TAXMAN: AFFIRMATIVE ACTION DODGES FIVE BULLETS

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Twenty years ago I asked whether the Supreme Court would end the Second Reconstruction in its decision in Bakke and I predicted it would not. When the Supreme Court granted certiorari in Piscataway Township Board of Education v. Taxman, the same issue was at stake. In face of almost uniform predictions that affirmative action under Title VII of the Civil Rights Act of 1964 would be severely narrowed, the parties settled the case and took it off the docket of the Supreme Court.

The First Reconstruction began at the end of the Civil War with passage of radical reconstruction legislation to transform the states of the Confederacy and to protect the newly freed slaves. That reconstruction ended with the Hayes-Tilden compromise of 1877 agreed to by the political branches of government. The Supreme Court joined in with its decision in the Civil Rights Cases in 1883. The Second Reconstruction began after World War II with the decision in Brown v. Board of

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2. 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506 (1997).
6. 109 U.S. 3 (1883).
Education and passage of the Civil Rights Act of 1964. The main thrust of the Second Reconstruction has been to end de jure segregation and to prohibit discrimination.

Part I of this Article will describe the law of voluntary affirmative action under Title VII of the Civil Rights Act of 1964 up until Taxman. Part II will trace the congressional reaction to the earlier attempt of the present Supreme Court to end the Second Reconstruction with its 1989 civil rights decisions. It will address the significance to affirmative action of section 116 of the Civil Rights Act of 1991. Part III will analyze the approach to affirmative action taken by the Third Circuit in Taxman. Part IV will show that Taxman is at best a quirky case to decide the fate of voluntary affirmative action under Title VII. Part V will describe the approach that the Supreme Court most likely would have taken in Taxman, and Part VI will try to show why that approach would be wrong.

I. TITLE VII AND AFFIRMATIVE ACTION

In 1979, the Supreme Court found that in enacting Title VII's prohibition of discrimination, Congress had not intended to prohibit all voluntary affirmative action by employers. In United Steelworkers of America v. Weber, a 5-2 majority upheld a collectively bargained affirmative action plan designed to train unskilled incumbent workers of Kaiser Aluminum to fill skilled jobs in the plant. Incumbent workers would be accepted into the training program one for one, black and white workers. Workers were chosen based on their plant seniority. Since black workers at the plant generally had been more recently hired, they had less seniority as a group than the incumbent white workers. Thus, some black workers were accepted into the training program before some white workers with more seniority. The plan was to continue until the percentage of African-American skilled craft workers approximated their percentage in the local labor force. Until this plan was adopted, the employer had filled all its craft jobs by hiring new employees from a pool of applicants who had prior craft experience. All the workers in the area with craft experience were white because the craft unions in the area, which provided the qualifying craft experience, excluded African-Americans.

The Court held that Title VII did not prohibit a voluntary affirmative

action plan that was consistent with Title VII’s objective of breaking down “old patterns of racial segregation and hierarchy.” The affirmative action plan at issue passed muster even in the absence of any suggestion that the employer had itself discriminated against African-Americans. The plan was structured to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”

At the same time, the plan does not unnecessary trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. ... Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance; but simply to eliminate a manifest racial imbalance.¹⁰

Weber and its approach were reaffirmed in 1987 in Johnson v. Transportation Agency.¹¹ The case involved a man’s challenge of the employer’s decision to hire the first woman into any of the employer’s 238 different Skilled Craft Worker positions. The Court clarified Weber:

[A]n employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an “arguable violation” on its part. Rather, it need point only to a “conspicuous . . . imbalance in traditionally segregated job categories."¹²

Justice O’Connor concurred in Johnson, saying she also agreed with Weber. Her approach was to equate Title VII law with constitutional equal protection. Thus, she said, “the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case . . . the employer must have had a firm basis for believing that remedial action was required.”¹³ For her, an affirmative action plan is permitted by Title VII only if the employer can “point to evidence sufficient to establish a firm basis for believing that remedial action is required."¹⁴ Evidence to support such a basis includes “a statistical imbalance sufficient for a Title VII prima facie case against the employer.”¹⁵ She then described Weber as consistent with the test she had

¹⁰. Id. at 208 (citations omitted).
¹². Id. at 630.
¹³. Id. at 649 (citations omitted).
¹⁴. Id. at 650.
¹⁵. Id. at 650-51 (emphasis added).
articulated:

The employer in *Weber* had previously hired as craftworkers only persons with prior craft experience, and craft unions provided the sole avenue for obtaining this experience. Because the discrimination occurred at entry into the craft union, the "manifest racial imbalance" was powerful evidence of prior race discrimination. Under our case law, the relevant comparison for a Title VII prima facie case in those circumstances—discrimination in admission to entry-level positions such as membership in craft unions—is to the total percentage of blacks in the labor force.\(^1\)

That there existed a prima facie case of discrimination against the craft unions was very clear. The era was one in which some craft unions explicitly excluded African-Americans and others used practices that excluded them from membership. The unions' discrimination was not discrimination by Kaiser Aluminum, the employer in *Weber*. Those craft unions did not represent any of Kaiser's workers. The only link between the unions and Kaiser was that, through their training programs, these unions had created a pool of qualified craft workers from which Kaiser hired the craft workers for its plant. Thus, *Weber* allowed Kaiser to use affirmative action to break down old patterns of racial segregation and hierarchy, even those not caused by its own discrimination.\(^2\)

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16. *Id.* at 651.

17. Kaiser would not appear to have been at risk to a systemic disparate treatment claim in its prior policy of hiring experienced craft workers. Absent some "smoking gun" evidence that it used the policy of hiring skilled craft workers because it would produce an all-white force of craft workers, the fact that all of its craft workers were white would not be attributed to discrimination by Kaiser. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), could be used to undermine any inference that it was Kaiser's discrimination that caused the pool to be entirely white. Kaiser could point to the unions as the discriminators and claim it had picked its craft workers "despite, not because" they were white. In short, Kaiser was not guilty of intentional disparate treatment in the use of its policy of filling skilled jobs with applicants who had prior craft training.

The remaining possibility for a prima facie case against Kaiser would be a disparate impact case challenging Kaiser's practice of hiring only workers with craft experience. Because the pool of potential employees was made up of only white craft union members, the policy had a disparate impact on African Americans. The disparate impact theory is premised on the notion that, as to the operation of its policies, an employer must take account of general societal discrimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court required Duke Power to take account of societal discrimination to the extent that effects of discrimination were imported into the workplace. Commenting on the racial impact of the company's high school diploma and test prerequisites, the Court noted that "[b]ecause they are Negroes, petitioners have long received inferior education in segregated schools.... Congress has now required that the posture and condition of the job-seeker be taken into account.... The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 430-31.

Disparate impact law mandates that employers take account of societal
words, for Justice O'Connor, Title VII prohibits affirmative action if an employer uses it to remedy the effects of past discrimination by other actors in society. In saying that Weber involved the use of an employer's own past discrimination as a justification for the use of affirmative action, O'Connor is reaching beyond the facts and holding of Weber. In Weber and Johnson, the Supreme Court found that affirmative action did not violate Title VII despite the fact that the employer itself had not discriminated in the past. To say it another way, Weber and Johnson did not link the legality of affirmative action to the employer's discrimination, no matter how Justice O'Connor described these cases. Taxman raised the question whether an employer not shown to have discriminated itself can use voluntary affirmative action to achieve education diversity without violating Title VII.

II. THE CONGRESSIONAL RESPONSE TO WEBER/JOHNSON

In Johnson, decided in 1987, the Court described the response of Congress to its earlier Weber decision as one of acquiescence.

Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.... Weber, for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction. 8

In 1989, the Supreme Court issued a series of decisions9 that amounted to such a massive restriction on the application of civil rights law that those decisions have been characterized as an attempt to end the Second Reconstruction. 20 Surprisingly, perhaps, no affirmative action cases were decided among those decisions, so Weber and Johnson were

discrimination, at least to the extent that discrimination carries its effects into the workplace. Consistent with that, voluntary affirmative action permits employers to take account of that societal discrimination by using affirmative action to break down patterns of segregation. Disparate impact law was codified in Title VII of the Civil Rights Act of 1991 and has been criticized because of its close relation to affirmative action, or at least to "quotas." See Kingsley R. Brown, The Civil Rights Act of 1991: A "Quota Bill," A Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?, 43 CASE W. RES. L. REV. 287 (1993).

8. Johnson, 480 U.S. at 629 n.7.
The end of the First Reconstruction in the latter part of the nineteenth century came once the Supreme Court joined the other two branches which had already ceased to support it. In contrast, the present Court in its 1989 decisions preceded Congress, and possibly the President, in moving to end the Second Reconstruction. Congress rebuffed this attempt. The Civil Rights Act of 1991 overturned those decisions and restored civil rights law, revitalizing the Second Reconstruction.

Since Weber/Johnson had not been directly affected by the 1989 decisions, Congress did not make any changes to that law. Congress expressed something more than acquiescence but perhaps less than full approval of Weber/Johnson. At a minimum, the 1991 Act gives the Court no warrant to make any changes in Title VII's approach to affirmative action. Section 116 is the only provision of the 1991 Act that speaks directly to affirmative action, but what it says is less than fully clear.

Section 116. Lawful Court Ordered Remedies, Affirmative Action, and Conciliation Agreement Not Affected.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

Stripped of all excess verbiage, section 116 says that nothing in the 1991 Act affects affirmative action that is in accordance with the law.

21. Two other sections of the 1991 Act arguably could have some effect on Weber/Johnson. Section 106 deals with employment testing and makes it unlawful for an employer "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin." Section 107(a) changes individual disparate treatment law by codifying the plurality opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Specifically, this section changes the level of showing necessary to establish the employer's state of mind in proving discrimination: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Challengers to Weber/Johnson could try to apply these provisions to have some effect on the law of voluntary affirmative action. The plain meaning of section 106 suggests that an employer can not shelter "race norming" of test scores, prohibited by section 106, behind an affirmative action plan. Opponents of affirmative action might try to stretch section 106 beyond its plain meaning. As to section 107(a), the "motivating factor" language might be urged to somehow change the meaning of "discrimination" to exclude voluntary affirmative action. Section 116 should work to forestall such arguments.


23. Even this restatement might be challenged because it could be argued that "court-ordered" modifies "affirmative action" as well as "remedies." If so, section 116 would speak to court ordered affirmative action but would say nothing about voluntary affirmative action. The Report of the House Education and Labor Committee foresaw that interpretative problem and proposed that section 211, which later became section 116, be
The issue becomes what Congress meant by "in accordance with the law." Did this amount to a reenactment of Title VII as construed by the Supreme Court in Weber and Johnson or was Congress taking no position on that body of law? Senator Kennedy said that section 116 reaffirmed Weber and Johnson: "[T]he bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination." The Congressional Record at one point supports the view that the intent of section 116 is "to leave things the way they were before passage of the legislation with respect to the legality of affirmative action." In contrast, Senator Hatch said that section 116 took no position on Weber and Johnson: "[T]he Act expresses neither Congressional approval nor disapproval of any judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements including the Weber, Johnson, Local [28], and Paradise Supreme Court decisions." Senator Dole's statement supported the view of Senator Hatch, and President Bush's signing statement incorporated Senator Dole's statement.

In section 116, a provision in which Congress told the Supreme Court that its recent civil rights decisions were wrong and that the need for the Second Reconstruction had not passed, there is no support to justify any change in the law of voluntary affirmative action. Beyond that, by speaking about affirmative action in section 116, Congress has gone beyond the mere "silent or passive assent" connoted by the word "acquiescence." Whether or not section 116 amounts to a full reenactment of Weber/Johnson, it is a statement recognizing the law in those cases. Thus, under any view, section 116 bolsters Weber/Johnson and the stare decisis effect that the courts should give to that law.

amended to say "otherwise lawful affirmative action, conciliation agreements and court-ordered remedies." H.R. Rep. No. 102-40(f) (Apr. 24, 1991). Even without the amendment, the plain meaning of section 116 indicates that "affirmative action" includes voluntary affirmative action. Otherwise, "court-ordered" would perfuse modify "conciliation agreements" as well as "remedies" and "affirmative action." Courts cannot order parties to reach a "conciliation agreement," so that cannot be the plain meaning of section 116.

Stare decisis is stronger in statutory cases than in constitutional ones, since Congress can always act by legislation to overturn erroneous statutory interpretations. The most recent statement of the Court on this is *Neal v. United States*:

Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that "Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S. Ct. 2061, 2070, 57 L. Ed. 2d 707 (1977). We have overruled our precedents when the intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132 (1989) (citations omitted). Absent those changes or compelling evidence bearing on Congress' original intent, *NLRB v. Longshoremen*, 473 U.S. 61, 84, 105 S. Ct. 3045, 3058-59, 87 L. Ed. 2d 47 (1985), our system demands that we adhere to our prior interpretations of statutes.

Passage of the Civil Rights Act of 1991, overturning a series of Supreme Court decisions deemed erroneous interpretations of various civil rights statutes, is the most vivid example of why stare decisis is so strong in statutory interpretation cases. It is no small irony that *Taxman* presents this question of statutory interpretation of section 116 to the Court, since section 116 was part of Congress' message to the Supreme Court that its 1989 decisions had seriously misinterpreted existing civil rights laws. Those decisions helped trigger the recent renaissance in the field of statutory interpretation. The Supreme Court, however, has not been receptive to these new approaches to statutory interpretation flowing from that renaissance. It would be difficult, therefore, for the Court to be credible if in *Taxman* it suddenly were to articulate a more fluid stare decisis doctrine. Before we get to that, however, the stage needs to be set by discussing what the Third Circuit did in *Taxman*.

III. THE THIRD CIRCUIT APPROACH IN TAXMAN

In Taxman, the school board decided to downsize by laying off one teacher from its high school business education department. State tenure law required layoffs by seniority. Two teachers, one African American and one white, had exactly equal seniority and supposedly were exactly equal in their other qualifications. Pursuant to its state-mandated affirmative action plan, the school board decided to retain Debra Williams, the only African American in the business department. Consequently, the white teacher, Sharon Taxman, was laid off.

The en banc court, with eight of twelve judges joining in the majority, found that the board's decision violated Title VII. While the majority opinion is lengthy, quite convoluted, and claims merely to follow Weber and Johnson, the decision in fact mirrors Justice O'Connor's concurrence in Johnson. First, Title VII limited affirmative action to an employer's remedying the present effects of past discrimination. "[U]nless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute . . . ." Second, and this is the key change from Weber, the court then limited that remedial purpose to an employer's remediation of its own past discrimination:

The Board admits that it did not act to remedy the effects of past employment discrimination. The parties have stipulated that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between Taxman and Williams was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher workforce as a whole.

In Taxman, the Supreme Court was faced with the failure of the Third Circuit to give stare decisis effect to Weber/Johnson. Justice O'Connor's concurrence in Johnson, that Title VII law is the same as equal protection and that Weber involved an employer remedying its own discrimination, was not the opinion of the Court and should not be the basis for overturning existing voluntary affirmative action law under Title VII. The

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34. See Taxman, 91 F.3d at 1547.
35. Id. at 1557.
36. Id. at 1563. The court also relied on two additional grounds. First, the plan was found to lack the necessary definition and structure. "[T]he Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose." Id. at 1564. Second, the layoff of Taxman unnecessarily trammled the rights of nonminority employees: "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 fashion." Id.
Supreme Court should apply stare decisis and reverse.\textsuperscript{37}

IV. A QUIRKY CASE

One of the many things that made \textit{Taxman} at least quirky, if not bizarre, is that the United States government had, over the life of the case, been on both sides and is now in the middle. The Bush Administration Department of Justice initially brought the case against the school board on behalf of Taxman. With the change of administration in Washington, President Clinton’s Justice Department attempted unsuccessfully to change sides in the school board’s appeal of Taxman’s victory to the Third Circuit. Instead, it was removed as a party.\textsuperscript{38} Once the Third Circuit affirmed and certiorari was sought, the Supreme Court asked the government for its input on whether certiorari should be granted. The government argued that certiorari should not be granted. Nevertheless, the Court decided to hear the case. Most recently, the Solicitor General filed a brief on the merits arguing that the Third Circuit decision was wrong but that the judgment nonetheless should be affirmed.

The defendant also appeared in some ways to be less than a fierce advocate of affirmative action. It was in the position of having to defend an affirmative action plan that it may never have really supported. The affirmative action plan was required by the state and so its adoption was no more than the board doing what it was told. That may account for the fact that the school board relied upon affirmative action only once in a layoff, and that was in its decision to retain Williams.\textsuperscript{39} In defense of its decision to layoff Taxman, the school board apparently conceded that Williams and Taxman had equal qualifications. In fact, Williams has a masters degree in business education and Taxman does not.\textsuperscript{40} If Williams was more qualified than Taxman, then the layoff decision should have been made in Williams’ favor without need to rely upon affirmative action. Hindsight is better than foresight, but conceding such an important point did not leave the

\textsuperscript{37} A more supportable ground for affirmance was that the employer’s plan lacked sufficient definition and structure. \textit{See} Kenneth R. Kreiling & Thomas D. Mercurio, \textit{Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action}, 88 \textit{DICK. L. REV.} 46, 107 (1983) (failure to have sufficiently articulated a plan is major ground to disallow an employer’s voluntary affirmative action).

\textsuperscript{38} Not only did the parties change, but so did the judges. The original panel of the Third Circuit to hear the case was composed of Judges Hutchinson, Mansmann and McKee, but Judge Hutchinson passed away between oral argument and resolution of the appeal. Chief Judge Sloviter was then designated to serve in place of Judge Hutchinson on the reconstituted panel.

\textsuperscript{39} \textit{See Taxman}, 91 F.3d at 1575 (Sloviter, J., dissenting).

\textsuperscript{40} \textit{See} Kathy Barrett Carter, \textit{Teacher in Court Test Sees a Matter of Degree}, \textit{THE STAR LEDGER} (New Jersey), Sept. 24, 1997, at 1.
school board with its strongest defense.\textsuperscript{41} Having used affirmative action only once to retain Williams, the school board then rescinded its plan.

More surprising was that Taxman is a Title VII case. Just before the facts of this case unfolded in May 1989, the Supreme Court decided \textit{City of Richmond v. J.A. Croson, Co.}\textsuperscript{42} In \textit{Croson}, a majority of the Court finally agreed that strict scrutiny applies to equal protection challenges to affirmative action by state and local governmental actors. Thus, the best strategy to successfully challenge Taxman’s layoff, if that were the goal, would be equal protection, not Title VII. Yet \textit{Taxman} was not brought on equal protection grounds but rather under Title VII. The Third Circuit’s explanation for this curious choice of litigation strategy is that the statute of limitations had run on Taxman’s equal protection claim under 42 U.S.C. §1983 when the action was commenced.\textsuperscript{43} That begs the question of how the Department of Justice, which brought the case, could let the statute of limitations run if its primary interest was to protect Taxman’s civil rights. It may be that the Department viewed the case more as a vehicle to change Title VII law than as an action primarily aimed at vindicating Taxman’s rights.\textsuperscript{44}

In sum, the initial advocates representing Taxman may not have been strongly committed to her best interests. The school board, in addition, hardly seemed to be a strong advocate of affirmative action. This case may have lacked the concreteness present in a truly adversarial situation.

Had the decision of the Third Circuit been affirmed, that result would have been at odds with one policy predilection of the present Supreme Court. In his massive study and critique of the textualist, plain meaning approach to statutory interpretation of the present Supreme Court, a study largely based on the Court’s 1989 civil rights decisions, Professor William Eskridge concludes that “[t]he Court’s civil rights decisions from 1989 to 1991 do not represent its adherence to plain meaning. Instead, they represent its preference that civil rights statutes not ‘intrude’ into employer decision making . . . .”\textsuperscript{45} The approach of the Third Circuit in \textit{Taxman} had just the opposite effect. It expanded the scope of application of Title VII

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\item The school board, of course, may just have thought that it was easier to declare the candidates equal and then claim to be using affirmative action than to announce that Williams was more qualified than Taxman. School districts and other civil service employers may have strong reasons to avoid evaluating the merits of incumbent employees out of fear that any adverse action taken against an employee would have to be justified under a cause standard. Affirmative action probably is commonly used as an explanation to disappointed applicants, even when that is not the actual basis for an unfavorable decision.
\item 488 U.S. 469 (1989).
\item See Taxman, 91 F.3d at 1552 n.5.
\item Plaintiff’s counsel in \textit{Johnson} had made the same decision to go with Title VII and not equal protection when both were available.
\item ESKRIDGE, \textit{supra} note 32, at 273.
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by outlawing more employer actions as discriminatory. It is no wonder then that the Third Circuit failed to even discuss one articulated purpose of Title VII, which is to minimize legal interference in the managerial discretion of employers. The Court in Weber, citing the Congressional Record, emphasized that "management prerogatives... be left undisturbed to the greatest extent possible." Thus, it would be ironic if the Supreme Court had affirmed Taxman, since that decision would be boldly activist in overturning stare decisis by a Court that claims to reject judicial activism. That would result in a substantial expansion in the burden the law places on the private sector, another outcome often abjured by this Court.

The settlement of the case, which took it off the docket of the Supreme Court, has its own quirky aspects. That civil rights organizations pushed for the settlement, including contributing significant amounts of money to achieve it, symbolizes the change in the role of the federal courts in civil rights enforcement: These groups now see it important to the achievement of their goals that cases be kept out of the Supreme Court.

47. Weber, 443 U.S. at 206. There is also some irony in Taxman for many of us who came to the law in the 1960s because of Brown v. Board of Educ., 347 U.S. 483 (1954), and the perception that law could be used expansively to transform society for the better, to increase the role of the law in order to increase justice and equality. We are the ones now arguing in Taxman to let voluntary employer affirmative action be free of judicially created legal restraints. See Jeffrey Rosen, The New Look of Liberalism on the Court, N.Y. Times, Oct. 5, 1997, § 6 (Magazine), at 60.
48. In one other area the present Supreme Court has chosen to value a market free of legal rules over another value that is perceived as important to it—the federalism value of state governmental actors to act with fewer constraints of national law. In C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1683 (1994), the Court, under the Dormant Commerce Clause, applied strict scrutiny on the basis of some hypothetical disparate impact on out-of-state business interests to overturn a town's decision to engage in a turn-key transaction for a solid waste treatment facility, with the town's contribution to be made by requiring that all solid waste in the town be taken to the local facility. Requiring all the waste to be treated locally had an adverse impact on all solid waste facilities elsewhere, including those outside the town and outside the state, but that seems hardly sufficient to justify the restraint on the discretion of local governments dealing with garbage.

In another area, the Court claimed to be supporting broader authority in state governments but actually overturned the exercise of that authority. In New York v. United States, 505 U.S. 144 (1992), the Court revived the Tenth Amendment as a vehicle to protect state sovereignty. But in doing so, it struck down an agreement of all the states on how to treat low-level nuclear waste that Congress had accepted under its power in Article I, Section 10, Clause 3, to approve compacts among the states. Justice White noted in his dissent: "The ultimate irony of the decision today is that in its formalistically rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems." Id. at 210 (White, J., dissenting).
49. See Linda Greenhouse, supra note 3.
50. See Barry Bearak, Rights Groups Ducked a Fight, Opponents Say, N.Y. Times,
That is a complete reversal of the goal of those organizations during the
days of the civil rights movement. A further twist is that these civil rights
organizations were helped by contributions from major corporations.51 Big
business and civil rights organizations would surely have been perceived
as strange bedfellows in the not too distant past. But now they share
interests in preserving affirmative action.

The final ironic twist to Taxman is that, in some ways, it is both the
best and the worst case to discuss affirmative action. Keeping the faculty
of a high school business department racially integrated with one African-
American teacher provides a good reason to support affirmative action in
this era when educational policy should be striving in every possible way
to keep students achieving in school. Presenting role models for African
Americans is not insignificant. Integration of a faculty is of value for the
education of white students because it permits them to see African
Americans in leadership roles. Based on this, Taxman would seem to be a
good case to reaffirm Weber and Johnson.

Another argument that Taxman is the best case for affirmative action
is that the case does present the question in the abstract whether race can
be taken into account when all else is equal. Given that the record
concludes all else is equal between the two candidates and that the
principle of stare decisis in its strongest form, whatever decision the Court
would have made would clearly reveal its view of the continuing reality of
discrimination against African Americans, the discretion the Court is
willing to grant to social, political, and economic actors to deal with that
problem, and its policy determination of how legitimate affirmative action
is when all else is equal. There is no cover in the case for the Court to hide
behind issues that are frequently involved in the debate about affirmative
action, such as lowering standards, benefiting unqualified workers, and
other issues.

The government argued that Taxman is the worst case to decide the
continuing viability of Title VII's affirmative action law because it
involves a layoff. Yet, Taxman did not lose her job permanently or even
for very long. She had statutory recall rights which worked to bring her
quickly back to teaching in the business department at the high school.
Had the school board not conceded that Taxman was as qualified as
Williams, and the reviewing court had found Williams more qualified,
Taxman would have lost her case, because the use of race would not be
implicated in her layoff. Even conceding that affirmative action was used
to retain Williams, all Taxman lost was what would have happened if
affirmative action had not been used; she lost the right to have the decision

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51. See Abby Goodnough, Financial Details Are Revealed in Affirmative Action
made by chance, a coin flip, a 50/50 chance of not being laid off. This is not to say that there was no adverse effect on Taxman, but, instead, that the impact was minimal. It is very hard to characterize this impact on just one worker as "trammeling" the interests of Taxman, much less those of white employees in any more general sense.

V. PREDICTING THE OUTCOME

Early during my clerkship with a federal appeals court judge, the Supreme Court granted a petition for certiorari in a case in which the judge had written the opinion. His immediate reaction—"They don't grant cert. to affirm"—would be, he said, the universal reaction of appellate court judges. So why predict that this maxim would not apply to Taxman and that the decision would be affirmed, not reversed? The answer lies, of course, in the affirmative action/equal protection decisions handed down since Johnson was decided in 1987.

A. Equal Protection

It took the Court seventeen years for a majority to agree on a conceptual structure to review affirmative action under the Equal Protection Clause. In 1978 in Bakke, the Court was split 4-4-1 on the University of California-Davis Medical School admissions program. Basically, the program reserved sixteen seats in the entering class for minority applicants, leaving the remaining eighty-four seats open to competition by all applicants. Without the Court agreeing on the level of scrutiny to be applied, the program was struck down based on Justice Powell's swing vote. He thought strict scrutiny applied and that the separate track for minority admissions that Cal-Davis used was unconstitutional, but that affirmative action plans that used minority group membership as a "plus" for admission—the "Harvard model"—would be constitutional if done to serve the goal of educational diversity.

Eleven years later in 1989, a bare majority of the Court in Croson finally agreed that strict scrutiny applied to the affirmative use of race by state and local governments in actions brought under the Equal Protection Clause of the Fourteenth Amendment. In 1990, again by a 5-4 majority, the Court distinguished Croson as limited to state actors and upheld a congressionally enacted affirmative action plan for broadcast licenses in Metropolitan Broadcasting, Inc. v. FCC by using intermediate-level

52. Judge Thomas E. Fairchild of the Seventh Circuit Court of Appeals.
scrutiny. Finally, in 1995, another bare majority in Adarand\textsuperscript{55} overturned Metropolitan Broadcasting and held that strict scrutiny applied to the affirmative use of race by all governmental actors, local, state and national: "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."\textsuperscript{56} Further, the Court gave a thumbnail description of how strict scrutiny was satisfied: "[racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."\textsuperscript{57}

The Adarand majority is itself split as to what strict scrutiny means. Justice Thomas, in his concurrence, takes the most extreme position, calling for an absolute color-blind standard:

谭[t]he government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.\textsuperscript{58}

By saying that no governmental actor may ever make distinctions based on race, Justice Thomas appears to be suggesting that violations of the Equal Protection Clause of the Fourteenth Amendment may not be remedied because such a remedy would violate his absolute color-blind standard. The argument would be that, since courts are governmental actors, courts cannot use race any more than any other governmental actor. To grant a remedy to the victim of a defendant's race discrimination would be to make a distinction on the basis of race and, as such, would violate his color-blind rule of equal protection.

Justice Scalia's concurrence is not quite so extreme but would limit the use of race by governmental actors to providing remedies to actual victims of race discrimination.

\textsuperscript{56}. Id. at 227. In another line of cases dealing with provisions of the Voting Rights Act that require the conscious use of race in drawing election districts, the Court has recently rejected redistricting plans because they used race to maximize minority representation among elected officials. See Shaw v. Hunt, 116 S. Ct. 1894, 1906 (1996); Bush v. Vera, 116 S. Ct. 1941, 1964 (1996). These decisions raise the specter that Congress, in enacting those provisions of the Voting Rights Act, exceeded its power under the enforcement provisions of the Civil War amendments. Finally, a majority of the Court in City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997), found the Religious Freedom Restoration Act to be beyond the powers of Congress under Section Five of the Fourteenth Amendment. The Court limited the power of Congress under that provision to the creation of remedies but did not permit Congress to define the substantive meaning of Section One, because doing so is within the province of the Supreme Court.
\textsuperscript{57}. Adarand, 515 U.S. at 227.
\textsuperscript{58}. Id. at 240 (Thomas, J., concurring).
[G]overnment can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.59

The other three Justices in the majority, Justices O'Connor and Kennedy and Chief Justice Rehnquist, would allow for a somewhat broader use of race as consistent with the strict scrutiny test. In her opinion for the Court, Justice O'Connor tried to "dispel the notion," based on the views of Justices Scalia and Thomas, that 

strict scrutiny is "strict in theory, but fatal in fact." ... The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.60

Recent Supreme Court authority suggests which governmental interests are compelling and which are not. In Shaw v. Hunt,61 a Voting Rights Act case, Chief Justice Rehnquist described how race could be used by a governmental actor to remedy discrimination where the beneficiaries of the use of race were not themselves victims of discrimination.

A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. For that interest to rise to the level of a compelling state interest, [the governmental actor] must satisfy two conditions. First, the discrimination must be "identified discrimination." ... Second, the institution that makes the racial distinction must have had a "strong basis in evidence" to conclude that remedial action was necessary, "before it embarks on an affirmative-action program."62

Remedying the present effects of past discrimination has been recognized as a compelling governmental interest even if that remedy benefits those who themselves have not been the victims of the governmental actor's discrimination. In United States v. Paradise,63 the Court upheld a quota remedy for promotions—one African American for each white—against the Alabama state police. This came after many years during which the state police failed to implement any remedy for having engaged in hiring discrimination against African-Americans.

59. Id. at 239 (Scalia, J., concurring) (citation omitted).
60. Id. at 237 (citation omitted).
62. Id. at 1902-03 (citations omitted).
In contrast, governmental actors are prevented by strict scrutiny from using race to remedy general societal discrimination unconnected to their own present or past activities. In 1986 in *Wygant v. Jackson Board of Education*, the Court indicated that it “never has held that societal discrimination alone is sufficient to justify a racial classification.” More recently, in *Shaw v. Hunt*, the Court made clear that remediating general societal discrimination is not a compelling governmental interest that would justify race conscious governmental action: “an effort to alleviate the effects of societal discrimination is not a compelling interest.”

In sum, the present Supreme Court’s interpretation of equal protection requires that all uses of race, even affirmative action, by all governmental actors must satisfy the strict scrutiny test. Two elements make up that test. First, the purpose for the use of race must be a compelling governmental interest. Ameliorating discrimination by providing a remedy to the actual victims of an actor’s discrimination as well as remediating the present effects of such discrimination by a governmental actor, even if the beneficiaries of the remedy were not themselves its victims, satisfies the compelling governmental interest test. Redressing general societal discrimination does not. There are, of course, other possible governmental interests, such as diversity, which a majority of the present Court has not yet characterized as either compelling or not. The second element of strict scrutiny requires the governmental actor to identify the discrimination and to have “a strong basis in evidence’ to conclude that remedial action was necessary.” If the governmental actor has that evidence identifying the discrimination, then the actual use of race must be narrowly tailored to serve the identified compelling governmental interest without unnecessarily trammeling the rights of the majority.

In light of that recent Supreme Court precedent, the lower federal courts are finding that only a quite narrow range of affirmative action survives under strict scrutiny and its compelling governmental interest test. First, one court has rejected the diversity rationale for the use of affirmative action that was articulated by Justice Powell back in *Bakke*. In *Hopwood v. State of Texas*, the Fifth Circuit struck down the affirmative action admissions plan of the University of Texas Law School. Like the Cal-Davis admissions plan in *Bakke*, the University of Texas Law School used a separate admissions track for minority candidates. In concluding that the educational diversity purpose was not a compelling governmental interest, the Fifth Circuit observed that the opinion of Justice Powell in

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64. 476 U.S. 267 (1986).
65. Id. at 274 (1986).
66. *Shaw*, 116 S. Ct. at 1903 (citation omitted).
67. Id. (citation omitted).
68. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).
Bakke did not command the assent of any other member of the Court. Further, even if Justice Powell had spoken for the Court at that time, Bakke was decided before a majority of the Court determined that all affirmative uses of race by governmental actors must satisfy strict scrutiny. While diversity among the student body might be a legitimate and even an important governmental interest, the Hopwood court found it was not a compelling one.\(^6\) In short, Bakke did not survive Croson and Adarand.

Second, even assuming a compelling governmental interest for the use of race is shown, the courts have strictly applied the “narrowly tailored” test that requires the affirmative use of race to be closely linked to the governmental interest its use is intended to serve. In Podberesky v. Kirwan,\(^7\) the University of Maryland acknowledged its history of intentionally excluding African Americans from its student body, only ending that policy after Brown v. Board of Education. Nevertheless, for a very long time after de jure exclusion had ended, very few African-Americans applied or attended the university. Numerous attempts to increase African-American enrollment had only marginal effect. Eventually, the university created a scholarship program for high achieving African-American applicants and students.

The Fourth Circuit struck down the program for failing to satisfy the strict scrutiny standard. First, given the time since de jure segregation had ended, the university was unable to identify that any present effects of its past discrimination still existed. All it could show was the existence of general societal discrimination rather than any present effects of the university’s own actions in the past. Such general societal discrimination could not be the basis for the use of affirmative action since remedying societal discrimination is not a compelling governmental interest. Second, even assuming some effects of the university’s past discrimination still existed, the university was not able to prove that the scholarship program for high achieving African-American students was narrowly tailored to remedy whatever that discrimination was.\(^7\)

B. Importing Equal Protection Into Title VII

The significance of the equal protection decisions to Taxman and Title VII law is that this equal protection law will be imported into and made applicable to Title VII. In fact, the Court has a model for doing this

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\(^6\) All of the discussion of diversity might be dicta since the University of Texas Law School had segregated its admissions tracks and did not use race as a “plus” in the way that Justice Powell in Bakke accepted as consistent with the diversity interest.


\(^7\) This issue was not resolved by the Court. See 956 F.2d at 57 n.7.
in *Adarand*. There, the Court imported *Croson*’s equal protection approach, applicable to the states under the Fourteenth Amendment, into the equal protection component of the Due Process Clause of the Fifth Amendment, which is applicable to the activities of the federal government.

Justice O’Connor’s opinion in *Adarand* identifies “three general propositions with respect to governmental racial classifications” as: (1) skepticism about any governmental use of race; (2) consistency in application to all races; and (3) congruence, so that equal protection doctrine is the same under both the Fifth and Fourteenth Amendments. All three propositions led to the importation of equal protection doctrine from the Fourteenth into the Fifth Amendment. “[T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from the principle that all governmental action based on race... should be subjected to detailed judicial inquiry so that the personal right to equal protection of the laws has not been infringed.”

The application of the *Adarand* analysis to Title VII would be straightforward. Title VII has been construed to protect all persons, blacks and whites, from race discrimination. Using Justice O’Connor’s three propositions—skepticism, consistency and congruence—could, therefore, lead to the application of equal protection strict scrutiny to voluntary affirmative action under Title VII, just as it led Justice O’Connor to import Fourteenth Amendment doctrine into the Fifth Amendment in *Adarand*. Further, in *Johnson*, Justice O’Connor already said the analysis of affirmative action under Title VII is the same as equal protection. While straightforward, that application is wrong. What makes it wrong is that these three general propositions are in fact so broad and open-ended that a majority of the Court would be giving itself wide discretion to impose its own personal and political values. Those values appear to be blind to our history of having fought a Civil War to end slavery and to the significant legal consequences of that war that still have relevance today.

VI. CIVIL WAR DENIAL

It is one thing, as the present Court has done, to deny the usefulness of legislative history in interpreting statutes because that history is subject to strategic uses by self-interested parties. But denying the history of our country is quite another. Saying that consistency requires the application of equal protection doctrine is exactly the same way to blacks and to
whites is an awesome denial of this country’s history of slavery and race discrimination against African Americans. Saying that consistency requires that the claims of “reverse” discrimination brought by whites be tested by the same standard as the claims of invidious race discrimination brought by African Americans is all the more significant, given Justice O’Connor’s admission in Adarand that race discrimination against members of minority groups continues to exist to this day: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . . .”

Congruence requires, according to the Adarand majority, that the federal government be seen as no different that the states in terms of its role in protecting civil rights. Justice O’Connor’s descriptions of Hirabayashi v. United States77 and Korematsu v. United States,78 dealing with the sorry treatment of Japanese Americans during World War II, are sobering, and do justify skepticism. They are sobering not just because the national government treated citizens as criminals solely based on their Japanese ancestry, but also because the Court failed to stop that invidious race discrimination. That the Court failed to exercise judicial review when it should have in that situation does not, however, justify the Court using such abstract propositions as consistency in unwarranted judicial activism now. Failing to analyze real differences between blacks and whites with regard to the impact of race discrimination, and not recognizing real differences between the federal government and the states in being empowered to redress that discrimination, is no better than the Court’s failure in Korematsu.

State property law permitting African Americans to be enslaved was the central issue in the Civil War.79 The Thirteenth Amendment overturned that body of law, and the broader Fourteenth Amendment overturned the fundamental structural error of the original Constitution that treated the states as only protectors and never the predators of individual rights.80

76. Adarand, 515 U.S. at 237.
77. 320 U.S. 81 (1943).
78. 323 U.S. 214 (1944).
79. See James McPherson, The Heart of the Matter, N.Y. REV. BOOKS, Oct. 23, 1997, at 35 (arguing that recent scholarship establishes conclusively that slavery was the heart of the matter at stake in the Civil War).
80. Adarand is not the only case where the Court appears to deny the legal consequences of the Civil War. In New York v. United States, 505 U.S. 144 (1992), the majority opinion relied on our history to support reviving the Tenth Amendment. In dissent, Justice White decried the inadequacy of that history as “wooden” and “elaborate window dressing” because it denied the fact that the Civil War had legal consequences:

With selective quotations from the era in which the Constitution was adopted,
The Court should recognize the lack of congruence between constitutional equal protection and federal statutory law such as Title VII based on differences in stare decisis. Stare decisis is weaker as to constitutional decisions than as to statutory interpretations because of the greater difficulty in overturning a wrong constitutional decision than in changing an erroneous interpretation of a statute through a statutory amendment. So, assuming a majority of the present Supreme Court thinks that Weber and Johnson were wrongly decided, still the proper response of the Court should be to recognize that Congress is the appropriate governmental body to make any changes in the law.

It may be that the use of the terms “skepticism,” “consistency” and “congruence” are meant to evoke the judicial process approach in vogue during the era in which the present members of the Court came to the law. If so, Justice O’Connor left out the most significant term of that approach:

the majority attempts to bolster its holding . . . . I do not read the majority’s many invocations of history to be anything other than elaborate window dressing . . . . Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority’s historical analysis has a distinctly wooden quality. One would not know from reading the majority’s account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government’s law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself . . . . While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress’ power under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature’s authority than may have existed in the late 18th century.

New York, 505 U.S. at 207 n.3 (White, J., dissenting).

81. See Lawrence C. Marshall, “Let Congress Do It”: The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177 (1989). Stare decisis only comes into play when a court is convinced an earlier decision was wrong. “In the [rule of statutory stare decisis] purest form, a court invoking stare decisis refuses to reverse a statutory precedent even though the court is quite convinced that the earlier decision was wrongly decided.” Id. at 186.

82. Presumably the collapse of the threat of world communism has reduced the centripetal force uniting our nation behind a strong national government. That may reflect the change in balance between those centripetal forces drawing us together and centrifugal forces pulling us apart that can be seen in the renaissance of federalism, see New York v. United States, 505 U.S. 144 (1992), and the narrowing of power of the national government, see City of Boerne v. Flores, 117 S. Ct. 2157 (1997); United States v. Lopez, 115 S. Ct. 1624 (1995). Even granted the militia movement, the Oklahoma City bombing and white male backlash against civil rights, nothing seems quite so dramatic to the survival of our constitutional system as the threat of renewed civil war that led to the Hayes-Tilden compromise of 1877. See generally Woodward, supra note 5. The Court might be required to sacrifice stare decisis to the need to maintain our form of government. See John J. Gibbons, Intentionalism, History, and Legitimacy, 140 U. PA. L. REV. 613 (1991).
“purposive.” A Court which fails to take account that the purpose of equal protection was to protect slaves freed by the Civil War\textsuperscript{83} simply does not understand what “consistency” and “congruence” should now mean.

VII. CONCLUSION

The Court attempted to end the Second Reconstruction in its 1989 civil rights decisions. It failed because Congress intervened with the passage of the Civil Rights Act of 1991. The Court already has read that Act narrowly\textsuperscript{84} and continues to narrow antidiscrimination legislation in cases not directly implicating the 1991 Act’s amendments.\textsuperscript{85} These decisions echo the Court’s view over one hundred years ago in \textit{The Civil Rights Cases}.\textsuperscript{86} There, less than twenty years after the Civil War, Justice Bradley suggested that the problems of slavery and discrimination were over and that the civil rights legislation of the First Reconstruction was no longer needed.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.\textsuperscript{87}

The Court was wrong in 1883 in believing the problems caused by slavery were solved. It will be wrong now to cast aside \textit{Weber} and \textit{Johnson}. We must wait for Congress to speak on affirmative action.\textsuperscript{88} While it seems unlikely that the present Congress would amend Title VII if the Supreme Court had affirmed \textit{Taxman}, that does not in any way legitimate the violation of stare decisis. Basically, the decisions of the Court in \textit{Weber} and \textit{Johnson} put the question of whether the law of voluntary affirmative action should be changed into the hands of Congress. It is for Congress, not the Supreme Court, to decide whether the time for voluntary affirmative action under Title VII has passed.

\textsuperscript{83} See \textit{Strauder v. West Virginia}, 100 U.S. 303 (1879).
\textsuperscript{84} See \textit{Landgraf v. ASI Film Prods.}, 114 S. Ct. 1483 (1994) (Act did not apply retroactively).
\textsuperscript{86} 109 U.S. 3 (1883).
\textsuperscript{87} \textit{Id.} at 25.
\textsuperscript{88} Pending in the House is the Civil Rights Act of 1997, H.R. 1909, 105th Cong. (1997), which would end affirmative action in federal employment.
The fact that the Supreme Court decided equal protection cases to create a different approach to affirmative action under the Constitution does not authorize the Court to overturn established Title VII law under stare decisis. Applying Adarand to Title VII is possible because Adarand is such a broad and unformed standard that it leaves open to judicial discretion any policy choice a majority of the Court decides appropriate. Given that stare decisis applies in its strong form to Weber and Johnson, and the stark nature of the question in Taxman—when all else is equal, can affirmative action be used?—an affirmance on all but the narrowest grounds in Taxman would have been rightly criticized as impermissible judicial activism, a majority of the Court acting as lawmakers, not judges.

When the rollback of civil rights by the Supreme Court's decisions in 1989 is put together with a possible affirmance in a case like Taxman, the policy predilection of the Court could be equated with the policy prescription of a recent controversial book, The End of Racism. In it, the author describes racism as existing today in two forms. First, there is the "rational" racism of whites reacting against the conduct of many African Americans living in a "dysfunctional" culture. That rational racism will disappear when African Americans conform their culture, and therefore their conduct, to majority norms. The continued cutback in civil rights law by the Supreme Court, even after Congress rebuffed that cutback with the Civil Rights Act of 1991, seems consistent with D'Souza's view that law need not be much involved any more in ending racial discrimination against African Americans. The second form of racism that D'Souza sees today is affirmative action; that is, discrimination against whites. If the Court imposes strict scrutiny in Title VII, it will virtually eliminate affirmative action as a tool to counter societal discrimination and will vindicate the views of those, like D'Souza, who see affirmative action as invidious discrimination.

The open-ended principles of consistency and congruence could be applied by the Court in a wide variety of situations. Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Executive Order 11,246 all are vulnerable to the extent they require or permit affirmative action. Even if a different Congress amended Title VII to explicitly codify Weber and Johnson, that legislation itself might be vulnerable to constitutional attack as beyond the power of Congress to

enforce the Fourteenth Amendment under Section Five of that Amendment\textsuperscript{93} and beyond the power of Congress to regulate commerce.\textsuperscript{94}

Lining up the parade of horribles does not mean they will come to pass. But the Court, through its judicial activism, effectively may prevent private actors, the states, and the federal government from legally using affirmative action to remedy general societal discrimination. If the Court had affirmed \textit{Taxman}, it would be ignoring stare decisis, thereby suffering a loss of legitimacy. It is not the same, but how close will that come to \textit{Dred Scott v. Sandford},\textsuperscript{95} where the Supreme Court took slavery off the political agenda and thereby helped set the stage for the disastrous Civil War that followed?\textsuperscript{96}

The settlement of \textit{Taxman} does not mean that the Supreme Court will not reach the issue of the continuing validity of affirmative action under federal civil rights statutes. It did, however, delay the Court's deciding that issue.\textsuperscript{97}

\textsuperscript{93} See City of Boerne, 117 S. Ct. at 2157 (Religious Freedom Restoration Act beyond power of Congress under Section Five of the Fourteenth Amendment).


\textsuperscript{95} 60 U.S. (How.) 393 (1856) (Missouri Compromise unconstitutional because Congress could not grant citizenship to slaves or their descendants).

\textsuperscript{96} Neil Gotanda, in \textit{A Critique of "Our Constitution is Color-Blind,"} supra note 20, at 68, states:

[A] parallel [exists] between the modern civil rights movement and the “first” Reconstruction; the Supreme Court’s civil rights decisions of 1989 are the equivalent of the Compromise of 1877, which ended the first Reconstruction. By fixating on formal race and ignoring the reality of racial subordination, the Court, in this second post-Reconstruction era, risks establishing a new equivalent of \textit{Plessy v. Ferguson}. There is, however, a second parallel for the Court. The greater danger for the current Court is that it will face the loss of legitimacy which confronted the Taney Court after \textit{Dred Scott} (citation omitted).