Board of Education v. Taxman:  
The Unpublished Opinions

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

\(^{1}\) 117 S. Ct. 2506 (1997).
\(^{3}\) See Taxman v. Board of Educ., 91 F.3d 1547, 1550-51 (3d Cir. 1996) (en banc).
programs. In November 1996 California’s voters passed Proposition 209, which prohibited affirmative action in public employment there. Earlier in 1996 the Fifth Circuit held in *Hopwood v. Texas* 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. 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*.

*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.”

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.” IBM has a “vice-president of global work force diversity.” 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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10. See id. at 962.
on a "moral imperative" but on a "strategic imperative" because
diversity is inextricably linked to the success of the business.\textsuperscript{15} Rather than taking steps to increase the representation of women and minorities in their work forces to redress previous discrimina-
tion, employers are increasingly asserting the right to make race and sex-conscious decisions to reap the competitive advantages as-
associated with a more diverse work force. The Court's decision in
\textit{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. \textit{Adarand}, the Supreme Court's
most recent affirmative action case, involved the legality of compi-
lcated incentive clauses in federal highway construction contracts,
and the Justices sparred over whether strict scrutiny or intermed-
iate-level scrutiny should be applied by courts reviewing such pro-
grams. By contrast, \textit{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 Cir-
cuit, "[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."\textsuperscript{16}

However, the case settled in November 1997 before argu-
ment,\textsuperscript{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 Pro-
tection Clause.

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

\textsuperscript{15} \textit{Id.}

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

\textsuperscript{17} \textit{See Joan Biskupic, Rights Groups Pay to Settle Bias Case, Wash. Post,
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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