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Whither Weber?

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Whither *Weber*?

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The *Taxman* case sparked passionate discussions about 1) all forms of affirmative action, 2) the value of diversity, 3) the persistence of discrimination, 4) the role of the workplace in furthering democratic principles, 5) employer prerogatives and congressional power, 6) "test" cases, and other important issues. What struck me about these discussions, most notably those among lawyers or law professors, was the absence of any reference to Title VII or the Supreme Court's Title VII jurisprudence. With the possible exception of Title VII aficionados, it appears that lawyers are not familiar with the Supreme Court's only Title VII affirmative action cases, *Weber* and *Johnson*.[1] I came away from many of these discussions with the impression that most lawyers think the Supreme Court has declared broadly that affirmative action is lawful under Title VII, and that the Court in *Taxman* would have to dramatically "undo" the law of affirmative action to affirm the Third Circuit's conclusion.

That view misconstrues *Weber* and *Johnson*. Some time ago, in preparing a talk entitled "The Diversity Justification for Affirmative Action" I read, perhaps for the first time, but certainly for the first time in many years, the unedited opinions in *Weber* and *Johnson*. What I found there explains in large measure how I drafted the mock opinion that follows.

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1. United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

I. THE MEANING OF *WEBER*

By a vote of 5-2 the Court in *Weber* held that an affirmative action plan that reserved for black employees 50% of the openings in an in-plant craft training program was lawful under Title VII.[2] But the Court endorsed the plan cautiously. The majority acknowledged that the plan would violate the "literal" terms of the statute,[3] but it could not bring itself to read Title VII to be "the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[4] The plan approved in *Weber* was designed to abolish such a pattern because the craft unions in the area from which the employer drew its work force had intentionally discriminated against black workers. Thus, only 1.83% of the skilled craft workers at the plant were black, while the work force in the area was 39% black.[5] Justice Blackmun, the fifth vote for approving the plan, wrote a separate concurrence, in which he acknowledged "misgivings" about the extent to which the legislative history of Title VII supported the Court's result.[6] He joined the majority nevertheless because its approach seemed to him a practical and equitable approach to the problem of work force segregation, and because "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses."[7]

Chief Justice Burger and Justice Rehnquist dissented in *Weber*, explaining that Title VII explicitly prohibits race discrimination, without any exception for affirmative action plans, and that nothing in the legislative history suggests Congress meant to exempt affirmative action plans from the reach of the statute.[8] The other members of the Court, Justice Powell and Justice Stevens, did not participate in *Weber*.

In *Johnson*, decided eight years later, the Court, "guided" by *Weber*, declared lawful an affirmative action plan intended to re-

2. *See Weber*, 443 U.S. at 197.
3. *Id.* at 201.
4. *Id.* at 204.
5. *See id.* at 198-99.
6. *Id.* at 209 (Blackmun, J., concurring).
7. *Id.* at 216.
8. *Id.* at 216-19 (Burger, C.J., dissenting); *id.* at 219-54 (Rehnquist, J., dissenting).

dress an underrepresentation of women in the defendant's work force.[9] In *Johnson* the Court purported to apply rather than expand the narrow exception recognized in *Weber*. The five Justices in the majority concluded that the employer's decision to consider the sex of qualified applicants for promotion "satisfie[d] the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate . . . work force imbalances in traditionally segregated job categories."[10] Moreover, as the Court had in *Weber*, the Court in *Johnson* then concluded that the plan did not unnecessarily trammel the rights of nonminority workers or create an absolute bar to their advancement.[11]

Two current members of the Court wrote concurrences in *Johnson*. Justice Stevens, who sat out in *Weber*, voted with the majority in *Johnson*, but he also wrote a concurrence to express his views about *Weber*.[12] Prior to *Weber*, he explained, the Court had always read Title VII to prohibit discriminatory preference for whites or blacks.[13] *Weber*'s new construction of Title VII was at odds with his understanding of the legislative intent,[14] but Justice Stevens chose to follow *Weber* in the interests of "'stability and orderly development of the law.'"[15] Although Justice Stevens has gone on to become the Court's "diversity champion,"[16] his views of the appropriateness of the holding in *Weber* may say something about the likelihood that a majority of the current Court will read *Weber* narrowly or broadly.

Justice O'Connor was the other concurring Justice in *Johnson* who is currently on the Court. She too expressed misgivings about the Court's decision in *Weber*, noting that the majority there read the statute to permit "what its language read literally would prohibit."[17] She chose to follow *Weber* because none of the parties in *Johnson* had suggested it be overruled,[18] and because to do otherwise would "fail[ ] to reckon with the reality of the course that the

9. *Johnson*, 480 U.S. at 627.
10. *Id.* at 637.
11. *Id.* at 637-38.
12. *Id.* at 642-47 (Stevens, J., concurring).
13. *See id.* at 642-43.
14. *See id.* at 643-44.
15. *Id.* at 644 (quoting Runyon v. McCrary, 427 U.S. 160, 190 (1976) (Stevens, J., concurring)).
16. *See infra* pp. 266-67.
17. *Johnson*, 480 U.S. at 647 (O'Connor, J., concurring in judgment).
18. *Id.* at 648.

majority of the Court has determined to follow."[19] She refused to join the majority opinion because it was, to her mind, an unwarranted extension of *Weber*.[20] It would permit an employer to make employment decisions otherwise prohibited by Title VII based simply on an imbalance in the work force, even if that imbalance did not suggest the employer might have previously discriminated against women or minorities.[21] For Justice O'Connor, an affirmative action plan was not lawful under Title VII unless the employer had a "firm basis" for believing that remedial action was required.[22]

Two other Justices currently on the Court participated in *Johnson*. Justice Scalia and Chief Justice Rehnquist joined in a dissent in which they urged the Court to overrule *Weber* because it was directly contrary to the language and legislative history of Title VII.[23] Justice White also dissented. Although he had voted with the majority in *Weber*, he voted to overrule it in *Johnson*.[24] He believed the majority in *Johnson* read *Weber* to permit the use of affirmative action for reasons other than to remedy intentional and systematic exclusion of blacks, and that was "a perversion of Title VII."[25]

Thus, contrary to the common perception I encountered in many discussions about *Taxman*, a close review of the Supreme Court's only Title VII affirmative action decisions reveals thin support for even the limited exception recognized in *Weber* and applied in *Johnson*. One of the five members of the *Weber* majority (Justice Blackmun) expressed concern at the time that the Court was misinterpreting the statute[26] and another (Justice White) voted to overrule *Weber* eight years later.[27] One member of the Court at the time of *Weber* who could not participate (Justice Stevens) subsequently explained that he too thought *Weber* was probably wrong.[28] And Justice O'Connor, who concurred in the result in

19. *Id.* at 648-49.
20. *See id.* at 649.
21. *See id.* at 649-57.
22. *Id.* at 649.
23. *See id.* at 657-77 (Scalia, J., dissenting).
24. *Id.* at 657 (White, J., dissenting).
25. *Id.*
26. *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring).
27. *See Johnson*, 480 U.S. at 657 (White, J., dissenting).
28. *See id.* at 644-47 (Stevens, J., concurring).

Johnson, suggested that *Weber* did not stand on solid footing and therefore read the case to recognize only a narrow exception to the antidiscrimination principle of Title VII.[29] Those who would read *Weber* and *Johnson* to create a broad "affirmative action exception" to Title VII must acknowledge this reality.

II. COUNTING THE VOTES

Because four members of the current Court participated in *Weber* or *Johnson* or both, (Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, and Justice Scalia) it is fairly easy to predict how they might have voted in *Taxman*. I looked to the Court's equal protection jurisprudence for additional guidance, and in particular to help me predict how the other Justices would vote.[30]

A. *Affirm the Third Circuit and Preserve* Weber *and* Johnson

Justice O'Connor

I chose to have Justice O'Connor write an opinion concluding that the Board's actions violated Title VII but refusing to overrule *Weber* and *Johnson*. This approach seems consistent with her concurrence in *Johnson*. There she respected the Court's prior decision in *Weber* but read it to create a relatively narrow exception to Title VII, permitting affirmative action plans only if they are *remedial*, in the sense that they are directed at redressing a serious underrepresentation of women or minorities in an employer's work force relative to the relevant labor market.[31] Her unwillingness to permit race-conscious decisions outside this "remedial" context is also evident in her dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[32] where the Court concluded that an FCC preference program, intended to increase the number of television and radio broadcasting licenses issued to minority-owned or controlled firms, did not violate the Fifth Amendment. In her *Metro Broadcasting* dissent Justice O'Connor wrote that "[m]odern equal protection doctrine has recognized only one [compelling interest to support the Government's use of racial classifi-

29. *Id.* at 648-51 (O'Connor, J., concurring in judgment).

30. *See generally* Akhil Reed Amar & Neal Kumar Katyal, Bakke's *Fate*, 43 UCLA L. Rev. 1745 (1996) (analyzing Supreme Court affirmative action decisions).

31. *See Johnson*, 480 U.S. at 648-53 (O'Connor, J., concurring in judgment).

32. 497 U.S. 547 (1990).

cations]: remedying the effects of racial discrimination."[33] Perhaps even more relevant is her statement in *Metro Broadcasting* that "[w]e would not tolerate the Government's claim that hiring persons of a particular race leads to better service . . . and we should not accept as legitimate the FCC's claim in these cases that members of certain races will provide superior programming . . . ."[34]

One difficulty in trying to predict how Justice O'Connor would react to *Taxman* arises from the context of the case—public education. In *Wygant v. Jackson Board of Education*,[35] the Court held that a school board could not, consistent with the Equal Protection Clause, layoff teachers based on race rather than seniority in order to maintain a mix of black and white teachers keyed to the racial mix of the student body. While joining the plurality in concluding that societal discrimination and role-modeling were not sufficient bases for making race-based employment decisions,[36] Justice O'Connor wrote separately to distinguish the impermissible goal of providing role models with what she called "the very different goal of promoting racial diversity among the faculty."[37]

I concluded that if Justice O'Connor voted to affirm the Third Circuit in *Taxman* she could emphasize that on the record before it the district court could only conclude that the faculty at Piscataway High School was already racially diverse. Moreover, she could explain that the Board did not show why racial diversity in the Business Education Department at an otherwise racially diverse high school was important. I tried to reconcile her approach in *Johnson* limiting the use of affirmative action to "remedial" situations with her statement in *Wygant* endorsing faculty diversity by having her explain that a lack of racial diversity in a faculty could be redressed under *Johnson* if the imbalance was of sufficient magnitude.

Finally, in *Wygant* Justice O'Connor seemed to reject the proposition that a valid affirmative action plan could never rely on layoffs to achieve its goals. She did not join the section of the plurality's opinion that came close to adopting such an approach,[38]

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33. *Id.* at 612 (O'Connor, J., dissenting).
34. *Id.* at 620.
35. 476 U.S. 267 (1986).
36. *See id.* at 274-77 (plurality).
37. *Id.* at 288 n.* (O'Connor, J., concurring in part and concurring in the judgment).
38. *See id.* at 278-84 (plurality).

and she explicitly refused to "resolve the troubling questions whether any layoff provision could survive strict scrutiny."[39] In her mock opinion in *Taxman* I chose to have her again refuse to decide that question. Instead I had her write that under the circumstances, where the purpose of the plan was improper, Sharon Taxman was tenured, and the plan in question had no stopping point, the Board's decision to discharge her unnecessarily trammeled Taxman's rights.

Justice Kennedy

I predicted that Justice Kennedy would join Justice O'Connor's opinion based in part on his decision to join her dissent in *Metro Broadcasting*. There, you will recall, she asserted that modern equal protection doctrine has deemed only an interest in remedying the effects of racial discrimination to be sufficiently compelling to support the government's use of racial classifications.[40]

In addition, Justice Kennedy wrote his own dissent in *Metro Broadcasting* to criticize the majority's willingness to permit the FCC to use race-conscious measures to further an interest in "broadcast diversity."[41] In his view, the stereotypical assumption that the race of the owner of a broadcast license is linked to broadcast content was "based on the demeaning notion that members of . . . racial groups ascribe to certain 'minority views' that must be different from those of other citizens."[42] Thus, I concluded that he would not approve of the Board's action in *Taxman*. However, I also concluded that because of his respect for precedent he would not join the Justices voting to overrule *Weber* and *Johnson*.[43]

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39. *Id.* at 293 (O'Connor, J., concurring in part and concurring in judgment).

40. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 612, 632-37 (1990) (O'Connor, J., dissenting).

41. *Id.* at 632 (Kennedy, J., dissenting).

42. *Id.* at 636.

43. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (stating that because "a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point").

Justice Souter and Justice Breyer

My decision to have these Justices join in Justice O'Connor's opinion affirming the Third Circuit in *Taxman* is based on their positions in *Adarand Constructors, Inc. v. Pena.*[44] The *Adarand* majority concluded that federal programs granting race-based preferences were subject to strict scrutiny under the Fifth Amendment.[45] Justices Souter, Breyer, Stevens, and Ginsburg dissented. However, Souter and Breyer did not join a separate dissent by Stevens and Ginsburg that embraced the diversity justification for affirmative action.

In that dissent, Justice Stevens wrote that a majority of the Court in *Metro Broadcasting* had correctly held that reliance on race in granting licenses was a legitimate means of achieving broadcast diversity.[46] Along with Justice Ginsburg, he asserted that the majority in *Adarand* was overruling *Metro Broadcasting* only to the extent that the Court in *Metro Broadcasting* held that "benign" racial classifications were not subject to strict scrutiny.[47]

> The proposition that fostering diversity may provide a sufficient interest to justify . . . a[n affirmative action] program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.[48]

By contrast, Justice Souter's dissent, which Justice Breyer joined, made no mention of the diversity justification for affirmative action. Instead he explained how the majority's approach in *Adarand* should not jeopardize the use of race to eliminate or remedy the past effects of discrimination.[49] The price paid by nonminorities in these circumstances, he explained, is considered reasonable.[50] "[I]f the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing."[51] Moreover, Justice Breyer joined a separate

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44. 515 U.S. 200 (1995).
45. *Id.* at 236.
46. *See id.* at 254-59 (Stevens, J., dissenting).
47. *Id.* at 258.
48. *Id.*
49. *Id.* at 270 (Souter, J., dissenting).
50. *See id.*
51. *Id.* at 270.

dissent authored by Justice Ginsburg that also focussed on remedial uses of race-conscious measures. She explained that all members of the Court acknowledged "Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects,"[52] so long as "[c]ourt review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once preferred groups."[53]

Thus, it appears that both Justice Breyer and Justice Souter would be comfortable with a view of Title VII affirmative action limited to *Weber's* search for 1) a remedial purpose, and 2) means that do not unnecessarily harm nonminorities. It does not appear they would support extending *Weber* to permit employers to make all forms of race-conscious employment decisions to further an interest in diversity.

B. *Affirm the Third Circuit and Overrule* Weber *and* Johnson

Chief Justice Rehnquist and Justice Scalia

Predicting how Chief Justice Rehnquist and Justice Scalia would vote in *Taxman* was easy. Chief Justice Rehnquist dissented in *Weber* on the grounds that Title VII did not contain an affirmative action exception to its prohibition on discrimination in employment and nothing in the legislative history suggested that Congress intended to include such an exception.[54] Later, in *Johnson*, he was joined by Justice Scalia in urging the Court to overrule *Weber*.[55]

Justice Thomas

I concluded Justice Thomas would likely provide a third vote to overrule *Weber* and *Johnson* because of his concurring opinion in *Adarand*, in which he explained that "there is a 'moral [and] constitutional equivalence,' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[56] His view of equal pro-

52. *Id.* at 273 (Ginsburg, J., dissenting).
53. *Id.* at 276.
54. *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting).
55. *Johnson*, 480 U.S. at 657-77 (Scalia, J., dissenting).
56. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in judgment) (citation omitted).

tection comports with a literal interpretation of the language of Title VII that would require the Court to overrule *Weber* and *Johnson*. To Justice Thomas, "racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[57]

C. *Reverse the Third Circuit*

Justice Stevens

Given his opinion in *Johnson* it is also fairly easy to predict how Justice Stevens would have voted in *Taxman*. While he expressed misgivings in *Johnson* about the Court's decision in *Weber*, "[g]iven the interpretation of the statute the Court adopted in *Weber*, [he saw no reason an employer should be required, before granting] preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII."[58] Instead of looking backward at past discrimination to determine the outer limits of affirmative action, he explained, an employer might consider other legitimate reasons to give preferences to members of underrepresented groups, including "'increasing the diversity of the work force.'"[59]

For example, he wrote in *Wygant*:

> 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 . . . . 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.[60]

Similarly, in his concurrence in *Metro Broadcasting* embracing the diversity justification for affirmative action, he concluded that "the public interest in . . . diversity in the composition of a public school

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57. *Id.* at 241.

58. *Johnson*, 480 U.S. at 646 (Stevens, J., concurring).

59. *Id.* at 646-47 (quoting Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 96 (1986)).

60. *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (footnote omitted).

faculty . . . is in my view unquestionably legitimate."[61] Finally, in his dissent in *Adarand*, which is discussed above, he asserted that the majority's embrace of the diversity rationale for affirmative action in *Metro Broadcasting* was not affected by the holding in *Adarand*.[62]

Justice Ginsburg

I predicted that Justice Ginsburg would join Justice Stevens in *Taxman* because she joined his dissent in *Adarand* seeking to preserve the diversity holding of *Metro Broadcasting*.[63]

III. An Aside on the Absence of a Race-Based BFOQ Defense

Finally, another aspect of Title VII that I found was largely ignored in the discussions of *Taxman* is the so-called "bona fide occupational qualification defense." Under section 703(e)(1) of the act, an employer can engage in intentional discrimination "on the basis of . . . *religion, sex, or national origin* in those certain instances where *religion, sex, or national origin* is a bona fide occupational qualfication reasonably necessary to the normal operation of that particular business or enterprise."[64] In omitting discrimination on the basis of race from the reach of the BFOQ, Congress made it clear it would not tolerate race discrimination in employment even if an employer could show that discrimination furthered its operational goals.[65] While some commentators assume there must be an implied "necessity exception" to the limited reach of the BFOQ,[66] the absence of a race-based BFOQ presents a problem for those who would read Title VII to permit an employer to make race-conscious, employment decisions to produce better products or provide better services to its customers, or, as in *Taxman*, to better educate its students.[67]

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61. *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., concurring) (citations omitted).

62. *See supra* pp. 264-65.

63. *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting).

64. 42 U.S.C. § 2000e-2(e)(1) (1994) (emphasis added).

65. *See* Kingsley R. Browne, *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 12 Lab. Law. 451, 467 (1997).

66. *See, e.g.*, Mack A. Player, Employment Discrimination Law 284 (1988).

67. An interesting aspect of the inclusion of sex in the BFOQ and the exclusion of race is that it might give an employer more freedom to take affirmative

steps to favor women than African-Americans. This aspect of the Court's equal protection jurisprudence was criticized by Justice Stevens in *Adarand*, where he wrote that using strict scrutiny to test the legality of benign race-based classifications and intermediate-level scrutiny for sex-based classifications might give governments more freedom to favor women than minorities. *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

PETITIONER,

v.

SHARON TAXMAN,

RESPONDENT.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion in which KENNEDY, SOUTER, AND BREYER J.J., joined, and Part IV of which was also joined by REHNQUIST, C.J., SCALIA, AND THOMAS, J.J.

JUSTICE O'CONNOR announced the judgment of the Court.

This case involves a Title VII challenge to the decision of Petitioner Board of Education of the Township of Piscataway ("Board") to use race to determine which of two equally qualified teachers should be laid off during a reduction in force.

I

A.[1]

In the Spring of 1989 Petitioner Board accepted the recommendation of the Superintendent of Schools that it eliminate one teaching position in the Business Education Department of Piscataway High School. Under New Jersey law the Board was obliged to first lay off untenured faculty. If only tenured faculty were affected by a particular reduction, layoffs were to proceed in reverse order of seniority. Where seniority was equal, the Board had the discretion to choose among tenured faculty.

The junior teachers in the Business Education Department at Piscataway High School, Debra Williams and Respondent Sharon Taxman, were both tenured, and Williams and Taxman were in a seniority tie. Both were hired on September 1, 1980. In order to break the tie, the Board exercised its discretion to consider the teachers' classroom performance, evaluations, volunteer activity,

1. The facts recited here come from the stipulations of the parties submitted in the District Court with their cross-motions for summary judgment.

and teaching certifications. However, after its review the Board concluded that Williams and Taxman were "two teachers of equal ability" and "equal qualifications." The Board had drawn lots in the past to break similar ties, but it decided not to use that approach in this case.

Debra Williams is black, and Sharon Taxman is white. The Superintendent of Schools recommended that the Board invoke its affirmative action policy to break the tie. The predecessor to that policy was adopted in 1975 in response to a directive from the New Jersey State Board of Education to each school district in the state to adopt affirmative action programs to address employment and classroom practices and to ensure equal opportunity to all persons. In 1989 the policy, which applied to "every aspect of employment, including . . . layoffs," provided that "the most qualified candidate will be recommended . . . . However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." The phrase "candidates meeting the criteria of the affirmative action program" referred to members of racial, national origin or gender groups identified as minorities for statistical reporting purposes by the New Jersey State Department of Education, including blacks.

The Board did not adopt the policy to remedy its own prior discrimination (in fact there was no evidence of any prior discrimination by the Board) or in response to an identified underrepresentation of minorities within the Piscataway public school system. Statistical analyses from 1976 and 1985 showed that the percentage of black employees in the job category that included teachers exceeded the percentage of blacks in the available work force and concluded that the school district was not underutilizing blacks in its professional work force.[2] Blacks were not underrepresented in the teacher work force at the Piscataway High School, where both Williams and Taxman were employed, and they would not have been underrepresented if Williams had been terminated.

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2. In 1976 an analysis of minority employment in the job category of "professional," which includes teachers, revealed that minorities comprised 7.4% of the statewide pool of persons with the requisite skills for professional positions and 10% of the Board's professional work force. A January 1985 analysis similarly showed that 5.8% of the available labor market for educational professionals in Middlesex County, which contains Piscataway, was black, while 9.5% of the educational professionals employed by the Board were black.

On May 22, 1989 the Board voted to use the affirmative action policy to break the tie between Williams and Taxman, and it terminated Sharon Taxman effective June 30, 1989.[3] The Superintendent of Schools supported the decision because Williams was "the only black teacher in the [ten-teacher] Business Education Department." The Board's President supported the decision because "it was valuable for the students to see in the various employment roles a wide range of background and . . . it was also valuable to the work force and in particular the teaching staff." He continued, "there is a distinct advantage to . . . all students, to . . . come into contact with people of different cultures, different backgrounds, so that they are more aware, more tolerant, more accepting, more understanding of people of all backgrounds."

B.

On June 8, 1989, Taxman filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and the New Jersey Division of Civil Rights, asserting that the Board's race-based decision to terminate her was unlawful. The EEOC charge was referred to the United States Department of Justice. Thereafter, the United States filed a Title VII suit against the Board in the United States District Court for the District of New Jersey. The District Court later granted Taxman's motion to intervene as a party plaintiff, and she filed a complaint invoking the protections of Title VII and the New Jersey Law Against Discrimination.

Although the Board conceded that it took race into account in deciding to terminate Taxman, after discovery it moved for summary judgment on the ground that its actions were taken pursuant to a valid affirmative action plan. The United States and Taxman filed cross-motions for summary judgment as to liability only. The District Court determined that the plan was invalid as a matter of law, and it granted summary judgment to the United States and

3. The Board's Director of Personnel, Gordon Moore, informed Respondent Taxman by letter that:

> The board of education has decided to rely on its commitment to affirmative action as a means of breaking the tie in seniority entitlement in the secretarial studies category. As a result, the board, at its regular meeting on the evening of May 22, 1989, acted to abolish one teaching position and to terminate your employment as a teaching staff member effective June 30, 1989.

Taxman. 832 F. Supp. 836 (D.N.J. 1993). The District Court read this Court's prior decisions in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) as requiring an affirmative action plan to satisfy two conditions to survive Title VII scrutiny: 1) the plan must have been adopted for a proper purpose, and 2) it must not unnecessarily trammel the rights of nonminority employees. 832 F. Supp. at 844.

With respect to the "proper purpose" inquiry, the Board sought to justify the plan on the grounds that it was adopted to promote racial diversity in an otherwise all-white department at a high school "for education's sake" or "as an educational goal." The District Court concluded that Title VII did not permit a race-conscious affirmative action plan to foster "faculty diversity for education's sake" because *Weber* and *Johnson* permitted affirmative action plans only to respond to a manifest imbalance in the numbers of women or minorities in a work force. No such imbalance existed in the teacher work force of the Piscataway public schools. *Id.* at 848.

The District Court explained that the affirmative action plan did not satisfy the second prong of *Weber* and *Johnson* because of its impact on Taxman. It held that invoking the plan to terminate Taxman's employment imposed an intolerable burden on her because she had a legitimate and firmly rooted expectation in continued employment. The Court distinguished this effect on Taxman from the effect of the plans approved in *Weber* and *Johnson*, in which race was considered for the purpose of making hiring or promotion decisions. *Id.* at 849-850. Finally, the District Court held that the plan was deficient because its serious effects were not temporary. According to its terms the plan was to continue indefinitely — it was not scheduled to "be reassessed with any regularity or, for that matter, at all." *Id.* at 850.

After a trial on damages, the District Court awarded Taxman $134,014.62 on her Title VII claim for back pay, fringe benefits and prejudgment interest. Because she had been rehired by the Board while the case was pending, reinstatement was not an issue, but the Court ordered the Board to give Taxman full seniority credit as if she had no break in service. A jury awarded Taxman $10,000 for emotional suffering under the New Jersey Law Against Discrimination.

The Board appealed to the United States Court of Appeals for the Third Circuit, contending that the District Court erred in granting summary judgment to the United States and Taxman and in awarding Taxman 100% back pay under Title VII.[4] The United States withdrew from the case while the appeal was pending because it no longer supported the judgment of the District Court.[5]

By a vote of 8-4 an *en banc* Court of Appeals affirmed the District Court's judgment. 91 F.3d 1547 (3d Cir. 1996). The majority approached the case in much the same way as the District Court, identifying the dispositive issue as the validity of the Board's affirmative action plan under *Weber* and *Johnson*. The majority determined that the District Court correctly concluded that the Board's plan was not adopted for a proper purpose because "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purpose of [Title VII], and, therefore, cannot satisfy the first prong of the *Weber* test." *Id.* at 1557. It found itself

> constrained to hold, as did the district court, that inasmuch as "the Board does not even attempt to show that its affirmative action plan was adopted to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities," the Board has failed to satisfy the first prong of the *Weber* test.

Id. at 1563 (citation omitted).[6]

As the District Court had, the Court of Appeals concluded that the Board's policy also unnecessarily trammeled the interests of nonminority employees. It explained that the Board's policy lacked "definition and structure." *Id.* at 1564. In its view, the Board had "abdicate[d] its responsibility to define 'racial diversity'

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4. The Board also claimed on appeal that the District Court incorrectly calculated prejudgment interest on the back pay award to Taxman. Taxman cross-appealed, contending that the District Court erred in dismissing her claim for punitive damages under New Jersey law.

5. The United States actually sought leave to file a brief as *amicus curiae* in support of the Board's request for reversal of the District Court's judgment. The Court of Appeals denied that request, treated it as a motion to withdraw, and granted the motion. Before this Court the United States as *amicus curiae* now argues again in support of the District Court's judgment.

6. "Although we applaud the goal of racial diversity," Judge Mansmann wrote for the majority, "we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures." 91 F.3d at 1567.

and to determine what degree of racial diversity in the Piscataway High School is sufficient." *Id.* Moreover, the Board's policy was "an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway School is skewed." *Id.* Finally, the Court of Appeals reasoned:

> the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion . . . especially . . . where, as here, the nonminority employee is tenured.

Id.

On the issue of damages, the Board argued on appeal that the District Court's award of 100% back pay was unwarranted because had the Board not invoked the affirmative action plan, it would have used a random process, such as a coin toss, to break the tie. In a random process Taxman stood only a fifty percent chance of keeping her job. The majority concluded that the District Court's award was within its discretion because it "most closely approximates the conditions that would have prevailed in the absence of discrimination." *Id.* at 1565-1566.[7]

Judge Sloviter filed a dissent joined by three other members of the Court. The dissenters read *Weber* and *Johnson* to permit not just remedial affirmative action plans, but all those "consistent with and in furtherance of the broad statutory goal of eliminating the causes of discrimination." *Id.* at 1571 (Sloviter, C.J., dissenting). The Board's plan satisfied this requirement, in their view, because "racial diversity in the classroom [is] an important means of combatting the attitudes that can lead to future patterns of discrimination." *Id.* at 1572.

The dissenters concluded that the plan did not unnecessarily trammel Taxman's interests because had the Board's decision not been race-conscious, Taxman would have had only a fifty percent chance of avoiding the layoff. That "chance," they reasoned, was not a "legitimate and firmly rooted expectation" in continued employment. *Id.* at 1574 (quoting *Johnson*, 480 U.S. at 638). More-

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7. The Court of Appeals also affirmed the District Court's calculation of prejudgment interest and its decision to dismiss Taxman's claim for punitive damages under the New Jersey Law Against Discrimination.

over, Taxman retained recall rights after the layoff and was subsequently rehired. *Id.* Unlike the majority, the dissenters found the discretionary nature of the Board's plan attractive. By giving the Board the freedom to use race as a factor in employment decisions only where the Board found it necessary to further the educational mission of the Piscataway schools, the impact of the plan on nonminorities was minimized. *Id.* at 1575.[8]

We granted certiorari. 117 S. Ct. 2506 (1997). We now affirm.

II

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) this Court held that despite Title VII's prohibition of employment discrimination "against any individual . . . because of such individual's race," 42 U.S.C. § 2000e-2(a)(1), a covered employer could lawfully make certain race-conscious employment decisions. Under *Weber*, Title VII does not prohibit race-conscious affirmative action "to eliminate manifest racial imbalances in traditionally segregated job categories," 443 U.S. at 197, so long as "the plan does not unnecessarily trammel the interests of the white employees." *Id.* at 208. In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) this Court held that the same rules govern the lawfulness of affirmative action plans authorizing employers to make employment decisions based on sex. Thus, the Court in *Johnson* first considered whether the plan at issue there "was justified by the existence of a 'manifest imbalance' that reflected an underrepresentation of women in 'traditionally segregated job categories,'" *id.* at 631 (quoting *Weber*, 443 U.S. at 197), and then whether the plan "unnecessarily trammeled the rights of male employees." *Id.* at 637-638. *Weber* and *Johnson* control the outcome of this case, and they require that we affirm the Court of Appeals.

A.

At issue in *Weber* was an affirmative action plan collectively bargained by a union and an employer that reserved for black employees 50% of the openings in an in-plant craft training program.[9]

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8. Judges Scirica, Lewis and McKee, who joined Judge Sloviter's dissent, each filed separate dissents emphasizing various aspects of the joint dissent.

9. Plaintiff was a white worker excluded from the program who had more seniority than several blacks admitted to the program.

Before it created the plan the employer filled craft positions with experienced craft workers. However, because the local craft unions excluded blacks, few had the requisite experience. Thus, only 1.83% of the skilled craft workers at the plant were black, while the general work force in the area was 39% black. *Weber*, 443 U.S. at 198-199. The affirmative action plan was scheduled to terminate when the percentage of black skilled craft workers in the plant approximated the percentage of blacks in the local labor force. *Id.* at 198.

The majority in *Weber* approved the plan, rejecting "a literal construction" of the statute in favor of one that it described as more sensitive to the background, legislative history, and historical context from which Title VII arose. *Id.* at 201. This broader construction was required because an interpretation of Title VII "that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute.'" *Id.* at 202 (citation omitted). That purpose "was to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Id.* at 208 (quoting 110 Cong. Rec. 6548 (1964)) (remarks of Sen. Humphrey). Because the employer in *Weber* created its plan to address the manifest racial imbalance in its craft work force caused by the exclusion of Blacks from craft unions, the Court held that the "purposes of the plan mirror[ed] those of the statute." *Id.*

Eight years later, in *Johnson*, this Court held that Title VII permitted an employer to consider as one factor the sex of a qualified applicant for promotion to a position within a traditionally segregated job classification in which women were significantly underrepresented. 480 U.S. at 620-621, 641-642. The employer had created an affirmative action plan in response to its finding that women constituted 36.4% of the area labor market but 22.4% of its work force, and that not one of its 238 Skilled Craft Worker positions was held by a woman. *Id.* at 621. The plan "set aside no specific number of positions for . . . women," *id.* at 622, but the stated long-term goal or aspiration was to attain a work force whose composition reflected the proportion of women in the area labor force. *Id.* at 621-622.

This Court held that the employer did not violate Title VII when it considered the sex of qualified applicants for the job of road dispatcher, a Skilled Craft Position, and chose a qualified woman

rather than a qualified man. The Court found that the decision to promote the woman was made "pursuant to a plan prompted by concerns similar to those of the employer in *Weber*." *Id.* at 631. The employer's plan "was justified by the existence of 'a manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'" *Id.* (quoting *Weber*, 443 U.S. at 197). Specifically, wrote the Court, "[g]iven the obvious imbalance in the Skilled Craft category, and given the [employer's] commitment to eliminating such imbalances, it was plainly not unreasonable for the [employer] to determine that it was appropriate to consider as one factor . . . sex . . . in making its decision." *Id.* at 637.

Applying the teachings of *Weber* and *Johnson* to this case, Respondent met her burden of showing the Board's decision to discharge her was unlawful.[10] Petitioner urges the Court to read Title VII to permit a school board to make race-conscious employment decisions to 1) reduce the risk that teachers or administrators will discriminate against minority students, and 2) promote understanding and tolerance among students. Notwithstanding the importance of these goals, *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954) (education is "the very foundation of good citizenship" and "a principal instrument in awakening the [student] to cultural values," preparing her for participation as a political equal in a pluralist democracy); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) ("the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples") (citation omitted), Title VII forecloses a school board from pursuing them in the way Petitioner did here.

Petitioner's arguments ignore the narrowness of the Court's holdings in *Weber* and *Johnson*. In *Weber*, the Court read Title VII to "permit what its language read literally would prohibit." *Johnson*, 480 U.S. at 647 (O'Connor, J., concurring in judgment). That language expressed Congress's intent to prohibit invidious discrimination against any person on the basis of race or gender, but the Court in *Weber* also found that Congress intended in Title VII to eliminate the lasting effects of prior discrimination. *Id.* at 649.

10. If an employer defends against a Title VII charge of intentional discrimination by invoking an "affirmative action plan," the plaintiff has the burden of proving that the plan is invalid. *Johnson*, 480 U.S. at 626.

Thus, the Court relaxed Title VII's express prohibition on discrimination only to accommodate this unexpressed complementary objective. Contrary to Justice Stevens's views in *Johnson*, the Court in *Weber* "did not approve preferences for minorities 'for any reason that might seem sensible from a business or a social point of view.'" *Id.* (quoting *Johnson*, 480 U.S. at 645 (Stevens, J., concurring)).[11] "Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a 'manifest . . . imbalanc[e] in traditionally segregated job categories.'" *Id.* at 650 (quoting *Weber*, 443 U.S. at 197). The majority in *Johnson* explicitly stated that its decision "must be guided" by *Weber*, *id.* at 627, and it adhered to the limits expressed in *Weber*, concluding that the plan satisfied "the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate . . . work force imbalances in traditionally segregated job categories." *Id.* at 637.

The dissent relies on statements made by the Court in *Weber* that it did not intend to define the full range of affirmative action plans permissible under Title VII. However, exclusive reliance on those statements to justify broad use by employers of affirmative action would ignore the reasoning that led the Court in *Weber* to eschew "a literal reading" of Title VII and would be unfaithful to that decision and the intent of Congress. A fairer reading of *Weber*, *Johnson*, and Title VII emphasizes the antidiscrimination principle expressed clearly in Title VII and not implied exceptions to that principle. Requiring that affirmative action be directed at rectifying a manifest imbalance in traditionally segregated job categories "provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed." *Johnson*, 480 U.S. at 631.

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11. "[S]uch an approach would [be] wholly at odds with this Court's holding in *McDonald* [*v. Sante Fe Transportation Co.*, 427 U.S. 273 (1976)] that Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities." *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring in judgment). "Discriminatory preference for any group, minority or majority, is . . . what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Even if the Board had shown that laying off Sharon Taxman (as contrasted with laying off Debra Williams) 1) reduced the likelihood that minority students at Piscataway High School would be discriminated against by teachers and administrators, and 2) promoted understanding and tolerance of human difference among the students at Piscataway High School, § 703(e) of Title VII limits a court's consideration of that showing. That provision exempts from the statute's reach an employer's discrimination "on the basis of . . . *religion, sex, or national origin* in those certain instances where *religion, sex, or national origin* is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (emphasis added). Notably absent from the types of discrimination 703(e) might justify is race discrimination. The limited scope of this "BFOQ" defense to intentional discrimination makes apparent Congress's determination to prohibit race discrimination by employers under all circumstances, including those that might somehow be justified by an employer's operational needs. *See also* 42 U.S.C. § 2000e-2(k)(2) ("[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination"). To expand the legitimate purposes for race-based affirmative action beyond the limits expressed in *Weber* and *Johnson* would ignore this express intention.[12] Nowhere in Title VII or in this Court's decisions in *Weber* and *Johnson* were employers made the ultimate arbiters of when "it is desirable and benign . . . to disfavor some citizens and favor others based on the color of their skin . . . . [H]istory suggests much peril in this enterprise." *Metro Broadcasting, Inc. v. Federal*

12. Petitioner urges the importance of the context in which this case arises — public education. However, nothing in Title VII suggests that school boards making employment decisions are exempt from the prohibition on race discrimination. Prior to 1972, Title VII did not apply to public employers, and until that time actions like those taken by Petitioner would have been beyond the reach of Title VII. However, "[w]hile public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct." *Johnson*, 480 U.S. at 627-628 n.6. "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977). Thus, public employers are subject to the same standards imposed on private employers by *Weber*, *Johnson* and the substantive provisions of Title VII, including § 703(a) and (e).

Communications Comm'n, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting).

Moreover, the Board's decision here was not supported by any studies showing that minority students at Piscataway High School received discriminatory treatment or that the school was failing in its mission of teaching its students to be tolerant and understanding of human difference. Similarly missing was any finding by the Board that maintaining a racial balance in the Business Education Department was necessary to reduce the incidence of discrimination or promote tolerance and understanding. And the Board never identified the amount of diversity necessary to realize these benefits. As the District Court stated, there was "no finding by the Board or any other authority that the faculty [at the High School was not] 'diverse.'" 832 F. Supp. at 850. Simply observing that Williams was the only black teacher in the Business Education Department or asserting that there is educational value in employing teachers of different cultures and backgrounds would not be sufficient to overcome the Title VII prohibition on race discrimination in employment, even if the dissent's creation of a large, undefined implied BFOQ for racial classifications thought to promote operational goals was the law.

Given that the Board never considered how its affirmative action plan could achieve its asserted goals, the harm of race discrimination in employment is evident on this record. The Board's decision seems based, at least in part, on "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting). The Board also seems to have retained Williams in favor of Taxman in part to provide a minority role model for its minority students. But "[c]arried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986) (plurality). In *Wygant*, this Court found the role-model justification for race-based layoffs unlawful under the Equal Protection Clause because it also "allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." *Id.* at 275.

While "the goal of providing 'role models' . . . should not be confused with the very different goal of promoting racial diversity among the faculty," *Wygant*, 476 U.S. at 288 n.* (O'Connor, J., concurring in part and concurring in judgment), that goal may be pursued under *Weber* and *Johnson* where a school board can show a manifest underrepresentation of black teachers in its work force. However, the Board stipulated in the District Court that no such imbalance existed. In fact, the percentage of black teachers in the school district exceeded the percentage of blacks in the labor pool from which the Board hired its teacher work force. The Board did not argue that black teachers were underrepresented at Piscataway High School, nor did the Board try to show that even if there was no underrepresentation in the teacher work force in the district or at Piscataway High School, it was important that there be no underrepresentation of black teachers in the Business Education Department. The Board never evaluated the composition of its teacher work force in this segmented way, so there is no reason for this Court to consider whether the "manifest imbalance" test of *Weber* and *Johnson* could justify affirmative action in a sub-category of one category of an employer's work force. Suffice it to say that *Weber* and *Johnson* give an employer considerable freedom to exercise "management prerogatives" to use affirmative action where the employer can show a relevant imbalance in its work force. Under *Weber* and *Johnson*, for example, the Board's goals of reducing discrimination against minority students and of teaching understanding and tolerance could have been furthered if the Board made the requisite showing of a manifest racial imbalance in its work force and took reasonable steps to rectify that imbalance.

B.

However, even if the Board's purpose in laying off Taxman was permissible under *Weber* and *Johnson*, the District Court and the Court of Appeals correctly concluded that the Board's action was unlawful because it unnecessarily trammeled Taxman's rights.

Under *Weber* and *Johnson* an affirmative action plan is lawful only if it is directed to correcting a manifest imbalance in traditionally segregated job categories *and* the plan does not "unnecessarily trammel the interests" of nonminority employees. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 630. The Court explained in *Weber*

that the plan there, which reserved 50% of the places in an in-plant training program for black workers, satisfied this requirement because it did not "require the discharge of white workers and their replacement with new black hirees." Nor did "the plan create an absolute bar to the advancement of white employees" because half of those trained in the program were white. Finally, the plan was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 433 U.S. at 208. Similarly, this Court found that the plan in *Johnson* was lawful because it "set[ ] aside no positions for women" and sex was "but one of numerous factors [taken] into account" in making the decision. *Johnson*, 480 U.S. at 638. Moreover, because the plaintiff in *Johnson* "had no absolute entitlement to the [promotion] . . . . denial of the promotion unsettled no legitimate, firmly rooted expectation" on his part. *Id.* "[H]e retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." *Id.* Finally, the plan was intended to attain a balanced work force and not to maintain one, establishing numerical goals "against which 'the employer [could] measure its progress in eliminating the underrepresentation'" of women in its work force. *Id.* at 639-640 (citation omitted).

Only one of the redeeming features of the plans in *Weber* and *Johnson* is present in the Board's action here — no person was automatically selected for layoff because of race; the seniority and qualifications of the teachers were considered first. Thus, the Board's plan did not create an absolute bar to the retention of white employees in the event of a layoff, and it did not permit the Board to make race a determining factor in employment decisions unless the teachers in question were deemed equally qualified.

The remaining features of the Plan make it unlawful. The Plan authorizes the Board to exact too high a price from nonminority employees in pursuit of vague benefits, and it authorizes the Board to exact that price for an indeterminate period. Unlike the plaintiffs in *Weber* and *Johnson*, Sharon Taxman lost her job. As a general matter, while hiring and promotion goals like those in *Weber* and *Johnson* "impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant*, 476 U.S. at 283 (plurality). The Board's decision to discharge Taxman unsettled the

legitimate, firmly rooted expectation in continued employment that came with her tenure. Without concluding that an affirmative action plan that authorizes race-based layoffs will always violate Title VII, *see id.* at 294 (O'Connor, J., concurring in part and concurring in judgment), we can say that the harm suffered by Ms. Taxman, who lost her job as a tenured teacher because of her race, was not justifiable. After making the investment in her career necessary to earn the stability and security of tenure, the rights and expectations that come with that status make up what could be one of her valuable capital assets. *Id.* at 283 (plurality).

The Plan's threat to the rights obtained through tenure is magnified by the Board's assertion that it can make race-based decisions in its teacher work force indefinitely. In its Brief, Petitioner asserted that where a school board uses affirmative action to pursue a goal of racial diversity in its faculty, it must be free to make race-based employment decisions at all times, for an indeterminate period, to assure that each and every student receives the benefits of instruction by a racially diverse faculty. Petitioner's Reply Brief on the Merits at 18-19. However, an affirmative action program "that can be equated with a permanent plan of proportionate representation by race and sex, would violate Title VII." *Johnson*, 480 U.S. at 656.

Petitioner in effect argues that the expectation in continued employment that came with Taxman's tenure evaporated once the Board determined that she and Williams were equally qualified to retain their jobs. At that point, according to Petitioner, Taxman retained only the right to expect that the Board would make its decision by tossing a coin or conducting some other "lottery." From that vantage, Petitioner then asserts that "[r]etaining a job by the toss of a coin or by lottery is not, like seniority, a cornerstone of modern employment relationships." Petitioner's Brief at 19.

But Petitioner's approach would give employers in the Board's position the freedom to effectively revoke tenure by determining that two or more tenured employees eligible for layoffs are equally qualified. Moreover, it misconstrues the purpose of the inquiry into legitimate expectations mandated by *Weber* and *Johnson*. All employees, whether tenured or untenured, have the right to be free from discrimination. *Weber* and *Johnson* tolerate certain race-conscious employment practices only where the harm associated with violation of the antidiscrimination principle of Title VII is out-

weighed by the benefits of rectifying a manifest racial imbalance in a work force. Thus, the employer's freedom to take steps the statute would ordinarily forbid diminishes as the employee's interest in continued employment increases. Given Sharon Taxman's status as a tenured member of the faculty, Title VII required the Board to make its difficult decision on some basis other than Sharon Taxman's race.[13]

III

The concurring Justices would overrule *Weber* and *Johnson* and affirm the judgment of the Court of Appeals on the grounds that Title VII forbids race and sex discrimination in employment "simpliciter," *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting) and contains no exception for "preferential treatment of minorities." *Id.* at 222. However, to be faithful to this Court's normal prudential restraints and the principle of stare decisis, this case should be resolved in light of prior decisions upholding affirmative action under some circumstances. *Johnson*, 480 U.S. at 648 (O'Connor, J., concurring in judgment).

Customarily we adhere faithfully to stare decisis in cases of statutory interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (stare decisis has "special force" in cases of statutory interpretation). When *Weber* was decided, Justice Blackmun, who joined the majority's opinion, wrote separately in part to assure the dissenters that if in reading Title VII to permit "moderate" affirmative action plans, the Court had "misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." *Weber*, 443 U.S. at 216 (Blackmun, J., concurring). Almost 20 years have passed since this Court's decision in *Weber*, and over 10 years have passed since the decision in *Johnson*. Congress has not amended Title VII to affect those decisions in that time. The force of precedent here is further enhanced by Congressional amend-

13. Similarly, we reject the view of the dissenters in the Third Circuit that because she retained recall rights after her layoff and was ultimately recalled, Taxman's rights were not violated. Title VII makes it unlawful for an employer to discharge an employee because of that employee's race. "Even a temporary layoff may have adverse financial as well as psychological effects." *Wygant*, 476 U.S. at 283. For example, in the event of a future layoff, Taxman would be junior to Williams.

ments to Title VII since *Weber* and *Johnson* that did nothing to modify the holdings in those cases. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998).

IV

Finally, we agree with the Court of Appeals that the District Court did not abuse its discretion in awarding Taxman 100% of the pay she lost as a result of the unlawful layoff. Once again, Petitioner emphasizes that Taxman might have been laid off even if the Board had not selected her for layoff because of her race. Petitioner then argues that the District Court was required to discount any back pay award to Taxman by a factor equal to that probability. However, Petitioner's argument ignores the discretion granted to a district court under Title VII to approximate a back pay award that in its best judgment constitutes a just result in light of the circumstances of a particular case. *See Teamsters v. United States*, 431 U.S. 324, 371-372 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-425 (1975). Under these circumstances, where Taxman was tenured and was performing well and where she lost her job because of her race, a full backpay award was not an abuse of discretion.

Moreover, Petitioner's rule would bar full backpay awards to most successful Title VII plaintiffs. For example, as Petitioner would have it, a black applicant for employment who proved that a racist employer favored a white applicant would not be entitled to a full back pay award unless she could also show that the employer would have hired her absent this discriminatory motive. There is no support in Title VII or our precedents for the novel regime Petitioner envisions.

Accordingly, the judgment of the Court of Appeals is AFFIRMED.

It is so ordered

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in the judgment.

This Court's decisions in *Weber* and *Johnson* should be overruled. By reading Title VII to permit employers to hire and promote employees based on race and sex, the majority in those cases ignored the language and the legislative history of the statute. The mere passage of time cannot correct these gross errors, and

congressional inaction during that time does not prove judicial correctness. That Petitioner believed it could, consistent with Title VII, discharge an employee because of the color of her skin in order to further an ill-defined interest in "diversity," is evidence of the danger of reading "into Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be." *United Steelworkers of America v. Weber*, 443 U.S. 193, 254-255 (1979) (Rehnquist, J., dissenting). The plurality has attempted to limit the damage of *Weber* and *Johnson* by reading them narrowly, but their interpretation serves only as "something of a halfway house between leaving employers scot-free to discriminate against disfavored groups, . . . and prohibiting discrimination, as do the words of Title VII." *Johnson v. Transportation Agency*, 480 U.S. 616, 665 n.4 (1987) (Scalia, J., dissenting). We should complete the journey away from *Weber* and *Johnson*, obey the language of the statute, and leave this unfortunate chapter of Title VII jurisprudence behind.

In my dissent in *Weber* and in Justice Scalia's dissent in *Johnson* we explained in detail how the majority in those cases went "not merely beyond, but directly against Title VII's language and legislative history." *Weber*, 433 U.S. at 255 (Rehnquist, J., dissenting). Thus, only a brief recitation of the main points of those opinions seems necessary.

Under 703(a) of Title VII, it is an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (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). "With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship," *Johnson*, 480 U.S. at 657 (Scalia, J., dissenting), "this language prohibits a covered employer from considering race when making an employment decision, whether the race be black

or white." *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting). In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), the Court unanimously concluded that the "uncontradicted legislative history" of Title VII supported the conclusion that Title VII prohibits discrimination against whites to the same extent it prohibits discrimination against blacks. "Not once during the . . . [legislative] debate . . . did a speaker, proponent or opponent, suggest that the bill would allow employers *voluntarily* to prefer racial minorities over white persons." *Weber*, 443 U.S. at 244 (Rehnquist, J., dissenting).

The opponents of the legislation expressed a wholly different concern. Notwithstanding the clarity of 703(a), they argued that it could be read to *require* employers to correct racial imbalances through the granting of preferential treatment to minorities. Senators Clark and Case, the floor captains of the bill in the Senate that became Title VII explained that:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.

Weber, 443 U.S. at 239 (Rehnquist, J., dissenting) (citation omitted). Because these assurances did not satisfy those opponents, § 703(j) was added to Title VII. It provides that:

> Nothing contained in this subchapter shall be interpreted to require any employer, . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of any imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j). Section 703(j) says nothing about *voluntary* preferential treatment of minorities because such racial discrimi-

nation was plainly proscribed by 703(a). *Weber*, 443 U.S. at 253 (Rehnquist, J., dissenting).

In rejecting a "literal reading" of 703(a) and reading into 703(j) a non-existent expression of a non-existent desire on the part of Congress to *permit* employers to intentionally discriminate against certain disfavored groups,

> *Weber* held that the legality of intentional discrimination . . . is to be judged not by Title VII but by a judicially crafted code of conduct, the contours of which are determined by no discernible standard, aside from . . . the divination of congressional "purposes" belied by the face of the statute and by its legislative history.

Johnson, 480 U.S. at 670-671 (Scalia, J., dissenting). That "self-promulgated code of conduct" was recast in *Johnson*, and the plurality recasts it again today. We should instead overrule *Weber* and *Johnson* and hold that Title VII means what it says. If we did so, we would conclude simply that the Petitioner's intentional discrimination against Respondent because of her race violated 703(a) of Title VII. Accordingly, I concur in the judgment of the Court.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In adopting a categorical approach to the lawfulness of affirmative action under Title VII the Court of Appeals misconstrued this Court's decisions in *Weber* and *Johnson*. The Court of Appeals concluded that "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test." 91 F.3d 1547, 1557 (3d Cir. 1996). But nowhere in *Weber* or *Johnson* did this Court state that affirmative action must have a remedial purpose to be lawful under Title VII. The Court of Appeals also concluded that "the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that . . . even [a] legitimate [goal] under Title VII, may not be pursued in this particular fashion." *Id.* at 1564. But nowhere in *Weber* or *Johnson* did this Court state that all layoff decisions made pursuant to an affirmative action plan are unlawful. I dissent because a more nuanced and flexible approach is required by this Court's precedents.

Since *Weber* this Court has unambiguously interpreted Title VII to permit employers to voluntarily adopt special programs to

benefit members of the minority groups for whose protection the statute was invoked. *Johnson v. Transportation Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring). Because of the undoubted public interest in "stability and orderly development of the law," *id.*, (citation omitted), I agree with the plurality that we should adhere to the construction given Title VII in *Weber* and *Johnson*. However, contrary to the plurality, I believe that construction leaves more "breathing room" for employer initiatives to benefit members of disadvantaged groups. *Id.* at 645.

Although this Court approved of an affirmative action plan intended to remedy a racial imbalance in the employer's work force in *Weber* and a gender imbalance in the employer's work force in *Johnson*, this Court never stated that such a purpose was the only permissible one for an affirmative action plan under Title VII. In fact, the Court in *Weber* explicitly declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). The Court in *Johnson* also did "not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Johnson*, 480 U.S. at 642 (Stevens, J., concurring). The Court of Appeals read limits into *Weber* and *Johnson* despite the absence of limiting language in this Court's decisions.

Moreover, the limits would prohibit a school board from giving preference to members of underrepresented groups to diversify the faculty and improve the quality of education in the school district. This Court has previously noted the importance of diversity in education and in other settings. Justice Powell first endorsed reliance on race as a legitimate means of achieving diversity in the student body of a public university in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-320 (1978) (Powell, J., concurring). Later, in *Wygant*, I wrote:

> 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 . . . . 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.

Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting). In that case Justice O'Connor also noted the possibility that the Court might conclude that the "goal of promoting racial diversity among the faculty" of a public high school, *Wygant*, 476 U.S. at 288 n.* (O'Connor, J., concurring in part and concurring in judgment) was sufficiently "compelling to sustain the use of affirmative action policies." *Id.* at 286. Finally, a majority of the Court recognized the importance of broadcast diversity in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990), where it held that a federal program favoring minority applicants for broadcast licenses was constitutional. The majority reasoned that "just as a diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated . . . the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (citation omitted). That aspect of the Court's decision in *Metro Broadcasting* was not affected by this Court's holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that federal programs granting race-based preferences must satisfy the requirements of strict scrutiny. *Id.* at 258 (Stevens, J., dissenting).

Favoring an interpretation of Title VII that forces employers under all circumstances to look backward for past discrimination before offering help to a qualified minority employee is myopic and premature, particularly without full consideration of other purposes for affirmative action.

> Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The . . . school board, . . . [might do] so in part to improve the quality of education . . . whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a ra-

> cially integrated future, but none reduces to "racial balancing for its own sake."

Johnson, 480 U.S. at 647 (Stevens, J., concurring) (citation omitted). "A [court] would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by [it]." *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996). In categorically refusing to consider nonremedial purposes for voluntary affirmative action under Title VII the Court of Appeals erred. A remand to that court is appropriate for consideration of other purposes that are consistent with Title VII and perhaps for further development of the record in the District Court.

A similar analysis requires a remand for more complete consideration of the question whether the Board's action here unnecessarily trammeled Respondent's rights. The Court of Appeals found that Respondent's layoff was dispositive of this question, but again, under *Weber* and *Johnson* a more complicated analysis was required. The plurality mentions three factors that *Weber* and *Johnson* found relevant to this question: 1) whether the employer's action upset a legitimate, firmly rooted expectation on behalf of the adversely effected employees; 2) whether the affirmative action plan was intended to maintain racial balance or simply to eliminate a manifest racial imbalance; and 3) whether the plan created an absolute bar to advancement of white employees or whether race was simply a factor in making the decisions. Thus, even under the plurality's limited approach the Court of Appeals erred in refusing to balance the relevant interests.

Moreover, the outcome of the plurality's balancing was colored by its rejection of any affirmative action plan that is not aimed at remedying a manifest imbalance in an employer's work force. It thus concludes that the harm suffered by Respondent is not outweighed by the benefits of some racial diversity in the Business Education Department at Piscataway High School. Because a layoff and a refusal to employ a qualified individual are both grave losses to the affected individual, the strength of the employer's interest in affirmative action must be determinative. In cases of layoff and refusal to hire the adverse decision forecloses only one of several opportunities that may be available. *See Wygant*, 476 U.S. at 318-319 & n.14 (Stevens, J., dissenting). Because the Court of

Appeals and the plurality did not give sufficient consideration to the Board's interest in faculty diversity, I would reverse the judgment of the Court of Appeals.