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# Board of Education v. Taxman: The Unpublished Opinions

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## INTRODUCTION

On June 27, 1997 the United States Supreme Court granted certiorari in *Board of Education v. Taxman*[1] to review a judgment of the United States Court of Appeals for the Third Circuit. That court had ruled, *en banc*, that the school board in Piscataway, New Jersey violated Title VII[2] when it chose to lay off Sharon Taxman, a teacher at Piscataway High School, rather than Debra Williams, her colleague.[3] The Board determined that the two teachers were equal in all other relevant respects; it laid off Taxman, who is White, rather than Williams, who is Black, in the interests of racial diversity among the faculty. An 8-4 majority of the Third Circuit concluded, as had the district court, that the Board's asserted interest in racial diversity was not sufficient to overcome the antidiscrimination principle of Title VII, particularly where the Board used race to decide which of two tenured teachers to discharge, as opposed to which of two qualified applicants to hire.[4]

*Taxman* quickly became the most anticipated decision of the Term. Only twice before, in 1979 and 1987, had the Supreme Court considered the scope of permissible affirmative action under Title VII.[5] Moreover, the affirmative action issue had crept back into the national consciousness. In June of 1995 the Supreme Court held in *Adarand Constructors, Inc. v. Pena*,[6] that federal programs granting race-based preferences were subject to strict scrutiny under the Fifth Amendment. The *Adarand* decision set off a comprehensive compliance review of federal affirmative action

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1. 117 S. Ct. 2506 (1997).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1998).
3. *See* Taxman v. Board of Educ., 91 F.3d 1547, 1550-51 (3d Cir. 1996) (en banc).
4. *See id.*; United States v. Board of Educ., 832 F. Supp. 836, 851 (D.N.J. 1993).
5. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).
6. 515 U.S. 200 (1995).

programs.[7] In November 1996 California's voters passed Proposition 209, which prohibited affirmative action in public employment there.[8] Earlier in 1996 the Fifth Circuit held in *Hopwood v. Texas*[9] that the University of Texas Law School violated the Fourteenth Amendment by making race-conscious admission decisions for the purpose of achieving a diverse student body.[10] Many viewed *Hopwood* as calling into question practices assumed to be lawful under the Supreme Court's decision almost thirty years before in *Regents of the University of California v. Bakke*.[11]

*Taxman* looked like it had the potential to be the *Hopwood* of employment by declaring that popular employment practices intended to increase workplace diversity were unlawful. For example, after completing its review of federal employment practices after *Adarand*, the Department of Justice had assured federal agencies that they could make race-conscious employment decisions to "assure that decisionmakers will be exposed to the greatest possible diversity of perspectives."[12]

Likewise, firms in the private sector are increasingly taking steps to increase the numbers of women and minorities in their work forces in order to reap supposed competitive advantages. Diversity programs are becoming popular among major U.S. employers, for whom it is almost an axiom that "our diversity is our strength."[13] IBM has a "vice-president of global work force diversity."[14] He has explained that the company's view of increasing job opportunities for women and minorities is no longer based solely

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7. *See* Ann Devroy, *Reno to Issue Policy Guidelines for Federal Affirmative Action Programs*, Wash. Post, June 23, 1995, at A1, *available in* 1995 WL 2100020.

8. California Voters Approve Proposition to End State Affirmative Action Programs, 1996 Daily Lab. Rep. (BNA) No. 216, at D-21 (Nov. 6, 1996).

9. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

10. *See id.* at 962.

11. 438 U.S. 265 (1978). A recent study of admissions practices at "elite" colleges concludes "that their affirmative action policies created the backbone of the black middle class and taught white classmates the value of integration." Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite Colleges*, N.Y. Times, Sept. 9, 1998, Metro, at B10, *available in* 1998 WL 5425812.

12. Associate Attorney General John R. Schmidt, *Post*-Adarand *Guidance on Affirmative Action in Federal Employment* (February 29, 1996), *reprinted in* 1996 Daily Lab. Rep. (BNA) No. 43, at D-31 (March 5, 1996).

13. Frederick R. Lynch, *Clinton Dabbles in Diversity*, Tampa Trib., July 2, 1997, Nation/World, at 11, *available in* 1997 WL 10795334.

14. Tim Green, *Keeping Current at IBM; Diversity: A Moral and Strategic Imperative*, Chi. Trib., Aug. 9, 1998, Jobs, at 21, *available in* 1998 WL 2883890.

on a "moral imperative" but on a "strategic imperative" because diversity is inextricably linked to the success of the business.[15] Rather than taking steps to increase the representation of women and minorities in their work forces to redress previous discrimination, employers are increasingly asserting the right to make race and sex-conscious decisions to reap the competitive advantages associated with a more diverse work force. The Court's decision in *Taxman* had the potential to determine the future of these practices.

And if these issues were not enough to attract attention, the facts of the case were compelling. *Adarand*, the Supreme Court's most recent affirmative action case, involved the legality of complicated incentive clauses in federal highway construction contracts, and the Justices sparred over whether strict scrutiny or intermediate-level scrutiny should be applied by courts reviewing such programs. By contrast, *Taxman* involved two tenured teachers who had equally compelling claims to continued employment. One was fired, one was retained, and the employer used race as the tie-breaker. As Judge Sloviter wrote in her dissent in the Third Circuit, "[t]he posture in which the legal issue in this case is presented is so stripped of extraneous factors that it could well serve as the question for a law school moot court."[16]

However, the case settled in November 1997 before argument,[17] so the issues it raised are unresolved. Because of the high profile of the case much has been said and written about it, and it is not our intention to rehash those discussions. Rather, what we hope to do here is add a new perspective by focusing in detail on the doctrinal issues that would have faced the Court if the case had not been settled. By placing ourselves in the shoes of the Justices we hoped to gain a better appreciation of the likely outcome of the case in light of the language and intent of Title VII as well as the Court's prior precedents interpreting Title VII and the Equal Protection Clause.

The format is thus somewhat unusual for a law review. Two mock opinions follow. The first represents Professor McGinley's

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15. *Id.*

16. Taxman v. Board of Educ., 91 F.3d 1547, 1568 (3d Cir. 1996) (Sloviter, C.J., dissenting).

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

best estimate, having read the briefs and the record, of what the Court would have said had it reversed the Third Circuit. The second is Professor Yelnosky's best estimate of what the Court would have said had it affirmed. With the indulgence of the editors of the *Roger Williams University Law Review* we have deviated from the *Bluebook* in favor of a citation style more consistent with that found in Supreme Court opinions. Each opinion is preceded by a foreword in which the author discusses the issues confronted and the decisions made in "resolving" the case. We hope this exercise helps illuminate important issues that will undoubtedly be presented to the Court sometime in the future.

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