]

Moreover, Respondent's argument that Title VII permits more limited affirmative action than the Equal Protection Clause is a distortion of the Title VII affirmative action cases. In *Johnson*, the leading affirmative action case under Title VII, the Court concluded that Title VII imposes *fewer* restrictions than the Equal Protection Clause on an employer making affirmative action decisions: "The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."[68]

This language demonstrates that the Court believed Title VII permitted more leeway in creating affirmative action programs.[69] Although a few justices in *Johnson* opined that Title VII imposed the same restrictions on a public employer as the Equal Protection Clause,[70] not one justice concluded that Title VII imposed more limitations on voluntary affirmative action plans than did the Equal Protection Clause.

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67. *See* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 Case W. Res. L. Rev. 287, 294-96 (1993).

68. Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6 (1987).

69. Respondent argues that this passage is irrelevant *dicta* because there was no challenge brought in *Johnson* under the Equal Protection Clause. *See* Brief for Respondent at 28 n.30, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679) *available in* LEXIS, 1996 U.S. Briefs 679. Moreover the respondent argues that the Court was only referring to the fact that "the remedial predicate for race-conscious action is somewhat less stringent under Title VII than under the Constitution . . . . It is certainly not the case that Title VII's requirements generally are less demanding than the Constitution's." *Id.* These arguments are unconvincing.

70. *See Johnson*, 480 U.S. at 649 (O'Connor, J., concurring); *id.* at 664 (Scalia, J., dissenting).

V. *JOHNSON* AND *WEBER*: CONTINUED VITALITY

In *Taxman*, Respondent and amici never urged the Court to overrule *Weber* and *Johnson*. Instead, they argued from the plain language of Title VII and the original legislative history of the 1964 Act that Title VII was a color-blind statute. Thus, it did not permit an employer to consider race when making an employment decision unless the decision was made pursuant to an affirmative action plan narrowly tailored to remedy the present effects of past discrimination. These were exactly the same arguments, based on the same statutory language and portions of legislative history, that the *Weber* Court rejected in 1979.[71]

While it is true that a strict statutory constructionist looking at the language of Title VII would likely conclude that it is always impermissible to consider race when making an employment decision, these arguments have little force given subsequent Supreme Court decisions and amendments of the Act. The Court in *Weber* foreclosed the strict construction argument by examining the historical context of the statute—it was passed in large part to eliminate discrimination against Blacks in the employment sector.[72] *Weber* noted that there is no language in the statute expressly forbidding the voluntary use of preferences to obviate discrimination.[73] Instead, the language of the statute expressly states that the statute does not *require* preferences based on race or gender.[74] Finally, *Weber* noted the emphasis in the legislative history on the preservation of managerial prerogatives, concluding that the affirmative action plan in that case was permissible because it mirrored the purposes of the Act and did not unnecessarily trammel the rights of non-minorities.[75]

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71. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 204-07 (1979). However, the plaintiff in *Weber* argued that any and all justifications for affirmative action were illegal. *See id.* at 200-01.

72. For a discussion of the Court's analysis in *Weber* of the Congressional intent of Title VII, see Eskridge, *supra* note 62, at 13-47.

73. *See Weber*, 443 U.S. at 203-04.

74. *See id.* at 204-07.

75. *See id.* at 206-09.

VI. COLOR BLINDNESS *UBER ALLES*[76]

Respondent's arguments embody a theoretical shift in discrimination law. This shift emphasizes the value of color-blindness over all other values without concern for historical context and the legislative purpose of improving the economic condition of Blacks. Although a color-blind society is the goal we should eventually achieve, Respondent's brand of color-blindness reinforces the historic barriers to economic success that members of minority races have encountered. As I have demonstrated elsewhere,[77] there is a significant difference between a powerful predominantly white school board choosing to retain the only Black person in the Business Department in order to maintain diversity in the department and the same society refusing to hire a Black business teacher because she is black. The first action, although not labeled as remedial, develops from an understanding of historical context. I would not deem this action to be "discrimination" if it is narrowly tailored to the desired goal. The second action, which reinforces the power of white society, is the discrimination the statute was designed to eliminate.

Respondent's simplistic color-blind approach was eschewed by *Weber* and *Johnson* and subsequent legislative history of Title VII. *Weber* and *Johnson* were never overruled legislatively. Although this fact alone is not necessarily demonstrative of Congressional approval, Title VII's history after *Johnson* gave Congress ample opportunity to overrule the affirmative action cases. In the Summer of 1989, the Court handed down a number of conservative decisions, reinterpreting Title VII.[78] One of these decisions, *Wards Cove Packing Co. v. Atonio*[79] seriously reduced the effectiveness of *Griggs*, altering the standards and shifting the burden of proving business necessity to the plaintiffs. Congress responded rapidly, passing by a wide margin the Civil Rights Act of 1990 in order to

76. I call the theory that the purpose of color blindness trumps all other purposes "Color Blindness *Uber Alles*," meaning "Color Blindness Above All."

77. *See generally* Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 Ariz. L. Rev. 1003 (1997) (discussing the problems with the current judicial approach to Title VII cases and proposing a new conceptual framework for deciding such cases).

78. For a description of these decisions, see McGinley, *supra* note 29, at 203 n.1.

79. 490 U.S. 642 (1989).

reinstate the protections of the Act. President Bush vetoed the amendments and Congress responded with the Civil Rights Act of 1991, which President Bush signed under political pressure.[80] The 1991 Act was meant to strengthen and improve civil rights law, restoring rights lost by the Supreme Court decisions and adding other rights.[81] In passing the Act, Congress did not emphasize the color blind rationale of the statute. Instead, it focused on restoring and improving the rights of women and minorities.[82]

In fact, in passing the 1991 amendments, Congress stated explicitly that it did not intend to affect legal voluntary affirmative action.[83] Congress's explicit adoption and strengthening of disparate impact law in the 1991 Civil Rights Act demonstrates not only approval of *Griggs*, but also a commitment to affirmative action law as expressed in *Johnson* and *Weber*.[84] Moreover, Congress's failure to overrule *Johnson* and *Weber* create a strong presumption that the 1991 Act affirmatively incorporated *Weber* and *Johnson*.[85]

VII. REMEDIAL PURPOSE: INTERPRETATION

The Board of Education in *Taxman* never argued that it had a remedial purpose in passing or implementing its affirmative action plan. Its purpose was to achieve and maintain a diverse faculty. This stipulation avoided a thorny issue present in most affirmative action litigation. The Court has held that a voluntary plan whose purpose is to remedy the present effects of past discrimination will pass muster under the Equal Protection Clause of the Fourteenth Amendment if it is narrowly tailored to achieve its purpose. However, there appears to be considerable disagreement in the cases concerning the definition of a "remedial" purpose.

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80. For a description of the passage of the 1990 and 1991 Acts and the presidential veto, see McGinley, *supra* note 29, at 203-06.

81. *See id.*

82. *See* H.R. Rep. No. 102-40, pt. 2, at 161 (1998).

83. *See supra* note 62.

84. *See* Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 Rutgers L. Rev. 903, 909-11 (1993).

85. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (stating that the force of Supreme Court precedent in the area of sexual harassment was enhanced because Congress amended Title VII's liability provisions in 1991 without amending the Supreme Court decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

The disagreement focuses on three issues: the identity of the "victims" who are permitted to benefit from the legislation, the identity of the perpetrators who may remedy the past discrimination and the fit between the two. While the Court has clearly stated that under the Equal Protection Clause, it is not a permissible purpose to remedy "societal discrimination,"[86] because it is too "amorphous,"[87] the question remains exactly what is a permissible remedy and who can benefit from it.[88] Although the earlier cases seemed to permit a more widespread definition of remedial purpose,[89] recent cases have moved the inquiry to levels of specificity that may be impossible to prove.

For example, in *Hopwood v. Texas*,[90] although the state of Texas's educational system had subjected Black and Mexican students to widespread race discrimination and segregation,[91] a panel of the Fifth Circuit Court of Appeals recently ignored this discrimination, requiring evidence that the law school itself had discriminated in the past.[92] In *Podberesky v. Kirwan*,[93] the Fourth Circuit struck down minority scholarships at the University of Maryland, in part because there was no proof that the persons to be awarded scholarships belong to the class discriminated against. Assuming that the University had discriminated in the past, the Court stated, "[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past."[94]

Some have advocated limiting the use of "remedial" measures to exclude Blacks who have recently immigrated to this country because their ancestors were not slaves and their descendants

86. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76 (1986).

87. *Id.* at 276.

88. Although the Petitioner did not argue that Title VII gave government more leeway than the Equal Protection Clause to adopt affirmative action plans, there is a good argument that it does. *See supra*, Part IV (discussing *Johnson* and *Weber*).

89. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 631-34 (1987) (stating that the Agency's purpose of "remedying underrepresentation" is sufficient).

90. 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

91. *See id.* at 554, 556-57.

92. *See Hopwood*, 78 F.3d at 952.

93. 38 F.3d 147 (4th Cir. 1994).

94. *Id.* at 158.

should not share in the benefits of affirmative action.[95] Others have argued that affirmative action should not burden them because "my family never owned slaves."[96] These arguments are rooted in two beliefs: first, a remedy can be granted only to a person who was harmed or to his or her descendants; second, the person displaced by the remedy or his or her ancestors must be culpable of an evil act.[97] These arguments narrowly define the remedial purpose of affirmative action and demonstrate the poverty of the remedial justification for affirmative action. The justification should be broadened to take into account the historical treatment of women and minorities and the overwhelming presence of intentional and unintentional discrimination rooted in unconscious stereotyping that non-whites and non-males experience daily.[98]

VIII. Other Purposes

The most important question raised by *Taxman* is whether non-remedial reasons will justify the use of race-conscious measures. Although every legitimate purpose for affirmative action is grounded in history, affirmative action should also play a forward-looking role. In my view, the purpose of affirmative action is neither to remedy past discrimination nor to achieve or maintain diversity for its own sake in our workplaces and our schools. The overriding purpose is to create the free, equal society to which we Americans give lip service.

While it is true that diversity in the classroom provides an opportunity for a robust exchange of ideas, I agree with Professor Charles Lawrence that the First Amendment justification for di-

95. *See* Amicus Brief Curiae of Yvette Farmer and Pacific Legal Foundation in Support of Respondent Sharon Taxman at 7, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

96. This argument was made by Commissioner Langley of the 1997-98 Florida Constitution Revision Commission when debating the merits of an affirmative action proposal. *See* H.R. Rep. No. 102-40 pt. 2, at 160-64 (1998).

97. This is a curious position given that when there is a finding of discrimination, courts can order remedies displacing persons who themselves are not responsible for the discrimination itself. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 372-75 (1977).

98. *See generally* McGinley, *supra* note 77 (proposing a new conceptual framework for Title VII cases that considers a broad range of issues).

versity is insufficient.[99] Instead, as Professor Lawrence explains, diversity's purpose should be the destruction and subordination of racism and "disestablishing white supremacist structures and ideologies."[100]

Our society is already diverse. The real question is whether we intend to perpetuate a society built on slavery and maintained by white privilege. This is the society that the color-blind *uber alles* principle would reinforce. Unless education and positions of power are open to persons of color and women, the voices of persons who have had different experiences by virtue of their gender or color will be lost.[101] Without these voices, our society will not attain the promise of equality and freedom for all that we say we hold dearly.

In *Taxman*, amicus briefs for the National Education Association[102] and the American Council on Education[103] present social science research unquestionably demonstrating that a diverse classroom promises a better education for Blacks and Whites and a more unified society. A diverse faculty helps to protect children of color from stereotyping by White faculty members and promotes the educational achievement of Black students. These findings should be sufficient to confirm that diversity is and should be a compelling governmental interest. Like school desegregation at the time of *Brown v. Board of Education*,[104] affirmative action represents more than a mere remedial purpose. It seeks to change society and the opportunities for all persons living on American soil.

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99. *See* Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, *in* Symposium, *In Honor of Professor Trina Grillo: Legal Education for a Diverse World*, 31 U.S.F. L. Rev. 757, 774-76 (1997).

100. *Id.* at 775.

101. Professor Lawrence explains that this is not the stereotypical assumption that all women or all persons of color will have the same viewpoint. Instead, persons who have been subject to discrimination bring important experiences to the university as well as a commitment to ending racism and sexism. *See id.* at 775-77.

102. *See* Amicus Brief for the National Education Association at 5-11, Piscataway Township Board of Education v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

103. *See* Amicus Brief for the American Council on Education et al. at 3-7, Board of Education of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679.

104. 347 U.S. 483 (1954).

IX. STRATEGIES, WEAKNESSES AND INSTITUTIONAL COMPETENCE

Although I have commented implicitly on the lawyers' strategies in this case, I would like to discuss briefly the weaknesses of the Petitioner's and Respondent's cases, respectively. Although the Respondent's strategy was to deal a mortal blow to affirmative action, I think that there were better arguments on narrower grounds to defeat the School Board. Placing myself in the shoes of a moderate/conservative Justice O'Connor, I was quite concerned that the School Board had not considered the purpose for its affirmative action policy. The School Board would have made a much stronger case had it considered all of the literature on the importance of diversity in the educational context before adopting the plan and before making a decision based on the plan. Members of the Board of Education, although acting in good faith, may not have had a factual basis for their decision, even though there was plenty of literature supporting their general views. My mock opinion of Justice O'Connor found the Board of Education's lack of information troubling, whereas the mock concurrence of Justice Ginsberg relied more heavily on the social science research presented in amicus briefs.[105]

Even assuming the legitimacy of the plan because of the social science research, there was a question of whether it was properly applied here to the Business Department. Is diversity in every department a compelling state interest? Was there a proper "fit" be-

105. Another issue was whether the Court should balance the state interest against the method used to achieve it. The amicus brief for the Mexican American Legal Defense Fund argued that the Court should balance the two. Since the method was so innocuous—the selection of an equally qualified person for retention—when compared to the ordinary procedure—a lottery—MALDEF argued that the Court should accept diversity as a sufficient interest, even if in other circumstances it may not be sufficiently compelling to justify a race-based preference. *See* Amicus Brief for the Mexican American Legal Defense and Education Fund, Piscataway Township Board of Education v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679), *available in* LEXIS, 1996 U.S. Briefs 679. This argument had a great deal of appeal because, practically speaking, the race-based decision here was hardly what people usually think of as "affirmative action." No preference was granted to a less qualified person of color. And, the chance that Taxman would not have been laid off using the normal lottery procedure was only 50%. Thus, Taxman was not superior to Williams and she had no legitimate expectation that she would win the lottery. Because, however, no Justice has ever spoken of a balancing test to assure the legitimacy of an affirmative action policy, I chose not to adopt this method in the mock opinions.

tween the plan here and the decision made? The answer to these questions may rely on facts that were not in the record.

The petitioner adopted a strategy which avoided arguing that the standards for permissible affirmative action plans are less strict under Title VII than the Equal Protection Clause. I assume that the reason for the strategy was twofold. First, since the composition of the Supreme Court had changed since *Johnson*, there may not be a majority on the Supreme Court that would adopt this reasoning. Second, this ruling would not be beneficial to public employers overall since most race-based decision-making will be challenged under both the Equal Protection Clause and Title VII. I think this strategy altogether makes sense, but as I demonstrate above, I think there is still a very good argument based on *Griggs*, *Weber* and *Johnson*, that Title VII imposes *fewer* limitations on the employer's voluntary use of race-conscious measures and I would encourage lawyers to develop this argument. Even if it is not successful before this Supreme Court in the case of a public employer, this point may be particularly important to private employers in the future.

The School Board's lack of information about diversity raised the question of institutional competence. Do legislatures, the courts, or the institutions themselves have the competence to determine whether a remedial purpose is legitimate or necessary? If it is necessary to prove that discrimination has occurred in the institution before adopting an affirmative action remedy, who should determine whether discrimination has occurred: Congress, a local or state legislature, an institution voluntarily adopting a program, or a court?

Courts are generally more capable of deciding whether past discrimination has occurred in a particular institution. Legislatures generally are more attuned to fact-finding in order to create future-oriented policy and law. Should not the Board of Education be given broad discretion in adopting and implementing its plan? Should good faith be the test of the permissibility of the Board's decision? Is a Board of Education capable of investigating the facts?

Because Justice O'Connor seemed to ignore these institutional competence arguments in *Adarand*, I did not discuss them in her mock opinion. However, Justice O'Connor's opinion in *Adarand* may have a number of possible effects. Because they know that

affirmative action policies will be subject to strict scrutiny, individual institutions will forego formulating and implementing affirmative action plans. Even if the institutions do implement affirmative action plans, courts may interpret strict scrutiny to be an almost automatic finding that race-based provisions are unconstitutional.

Finally, strict scrutiny may shift the responsibility of analyzing whether a particular affirmative action plan passes constitutional muster from Congress, legislatures and School Boards to the courts. Although it is usually within the courts' role to decide whether particular legislation is constitutional, the courts tend to be backward-looking, generally lacking the ability to determine policy. Will the courts struggle with locating the permissible line separating constitutional race-based decision-making and that which is unconstitutional? Certainly, it appears lower courts will play an important role in this fact-finding. It is also certain that the fact-finding should include testimony of experts concerning the purpose for making a race-based decision in the particular context. The question remains whether the lower courts will take this fact-finding seriously, rather than automatically striking down all race-based decision-making.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

PETITIONER,

v.

SHARON TAXMAN,

RESPONDENT.

O'CONNOR, J., announced the Court's judgment and filed an opinion expressing her views of the case. GINSBERG, J., filed an opinion concurring in the judgment in which STEVENS, SOUTER AND BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment in which GINSBERG, J., joined. REHNQUIST, C.J., filed an opinion dissenting in which KENNEDY, J., joined. SCALIA, J., filed an opinion dissenting in which THOMAS, J., joined. THOMAS, J., filed a separate dissenting opinion.

JUSTICE O'CONNOR announced the judgment of the Court.

This case presents the question of whether under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* a public school district having no history of prior discrimination or underrepresentation of Blacks in its professional staff can take race into account when selecting between two equal candidates for layoff, one Black and one White. The Court of Appeals decided this case on the basis of a thin factual record, reaching a broad conclusion that it is never permissible under Title VII, as interpreted in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), to consider race in making a layoff decision unless there is a history of race discrimination and a remedial purpose for the discrimination. *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996). Furthermore, the Court of Appeals held that the layoff failed the second prong of the *Weber* test because it unnecessarily trammeled the rights of non-minorities. *Id.* at 1565. Because we believe that under some circumstances that may be present in this case, diversity in the teaching staff of a school district could present a compelling interest and a race-based decision could be narrowly tailored to achieve this interest, we must reverse and remand to develop a

factual record that would permit us to decide the legality under Title VII of the Board of Education's action in this case.

I.[1]

In May, 1989, the Board of Education of the Township of Piscataway, New Jersey, reacting to a decline in student enrollment in business courses, decided to reduce by one the number of business education teachers in the Business Department at Piscataway High School. According to New Jersey law, layoffs were governed by seniority, the last hired to be laid off first; ties were broken by the Board of Education as it saw fit. In 1983, the Board had adopted a formal affirmative action policy[2] which stated in its entirety:

> PISCATAWAY TOWNSHIP BOARD OF EDUCATION
>
> Piscataway, NJ
>
> Policy 4111.1
>
> AFFIRMATIVE ACTION—EMPLOYMENT PRACTICES
>
> PURPOSE:
>
> This policy ensures equal employment opportunity and prohibits discrimination in employment because of sex, race, color, creed, religion, handicap, domicile, marital status or national origin. 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.
>
> BASIC POLICY:
>
> The Superintendent of Schools shall implement a program of equal employment opportunity and affirmative action. This program shall be an integral part of every aspect of employment including upgrading positions, demotions, transfers, re-

1. Unless otherwise noted, the facts presented in this section are undisputed and come from the opinion of the Court of Appeals decision, 91 F.3d at 1550-52.

2. In 1975, the Board of Education adopted an affirmative action policy for employment decisions in response to a regulation promulgated by the New Jersey State Board of Education, directing local school boards to adopt affirmative action programs. In 1983, the Board adopted the one page policy cited in the text of the opinion. *See* 91 F.3d at 1550.

> cruitment, recruitment advertising, layoffs, benefits, selection for training, promotions and tenure.

Joint Appendix at 269.

At the time the layoff was to occur, there were ten teachers in the business department. Of the ten teachers, only one, Debra Williams, was a minority. Ms. Williams had been hired in 1980, the first Black hired to teach in the business department at Piscataway High School and the only Black in the department in 1989. On the same day Williams was hired, the Respondent was also hired to teach in the business department. Ms. Williams and Ms. Taxman were tied in seniority and were the two business teachers with the least amount of seniority. As the Board met to decide which teacher to lay off, it also found Taxman and Williams to be equal in qualifications.

For prior layoffs, the Board had decided ties by flipping a coin, but never before had the Board dealt with a situation where a White and a Black teacher were tied. After deliberation, the Board reached a consensus to invoke the affirmative action policy to break the tie because it believed that a better educational experience resulted for students by fostering diversity and cultural tolerance. Sharon Taxman, the White teacher, was laid off while Debra Williams, the Black teacher, was retained. This was the first time in the history of the affirmative action policy that the Board had taken race into account in making a personnel decision. *See* Joint Appendix at 194.

At the time the Board decided to lay off Sharon Taxman, the Board was unaware of any previous discrimination against Blacks in the school district. Moreover, Blacks were not underrepresented in the professional staff in the district as a whole when compared to their availability in the relevant labor market.

Sharon Taxman filed a race discrimination charge with the United States Equal Employment Opportunity Commission ("EEOC") alleging violations of Title VII and the New Jersey Law Against Discrimination ("NJLAD"). The United States government filed suit on behalf of Ms. Taxman and Ms. Taxman intervened.

After discovery, the Board moved for summary judgment and the United States and Taxman cross-moved for partial summary judgment on liability only. The district court denied the Board's motion and granted partial summary judgment to the United

States and Taxman. The court held that the decision violated both Title VII and the NJLAD.

After a trial on the damages, Ms. Taxman, who had since been rehired by the Board, was awarded damages under Title VII and the NJLAD. The Board of Education appealed to the Third Circuit. The United States sought leave to appear in support of reversal, stating that it could no longer support the district court decision. The Court of Appeals treated the United States' motion as a motion to withdraw as a party, which it granted, leaving Taxman and the Board of Education as the only parties before the court. Before issuing a decision, the Third Circuit heard argument three times on the matter, twice before a panel and once *en banc*. It finally issued a decision *en banc* on August 8, 1996 which affirmed the lower court judgment by a vote of 8-4. 91 F.3d 1547.

The Third Circuit Court of Appeals held that the Piscataway School Board violated Title VII when it laid off Sharon Taxman, Respondent, and kept Debra Williams, because the purpose behind the race-based decision was not remedial and the method used unnecessarily trammeled on the expectations of the white teacher, Sharon Taxman. 91 F.3d at 1550.

The Court of Appeals reached this decision by concluding that Title VII permits taking race into account only to remedy past discrimination. *Id.*

II.

This case, like most other disparate treatment cases brought under Title VII, applies the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), method of proof. *Johnson v. Transportation Agency*, 480 U.S. 616, 626-627 (1987). Under this method, the plaintiff retains the burden of proving intentional illegal discrimination throughout. Once the plaintiff proves a prima facie case under *McDonnell Douglas*, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the employment decision. We have held that a bona fide affirmative action policy is such a reason. *Id.* Once the defendant claims that the affirmative action policy is a bona fide reason for taking race or gender into account, the burden of production shifts back to the plaintiff to prove that the defendant's reliance on the policy is pretextual. The ultimate burden of proof remains throughout on

the plaintiff as in any other Title VII case applying the *McDonnell Douglas* construct. *Id.*[3]

In this case, the plaintiff has proved a prima facie case by demonstrating that the Board of Education took race into account when determining whom to lay off from the Piscataway High School Business Department. This proof shifted the burden to the Board of Education to articulate a legitimate non-discriminatory reason for Taxman's layoff. In keeping with *Johnson*, the Board of Education here produced evidence that it selected Ms. Taxman for layoff after consulting its affirmative action plan.[4] This done, the burden is on Ms. Taxman to prove that the plan is not a bona fide affirmative action plan.[5]

Here, Ms. Taxman and the United States, the plaintiffs in the case, moved for partial summary judgment on the issue of liability.

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3. This is not very different from affirmative action plans challenged under the Equal Protection Clause. As I explained in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292-93 (1986) (O'Connor, J., concurring in part and concurring in judgment):

> [T]he nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

4. There appears to be some factual dispute as to whether the Board of Education was acting pursuant to its own affirmative action plan. *See* Petitioner's Reply Brief on the Merits at 17, (claiming that the decision was not pursuant to an affirmative action plan). The President of the Board of Education, at the time the decision was made, certified, "[o]ur decision to retain Ms. Williams was a voluntary one on our part, for the reasons stated. Our affirmative action policy on its face required, at most, that a minority be 'recommended'. I did not feel bound to follow that recommendation, except as my conscience and good judgment dictated." Joint Appendix at 194.

5. Petitioner's Reply Brief on the Merits suggests that the Board's reasons for the decision were not adequately explored by the trial court. *See* Reply Brief at 17. This claim raises the question of whether the burden of proof would rest on Taxman to prove that the plan is not bona fide or whether the Board of Education would have the burden of interposing an affirmative defense in this case. This issue, however, has not been briefed by the parties or decided by the courts below.

According to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment will be granted only if there are no genuine issues of material fact in dispute and the moving party is entitled to a judgment as a matter of law. The moving party in this case bears the burden of demonstrating that it is entitled to summary judgment. Where the moving party on a motion for summary judgment is also the party with the burden of persuasion, the party has a very heavy burden to overcome.

Upon the Respondent's motions for partial summary judgment, the district court concluded that a non-remedial purpose can never justify a race-based employment decision under Title VII. 832 F. Supp. 836, 838 (D.N.J. 1993). In the alternative, the court concluded that in any event, the Board of Education's plan was not narrowly tailored to achieve its stated purpose of achieving diversity in the faculty population. 832 F. Supp. at 848. Because the district court viewed the question on partial summary judgment as a narrow legal question, it did not permit the development of the factual record, testing whether there was a compelling governmental interest for diversity in the faculty at the business school, 832 F. Supp. at 848 n. 9, a development that I believe is necessary to the determination of whether the Board of Education acted legally.

Unless we are ready to decide that a diverse faculty is *never* a justification for a school board to take race into account in making a layoff decision, we need a more developed factual record to decide whether the school board's justification for its decision is legal. This is particularly true now that the Respondent is justifying the summary judgment decision with reasons that were not before the lower courts and of which the petitioner had no notice at the time of the lower courts' consideration of the matter. Therefore, the district court erred in granting the motion and the Court of Appeals erred in affirming the district court's judgment. Thus, we will reverse and remand this case for application of the standards developed by this Court.[6]

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6. This case differs, in my view, from *Wygant* in a key respect. In *Wygant*, although the district court failed to make factual findings necessary to uphold the collective bargaining agreement as remedial, my opinion invalidating the agreement in *Wygant* did not rest on that fact. For that reason, I did not vote to remand. Instead, in *Wygant*, the claimed constitutional rationale for the race-based decision was remedial. The petitioners in *Wygant* met their burden of proving that the affirmative action plan was illegitimate by demonstrating that the affirmative action provision was keyed to an illegitimate hiring goal. That hiring goal was linked

III.

This Court has twice considered the validity of interposing affirmative action plans for making race- and gender-based decisions under Title VII. In both *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) there was a history of discrimination or underrepresentation either in the workplace itself or in a craft union that trained workers for the position. We concluded in *Weber* and *Johnson* that although the plain language of Title VII did not appear to contemplate the "benign" use of race- or gender-based decision-making, the particular affirmative action policies in those cases furthered the purposes of Title VII by permitting managerial discretion in creating voluntary programs to correct the imbalances in the workplace. *Weber*, 443 U.S. at 208-209; *Johnson*, 480 U.S. at 640-642.

Although in *Weber* and *Johnson* there was a manifest imbalance in the work forces based on race or gender, *Weber* made clear that it did not set out the only instances where it would be appropriate under Title VII to take race and gender into account, *Weber*, 443 U.S. at 208, and we did not reach the question in either of those cases of whether acquiring and maintaining a diverse faculty

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to the percentage of minorities in the student population, rather than to the percentage of qualified minority teachers in the relevant labor pool. Because the disparity between percentage of minority students and the percentage of minority faculty is not probative of employment discrimination, *see Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977), I concluded in *Wygant* that the affirmative action plan which was designed as a remedial provision, could not be upheld. I stated, "[b]ecause the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged 'narrowly tailored' to effectuate its asserted remedial purpose." 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in judgment).

Here, the Piscataway Board of Education makes no claim that its justification for its affirmative action plan is remedial. Instead, it offers diversity of faculty as a justification, a justification we have not yet addressed. In *Wygant*, I stated,

> The goal of providing "role models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the district Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case. The only governmental interests at issue here are those of remedying "societal" discrimination, providing "role models," and remedying apparent prior employment discrimination by the School Board.

Id. at 267 (O'Connor, J., concurring).

in an educational institution without a history of discrimination would support a voluntary affirmative action plan under Title VII.

Besides *Weber* and *Johnson*, which dealt with the standards for voluntary affirmative action programs under Title VII, this Court has also considered the validity of affirmative action plans under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As I have made clear in *Johnson*, I believe that the requirements of Title VII and the Equal Protection Clause are the same for public institutions. 480 U.S. at 649 (O'Connor, J., concurring in judgment). Thus, even though the plaintiffs in this case made no challenge to the decision of the Board of Education under the Equal Protection Clause of the Fourteenth Amendment, we must look to our equal protection jurisprudence as well as our Title VII jurisprudence to decide this case.[7]

IV.

Our cases decided under the Equal Protection Clause make clear that when determining the legality of all race-based decisions, no matter who benefits from the classification, no matter which governmental body makes the classification, the Court must apply strict scrutiny. *Adarand Constuctors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). To survive strict scrutiny, a race-based decision must be narrowly tailored to further a compelling governmental interest. *Id.*

The application of strict scrutiny, however, does not automatically invalidate a race-based classification. Instead, it requires the court examining the classification to make a searching inquiry into the justification for the measure. As I stated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989):

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7. Respondent argues that Title VII imposes even greater limitations on race-based affirmative action measures than the Equal Protection Clause. I cannot accept this proposition. Not one of the members of the Court in deciding *Johnson* even suggested that Title VII would prohibit voluntary race-based measures permissible under the Fourteenth Amendment. In fact, the disagreement in *Johnson* arose between two groups of justices, one arguing that Title VII permitted voluntary measures that would not pass muster under the Constitution, *see* 480 U.S. at 626-31 & nn. 6-8, and the other arguing that the standard for public employers was the same under Title VII and the Equal Protection Clause, *see* 480 U.S. at 649 (O'Connor, J., concurring in judgment); 480 U.S. at 664 (Scalia, J., dissenting). To conclude that Title VII imposes greater restrictions on employers would contravene the purposes of the Act and nullify the Congressional intent to preserve managerial prerogatives.

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493 (plurality opinion of O'Connor, J.).

The *Adarand* Court stated, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237.

Thus, application of strict scrutiny is not "strict in theory, but fatal in fact," *id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)) and we must examine the purpose of the race classification here as well as the means of achieving the goal.

This searching inquiry can only occur where there exists a full factual record explaining the history of the race-based decision and the motivations of the decisionmakers at the time of making the decision.

V.

In this case, the Piscataway Board of Education claims that its compelling state interest is a diverse faculty. Diversity of faculty, according to the Board, leads to an improved educational experience for students and faculty. The policy applied here, according to the Board of Education, was narrowly tailored to achieve this purpose because it applied only after the Board had determined that the employees were equal in seniority and qualifications. In fact, the Board argues, it had never applied the policy before to an individual employment decision.[8]

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8. *See* Joint Appendix at 194.

It is an open question whether diversity can ever be a compelling state interest justifying a race-based decision. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Court struck down as violative of the Equal Protection Clause a medical school special admissions program that reserved 16 of 100 seats for minorities, insulating them from competition with candidates applying through the general admissions program. *Id.* at 320. Justice Powell, *in dicta*, concluded that diversity of a student body in an institution of higher learning was a compelling state interest, but the particular program at issue at the University of Davis was not sufficiently narrowly tailored to achieve this purpose. Justice Powell's conclusion that diversity was a proper justification for race-based affirmative action programs in higher education was based on First Amendment considerations of academic freedom. Justice Powell stated:

> The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 311-312.

Quoting Justice Frankfurter, Justice Powell continued:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

Finally, Justice Powell recommended the use of the "Harvard Plan" to achieve diversity. This method, used by Harvard University in its admissions program, permitted the consideration of race as a plus factor among many other factors. Four other Justices agreed that a plan like the "Harvard Plan" would be constitutional if used in a public institution "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering

effects of past discrimination." 438 U.S. at 326 n. 1 (Brennan, J., concurring in the judgment in part and dissenting in part).

In *Metro Broadcasting Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990), employing an intermediate level of scrutiny, this Court upheld the FCC's minority ownership policies, which gave minority applications for new licenses and enhancement and permitted a limited category of existing radio and television broadcast stations to be transferred in a "distress sale" only to minority-controlled firms. 497 U.S. at 552. After the policies were in effect, Congress enacted into law the FCC appropriations legislation for fiscal year 1988, which prohibited the Commission from spending any appropriated funds to examine or change the minority policies, thereby placing its approval on the race-based classification. *Id.* at 560.

Metro Broadcasting applied an intermediate level of scrutiny because its use of race was considered a "benign" classification. In that case, there was no remedial purpose. Instead, the Court concluded that the policies were substantially related to achieving the important governmental interests of achieving diversity in broadcasting. *Id.* at 564-565. *Metro Broadcasting* had a short life, however. In *Adarand Constuctors, Inc. v. Pena*, this Court made clear that strict scrutiny must be applied to all race-based classifications whether they be "benign" or invidious. Expressly overruling *Metro Broadcasting* the Court stated:

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

Adarand, 515 U.S. at 227.

Justice Stevens' dissent in *Adarand* read these words to overrule *Metro Broadcasting* only to the extent that it applied the improper standard under the Equal Protection Clause. *Id.* at 257-258 (Stevens, J., dissenting). He argued that *Adarand* was not inconsistent with the conclusion in *Metro Broadcasting* that fostering diversity "may provide a sufficient interest to justify such a program." *Id.* at 258 (Stevens, J., dissenting). I agree with this reading of *Adarand*, but I also believe that *Metro Broadcasting* is not deter-

minative of the case before us. The regulation in *Metro Broadcasting* was analyzed under the intermediate scrutiny test and the Court has not addressed whether such a regulation would be upheld if subject to strict scrutiny. Because in *Adarand* we did not apply the strict scrutiny standard to the classification in *Metro Broadcasting*, we have never reached the question of whether the FCC rules would survive strict scrutiny. Furthermore, even if the FCC rules would be upheld under the strict scrutiny standard, there appear to be sufficient factual differences from this case that without the development of a factual record, we cannot say whether faculty diversity in the business department of a public high school is a sufficiently compelling reason for the race-based decision in the present case.

Respondent would have us conclude, without the benefit of the factual record, that diversity is never a sufficiently compelling interest to withstand strict scrutiny. I cannot agree with this conclusion.

In *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), the Court struck down as unconstitutional an affirmative action plan negotiated by the union and the employer that laid off more senior White employees before less senior Black teachers were laid off. This Court rejected the Board of Education's arguments that the plan was justified because Black teachers provided role models for Black students and the plan remedied societal discrimination. 476 U.S. at 288-289 (O'Connor, J. concurring in part and concurring in judgment). As I noted in my concurrence, however, *Wygant* did not present the very different question of whether a diverse faculty in an educational setting can justify a race-based affirmative action program. *Id.*

Here, as in *Wygant*, there is no evidence of a history of discrimination. Instead, the Board of Education would have us approve the use of race as a tie-breaker in order to assure that students and faculty in the business department of a high school have access to a diverse faculty. Under certain conditions, I believe that the goal of acquiring and maintaining a diverse faculty could be compelling.

I need not, however, go as far as the concurring opinions in this case. I merely believe that a diverse faculty in the business department may be a compelling justification for considering race along with other factors in a layoff decision. I cannot reach this conclusion, however, without a more developed record.

In developing the record, the parties should concentrate on the reasons why a diverse faculty is compelling, including, but not limited to, the numbers of Black faculty members in the Piscataway High School, the frequency of exposure of the business students to Black faculty members in other courses, and data demonstrating that a diverse faculty protects students from discriminatory treatment.[9] Expert evidence demonstrating why a diverse faculty enhances the educational experience of students from different backgrounds, as well as more specific evidence demonstrating why it is important to maintain diversity in the Business Department, would help inform the Court's judgment concerning the importance of diversity in this context.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered

JUSTICE GINSBERG, with whom JUSTICE STEVENS, JUSTICE SOUTER and JUSTICE BREYER join, concurring in the judgment.

The narrow question before the Court is whether the decision made by the Board of Education of the Township of Piscataway to lay off a White teacher instead of an equally-qualified Black teacher is valid under Title VII of the Civil Rights Act of 1964, as amended by the 1991 Civil Rights Act.[10] We would hold that the decision was legal under Title VII and therefore reverse the holding of the Third Circuit Court of Appeals. Because, however, Justice O'Connor, whose vote constitutes the necessary vote to make a majority of this Court, prefers a more developed factual record, we agree that the case should be remanded to the lower courts for development of the facts on the record.

I.

According to the undisputed facts in this case, the Piscataway Board of Education had to choose to lay off one of two equally qual-

9. *See* Reply Brief at 6-8 (stating that petitioner intended to present evidence demonstrating that a more diverse faculty protected students from discriminatory treatment).

10. This suit was not brought under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

ified faculty members in the Business Department of Piscataway High School. One, Debra Williams, was the only minority in the business department and the first Black hired to teach in the department. The other, Sharon Taxman, a White woman, was hired to teach on the same day as Ms. Williams. After considering the seniority and qualifications of both women, the Board of Education reached the conclusion that they were equal in seniority and in qualifications.

In other instances where there was a need to lay off a faculty member and the Board found a tie, the Board used a lottery system to break the tie. Never before, however, had the Board decided between two equal candidates: one Black and one White. The Board met at least twice thoroughly to discuss its decision, concluding finally to lay off Ms. Taxman, the White teacher and retain Ms. Williams, the Black teacher. At the time of the layoff, the School District had an affirmative action policy in force which is quoted in its entirety in JUSTICE O'CONNOR'S opinion.

Although Petitioner's Reply Brief on the Merits raises a dispute as to whether this policy applied to layoffs and as to whether the Board invoked the affirmative action plan to reach its decision,[11] on its face, the policy applies to layoffs and there is undisputed testimony in the record that, at least, the Board was aware of the plan when it made its decision, that it did not consider the plan to require the layoff of the White faculty member instead of the Black one, and that the board had discretion in deciding whether to use race to break the tie. *See* Joint Appendix at 194.

At the time the decision was made, there was only one minority faculty member—Ms. Williams—teaching in the business department. In the Piscataway High School as a whole, there were 176 professional staff members, 14 of whom were Black. *See* Brief for Petitioner at 2. Blacks were not underrepresented in the professional jobs with reference to the qualified labor pool. *Id.* at 2 n. 3. Moreover, at the time the Board made its decision it was unaware of any previous discriminatory actions made in personnel decisions at the school district. *Id.* at 2.

At his deposition, Mr. Theodore H. Kruse, the President of the Piscataway Board of Education in 1989 when the decision was made to abolish the secretarial studies job and to retain Ms. Wil-

11. *See* Respondent's Reply Brief on the Merits at 17.

liams, testified that he had voted in favor of adopting the above-quoted affirmative action policy in 1983 for the following reason:

> Basically, I think because I had been aware that the student body and the community which is our responsibility, the schools of the community, is really quite diverse and there—I have a general feeling during my tenure on the board that it was valuable for the students to see in the various employment roles a wide range of background, and that it was also valuable to the work force and in particular to the teaching staff that they have—they see that in each other.

Joint Appendix at 196.

When asked in what way retaining Ms. Williams furthered an educational objective for the Piscataway Board of Education, Mr. Kruse testified:

> In my own personal perspective I believe by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made—come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all background.

Id. at 197.

When asked to define "culturally diverse," Kruse further testified:

> Someone other than—different than yourself. And we have, our student population and our community has people of all different background, ethnic background, religious background, cultural background, and it's important that our school district encourage awareness and acceptance and tolerance and, therefore, I personally think it's important that our staff reflect that, too.

Id.

In a certification submitted to the district court after his deposition on July 1, 1993 to clarify the above comments made in his deposition, Mr. Kruse certified:

> Based on my experience as a university professor and a long-time Piscataway Township Board of Education member, I had come to the conclusion by May 1989 that a racially and culturally diverse faculty and student body promoted a more enriching educational environment for students. During my

> tenure on the Board beginning in approximately 1983, we have taken various steps in the School District in furtherance of that goal. As an educator and school board member, I see this objective as distinct from fostering equitable labor relations; the former is for the students' benefit, the latter for the employees'.
>
> When we were confronted with this issue in May 1989, it was the first time I can recall that the Board itself was ever given a choice of considering race as a factor, to any extent, in making a specific personnel decision. In the past, we normally deferred to the recommendation of our Superintendent on personnel matters, without extensive discussion. Because of the unusual nature of this case, we discussed it in depth as a Board, . . . recognizing the unique circumstances confronting us. Our decision to retain Ms. Williams was a voluntary one on our part, for the reasons stated. Our affirmative action policy on its face required, at most, that a minority be "recommended." I did not feel bound to follow that recommendation, except as my conscience and good judgment dictated.

Joint Appendix at 194.[12]

Although these expressions of the Board of Education's beliefs about the importance of diversity to the education of the Piscataway students are somewhat general, the research on educational institutions strongly supports the Board's conclusion that a better educational experience for faculty and students will occur in a diverse educational setting. *See* Brief of Amici Curiae American Council on Education et al., at 7-13. Moreover, there exists a "strong consensus among educators, representing a broad spectrum of institutions, that diversity is essential to the institutions' missions." *Id.* at 3. *See, e.g.*, American Council on Education, Making the Case for Affirmative Action in Higher Education 19-23 (1996) (reporting comments of university presidents supporting affirmative action); Neil L. Rudenstine, *Why a Diverse Student Body is so Important*, The Chron. of Higher Educ., Apr. 19, 1996, at B1 (president of Harvard University sees diversity as a means of overcoming society's stratification). Both social-science data and the anecdotal evidence of educators working in the field "support the

12. It is unclear whether the district court considered this statement in its decision, but it made clear that the statement, "even if factually supported, does not constitute a legal justification for the Board's Affirmative Action plan . . . ." 832 F. Supp. at 848 n. 9.

conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype." Amicus Brief of American Council on Education at 9.

Specifically, there are measurable positive effects of a diverse student body and faculty on the education of both Black and White students. Students learning in an environment that is more diverse and who have the opportunity to discuss issues of race and culture in school tend to be more successful in college. *See, e.g.,* Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How are Students Affected?* 25 Change 44, 46, 48 (Mar./Apr. 1993). These same students tend to carry over positive behaviors into their workplaces, after they graduate from college. Blacks and Whites who attend racially diverse schools, for example, are more likely to work in racially mixed firms; Blacks who attend racially diverse elementary schools will more likely have White friends, live in integrated neighborhoods and judge White co-workers positively. *See* Marvin P. Dawkins and Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394, 403 (1994).

Research also shows that a diverse teaching staff reduces the risk of minority students' suffering from discrimination. *See* Kenneth J. Meier et al., England, Race, Class, and Education 6 (1989). White teachers often view minority students less favorably in disciplinary and non-academic settings. *See* 1 Willis D. Hawley et al., Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies 86-87, 89 (1981) ("Vanderbilt Study"). Furthermore, earlier studies concluded that minority teachers generally give more attention to minority students and are less likely to place minority students in lower tracks than white teachers are, *see id.* at 87, and that Black teachers generally have greater expectations for Black students than do White teachers. *See id.*

A very recent study examining the effects of race and gender on elementary teachers' perceptions of students' behavior and social skills found that White female teachers rated Black male students significantly lower than White female and male students and Black female students. *See* Xue Lan Rong, *Effects of Race and Gender on Teachers' Perception of the Social Behavior of Elemen-*

tary Students, 31 Urb. Educ. 261, 276-279 (1996). The author of this study concluded that the rating was due in large part to perceptions of the White female teachers because White male and Black male teachers' responses to the same students did not show such a significant divergence in rating of Black male students. *See id.* at 279. Other research confirms that while desegregation has significantly raised test scores of Black students, Black students achieve better in desegregated schools when there are more Black teachers in the school. Robert L. Crain, *The Research on the Effects of School Desegregation, in* Brown Plus Thirty 40, 40-41 (Lamar P. Miller ed., 1986).

Because of the overwhelming consensus of educators, rooted in practical experience and social-science research, that a diverse faculty has substantial educational benefits for students and faculty alike, I believe that there exists a compelling governmental interest in achieving and maintaining diversity in the teaching staff of the Business Department at Piscataway High School.

I am particularly comfortable with this decision because the method used by the Board of Education was narrowly drawn to achieve its purpose. For example, the method used in this case makes race even less important than the plus factor we approved in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).[13] In *Johnson*, the lower court made a factual determination that Diane Joyce, the woman who was selected for the job in question, was slightly inferior to her competitor, Paul Johnson. Thus, in that case, sex was used to boost Joyce's criteria above those of John-

13. There is an issue before this Court as to whether Title VII places greater limitations than the Equal Protection Clause on public institutions implementing affirmative action plans. A principled reading of *Johnson*, however, demonstrates that no Justice of this Court believed that Title VII would impose greater limitations than the Equal Protection Clause. In fact, a number of Justices in *Johnson* expressed the belief that Title VII imposed fewer restrictions than the Equal Protection Clause on public officials implementing voluntary affirmative action programs. *See* 428 U.S at 627-628 n. 6. Petitioner does not ask us to hold that Title VII imposes a lesser limitation on public institutions than does the Equal Protection Clause. It merely argues that the Court of Appeals' implication that Title VII imposes greater limitations on public employers than the Equal Protection Clause, 91 F.3d at 1559-1560, is erroneous. *See* Reply Brief at 13. We hold that the standards under the Equal Protection Clause and Title VII are the same for voluntary race-based affirmative action decisions and that Title VII imposes no greater limitation than does the Equal Protection Clause. We do not reach the question of whether a lesser standard may be applicable to private employers.

son.[14] In this case, however, race was not used as a plus factor. It was given even less weight than that. Before the Board considered race, it found that both candidates were equal in seniority and qualifications. This finding, affirmed by the lower court, has not been challenged on appeal. Thus, the Board of Education merely considered race to break a tie once the candidates were determined to be equal.

Wygant is also distinguishable. In *Wygant*, the voluntary plan required the layoffs of more senior White faculty before the less senior Black faculty members were laid off. This program affected a considerable number of faculty members who had greater seniority than those who were retained. Here, the layoff was of only one faculty member; both Taxman and Williams were hired on the same day and they were judged equal in qualifications by the Board of Education.

The Board action in this case resulted from a compelling justification—faculty diversity in a public school setting. The means used to further this interest were the narrowest means available to the Board of Education. Although Respondents would have us condemn the policy because it is open-ended and has no fixed stopping point, the facts in this case demonstrate that the Board used the policy judiciously. It applied its policy only once in making an individual personnel decision and before it took race into account, it made a separate determination that the candidates for layoff were equal. Moreover, requiring a policy whose justification is to acquire and maintain diversity within the school district to have an ending point makes no sense. It is the very future-oriented purpose of the policy that requires the policy to be open-ended. Since we are not passing judgment on the application of the policy on any occasion but the one before us, we are convinced that this race-based decision would pass muster under the Harvard plan.

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14. This determination appears, however, to be false. For an interesting account of the facts in the Diana Joyce case, see Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 Ariz. L. Rev. 1003, 1032-36 (1997).

JUSTICE STEVENS, with whom JUSTICE GINSBERG joins, concurring.

I join the Court's opinion, but write separately to emphasize my continuing disagreement with *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), I explained that "race is not always irrelevant to sound governmental decisionmaking." *Id.* at 314 (Stevens, J., dissenting). I continue to believe that government can and should take race into account for future-oriented benign reasons and that the standard the law applies to race-based classifications should recognize the difference between those granting an opportunity to persons who are members of groups that have suffered historically from discrimination and invidious race-based classifications that favor the group in power. As I stated in *Adarand*, "[i]nvidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society." *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

For example, I agree, for the reasons expressed in JUSTICE GINSBERG'S concurring opinion today, that achieving and maintaining diversity on a high school teaching staff is a legitimate reason for a race-based personnel policy.

Moreover, there are other legitimate reasons for taking race into account. Post-secondary education may legitimately employ race-based admissions policies. These policies can guarantee diversity of experiences and viewpoints, leading to a "robust exchange of ideas." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Race-based personnel policies may lead to increased prison safety or peace in a racially divided community. *Cf. Wittmer v. Peters*, 87 F.3d 916, 921 (7th Cir. 1996) (stating that boot camp can legally take race into account in staffing).

Finally, race-based personnel policies may prevent future discrimination against persons who are members of a historically disadvantaged group, whether that discrimination be conscious or unconscious. *See* Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinc-*

tion Between Colorblind and Race-Conscious Decision Making Under Title VII, 39 Ariz. L. Rev. 1003, 1048-1051 (1997).

Because I believe that an "'examination of the legislative scheme and its history,' . . . will separate benign measures from other types of racial classifications," *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 564 n. 12 (1990) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n. 16 (1975)), I believe that our standard of review should distinguish between benign and invidious race-based classifications. For this reason, I would apply intermediate scrutiny to a benign race-based classification as we did in *Metro Broadcasting*, 497 U.S. at 564-565. To survive intermediate scrutiny, the racial classification must serve important governmental objectives and be substantially related to achievement of those objectives. *Id.* at 565.

I am concerned that applying strict scrutiny to benign classifications may lead to pernicious results. For example, I believe that the use of strict scrutiny will create a chilling effect on government-sponsored affirmative action programs, even programs that would be found legitimate when examined with the strictest scrutiny. In order to avoid the costs of increased litigation, Boards of Education will, for example, avoid legitimate affirmative action programs designed to promote diversity or even to remedy prior discrimination.

Furthermore, because gender-based classifications are subject to intermediate scrutiny, *United States v. Virginia*, 518 U.S. 515 (1996), it would be very odd to subject a benign gender-based classification to strict scrutiny. If benign gender classifications are not subject to strict scrutiny, however, the very same affirmative action programs designed to benefit both women and persons of color may be struck down when they benefit persons of color but upheld when they benefit women. *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting). This is an anomalous result under Title VII and the Equal Protection Clause since the primary purpose of their passage was to ensure racial equality.

* * *

This said, we are limited by *stare decisis* to adhere to our decision in *Adarand*, which makes clear that the reviewing court must scrutinize any race-based classification, whether invidious or benign. Strict scrutiny requires a searching inquiry into the objec-

tives of the classification and the method used to acquire those objectives. I agree with the Court that *Adarand* permits, even requires, us to consider who will benefit and who will bear the burden of the classification as part of that scrutiny.

The objective of the Piscataway Board of Education was legitimate and compelling here. A diverse public high school faculty, as the Court's opinion demonstrates, enhances the education of its students, preparing them for citizenship in a pluralistic society. In *Wygant*, I explained the importance of having a diverse faculty teach our children:

> In 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. For one of the most important lessons that the American public schools teach is 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. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

476 U.S. at 315 (Stevens, J., dissenting) (citation omitted).

Moreover, the Piscataway Board of Education applied its affirmative action plan only once it had made the determination that the two candidates for layoff were equal in seniority and qualifications. This plan, therefore, is limited in scope and does not unnecessarily trammel on the rights of white teachers.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY joins, dissenting.

Because this case involves a layoff, I believe that *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), is controlling and we should affirm the judgment of the Court of Appeals. As we stated in *Wygant*:

> We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties . . . .
>
> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden

> some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 282-283 (citations omitted).

For this reason, I dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

As I made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), there can *never* be a compelling state interest in discriminating against individuals to make up for past racial discrimination. I stated:

> To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id. at 239 (Scalia, J., concurring in part and concurring in judgment).

There is even less of an interest in making personnel decisions in order to achieve diversity in a department of a high school in a school district that has never discriminated against Blacks.

For this reason, I dissent.

JUSTICE THOMAS, dissenting.

I dissent. Government-sponsored racial classifications, whether they be "benign" or not, are morally reprehensible and unconstitutional. As I stated in *Adarand Constuctors, Inc. v. Pena*, 515 U.S. 200 (1995):

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may

> cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

Id. at 241 (Thomas, J., concurring in part and concurring in judgment).