“One person’s diversity is another person’s discrimination”: Piscataway v. Taxman and the fight to retain affirmative action in the 1990s

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An honors thesis submitted to the History Department of Rutgers University, written under the supervision of Professor Paul Clemens.

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The very idea of writing a thesis, never mind this particular topic, would not have entered my consciousness, or have been considered seriously, had it not been for Professor Paul Clemens. I entered my junior year at Rutgers University with scarcely a mild interest in law and only the most rudimentary understanding of the Supreme Court and constitutional history. By the end of the fall semester, however, and after having been fortunate enough to take Professor Clemens’ course on constitutional history (from the post-civil war period to present), I was thoroughly engaged and fascinated by the Supreme Court and its much-neglected story within the larger American narrative. Towards the end of the fall semester, Professor Clemens inquired as to whether or not I was going to consider spending my senior year writing a thesis. Perhaps unbeknownst to him at the time, my response was almost visceral: absolutely not. My reasoning was fairly straightforward. Despite serving as the president of the Rutgers University debate team, I had been forced to sit out almost the entire season my junior year due to a work-schedule conflict. I had vowed to the team that I would return as an active competitor the moment my senior year began—no excuses.

As it turned out, life had other plans. Late in my junior year I learned of an internship at the United States Supreme Court, and I jumped at the opportunity. Expecting absolutely nothing, I nearly fainted several months later when I learned that I was actually being offered a position. The catch, however, was that it was for the fall semester; I would have to put school on hold and move down to Washington, D.C. in order to work full-time. With the prospect of having no classes to deal with, and the likelihood of competing for the debate team nil, suddenly the opportunity to spend time putting together a thesis project seemed increasingly attractive.
By the end of the summer before my senior year, I was certain I wanted to write this paper, though wholly uncertain of how I was actually going to do it. The idea of conducting research while working in D.C. was leaning on a set of unlikely contingencies. It was only due to the thoughtful consideration and trust that several individuals placed in me that this project ever got off the ground.

First, I must thank Professor Masschaele for going out on a limb and allowing me to receive credit for the honors seminar despite scarcely ever attending the fall class. I can only hope that the finished product will assure him that I was in fact doing research while away. Next, I would have never had the resources to live in D.C. had Professor Susan Lawrence—who also kindly agreed to serve as a second reader—not moved mountains to create an independent study program within the political science department in order to grant me the credits needed to maintain full-time status as a student; To her I owe a great deal of thanks. Likewise, if Professor Bert Levine had not agreed to serve as my independent study advisor during my time away this project would have been unfeasible.

With that said, having the unlikely opportunity to delve into a legal history topic I was deeply interested in while reporting daily to the nation’s highest court was at times an awe-inspiring experience. I will never forget Justice Scalia griping about the incorporation doctrine, Chief Justice Roberts comparing Roger Taney’s portrait to Severus Snape, Justice Thomas’ deep treble guffaws, or Justice Sotomayor’s perpetual warmth to just about everyone. More germane to this paper, however, the research itself would not have been possible without having such supporting supervisors at the Court. Namely, Gwen Fernandez, Erin Huckle, and Steve Petteway, each of whom were never bothered by my incessant reading on the job and constant fatigue, are
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I must not leave out yet another essential facilitator of this project, Steven Li, my
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often even cooked dinner. Finally, to my mother, father, sister, and friends, who long ago gave
up on having regular daily contact with me, I can only hope that absence truly does make the
heart grow fonder.

My four years at Rutgers have been an incredible experience and I would like to think
that this project is an expression of my growth as a student. With that in mind, I dedicate this to
everyone I have worked with, learned from, and have had the joy of getting to know during my
stay on the Banks.

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Introduction

This paper was written to further explore the history of one specific lawsuit on affirmative action, and the ensuing chapters do just that. In reality, however, this paper is much more than an extended account of the legal proceedings that took place. It is rather an attempt to use the lawsuit, *Board of Education of Piscataway v. Taxman*, as a medium to discuss some of the specific issues embedded in the legal and political history of affirmative action during the 1990s. It is indeed a narrative about a federal court case, but also one about the intersection of law and politics more generally on the charged issue of racial preferences.

It is also worth pointing out that this is a history, not a treatise on the philosophy of affirmative action, and details are used liberally on purpose. In this account, it is the details that are of key importance to understanding what is at issue. In other words, the background and the facts of *Taxman* are explored in depth because it is precisely these facts that make the case particularly salient.

At its most basic level, *Taxman* is a story about a controversial employment decision involving two teachers, one black and one white. It is about a lawsuit that arose in 1989 when the Piscataway Board of Education had to choose which of these two seemingly equal faculty members to lay off. Following their own state-approved affirmative action policy, the school board laid off the white teacher, Sharon Taxman, in order to maintain greater diversity among teachers at the high school. Taxman subsequently sued, and by 1997 the case reached the Supreme Court. The legal question at issue was remarkably straightforward: is it permissible to justify affirmative action in employment decisions on the basis of “fostering diversity”?

During the protracted ascent through the federal court system, *Taxman* became increasingly less about a school board trying to promote diversity at a high school, and more
about the extent to which affirmative action would still be permissible at the close of the twentieth century. *Taxman* was crucial in framing this debate because of the uncanny way in which it distilled affirmative action to its most basic question: when all else was equal—when there was no discrimination or serious underrepresentation of minorities—was it still legal, or even ethical, to choose a black candidate over a white candidate? Beneath the surface, the unanswered question was even greater: thirty years after the civil rights movement, was it now time to end the country’s experiment with building racial inclusion through “reverse discrimination”?

This paper is then a history of how the federal courts and the Clinton administration were forced to answer these questions—from two very different perspectives—when confronted with *Taxman*. While American history is likely to teach Bill Clinton as the president strong on civil rights as compared to his 1980s predecessor Ronald Reagan, *Taxman* is hard evidence of an area, affirmative action, in which Clinton’s lackluster commitment and political calculation enabled Reagan’s vision to triumph emphatically; nearly ten years after leaving the presidency, the conclusion of *Taxman* was in some ways a tribute to Reagan’s anti-affirmative action stance of complete race neutrality.

In telling any story, perspective is important. That being said, this history is told exclusively from the point of view of the school board as well as the individuals fighting to keep the board’s affirmative action policy intact. Stories are generally told better through the eyes of the protagonist, and in *Taxman* it was clearly the school board’s position that was pushing the legal boundaries, stirring the majority of the debate, continuing the appeal process in court and brushing up against an increasingly conservative view on the issue. For this reason, the story is
told through the eyes of the Piscataway board members, the school board lawyer, and the Assistant Attorney General, Deval Patrick.

The chapters are organized to build very broad ideas in a very specific way. Chapter one establishes the tenuous nature of the law surrounding affirmative action at the moment Sharon Taxman filed her discrimination complaint. By looking at how the Supreme Court was grappling with the issue it should be clear that from a legal perspective affirmative action was up for grabs. Furthermore, chapter one contrasts an increasingly conservative Supreme Court with President Clinton’s incoming team of liberals, and explores what the Lani Guinier nomination debacle may have portended about Clinton’s commitment—or lack thereof—to unpopular civil rights ideas. Chapter two introduces Deval Patrick, Clinton’s assistant attorney general, and highlights the way in which Patrick’s deep convictions moved civil rights enforcement sharply to the left. Chapter three explores the history of Piscataway Township, the school board’s longstanding commitment to promoting diversity, and the lawsuits history through the decision at the District Court. Chapter four details the intersection of Deval Patrick’s ideas on affirmative action, the government’s stance in Taxman, and the federal circuit courts’ treatment of the issue. Chapter five picks up the litigation history of Taxman, and analyzes the Third Circuit Court of Appeals’ broad ruling on the case as well as the implications of this ruling. Finally, chapter six outlines how both sides of the affirmative action debate viewed the settlement that pulled Taxman from the Supreme Court’s docket.

Collectively, these chapters argue that by the mid 1990s the majority of the country was no longer willing to justify affirmative measures in the purest sense. That is, a majority of Americans did not want to advance minorities over non-minorities when all else was equal. The hypothetical rationale for affirmative action famously given by President Lyndon B. Johnson—
that it is unjust to simply set all things equal and expect true equality to emerge given our
nation’s history—no longer appeared acceptable. Essentially, the thrust of this paper examines
how this seachange in civil rights came to be. More specifically, the history of *Taxman*
underscores this shift in attitude, beginning at a point in which the school board’s affirmative
action policy appeared unquestionably legitimate, and ending at a moment in which even the
liberal leaning Clinton administration refused to support it. Understanding how and why this
came to be is understanding the story of *Board of Education of Piscataway v. Taxman.*
Chapter 1

Affirmative action circa 1990: on precarious legal and political ground

Even for trained lawyers, extrapolating clear guiding principles from the series of affirmative action opinions that were handed down by the Supreme Court during the 1980s is a tall order. The Court had upheld and struck down several different types of racial preferences—mainly in employment decisions—ranging from hiring, promoting, and layoffs. Each case seemed to have an internal logic of its own, and broadly speaking, seemed to turn on the specific facts of the case more than any overarching, immutable principles of law. By the end of the 1980s, and as the Court was growing more conservative following three Reagan appointments, it had long been established that affirmative action was both legal and constitutional. It was unclear, however, how far the increasingly conservative Court would allow affirmative action policies to go, or conversely, whether this new coalition could garner a majority to end such policies in the future. To underscore the uncertainty of the law during this period, it is worth briefly examining two of the major affirmative action opinions handed down just as the Piscataway lawsuit was getting underway. As will be shown, these cases yielded two opposing stances on the issue of affirmative action, and further muddled the jurisprudence of racial preferences going into the 1990s. That being said, at the start of Bill Clinton’s presidency the legality of affirmative action was an open question.

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On January 23, 1989, just three days after Ronald Reagan had left office and six months before Sharon Taxman would file her discrimination claim with the Equal Employment Opportunity Commission, the Supreme Court tightened the noose on affirmative action programs
nationwide. It was on this day in which the Court released its 6-3 opinion in *City of Richmond v. Croson*; the decision held far reaching implications both legally and symbolically for the future of affirmative action.

Writing for the majority, Sandra Day O’Connor struck down a minority set aside employed by the city of Richmond, Virginia. According to the policy in question, 30% of any given city contract was to be subcontracted out to minority run businesses. Rather than simply delivering a narrow ruling on the case at hand, O’Connor went much further. The majority opinion stipulated that all racial preferences implemented by state or local government agencies would now have to survive “strict scrutiny”. In other words, this meant that any such race-based policy would have to be narrowly tailored to serve a “compelling governmental interest”. The policy could not “unnecessarily trammel” the interests of non-minorities, and must be a product of having no race-neutral alternatives available to accomplish the same goal.

Beyond mandating that all programs would now have to survive the most heightened of judicial scrutiny, the *Croson* opinion was also notable for the remarkably narrow language it used to define what now constituted a “compelling governmental interest”. Historically, if an institution or actor could show that they were in fact using the racially geared program to remedy the effects of prior discrimination, the Court would accept this as a sufficient government interest. More importantly, the institution or actor did not have to show they had specifically initiated the discriminatory behavior they were now correcting, and the beneficiaries of the program were never required to be the actual victims of the historical discrimination in question. Much to the chagrin of Reagan’s Department of Justice, “victim specific” policies never became the Court’s ultimate requirement when upholding affirmative action programs throughout the
In the opinion, O’Connor demanded that the city “…show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry…” Furthermore, O’Connor argued that “[t]o accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”

Evoking sentiments strikingly similar to the race-blind pronouncements proffered by the departing Reagan administration, O’Connor remarked that “The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”

In Firefighters Local Union No. 1784 v. Stotts (1984), Byron White had indicated in his majority opinion that the Civil Rights Act of 1964 permits “…relief only to those who have been actual victims of illegal discrimination”. Despite the broad interpretation Reagan’s Justice Department gave to this, White’s victim-specific rationale was applied only to the narrow case at hand, one in which employers broke the rules of seniority in layoff decisions to retain minority workers. To be clear, White’s argument actually was meant to read “If you are going to break the rules of seniority on account of keeping minority workers, it is only constitutional to do so when granting relief to individuals who had been discriminated against in the past”. In subsequent cases the Court would uphold plans in which the beneficiaries were never in fact actual victims of discrimination. Sandra Day O’Connor’s concurring opinion in Wygant v. Jackson Board of Education (1986) made this clear when she pointed out that a “plan need not be limited to the remedying of specific instances of identified discrimination”.

3 Ibid.
4 Ibid.
While not accomplishing the endgame of Reagan’s Department of Justice—dismantling racial preferences entirely—the language of the opinion incorporated much of what the outgoing administration had fought for: in one fell swoop it made non-federal minority set-asides inherently suspect and casted doubt upon the viability of race based policies in employment more generally. Charles Fried, who had stepped down as Solicitor General just one week earlier, told reporters that this decision “…would have made his four years in the job ‘worth it’ even if he had accomplished nothing else”.  

William Bradford Reynolds, the Assistant Attorney General throughout Reagan’s presidency, later remarked that *Croson* added to the sense that he had finally shifted the direction of the United States Supreme Court in a way that was closer to the former administration’s race neutral stance.

From a very different vantage point, Thurgood Marshall, at the age of 80 and sitting on the bench for his 21st term, could not help but agree with the significance attached to the *Croson* decision by the departing Reaganites. Marshall recognized that the delicate contours of affirmative action jurisprudence shaped by him and his colleagues in the earlier parts of the decade were being called into question. Writing a fiery dissent on behalf of himself, William Brennan, and Harry Blackmun, Marshall opened his opinion in *Croson* with forceful language to imply that the majority was not only racially insensitive, but also legally inconsistent:

> It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond’s set-aside program is


indistinguishable...[from] the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick* (1980).  

Marshall called the majority opinion “...a deliberate and giant step backward in this Court’s affirmative-action jurisprudence”, and one that “…launches a grapeshot attack on race-conscious remedies in general.”

In retrospect, it is quite likely that even the more liberal Court of the early 1980s would have struck down the plan in *Croson*, especially considering that the 30% set-aside was unusually high. However, the danger in the *Croson* opinion for liberals who still supported various forms of affirmative action was its overly broad language. Marshall was quite obviously distraught by this, and continued his lengthy dissent by remarking that “I would ordinarily end my analysis at this point…However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.”

Marshall’s fears concerning the Court’s broad language in the opinion were not unfounded. At the time of the decision there were similar set aside programs in 32 states and 160 other cities.  

What is more, Marshall himself had already produced a famous quote regarding strict scrutiny in an opinion nine years earlier, calling it “strict in theory…fatal in fact”, referring to the extremely low probability that an affirmative action policy subjected to this heightened

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8 Ibid.

9 Ibid.

judicial standard would ever be upheld. \(^{11}\) With little he could do, Thurgood Marshall voiced his outrage from the impotent position of the minority as the *Croson* court made this fatal level of review the law of the land.

Marshall and the liberal trio were not alone in their dire assessment of what the *Croson* opinion may entail. Following the decision, civil rights activists and scholars feared that cities across the United States would dismantle their affirmative action programs in order to avoid expensive litigation. In an attempt to counter this, Professor Laurence Tribe of Harvard Law School moved quickly to gather some of the most preeminent constitutional scholars and release an advisory statement on the state of affirmative action in light of *Croson*. On March 30, 1989, just over three months after the opinion was handed down, Tribe and 28 others convened a conference in Boston to discuss what practical impact the court’s ruling had on programs already in place. \(^{12}\)

The statement that ultimately came out of the conference is notable not only for what it said, but also for the signatories it boasted. Listed were reputable names from the past, present, and perhaps most importantly, the future of civil rights policy. The deans of Harvard, Yale, Columbia, Chicago, Michigan and Berkeley law schools were listed alongside former government officials such as Eleanor Norton, the first female to head the Equal Employment Opportunity Commission under Jimmy Carter, and Burke Marshall, the Assistant Attorney General under John F. Kennedy. Beyond this, three signatories are of particular note: Drew Days, Walter Dellinger, and Christopher Edley. The first two would serve as the first and second


Solicitor General respectively during the Clinton administration, and the third would become one of Bill Clinton’s top advisors on civil rights and affirmative action, ultimately chairing a review on affirmative action policies nationwide.¹³

Signed by these influential figures, the statement was something of a manifesto on how to successfully protect affirmative action in light of heightened judicial scrutiny. It shot right to the heart of the matter, pleading that although in light of Croson “…some have recently argued that race-conscious remedies by local and state governments should be regarded as conflicting with the Constitution…we regard this assessment as wrong.”¹⁴

More to the point, the scholars then spelled out the constitutional rules of engagement for affirmative action plans according to the Court’s precedents. They made it clear that there was a fundamental difference between using race to advance permissible objectives such as correcting historic discrimination or promoting diversity versus using race to achieve malignant racial exclusion. Local governments did not have to document past discrimination to implement a program, they argued, and programs are not to be limited to “redressing the effects of that government’s or body’s own past discrimination”.

Advancing their argument one step further, the scholars finished by touching upon a less robust area of the court’s jurisprudence: promoting diversity in education. Since the 1978 decision in Regents of the University of California v. Bakke,¹⁵ the Court had said very little as to


¹⁴ Ibid

¹⁵ See Regents of the University of California v. Bakke. (1978), where Justice Powell wrote a plurality opinion striking down the use of racial quotas in admissions decisions, but allowed for race to be used as one “plus factor” to advance the compelling interest of diversity in higher education.
the extent to which affirmative action programs could be upheld based on the promotion of
diversity alone. The scholars hit on just that point, recalling:

In educational settings in particular…the Supreme Court has recognized not only the
crucial role of racial integration…but also the positive educational value of assuring
racial diversity and facilitating multiracial experiences. Some Justices have explicitly
treated this value as a sufficiently compelling governmental interest to justify race-
conscious measures in education\(^\text{16}\). And the Supreme Court as a whole has not yet
resolved the issue of what goals other than overcoming historic discrimination may
provide permissible grounds for race-conscious measures in areas outside education.\(^\text{17}\)

In many ways, this statement reflected the lessons of affirmative action going into the
1990s. Three conservative Reagan appointments to the Supreme Court later, it was clear that all
but the most exceptional variants of affirmative action would be viewed suspiciously. Despite
this, the Court was still bound by the tradition of stare decisis, and the 1980s had witnessed
several cases in which contract set asides and employment decisions based on race and gender
had been upheld.\(^\text{18}\) Moving forward, the debate over affirmative action became a battle of
interpretation. That is, liberals would push the idea that the Court had implicitly allowed for all
types of affirmative action except for that which they had explicitly prohibited. Conservatives on
the other hand, would argue that the Court’s suspicion implied banning all but the most

More precisely, on the 1988-1989 Court Justice Stevens, Blackmun, Brennan, and Marshall
had all implied in previous opinions they would consider the promotion of diversity a compelling
governmental interest in its own right. Justice O’Connor had not explicitly ruled it out, and had
stated that “although its precise contours are uncertain, a state interest in the promotion of racial
diversity has been found sufficiently ‘compelling’, at least in the context of higher education”
\(^\text{17}\) Supra at 13. (1713)

For examples of racial set asides and preferences see \textit{Fullilove v. Klutznick} (1980),
\textit{Firefighters v. Cleveland} (1986), \textit{Local 28 Sheet Metal Workers v. EEOC} (1986). For gender
being used as a plus factor in promotion decisions see \textit{Johnson v. Transportation Agency, Santa
Clara County} (1987).
necessary forms of affirmative action. How these differing points of departure would play out in practical terms was anything but clear at the start of the new decade. More to the point, it would take cases such as *Piscataway v. Taxman* to test how these vague rules would be applied in the real world.

As the constitutional scholars had suggested, the Court was going to have to better articulate what “goals other than overcoming historic discrimination” would survive scrutiny in court. The *Taxman* case would ultimately center on this very question and it appeared to be one of the most open areas for debate heading into the 1990s. In fact, just nine days into the new decade and less than one year after *Croson* had been decided, the Supreme Court granted certiorari in a case that would grapple with this very issue.19

The case was *Metro Broadcasting Inc. v. Federal Communications Commission*, and on June 27, 1990, the Court made something of a surprise decision. Justice William Brennan, writing the 5-4 majority opinion, upheld two F.C.C. programs that awarded preferences to minorities in the issuance of broadcast licenses. The rationale used to uphold the policies, perhaps more so than the holding itself, is of particular importance. Brennan’s majority opinion declared, “We hold that benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible…”20 Furthermore, Brennan maintained, the F.C.C.’s interest in “enhancing broadcast diversity” was an “important governmental objective”. In keeping with past precedent, the Court required the federal


affirmative action program to only pass the so-called “intermediate level” of scrutiny test.\textsuperscript{21} Under this level of review, the F.C.C.’s minority preferences were deemed constitutionally sound.

Moreover, the opinion’s language regarding the “fostering of diversity” as a permissible goal held powerful implications. For this reason, Justice Stevens concurred in both the opinion and judgment of the Court, but wrote separately to highlight the significance of Brennan’s rationale. Opening his concurrence, Stevens observed that “Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.”\textsuperscript{22} More specifically, he pointed out that “The public interest in broadcast diversity, like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school, is in my view unquestionably legitimate.”\textsuperscript{23}

Response to the \textit{Metro} decision was predictable. On the left, legal scholars speculated that the Court may be receptive to applying the diversity argument to uphold affirmative action programs in other areas. Some affirmative action enthusiasts were even more sanguine, interpreting \textit{Metro} as an invitation to overturn the previous term’s \textit{Croson} decision.\textsuperscript{24} Conservatives such as Charles Fried, however, disagreed, and lamented that the type of minority

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\\textsuperscript{21} In \textit{Fullilove v. Klutznick} (1980) a plurality of the court had decided that affirmative action programs enacted by Congress should be given greater deference, and thus only have to survive a lower level of scrutiny in order to be upheld, a standard the Court calls “intermediate scrutiny”.

Supra at 20. J. Stevens concurring.
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\begin{flushright}
\\textsuperscript{22} Ibid.
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\\textsuperscript{23} Ibid.
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set-asides upheld in this instance were a “‘ready-made source of corruption’ that rewarded people who needed help the least: wealthy minority entrepreneurs…”

What both sides could agree on, however, was the tenuous nature of the court’s approval for affirmative action policies at the moment. The swing vote in *Metro* was provided by Justice Byron White, whose decision to join the majority appeared much more a product of his deference to congress’ authority in crafting remedial legislation than any liberal proclivities on the affirmative action issue itself.  

Thus, when Thurgood Marshall announced his retirement from the bench exactly one year later in June of 1991, it was clear that an anti-affirmative action coalition could be in the making.

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President George H.W. Bush, though not advocating the type of categorical rejection of affirmative action taken up by his predecessor, was equally opposed to any sort of racial preferences that bordered on the idea of rigid quotas. His administration would ultimately be forced to sign into law a bill that Reagan likely would have rejected: The Civil Rights Act of 1991.  

To anti-affirmative action Reaganites who rallied behind the idea of race-neutrality, Bush’s most important accomplishment on this front was the successful appointment of Clarence Thomas to the Supreme Court in July of 1991.

Clarence Thomas was something of an anomaly. Looking to burn the bridge that had ultimately enabled much of his own personal success, Thomas adamantly opposed racial preferences of all kinds. In a Yale Law and Policy Review article, Thomas derided affirmative

25 Ibid.

26 Ibid.

action as “social engineering”.\textsuperscript{28} Moreover, during his eight-year tenure as chairman of the Equal Employment Opportunity Commission (EEOC), Thomas moved the agency in an increasingly conservative direction, leaving it in 1990 as an institution far removed from the enforcement vehicle it was in the 1960s and 70s.\textsuperscript{29} By the mid 1980s Thomas had effectively taken the teeth out of the EEOC, discouraging the use of statistical disparities to prove discrimination in employment, and advising staff lawyers to discontinue proposing settlements that utilized goals and timetables to increase minority representation in the work force.\textsuperscript{30} Clarence Thomas along with others such as William Bradford Reynolds, the Assistant Attorney General from 1981 through 1988, and Clint Bolick— a special assistant to both of these individuals— was part of the cadre under Ronald Reagan who shaped the “zero is best” approach to affirmative action. The only thing deterring their absolutist stance from being adopted on the ground was the law of the land itself. Liberals were justified then in fearing what placing Thomas on the bench entailed for the future of affirmative action jurisprudence.\textsuperscript{31}

An article covering the changing of the guards from Thurgood Marshall to Clarence Thomas correctly observed “It comes amid a growing debate over the policies of affirmative action and racial preferences. The political consensus supporting those policies, increasingly

\begin{itemize}
\item Supra at 6. (219)
\item \textsuperscript{30} Robert Pear. Court Nominee Defied Labels As Head of Job-Rights Panel. \textit{New York Times} July 16.
\item Stuart Taylor. 1991. Beware the Judicial Override. \textit{New York Times}. October 3. Taylor’s article cites an unpublished opinion in which Thomas struck down an F.C.C. policy that preferred women for broadcast licenses, a policy strikingly similar to that upheld by the Court in \textit{Metro Broadcasting Inc. v. F.C.C.} Had Thomas sat on the court for \textit{Metro} it is all but certain the opinion would have been 5-4 in the opposite direction.
\end{itemize}
fragile in recent years, seems frayed, and civil rights groups and their allies are increasingly on
the defensive, both in the courts and in the political realm.\textsuperscript{32} For civil rights groups, Thomas’
52-48 confirmation in the Senate was the confirmation of something much larger: It was official
that moving forward the Supreme Court was no longer an amicable medium in which to further
or even maintain most liberal civil rights interests. Legal weapons such as the Civil Rights Act of
1964 had long been turned on their heads, and groups that had historically looked to the courts
for help were now focused on keeping their cases out of them. As the \textit{Piscataway v. Taxman} case
will show, the legal and political reality of the 1990s meant that allowing courts to better define
what types of race-based policies were permitted meant risking the loss of affirmative action
programs that had been deemed acceptable ten or twenty years earlier.

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This was the reality that confronted Bill Clinton when he entered office in 1993. Clinton
was open about his desire to make his cabinet “look like America” by appointing men and
women of all races to fill various posts. More importantly for civil rights policy, Clinton also
made it a point to fill most key positions in the area of civil rights enforcement with figures from
historically liberal civil rights groups. In the Department of Justice, Deval Patrick, Bill Lann Lee,
and Kerry Scanlon—each of which who had worked for the NAACP Legal Defense Fund—
would take the most important posts in the Division of Civil Rights. Isabelle Pinzler would serve
as one of the top deputies in this division, and had come from the American Civil Liberties
Union.\textsuperscript{33} Drew Days, who also spent several years at the NAACP Legal Defense Fund before

\textsuperscript{32} Robin Toner. 1991. Symbolic Justice; Capturing an Era’s Racial Conflicts and Ironies. \textit{New

and Public Policy}. 24 Spring 2001. (555)
becoming the first African American Assistant Attorney General under Jimmy Carter, was picked to be Clinton’s first Solicitor General—a position with immense independence in the litigation of the law before the Supreme Court.34

To chair the Equal Employment Opportunity Commission Clinton ultimately selected Gilbert Casselas from the Puerto Rican Legal Defense Fund. Casselas’ recognition that the agency, which had grown lax under Clarence Thomas’ watch in the 1980s, needed to be reinvigorated was captured at his press conference when he remarked that “By the end of my term, I hope people worry when they get a call from the EEOC.”35 Rounding out the important civil rights related posts was Norma Cantu, formerly a director of the Mexican-American Legal Defense and Education Fund, for Assistant Secretary for Civil Rights at the Department of Education. And finally, Clinton appointed Roberta Achtenberg as Assistant Secretary for Fair Housing and Equal Opportunity at the Department of Housing and Urban Development;36 Achtenberg was formerly the executive director of the National Center for Lesbian Rights.37

On paper then, it would seem as if Bill Clinton had the opportunity, barring any impediments from the federal courts, to regain the territory lost by liberals in the area of civil rights under Reagan and Bush. To be fair, in some areas, such as disparate impact litigation,


37 Supra at 33. (556)
Clinton’s team of liberals vigorously enforced the law. However, as the Taxman case will exemplify, in areas such as affirmative action, where enforcement entailed national attention and the possibility of negative scrutiny in the press, Clinton’s political sensitivity and inclination for popular compromise threw the more liberal stances to the fan.

Despite having the support of over 80% of blacks that voted in the 1992 election, Clinton was largely supported by a base of “New Democrat” moderates who envisioned a more limited version of affirmative action. Clinton was sensitive to this fact, and was loath to support some of the more liberal policies openly endorsed by his executive appointments. Perhaps at no point was Clinton’s lack of political gumption on civil rights more obvious than in the weeks after he made the decision to appoint Lani Guinier to Assistant Attorney General.

For Bill Clinton, Lani Guinier was a natural choice for the post of Assistant Attorney General. As William Bradford Reynolds had shown under Ronald Reagan, the position offered the opportunity to influence the direction of civil rights policy, as it entailed formulating the litigation strategy for major civil rights cases in the lower federal courts, where the vast majority of cases would ultimately be settled. Lani Guinier had spent the 1980s as a staff attorney for the Legal Defense Fund and had even litigated several voting rights cases against Clinton during his time as Arkansas governor. On a personal level, she had attended Yale Law School with the President and First Lady, and had even invited them to her wedding. In fact, just three days into the new presidency, Lani Guinier hosted a small private dinner party for Bill and Hillary Clinton.

On April 29, 1993, Clinton announced Guinier as his nominee for the crucial civil rights job. With the help of former Reagan official Clint Bolick, however, controversy began surrounding the appointment within a single day. On April 30th, Bolick penned an acerbic attack on two of Clinton’s nominees, Lani Guinier and Norma Cantu, for the Wall Street Journal in an editorial entitled “Clinton’s Quota Queens.” Bolick used law review articles Guinier had written to paint her as a radical leftist who was not only firmly in support of racial quotas, but fundamentally opposed to the principle of “one-person one vote”. Laurence Tribe and Randall Kennedy, both renowned constitutional scholars at Harvard Law School, would later remark that a fair reading of Guinier’s articles could easily disprove Bolick’s comments. For the time being, however, Clint Bolick had set the agenda for conservatives who were opposed to Bill Clinton’s revamping of civil rights policy in the executive branch.

During the initial two weeks following the nomination, criticism remained largely confined to circles on the right. With mainstream America still largely apathetic on the issue, Clinton was still willing to openly support Guinier, and on May 11, during a speech to the Leadership Conference on Civil Rights, Clinton briefly came to her defense:

I thank you for the vote of the national board of the leadership conference today to support the nomination of Lani Guinier to be Assistant Attorney General for Civil Rights. I want to say a special word of support for Lani Guinier. I went to law school with her, and I announced at the Justice Department the other day when we announced all of our Assistant Attorneys General that she had actually sued me once. Not only that, she didn’t lose. And I nominated her anyway. So the Senate ought to be able to put up with a little controversy in the cause of civil rights and go on and confirm her so we can get about the business of America.


By the latter part of May, however, attacks on Guinier snowballed, and grew into a major story in the national press. On May 21, the Washington Post recapped the charges initially brought by Bolick, and included discouraging statements from Democratic congressmen. Senator Patrick Leahy commented that “If the writings I’ve seen so far reflect the way she feels about how the Civil Rights Division should be run, then it would be a complete aberration and in no way would be acceptable to me”. Senator Joseph Biden added that at her confirmation “there will be a fair amount of explaining to do.”\textsuperscript{43}

Regardless of the actual merit of Guinier’s writings, her nomination soon took on an even larger meaning for moderates who supported Clinton. On May 23, the press took the story one step further. The New York Times described the “bedrock” of Clinton’s electoral base as being “frightened and angry” over a “long list of signals they feel send a message of overwhelming liberalism to voters…like the choice of the civil rights litigator Lani Guinier.”\textsuperscript{44} This story was juxtaposed with “A Gallup poll conducted May 10-12 [that] found only 45 percent of the respondents approved of the job Mr. Clinton was doing, a record low for a President this early in his term.”\textsuperscript{45} From May through the beginning of June over 330 articles appeared in the national press covering the Guinier controversy\textsuperscript{46}, most of them with titles implying she was a “radical”

\textsuperscript{43} Michael Isikoff. 1993. Confirmation Battle Looms Over Guinier. \textit{Washington Post}. May 21. Isikoff later admitted that the coverage did not accurately portray Guinier’s views, but he argued that the articles were meant to simply cover the controversy. For a discussion about this and how the media put a spin on Guinier’s views without ever fact checking with her actual law review articles, see Laurel Leff “The making of a quota queen” from Martha Fineman. Feminism, media, and the law. New York: Oxford University Press, 1997 (27).


\textsuperscript{45} Ibid.

\textsuperscript{46} Supra at 39. (39)
and that Clinton was retreating “leftward.” Even the New York Times Op-Ed page was framing the nomination as an indictment against Clinton, noting that “questions about how she came to be nominated are as important as she is herself…How could he have done such a thing?” Based on her nomination alone, the president was no longer “the Bill Clinton who had stood against quotas during the campaign.”

By the beginning of June the attacks had taken a toll on the politically sensitive president. Early in the day on June 2nd, Clinton cautioned that “he did not agree with all of her writings on civil rights and needed to consult with senators before determining how to proceed.” A last ditch effort by Guinier to defend herself on Nightline was of no avail. On June 3rd, much to the chagrin of the civil rights establishment, Clinton withdrew Guinier’s nomination.

At the press conference announcing the withdrawal, Clinton came down hard on Guinier’s law review articles, commenting that “They clearly lend themselves to interpretations that do not represent the views that I expressed on civil rights during my campaign, and views that I hold very dearly…had I read them before I nominated her, I would not have done so.” After his remarks were given, one reporter commented quite pointedly, “Mr. President, there’s a perception among some of your critics among the Black Caucus that your move to the center and your desire to have conservative Democratic votes in the Senate on your economic


plan and your health plan to come played a large role in this…”52 A conversation between
Guinier and Clinton behind closed doors just before the withdrawal announcement implied a
similar idea. Clinton told Guinier, “…my problem is with your articles and what other people are
saying about them, and it will be divisive to have this conversation [in the senate] and I need
these senators’ support on other things.”53

In his 2004 autobiography, Clinton sounded a similar tone when recapping the Guinier
withdrawal. Clinton recalls a conversation with Senator David Pryor, in which he was reminded
“that we also have an economic program to pass and not a vote to spare”. Regardless of this
political explanation, Clinton’s memoir maintains that Guinier’s articles were “in conflict with
[his] support for affirmative action and opposition to quotas, and seemed to abandon one man,
one vote.”54

Clinton’s fear of losing support among moderate Americans and congressional support
from moderate Democrats was telling. It signaled from the start of his presidency that on the
hierarchy of objectives, refashioning a strong civil rights agenda to counter the retreat that
Reagan had begun twelve years earlier was far below many of Clinton’s other goals. As
Guinier’s withdrawal suggested, Clinton would remain supportive of liberal civil rights causes
only insofar as they did not alienate his more moderate base of supporters.

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Ibid.

53 Supra at 39.(122)

Chapter 2

Deval Patrick and the aggressive enforcement of civil rights

Less than twenty-four hours after Bill Clinton withdrew the nomination of Lani Guinier to be Assistant Attorney General, the media pendulum began to sway in the opposite direction. The broad assault on Guinier’s academic theories was replaced with an equally assertive defense of her position. In bi-polar fashion, the press turned the Guinier withdrawal into a referendum on Clinton’s civil rights commitments.

Beginning on June 4, in the days after Clinton had held the press conference regarding the withdrawal, the press finally began exploring Guinier’s ideas beyond what had been ascribed to her by conservative commentators. William Coleman of the *New York Times* protested that Guinier was “superbly qualified, mainstream and pro-integrationist in the tradition of Thurgood Marshall” before getting into a detailed discussion about her ideas on cumulative voting, majority rule, and voting rights.\(^{55}\) Another New York Times reporter did a piece examining a county in Alabama where the cumulative voting ideas that Guinier had advocated in her review articles had not only been implemented, but had been “used successfully and with minimal controversy.”\(^{56}\) As an increasing number of individuals belatedly began defending the failed nominee, a new consensus was beginning to form over what had just happened: namely, that

\footnotesize{\begin{enumerate}
\end{enumerate}}
“Professor Guinier was the target of the most effective smear campaign seen in Washington since Joe McCarthy’s day.”  

Regardless of how much truth this hyperbolic analysis held, the press was suggesting that the story was now less about a radical liberal failing to be confirmed and more about a President who allowed conservatives to take over the civil rights agenda. “Who is Bill Clinton? What does he stand for?” asked Maureen Dowd of the New York Times. Academics weighed in as well, arguing quite correctly that by allowing such writings to derail a nominee, it would invariably have a chilling effect in academia, causing fewer “legal scholars who have serious ambitions for public service to take chances in their work.”

Most damaging for Clinton, however, was the obvious rift this incident had created between himself and the liberal civil rights groups. As the press vindicated Guinier, Clinton was less able to defend his withdrawal decision. Moreover, as mainstream America was reintroduced to Lani Guinier in a more favorable light, it became increasingly important for Clinton to save face with liberal groups that had supported him politically. For the next few days his aides would reach out to these individuals and organizations in order to repair the “breach that [had] now opened between him and the leaders of civil rights and women’s groups.”

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59 David Margolick. 1993. Musty Academic Speculation or Blueprint for Political Action. *New York Times*. June 4. This is far from an original idea, and the chilling effect in academia was widely speculated on after Robert Bork’s writing played an influential role in his failure to attain a seat on the Supreme Court in 1987. What was particularly noteworthy this time was that Guinier’s writing had deterred her from even receiving a senate hearing.

Over one month later, President Clinton was still picking up the pieces politically from his failed appointment. In an attempt to mend relations with the black community, Al Gore traveled to Indianapolis in mid July to speak at the annual N.A.A.C.P. convention. Before the Vice-President gave his remarks, N.A.A.C.P. chairman William Gibson noted that Clinton “‘kicked us in our teeth’ by abandoning Ms. Guinier last month.”61 Gore then made an attempt at reconciliation, promising, “We intend to have a great attorney general for civil rights—one that you and we and our country can be proud of.”62 The remark reportedly drew near silence from the crowd.63

Over the next few months the Assistant Attorney General seat remained conspicuously open. In light of the lingering resentment amongst civil rights leaders over the Guinier incident, Clinton knew he needed a strong candidate to fill what was perhaps the most important post for setting the civil rights agenda. However, his next choice, John Payton, would mark yet another failed nomination. At first glance, Payton appeared to be a highly attractive choice. In fact, he had participated in several important civil rights court battles and had even represented the city of Richmond, Virginia in the Croson case four years earlier. His strong rapport with civil rights groups was clearly a plus factor for the administration as they looked to make good on their election promise to reinvigorate civil rights enforcement at the Justice Department.64

Unfortunately for Clinton’s already battered image, Payton too had some insurmountable pitfalls. The most glaring of these was the fact that he had not voted in sixteen years, and the

62 Ibid


Congressional Black Caucus took particular issue with this. Nina Totenberg of NPR news framed the dilemma quite poignantly in noting that “for members of the Black Caucus, some of whom had fought and been even beaten up gaining the right to vote, this was not an acceptable thing for a man who was to head the Civil Rights Division.”65 This moral argument made against Payton was coupled with perhaps an even more potent political one for Black Caucus members: The nominee had remained ambiguous on whether he supported an interpretation of the Voting Rights Act which would allow for voting districts to be gerrymandered by race in such a way as to create black majorities.66 Many of the Caucus members had been successfully elected because of this process, and the possibility of an interpretation hostile to their political interests was naturally unacceptable to the confirmation. The writing was on the wall in the senate—Payton wasn’t going to be confirmed; he wrote a letter to Janet Reno in December of 1993 announcing his withdrawal.

It took until February of 1994, over one year after taking office, for Clinton to come forward with a nomination that would both appease civil rights groups and win confirmation in the Senate. On February 1st, Clinton held a press conference to introduce his third nomination for the post. He prefaced the introduction by stressing the importance of the position: “We need a strong and aggressive Civil Rights Division and a strong and compassionate advocate for freedom and fairness at the helm of that Division.”67 Stepping to the podium was Deval Patrick, a


young, black, and relatively unknown lawyer. From this point forward, until about three years later when he would step down, Patrick would lead the Civil Rights Division in a sharp left turn from where it stood following the end of Bush’s presidency. In fact, by the end of his tenure, Patrick’s close relationship with the President had many observers considering him to be the most influential Assistant Attorney General in the previous twenty years. His personal impact on both the department and President Clinton was a key factor in elevating the *Piscataway v. Taxman* case from just another affirmative action lawsuit being debated in the appellate courts, to a point of contention in the national debate beginning to develop over whether race-based policies should be continued.

In accepting the nomination for Civil Rights Chief, Patrick remarked that “To understand civil rights, you must understand how it feels. How it feels to be hounded by uncertainty and fear about whether you will be fairly treated.” The comment was not simply academic. At the age of fifteen, Patrick recalls being terrified when a group of teenagers surrounded the car he and one other were sitting in, and shouted “Nigger! Nigger! Get out of here!” while banging on the windows. This incident stuck with him. Christopher Edley, a top advisor to the President, would later explain that “Patrick ‘provides a moral grounding and a language of values that teaches people the importance’ of civil rights policies.”


70 Supra at 14.

71 Supra at 15.
remarks as well as the moral framework described by Edley both seem to suggest that the 
Assistant Attorney General’s firm beliefs on these issues were shaped from real life experience.

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Patrick was raised in the Robert Taylor Homes housing project in South Chicago. The neighborhood has been described as “one of the most impoverished and crime-ridden communities in the nation”, where “Drugs, violence, broken families, and welfare dependence are the order of the day”.73 He was raised without a father, who left when he was four years old, and grew up in a basement with his sister and mother, the latter of whom was a welfare beneficiary through much of Patrick’s childhood.74 The room his family shared had only two beds, and on every third day Patrick would take his turn sleeping on the floor.75 As Gwen Ifill discovered when putting together her book on breakout black leaders, Patrick’s “childhood was the kind of hardship tale most politicians have to embellish in order to seem more authentic.”76

Despite the adversity, Patrick excelled throughout elementary and middle school, and by eighth grade his teacher recommended him for the “A Better Chance Program”. Established in 1963, the program was designed to take poor young blacks that showed academic promise and place them in impressive private and public schools outside of their impoverished

74 Ibid.
76 Supra at 17 (181)
neighborhoods. For Deval Patrick, this meant free room and board at Milton Academy, a prestigious private high school in Massachusetts. In what has become one of his favorite anecdotes, Patrick often speaks about how out of place he was when he first arrived:

[Milton Academy] had a dress code then: boys wore jackets and ties to classes. Now, a jacket on the south side of Chicago is a “windbreaker”. So when the clothing list arrived at home, explaining the dress code, my family splurged on a new windbreaker. The first day of classes, when all the other boys were donning their blue blazers and tweed coats, there I was in my windbreaker. I had a lot to learn indeed.

In many ways “A Better Chance” was affirmative action at its best, and Deval Patrick was the program’s case in point. Upon graduating from Milton Academy, Patrick entered Harvard College, where he got involved with the Phillip Brooks House Association, a student-run non-profit that works on various projects to help the poorest members of the surrounding community. Patrick went on to win a Rockefeller Scholarship to work in Sudan after finishing his undergraduate studies, and was granted admission to Harvard Law School following his one-year stint abroad. At Harvard Law, he headed the Harvard Legal Aid Bureau, an organization dedicated to providing free legal services to the impoverished.

There is little doubt that Patrick’s views on affirmative action were shaped by his own personal success coupled with the hands-on work he did in the poorest black communities. This appears evident from both the way he spoke about affirmative action, calling it “the only


78 Remarks by Deval Patrick Before the Town Hall. Los Angeles, California. October 4, 1994. Taken from: Civil Rights in America 1500 to the Present. Thomson Gale: July 1998. (Preface) I took the liberty to call this a “favorite anecdote” as this same story was told to Gwen Ifill during her interview for The Breakthrough, and also appears in the above footnoted article on Patrick in The Journal of Blacks in Higher Education.

79 Supra at 19. (29).

Supra at 21. (963)
effective tool for integrating many American institutions”\textsuperscript{81}, as well as the actual career choices he made to follow up on the commitment to equal opportunity he displayed earlier as a student.

In 1982, with a J.D. in hand and the prospect of earning a comfortable living, Patrick held off private practice and instead chose a significantly lower paying position at the NAACP Legal Defense Fund working on voting rights and death penalty cases. For the next four years, Patrick would work with several notable civil rights leaders such as Lani Guinier and Elaine Jones, the latter of whom would go on to become President of the Legal Defense Fund and help broker the settlement in \textit{Taxman} in 1997. During this period, and as co-counsel with Guinier, Patrick successfully sued then Arkansas governor Bill Clinton in a case challenging the state’s voter registration laws.\textsuperscript{82} One year later, Patrick returned to Boston and began working for Hill and Barlow, a prominent law firm. His commitment to public service and equal opportunity did not wane, however, as he dedicated nearly one-third of his time at Hill and Barlow to pro-bono cases in the area of civil rights.\textsuperscript{83}

By February of 1994 this professional record caught the attention of Bill Clinton, who was both fully aware that Patrick did not have a potentially dangerous paper trail akin to Lani Guinier’s, and in desperate need of someone to fill the long vacant post at Assistant Attorney General. Without such academic baggage hanging over his head, Patrick was able to enjoy widespread support among civil rights leaders and Black Caucus members, as well as leaders of


\textsuperscript{82} Supra at 17. (185).

\textsuperscript{83} Supra at 21. (960).
the America Jewish Congress\textsuperscript{84} and many Republicans who thought the pragmatic talking lawyer was the best they were going to do.\textsuperscript{85}

On the morning of Deval Patrick’s Senate hearing it was evident that the tactics of Clint Bolick, who had led the assault on Lani Guinier’s nomination nearly one year earlier, were amounting to very little. On NPR’s Morning Edition, Nina Totenberg commented that Bolick’s assessment of Patrick as a “quota clone” and a “stealth-Guinier” “was not based on any position Patrick has taken personally”, but rather from the mere fact that “he once worked, and still remains, a director of the NAACP Legal Defense Fund, an organization that Bolick says is outside the mainstream”.\textsuperscript{86} Worse for Bolick, he had been largely discredited the night before when appearing on the Macneil/Lehrer News Hour in a debate with Elaine Jones of that very organization, the Legal Defense Fund. Pressing Bolick to explain why Deval Patrick was not a suitable candidate for the position, Jones forced him to concede that even Thurgood Marshall would be considered an ill choice given the standards he was using.\textsuperscript{87}

At the congressional hearing, Patrick used conciliatory language to deflect the “quota king” image that conservatives such as Bolick had tried to conjure up. He noted that civil rights


“Statement of Orrin Hatch Before the U.S. Senate” Nov. 4 1997. In opposition to Patrick’s successor Bill Lann Lee, Hatch dedicated a section of this speech to explaining how he and other Republicans gave Patrick the benefit of the doubt, believing he was a “practically oriented lawyer” who would oppose racial preferences, but who “upon assuming the reigns of the Civil Rights Division...revealed himself to be a liberal civil rights ideologue”. Hatch made it explicit in this later speech that his support for Patrick was unfounded and the wrong decision.


\textsuperscript{87} Ibid.
are “something more…than the mere shifting of entitlements from one group to another.”  

In response to Republican Senator Strom Thurmond’s demand that Patrick define a racial or gender quota, Patrick played to his audience, and used strongly pejorative language to describe the concept as a “numbers game…which is both a ceiling and a floor, has no flexibility…ignore[s] the notion of qualifications”, and is “against the law.”

Republican Senator Orrin Hatch took the opportunity to pepper Patrick with questions that formed the basis of Lani Guinier’s withdrawal the year before. He demanded answers on whether Patrick would support cumulative voting, supermajorities on issues affecting minorities, and minority veto power in various contexts. Patrick, quite shrewdly, gave the same general response; namely, that “these cases need to be taken on a case-by-case” basis.

Senator Chuck Grassley spoke directly to the issue of affirmative action, and wanted to know if Patrick believed the Supreme Court had correctly decided in both Wygant and Croson, where they had struck down affirmative action policies in layoff decisions and contract set-asides respectively. More to the point, Grassley tried to get Patrick to concede that the same standard of review, strict scrutiny, should be used to evaluate instances of discrimination whether it was regarding malignant discrimination against minorities, or benign classifications aimed at helping minorities—affirmative action. In similar fashion, Patrick appeased Grassley, but still remained ambiguous, responding that it “is a hard question for me to answer in the abstract”, and advised that “the most responsible use of my talents in this job is to take the cases on a case-by-case basis.

88 Supra at 21(970).

89 Ibid. (985)

90 Ibid. (978).
and make judgments at that time.”

Pleasing his questioners, but leaving much to the imagination, Patrick was later confirmed quite easily.

It was this confluence of events—the political fallout from Guinier’s withdrawal, the failed nomination of John Payton, Clinton’s need for a strong civil rights leader to save face with women and minority rights groups, as well as the absence of a controversial record and a masterful performance in the Senate by Deval Patrick—that brought to the helm of civil rights policy someone who—unbeknownst to many—proved to be a firm advocate of affirmative action in the broadest sense. In retrospect, Clint Bolick was correct. If “stealth-Guinier” meant fiercely liberal, Deval Patrick was that indeed, and unapologetically so.

The new Assistant Attorney General did not waste time revitalizing the Civil Rights Division—some 250 lawyers—that he now oversaw. Just one month after being sworn in, Patrick made headlines with one of the most visible and large-scale antidiscrimination settlements in years. In May of 1994, the Denny’s Restaurant chain agreed to pay 46 million dollars to settle a discrimination lawsuit after being charged with treating black costumers markedly worse than whites. The charges came about after a group of black secret service agents working for President Clinton stopped for breakfast and were never served; their white counterparts were reportedly finishing up their meal while the blacks were still waiting to be seated. After further investigation, the Justice department found 1,300 cases of similar discrimination at Denny’s restaurants nationwide. The cases ranged from a black judge who was refused service for over an hour, to a young black girl who requested the special birthday meal,

91 Ibid. (1004).
as advertised, but was ridiculed by the staff and denied the promotion. At a press conference announcing the settlement, Deval Patrick made the Justice Department’s tough stance on this issue clear, reminding potential offenders that “There will be a high price to pay for unlawful indignities and the Justice Department will exact that price wherever the law is violated”. “For all those public accommodations that haven’t lost the appetite for racism”, he continued, “I want to warn you that we are watching.”

These words were not meant to serve as mere sound bites. The nature of the Denny’s settlement itself was a clear signal that civil rights were not simply going to be enforced according to what the law required, but rather in ways that would have the maximum impact as to what the law intended to accomplish. For example, in the Denny’s suit Patrick pushed for a comprehensive settlement in which money was set aside for victims who could come forward later on and prove they were discriminated against. The amount, totaling roughly 44 million dollars, made the Denny’s settlement the largest in an accommodations discrimination case in United States history. Patrick also worked to have Denny’s agree to hire an outside monitor who would oversee how minorities were treated and even pose sporadically as a patron to test employees at various restaurants. This too made the settlement novel with regards to the level


93 Ibid.


95 Ibid.
the Accommodations Act was used to avert future discrimination while forcing a private company to foot the bill.\textsuperscript{96}

In cases such as this, in which a settlement is reached through a consent decree, a voluntary but legally binding agreement reached by parties outside of the courtroom, the individual charged with enforcing the law is particularly important. This is because unlike remedies crafted within the courtroom, the terms of a consent decree are largely decided by the parties involved—that is, the lawyers at the Department of Justice. With Deval Patrick looking to deter instances of discrimination, including by definition those that have not yet occurred, he was able to force Denny’s to take steps that the law—taken literally—may have not necessarily demanded. Despite this, Denny’s was happy to avoid the negative publicity, moral culpability, and increased legal fees that a protracted court battle may have entailed. As Patrick stated himself, enforcing civil rights “is an effort to make sure that citizenship is meaningful for everyone and a confirmation of basic American values”.\textsuperscript{97} In this sense, the Denny’s settlement was the first instance in which Patrick was able to show how his own personal views on the direction of civil rights can translate into enforcement beyond simply the minimum requirements of the law. For liberals, this was precisely the type of civil rights enforcement that had been missing since Ronald Reagan took office. For conservatives who disdained federal intervention, this was a reason to grow wary of the direction of civil rights under Clinton and Patrick.

\textsuperscript{97} Supra at 15.

Title II of the 1964 Civil Rights Act, or the Public Accommodations Act, grants authority to the Attorney General to take action whenever there is “reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title”. The ambiguous nature of the phrase “pattern or practice” leaves it up to the Justice Department to determine when they wish to pursue a case of discrimination. This is similar to the “pattern or practice” clause of the Fair Housing Act, which leaves a similar level of discretion up to the Justice Department, as is discussed below.
Despite its comprehensive nature, the Denny’s settlement received little backlash, and for good reason. Liberals and conservatives alike could see that the legal remedy being imposed was leaning on a sound premise: Denny’s had overtly discriminated against blacks and should be held accountable for their actions. Just a few months later, however, in another consent decree, Patrick would use an expansive interpretation of the Fair Housing Act to strike an unprecedented settlement with Chevy Chase Bank. This second case made it clear: Patrick was willing to extend the law to further a more expansive vision of civil rights and equal opportunity.

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In order to place the Chevy Chase Bank settlement in proper historical perspective, it is worth noting that perhaps nothing fueled the wage gap between blacks and whites during the twentieth century more than the inability of the former to attain loans. Even as the walls of Jim Crow were tumbling down throughout the latter half of the century, blacks were stymied by institutional racism that kept them from acquiring capital to buy homes or start small businesses. More specifically, following World War Two, home ownership among whites increased several times over as white veterans returning from war were able to tap into the GI Bill to attain loans and mortgages at low interest rates that were federally backed by the Veterans Administration.  

Though blacks were not explicitly discriminated against in the language of the GI bill, the legislation itself called for the execution of loans to be carried out on a state and local level. This

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98 Katznelson, Ira. When Affirmative Action was White. New York: W.W. Norton & Company, 2005. From pages 116-120 Katznelson begins a discussion on how widespread the benefits of GI Bill loans were for veterans, with more than 200,000 new businesses and farms started as a result and over five million new homes purchased. In the years just after World War Two nearly 40 percent of all new mortgages were a result of the Veterans Administration-- part of the GI Bill—which allowed poorer Americans, mostly white, to enter the housing market for the first time and begin to build a foundation for wealth.
meant that local branches of banks were able to use their own discretion when issuing loans, much to the misfortune of blacks. Black veterans were routinely turned down for myriad reasons, ranging from low amounts of capital, unestablished credit ratings, and neighborhoods deemed too volatile by the banks. In fact, some banks simply labeled blacks as high-risk candidates and closed off access to capital without individual consideration. In Mississippi for example, among the 3,229 loans issued in the state’s major cities, only 2 went to blacks. Moreover, these practices were not simply limited to the south. Of the 67,000 mortgages insured by the GI Bill in northern New Jersey and New York following the Second World War, less than 100 were issued to blacks.99

The racist practices permitted by the GI Bill were nothing new. In the area of home loans, the Federal Housing Administration (FHA), created in 1934, had promoted racial segregation until 1948 when the Supreme Court struck down racial covenants in *Shelley v. Kraemer*. The underwriting manual used by the FHA during this period warned that “[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.”100 Well into the 1960’s, both the FHA as well as the Veterans Administration refused black loan applicants who wished to purchase homes in white neighborhoods.101 It was against this backdrop that the Civil Rights Act of 1968 was passed, with Title VIII banning racial discrimination in the lending, selling, renting and advertising of homes and mortgages. This

99 Ibid. (140). Katznelson uses statistics on loans issued to blacks versus whites as well as testimony from a GI Home Loan representative who explains, “It is almost impossible for a colored man to get a loan”.


section of the law came to be known as the Fair Housing Act and although violations were watched over by the Department of Housing and Urban Development, it was ultimately the responsibility of the Department of Justice to bring cases to court.

Between 1969 and 1978, the housing section of the Department of Justice participated in over three hundred cases in an attempt to establish a wide body of case law that could protect against housing discrimination. In contrast, beginning in 1981 under William Bradford Reynolds’ guidance, the Department of Justice scaled back its efforts considerably, and in the course of the first thirty months only 6 cases were filed in the area of housing. Though the number of cases would increase during the later years of Reagan’s presidency, they would never approach something comparable to previous administrations. This was largely due to then Assistant Attorney General William Bradford Reynolds’ approach to interpreting Title VIII, in which he believed proof of intentional discrimination was required in order to bring suit, a considerably difficult requirement to fulfill. Despite Reynolds’ animosity to the overzealous pursuit of discrimination cases, the late 1980’s brought the Fair Housing Amendments Act of 1988, which gave legally binding powers to the Department of Housing and Urban Development and allowed for increased penalties to be imposed. This in turn paved the way for future administrations to pursue housing discrimination with increased intensity.

102 Ibid. Beginning on pgs 91-93, Amaker goes through a brief history of enforcement in housing discrimination at the Department of Justice before Ronald Reagan.

103 Ibid. 94

104 Ibid. 97

By the 1990’s when Clinton was taking office there were very few, if any, instances of overtly racist practices being used to deny loans to blacks; this, however, did not mean that race was no longer a factor. In a highly controversial paper released in 1992 by the Boston Federal Reserve, a study concluded that a considerable gap still remained among equally qualified loan applicants of different races. Testifying before Congress on this matter, the President of the Boston Fed explained: “Minority applicants with the same financial, credit history, employment, and neighborhood characteristics as the white applicants in Boston would have experienced a denial rate of 17 percent rather than the actual white denial of 11 percent.”

This was the dilemma that confronted Deval Patrick in 1994. It was up to his department to enforce the law so as to deter such racist practices from occurring, practices that had serious implications for maintaining the wage gap between black and white Americans. It was also up to him to do so in an environment where proof of intentional discrimination—the requirement demanded under the previous two administrations—was nearly impossible to fulfill. Thus, Patrick interpreted the Fair Housing Act and its clause permitting the Attorney General to take action against “patterns and practices” of discrimination to entail no such proof of intent.

Under this supposition, Patrick negotiated a highly visible and incredibly controversial consent decree with Chevy Chase Bank. The decree came about after the Justice Department accused the bank of redlining, a practice prohibited by Title VIII in which banks reject loan applicants in order to avoid lending to certain areas based on race. Settlements had been brought about by the Justice Department on similar grounds over the previous two years in Mississippi,

South Dakota, and Massachusetts. What made this case different, however, was the way in which redlining was defined. That is, Chevy Chase Bank had never denied a loan applicant based on the racial makeup of their region. Rather, the bank had chosen to make 97 percent of its loans during the period from 1976 to 1992 in white neighborhoods. And while Chevy Chase Bank was the largest savings and loan company in the region, 90 percent of blacks that lived in Washington, D.C. had no Chevy Chase branch in their neighborhood. In other words, Chevy Chase was being charged with redlining for not marketing and expanding their services into minority neighborhoods. To defend this newly expanded use of the term “redlining”, Janet Reno argued, “To shun an entire community because of its racial makeup is just as wrong as to reject an applicant because they are African-American” and “You can’t be refused service if there is no service being offered”, added Patrick. Under the terms of the settlement Chevy Chase bank was forced to open three mortgage offices and one bank branch in Washington minority neighborhoods and make 140 million dollars available to those who may have already been discriminated against because of the alleged redlining. Reflecting on the settlement, The American Banker magazine wrote that “To bankers, the Department of Justice is more frightening than Mary Shelley’s Frankenstein.”

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Collectively, the Denny’s and Chevy Chase settlements sent a clear message about the vision that Deval Patrick had for civil rights enforcement. Patrick was willing to impose broad remedies to reach the outcomes that the law had in mind, whether it was fair practices in public accommodations, housing, or as will be shown, affirmative action. It should also be noted that both of these cases were settled within the initial three months of Patrick’s tenure, and thus immediately placed the Civil Rights Division’s practices in sharp contrast with the relaxed enforcement standards of the previous two administrations. Moreover, while bankers remained opposed to the federal intervention and micromanagement practiced by Patrick in settlements such as the one with Chevy Chase, they were willing to settle outside of court in order to avoid high-profile cases involving discrimination and negative publicity, just as Denny’s had. This use of consent decrees to coerce parties to comply with the law as the administration envisioned engendered deep resentment among those who disagreed with the Civil Rights Division’s now liberal views, which valued proactive use of the law to counter discrimination, and broad remedies to work towards a more inclusive environment for minorities.

More generally, the above review of Deval Patrick, his role in revitalizing the Civil Rights Division, and the resentment he stirred among conservatives through his aggressive enforcement is useful in understanding both why Patrick subsequently took the position he did in the Piscataway v. Taxman case and why it was used as a cause célèbre to unite conservatives in opposition. If there was an issue involving civil rights that conservatives could openly oppose without being discredited it was affirmative action, and if there was ever a case with a favorable set of facts for anti-affirmative action forces to rally behind it was Taxman. A review of this case’s history is useful in further understanding how the courts attempted to reconcile how far the law permitted affirmative action to go, just as the Civil Rights Division under Patrick was
demanding more and the American public was demanding less. This case illuminates how an important legal question, though thought to be isolated within the sanctity of the judicial system, can be deeply influenced by both of these forces, for better or worse.
Chapter 3

The recipe for a perfect test case

The fact that Piscataway, New Jersey served as the backdrop for testing whether or not achieving diversity could be a valid rationale to uphold affirmative action is not surprising. In many ways, Piscataway had all the correct ingredients one would need to conjure up the perfect test case.

The town’s history extends back over three centuries to 1666, when colonists from New England settled on a piece of land they called “New Piscataqua”, an Indian word meaning “twilight”. It is one of the seven oldest municipalities in New Jersey, kept slaves until 1840 and remained predominantly agrarian through the first few decades of the twentieth century. Public schools first emerged in the 1830’s, and pauper schools, designed and publicly funded exclusively for indigent children, were established as early as 1821.

The turning point came in 1950, when housing developments first made an appearance. In the period between 1952 and 1958 the population more than doubled from 7,243 individuals to 15,000. In September of 1957 the town opened its first public high school. The population continued to experience rapid growth throughout the 1960s, and by 1970 Piscataway was home to 36,418 residents, nearly ten percent of whom were black.

During the 1970s, the white population remained stagnant, while the number of blacks living in Piscataway leaped in both absolute and percentage terms. By 1980, the number of blacks had nearly doubled over the previous ten years, reaching 6,162, or 15 percent of the total population.


population.\textsuperscript{114} Through the 1980s, the town’s growth continued to be disproportionately fueled by an increase in black residents. By 1990, the township’s total population had climbed to 47,089, with total whites actually decreasing by 2,000 over the past decade and blacks increasing by 2,000. Perhaps even more important, of the 8,296 black residents, one quarter were under the age of 18 and nearly all were enrolled in the township’s public schools.\textsuperscript{115}

While these numbers paint the picture of an increasingly diverse town, they only tell part of the story. By 1990 the per capita income in Piscataway was $17,047. When broken down by race, the white per capita income was $18,294 as opposed to $15,764 for blacks. Yet, interestingly enough, the educational attainment between races was identical. Among persons twenty-five years and older, 83.5 percent of whites were high school graduates or better versus 83.4 percent of blacks. Furthermore, 26.6 percent of whites had a bachelor’s degree or higher versus 26.3 percent of blacks.\textsuperscript{116} In many ways, Piscataway township was a microcosm of the United States, a place where the educational achievement of minorities was moving forward in leaps and bounds while the wage gap was only slowly inching closed. With regards to Piscataway specifically, this data suggests that the township had a young and growing minority population, one that was relatively educated compared to their white counterparts, but still largely unequal in economic terms.

The Piscataway of 1975 was a town friendly to the idea of implementing the type of affirmative action policy that was becoming the norm in various parts of the country. Just ten years earlier Lyndon Johnson had made the case for affirmative action quite persuasively in his

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speech at Howard University, famously arguing, “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others.’”  Two years later, Johnson’s Department of Labor devised the Philadelphia Plan, which required that minority workers in historically discriminatory construction trades be hired in rough proportion to their numbers in the local work force. The Nixon administration would expand upon this policy, and even incorporate the notion of disparate impact, which stipulated that behavior resulting in discrimination, even if unintentional, is illegal. During Nixon’s first term, some variant of the Philadelphia Plan emerged in fifty-five cities nationwide.

In May of 1975, during this period of modest support for affirmative action—at least politically—the New Jersey State Board of Education adopted a regulation requiring each school district to develop a policy of equal educational opportunity. In light of this regulation, and in the context of a young and growing black population, the Piscataway Board of Education took the initiative to implement an extensive affirmative action program. The program stated that its basic purpose was “to make a concentrated effort to attract women candidates for administrative and supervisory positions and minority personnel for all positions”. It stipulated that “in all cases, the most qualified candidate will be recommended for appointment. However, 

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118 In 1971 The Supreme Court upheld this idea in the landmark decision Griggs v. Duke Power Company. The decision made it illegal to impose new barriers to employment, such as a high school diploma, if they have a racially discriminatory result.
when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended.” The program went on to list vigorous and proactive measures that would be taken to ensure minorities were increasingly represented. It made clear that “[r]ecruitment and hiring for all positions will be conducted with a view toward affirmative action for women and minorities.” More specifically, “[a]ll women or minority personnel who contact the School System for employment in Administration positions will be asked to file an application regardless of whether vacancies exist.” Beyond this, an “affirmative action file” was designated in which all minority and women applications would be entered; the applications in this file would be consulted first should any administrative vacancies arise.  

Although the number of blacks was steadily increasing in Piscataway through the 1970s, the town was far from becoming an exemplar of diversity. By the late 1970s the town’s elementary schools were growing remarkably segregated, as many blacks lived in relatively isolated segments of the township. Once again, the town showed an incredibly proactive mindset in solving the de facto school segregation issue, and in 1979 Piscataway overhauled the organization of three of their eight elementary schools. Diverging from the traditional model, in which children attend pre-kindergarten through grade five at the same school based on proximity to neighborhood, the town created a three-school “interrelated complex”; one elementary school would service all pre-k through grade one students of three neighborhoods, another would be designated for grades two and three, and the third for grades four and five.  

Through this


122 Supra at 1(55)
system, minority and non-minority students would learn and work together during the earliest stages of their educational development.

It’s worth highlighting that these were not simply court-mandated solutions forced upon an obstinate school board. Current Piscataway school board members speak of a board that was highly conscious of the need to promote and foster diversity in the specific context of a town that was experiencing an influx of minorities, whether African-American, Latino, or Asian. In conjunction with the 1975 affirmative action program, the school district implemented a wide array of measures aimed at eliminating even the most subtle forms of discrimination while promoting a more inclusive educational environment. To underscore just a few examples from the program, a “Committee for Educational Program Affirmative Action” was established, with a mandate to “review curriculum, textbooks, curriculum guides, course descriptions, library resources and instructional strategies in all subject areas…for the purpose of identifying instances of discrimination and/or stereotyping”. Specific to affirmative action, the program established an Affirmative Action Council “for the purpose of implementation and evaluation of the district’s Affirmative Action Program.” The council was composed of administration representatives, teachers, and high school students.

Collectively, the Affirmative Action Program of 1975, the desegregation plan of 1979, and the sentiments of individual school board members reveal a township interested in not just fostering diversity in academic terms, but implementing affirmative measures that would integrate the town to the greatest extent possible. For the most part, it worked. With no history of discrimination and a wide pool of minorities willing and able to work within the Piscataway

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124 Supra at 10.(Section VIII- Classroom Practices).
school system, the Piscataway school board went from 1975—when the program was implemented—to 1989 without ever invoking the affirmative action policy with regards to an employment decision.125

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In September of 1980, two young teachers began their first day of work at Piscataway high school. Sharon Taxman, a 33-year-old native of Buffalo, New York, had received a bachelor’s degree in business education from the State University of New York. She had taught for three years in her home state and had earned a certification permitting her to teach a wide range of courses, from bookkeeping and accounting to business math and business English. Taxman had taught for three years before arriving in Piscataway, and was hired to teach in the Business Education Department.

Hired to start the same day at Piscataway high school, 28-year-old Debra Williams had grown up in Winona, Mississippi. Williams graduated from Mississippi Valley States University where, like Sharon Taxman, she completed a major in Business Education. Also like Taxman, Williams was hired to work within the Business Education department. Initially, Williams was certified to teach a narrower range of courses than Taxman—secretarial studies and typewriting only. However, one year after joining the high school staff Williams received a master’s in business education. By 1985, she too received a comprehensive certification, allowing her to teach the same courses as her counterpart, Sharon Taxman. Debra Williams was the first and ________________

125 Exhibits to U.S. District Court Brief. Deposition of Paula Van Riper. (Joint Appendix for Piscataway v. Taxman, pg. 132). Van Riper’s testimony as well as background provided in the lower court opinions and briefs all seem to agree on the fact that the Affirmative Action Program was never used for employment decisions until the layoff of Sharon Taxman.
only black teacher hired to work in the Business Education Department. At the time of her hiring, the department was comprised of 15 teachers.126

In 1985, while the Department of Justice was waging an ongoing battle to curtail the very type of affirmative action policies actively endorsed in Piscataway, the school board adopted an addendum to its original 1975 affirmative action program. The addendum was a report on the utilization of minorities by the Board of Education. It found that 9.5 percent of the educators currently working for the board were black. In comparison, only 5.8 percent of the total labor market specific to education was black. Generally speaking, it seemed the affirmative action program had either worked quite well or was simply not very crucial to maintaining a work force in which minorities were represented. With these numbers confirming that there was no underutilization of minorities, the board opted to set neither quotas nor hiring goals, but left the policy intact.

Through the rest of the 1980s not a single additional black teacher was hired to work within the department of business education. In fact, as school enrollment followed the general decline in population growth that was experienced during this decade in Piscataway, the business education department continued to be downsized. By 1989 there were only ten teachers working in Williams was the flag-bearer of “diversity”, whether she chose to be or not.

In the spring of 1989 the Piscataway school board found themselves in an awkward position. Enrollment at the high school had continued to decline and Burton Edelchick, the Superintendent of Schools, informed the board that a reduction in work force was necessary. All things considered, Edelchick recommended that one position within the Business Education

Department be removed. Under New Jersey State Law all layoff decisions must closely follow the “last hired first fired” rules of seniority.\(^{127}\) This was a common law in other states as well, and because of this, it was relatively rare that affirmative action was ever used in layoff situations. In fact, in a similar case in 1986—*Wygant v. Jackson Board of Education*—a school board broke the rules of seniority in order to keep racial minorities on the teaching staff. The Supreme Court ultimately ruled against the Jackson Board, and declared this an improper usage of affirmative action. Unfortunately, the simple seniority requirement failed as an instructive guide in making the layoff decision in Piscataway. With nine years of seniority each, at the end of the 1989 school year Sharon Taxman and Debra Williams were both the most junior members in the department; the next most junior member was a distant ten years their senior.\(^{128}\)

On April 24, 1989 the two teachers were each sent a letter informing them that in three days the board would be meeting to discuss “a reduction in the number of business teachers for the 1989-1990 school year”. Taxman and Williams were warned that as there was a tie in seniority between the two, the meeting “could possibly result in a recommendation to abolish a teaching staff position and terminate [their] employment”.\(^{129}\) The board met twice privately to discuss the issue—both on April 27 and again on May 18. At the meetings they discussed the two teachers, reviewed their teacher evaluations, performance, and credentials but ultimately came to the consensus that for all intents and purposes the two women were equally qualified. To

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\(^{127}\) The relevant law is N.J.S.A 18A:28-10 which states that tenured faculty in New Jersey must be laid off by reverse seniority.


\(^{129}\) Exhibit. Taxman’s Court of Appeals Cross-appeal brief. Joint Appendix to *Piscataway v. Taxman*. (151a)
be precise, Sharon Taxman had been certified to teach a greater number of courses for a longer period of time. Nonetheless, Debra Williams had earned a Masters degree one year after joining the staff. Some of the members suggested breaking the tie by drawing lots or flipping a coin, as had been done in the past when confronted with a tie, but a few influential individuals disagreed.

At the second private discussion to settle the issue Superintendent Burt Edelchick recommended that the board utilize the affirmative action policy as amended in 1983. Knowing that this would result in the termination of Sharon Taxman, he made it clear that he felt this was justified in light of the fact that Williams was the only black teacher within the Business Education Department. School Board President Theodore Kruse agreed. When later explaining his decision to follow Edelchick’s recommendation, Kruse made his convictions clear:

by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students…[who] 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.\textsuperscript{130}

At their public meeting on May 22, 1989 the school board members took a vote. With the Superintendent and Board President in favor of following an affirmative action policy that was ostensibly in accordance with a mandated regulation from the New Jersey Department of Education, there was likely very little doubt among members that the decision to retain Williams was not only legal, but in accordance with the school board’s larger goals. As the board’s lawyer, David Rubin, would later remark, “The law at the time was unclear at best, but the board’s decision was well within the bounds of an affirmative action policy that had been reviewed and

\textsuperscript{130} Deposition testimony of Theodore Kruse. Joint Appendix to \textit{Piscataway v. Taxman} (197)
approved by the State Department of Education.”

That same night a letter was drafted by the director of personnel and sent to Sharon Taxman. It made no attempt to conceal why she was being laid off. The note explained that the Board “decided to rely on its commitment to affirmative action as a means of breaking the tie in seniority entitlement in the secretarial studies category…and to terminate your employment as a teaching staff member.”

For Sharon Taxman, the layoff came at a particularly inopportune moment. Whether or not she opposed affirmative action, her son was set to attend the University of Wisconsin in the fall and she needed her job back. Less than two weeks after receiving notice of her termination, Taxman filed a complaint with the Equal Employment Opportunity Commission.

While the complaint was under review, Taxman went before the State Commissioner of Education to challenge the School Board’s determination of seniority; Taxman claimed that she had greater seniority in light of Williams’ maternity leave. The Commissioner disagreed, and the two teachers were once again determined to be of equal seniority.

For the next two years, Sharon Taxman remained out of work. In 1990, the EEOC—then under the leadership of Clarence Thomas—determined that there was “probable cause” to file suit for discrimination. In turn, they referred the case to the Civil Rights Division of the Department of Justice. The ball was now in the federal government’s court, and it was up to the Department of Justice whether they wished to pursue the case. Although the government ultimately filed suit in early 1992, it’s important to note that the passage of time placed a serious constraint on the prosecution of the suit moving forward. Had the U.S. government filed suit

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132 Supra at 9(6)

133 Supra at 15.
within two years of the incident, it would have been within their rights to make a 14th amendment claim—they could have charged that the board denied Taxman equal protection of the law based on her race. Because the statute of limitations—two years—had expired on the constitutional claim, the Justice Department was confined to challenging the board’s layoff on Title VII grounds alone.  

For the school board’s lawyer, David Rubin, who now had to defend the affirmative action policy in court, this was no subtle distinction. It was Rubin’s belief, as well as the belief of many lawyers during this period, that overcoming a Title VII challenge was significantly easier than a constitutional challenge. As he saw it, if the case could withstand something close to the strict scrutiny demanded by the 14th amendment, it would by default be upheld under the much more flexible standards of Title VII. Rubin was confident that under the standards the Supreme Court had used in its 1986 Wygant decision—a 14th amendment case—the school board’s policy would be upheld. In that case, a school board had made a layoff decision based on race, but this time they had broken the rules of seniority to do so. Most notably, in the majority opinion Sandra Day O’Connor remarked that “a state interest in the promotion of racial diversity has been found sufficiently compelling, at least in the context of higher education, to support the use of racial considerations in furthering that interest”. She argued that although the school board’s justification in Wygant—the notion that having minority role models is a compelling

Title VII of the 1964 Civil Rights Act: “It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training”

136 Ibid.
interest—was impermissible, that was “not to be confused with the very different goal of promoting racial diversity among the faculty.” However, because the litigants in Wygant had not attempted to justify the racial preferences with an argument for having “diversity among the faculty”, the Court passed on the opportunity to rule definitely on this issue one way or another. Sandra Day O’Connor had essentially left the door open for the argument the Piscataway board would have to hang their hat on.

Wygant was, by leaps and bounds, the most comparable case to Taxman that had ever been decided before the Supreme Court; it still only touched the issue tangentially. Because of this, the lower courts were faced with something of a novel case. Never before had the High Court definitely ruled whether the promotion of diversity was a sufficient rationale for affirmative action outside of higher education. More specifically, never had the Court clarified whether such policies were viable in the absence of minority underrepresentation or prior discrimination. Taxman had the potential to force the Court to play its hand, and provide definitive instruction on this issue. Before it got there, however, both the lower courts and the attorneys involved would have to look to a patchwork of precedents to place this case in context.

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Any lawyer grappling with an affirmative case being litigated in the 1980s and 1990s—and to some extent today—had to reconcile their arguments with the 1978 Supreme Court decision handed down in University of California at Davis v. Allan Bakke. The case has been studied and debated extensively in other works, with everything from monographs detailing the

story of those involved¹³⁸, to law review articles questioning the weight that should be afforded to the resulting precedent. For the purposes of analyzing how the *Piscataway v. Taxman* case came to hold such an important place in the legal debate around race based policies, the *Bakke* decision not only serves as a useful point of departure, but also directly relates to *Taxman’s* legal significance. In some ways, *Taxman* was the legacy of the confusion *Bakke* engendered.

To be brief, the *Bakke* case centered around the question of whether or not the U.C. Davis medical school could set aside 16 of 100 seats in the entering class for minority students. Lewis Powell, who wrote the quasi-majority opinion, was deeply divided on the issue. Powell ultimately struck down the University’s plan but made it clear that affirmative action programs in general, when done correctly, are very much constitutional; not one other Justice agreed with this nuanced position. Four members of the court—Burger, Rehnquist, Stevens, and Stewart—categorically rejected the use of race for admissions, and signed on to Powell’s opinion only with regards to its dismissal of the admissions plan. Four others—Brennan, Marshall, White, and Blackmun—wanted to uphold the U.C. Davis plan and found no conflict between the Equal Protection Clause, the Civil Rights Act, and affirmative action; these four justices signed on to Powell’s opinion insofar as it allowed for future affirmative action programs. Muddling the Court’s voice even more, Marshall, White, Blackmun, and Stevens each wrote separately, with Burger, Rehnquist and Stewart joining the Stevens dissent. Despite the fractured nature of the ruling, *Bakke* established that properly constructed affirmative action plans could be used.

More importantly to future cases such as *Taxman*, the Powell opinion described “diversity” as a possible rationale for upholding affirmative action plans. He was explicit on this idea, writing that “The diversity that furthers a compelling state interest encompasses a far

broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element. According to Powell, the benefits that “flow” from having a diverse student body are compelling enough to allow for race to be used as one such “plus factor” in admissions decisions.

The opinion left many questions unanswered. To name the most glaring, it wasn’t clear whether achieving diversity was a compelling interest in situations outside of higher education. Moreover, it was equally unclear whether or not the diversity rationale could stand independently as an argument to support a race policy, or whether it had to be accompanied by some statistical disparity or history of discrimination that was being corrected.

Getting a clear answer on whether or not using racial preferences was justified based on fostering diversity alone was exceedingly difficult, as most of the cases which subsequently came before the Court were mired with extemporaneous facts that allowed the Justices to avoid the question. The two cases most heavily leaned on by the District Court judge in Taxman, Weber and Johnson, are indicative of this dilemma.

In United Steelworkers of America v. Weber, Kaiser Steel Corporation implemented an affirmative action program for training black workers based on the premise that they had been severely underrepresented in the firm’s work force. The plan was upheld by the Supreme Court on the notion that it “was not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance.” Similarly, in Santa Clara County v. Johnson it was an extreme statistical disparity with regards to female workers that tipped the balance in favor of allowing affirmative action to be used to promote women.

In light of the ambiguous case law that preceded *Piscataway v. Taxman*, the particular fact pattern of *Taxman* and the way in which these facts translated into legal arguments is essential in understanding why the case took on such broad national significance. Quite aware of this particular fact pattern from the start, a quiet battle was waged between both sides as early as the depositions in order to frame the case properly.

During this early stage the United States’ attorneys attempted to paint the picture of a school board recklessly using race as a proxy for employment decisions. To no avail, the Department of Justice tried to force the President and Vice President of the School Board to concede that race was the “determining factor”. Vice President Paula Van Riper refused to allow any oversimplification, and reiterated that race was considered “only after other ways of trying to … break a tie.”

The Board’s position remained consistent: they first attempted to make a layoff pursuant to the usual rules of seniority. This was of little guidance. The Board then attempted to make a qualitative assessment of their credentials. In this regard too they were equal. They then scrutinized the two teachers’ classroom evaluations. Again, this was of no value. In all meaningful ways the two were equal. It was only at this point in which they consulted the affirmative action policy that had already been in place. The policy couldn’t have been clearer: when two candidates were of equal standing, they were to recommend the minority. If there was ever an instance in which equality among candidates was to play out in reality, it appeared to be at hand. One could go as far as postulating that if the board had not used the policy in this situation, there was essentially no point in having it at all.

This recapitulation of the board’s decision process is meaningful in that it contrasts sharply with the subsequent portrayals, years later, of a school board using race as a simple proxy for a tough employment decision. Though later depicted as reckless social engineers, the board members in fact displayed a meticulous and measured approach, and were as the District Court Judge remarked, “trying to make the best of a very unhappy situation”.

Despite these empathetic words, the District Court Judge, Maryanne Trump Barry, could as well have told the board that their arguments were dead on arrival at the Newark courtroom. Barry, the older sister of Donald Trump and a right-leaning judge appointed by Ronald Reagan in 1983, wrote an opinion that was anything but empathetic to David Rubin and the school board’s position. As Rubin recalls, he knew that with a dearth of clear precedents “the case was unwinnable unless [he] could persuade Judge Barry to go out on a limb…[and] go further than any court had gone before.”

As far as creating new law, Barry made it explicit that “this court will decline the invitation to do so”. Unwilling to speculate “as to whether the [Supreme] Court may one day extend its reading of Title VII to encompass a race conscious affirmative action plan in the absence of a manifest imbalance in the work force because of a desire to achieve faculty diversity”, Barry struck the plan down.

To reach this conclusion, Barry essentially set up a judicial straw man in her opinion. That is, after rehearsing the Supreme Court’s rationale in the Weber and Johnson opinions in particularly restrictive terms, she implied that only circumstances which matched the Court’s reasoning for upholding plans in these two cases would be deemed permissible. The obvious

problem for Rubin and the Board was two-fold: Firstly, the fact pattern in *Taxman* matched up particularly poorly with both *Johnson* and *Weber*, making it exceedingly difficult to craft a sound judgment in their favor in light of only these two cases. And secondly, the specific way in which Barry presented *Johnson* and *Weber* barred a case such as *Taxman* almost prima facie.

More precisely, Barry explained that the Court in *Johnson* and *Weber* upheld the plans in question for two reasons, or according to two “prongs”: first, the plans had the purpose of “breaking down old patterns of racial segregation and hierarchy.” And second, the plans did not “unnecessarily trammel” the rights of non-minorities. Barry then argued that *Taxman* failed at satisfying either prong.

Yet, interestingly enough, Barry then conceded that *Taxman* presented a unique issue that warranted further consideration. Digressing from her Title VII analysis, Barry noted that “While the heretofore strict adherence in Title VII cases to approving only plans with remedial purposes is certainly a basis upon which to declare the Board’s plan invalid, the Board’s argument that diversity for education’s sake should also justify an affirmative action plan…merits some discussion.”

Judge Barry continued, “The absence of Title VII case law…and the making of new law which adoption of the Board’s asserted purpose would engender, requires that the assessment of permissible and impermissible purposes for affirmative action consider the more varied analyses undertaken under the Fourteenth Amendment.” In other words, Barry conceded that although the majority of her opinion was devoted to striking down *Taxman* on Title VII grounds delineated by *Weber* and *Johnson*, the particular rationale the school board was using—fostering diversity for educational benefits—was never considered in any meaningful

142 Supra at 9.(12)

143 Ibid. (12)
way in these prior opinions. Thus, although this case did not present a Fourteenth amendment challenge, Barry found it necessary to review the much more robust body of 14\textsuperscript{th} amendment law to find an instance more comparable to Taxman.

Unfortunately, even in this much more comprehensive area of case law, the Supreme Court had never ruled on whether fostering diversity alone was a sufficient rationale. For David Rubin, this meant piecing together what the Court had explicitly \textit{allowed} under the 14\textsuperscript{th} amendment in order to make an argument for allowing school boards to maintain racial diversity. Conversely, for Judge Barry this meant piecing together what the Court had explicitly \textit{disallowed} to craft an argument as to why this was an impermissible rationale. Barry pointed to the Supreme Court’s dismissal of “societal discrimination” as a rationale in \textit{Croson}, and minority “role models” in \textit{Wygant} to conclude that maintaining racial diversity for educational benefit must certainly also be impermissible in the case at hand.

Although coming down on the side of Sharon Taxman and the United States government, Barry’s 18-page opinion reads as anything but absolute in its conclusions. Rather, Barry’s opinion implied that Supreme Court clarification on the issue would have clearly been beneficial. “While case law suggests that the Supreme Court considers faculty diversity to be at least a laudable goal”, she maintained, “the Board’s position must be rejected”.\textsuperscript{144} More than anything, Maryanne Trump Barry passed the buck, and decided that while someone might decide that this particular use of affirmative action was permissible, it certainly wasn’t going to be her. On an issue that Conservatives lined up neatly against, and on a case where stare decisis was ambiguous at best, Barry, a judge with aspirations to move up the judicial latter—and who later

\textsuperscript{144} Ibid. (14)
did—likely decided that this case was a no-brainer. For the District Court Judge, ruling otherwise would arguably have been irrational.\textsuperscript{145}

The opinion, which came down in September of 1993, didn’t spell defeat for David Rubin. After a short trial on damages in January of 1994, the school board was faced with the prospect of paying Sharon Taxman $144,000 in back wages and pain and suffering. Rubin’s advice to his client was clear: The board could either pay the amount in full or appeal to the Third Circuit. If they appealed, the legal fees would increase; in his estimation, however, the chance of having the damages erased entirely was a very realistic possibility.\textsuperscript{146} Under this cost-benefit analysis, the board voted to bring their case to the Third Circuit Court of Appeals.

From this point forward, the case was launched onto a national stage where it was less about school boards and teachers than it was about the justice or injustice of affirmative action in general. The moment David Rubin filed his appeal to the Third Circuit in early 1994, \textit{Taxman} grew into a case bubbling with broad implications and scrutinized by a wide range of interest groups. Within three years, the mundane personnel decision of the Piscataway School Board would become a national referendum on affirmative action.

\textsuperscript{145} Ironically, Maryanne Trump Barry was elevated to the Third Circuit Court of Appeals in 1999 by Bill Clinton after congressional gridlock kept out his initial nomination.

\textsuperscript{146} Supra at 24.
Chapter 4
The Judicial Branch v. Patrick

In early 1994, one year after Bill Clinton had taken office, the Taxman case was only finishing up in District Court, with a trial to determine the exact cost of damages. As David Rubin recalls, “Several times during the trial court proceedings I half-kiddingly asked the government’s counsel, Steven Schlesinger, whether the new administration backed the conservative legal positions his office was advancing”. Schlesinger maintained that “his superiors still regarded the board’s action as a classic case of reverse discrimination.” This response was likely half correct.

At the moment, the Justice Department was still without a civil rights chief. It was only in the spring of 1994, while David Rubin was preparing his brief for the Third Circuit Court of Appeals, that Deval Patrick was sworn in as Assistant Attorney General to head the Civil Rights Division. Out of pure happenstance, Patrick’s overhaul of the Civil Rights Division, and the sharp turn leftward he brought about at Justice, merged seamlessly with David Rubin’s appeal to the Third Circuit.

A few months into Patrick’s tenure, the Civil Rights Division was forced to make a crucial decision on the Taxman case. Rubin had submitted his briefs for the school board, and as the appellee in the case, Patrick’s division was required to respond in a timely manner. The Deputy Assistant Attorney General, Kerry Scanlon, reviewed the case with Patrick and discussed the possible routes the government could take. The two men agreed that their department

fundamentally disagreed with the District Court’s opinion as well as the position taken by the previous administration. They were undecided, however, whether or not they should try to reverse positions or drop out of the case entirely.  

In the summer of 1994 David Rubin received a phone call from an attorney at the Justice Department requesting his consent to extend the briefing deadline. It marked a dramatic turning point in the case, and he recalls the conversation quite vividly:

I listened in stunned silence as [the lawyer] explained that the government had determined on further consideration that its earlier position in the case had been erroneous, Judge Barry’s decision was incorrect, my client’s position had been in the right all along, and the government now wanted to switch sides and support my appeal.

Shortly after this point, Deval Patrick and Kerry Scanlon submitted a brief outlining their repudiation of the previous administration’s legal positions. They argued that the District Court decision had taken “too limited a view of the permissible scope of lawful affirmative action under Title VII…[and] the judgment of the district court is inconsistent with the Supreme Court’s pronouncements regarding the scope of lawful affirmative action measures”. From a public policy perspective, they asserted that the decision, “if allowed to stand will have a harmful effect upon the ability of employers to voluntarily adopt and implement affirmative action provisions.”

Legally speaking, what the Department of Justice did was not entirely unheard of. When new administrations come into office and have disagreement over a lawsuit their predecessors had won, they can make a “confession of error”. This usually entails asking for the lower court to


Supra at 1.(30)

Brief for the United States as Amicus Curiae. Taxman v. Board of Educ. of Tp. of Piscataway. 91 F.3d 1547. C.A.3 (N.J.) 1996
vacate or reverse the decision. In fact, in 1993 when Drew Days first took over as Solicitor General under Clinton, he too made a confession of error, this time in a high profile case before the Supreme Court on child pornography.\textsuperscript{151} It should be noted, however, that the process is quite rare, and almost never occurs quite the way it did in \textit{Taxman}, where rather than quietly acknowledging error and withdrawing, the government “comes out swinging” and attempts to represent the other side.\textsuperscript{152} \textsuperscript{153}

It’s worth pointing out that the decision to drop out entirely was a very real option for Deval Patrick and Kerry Scanlon as they reviewed the case. Just months after the United States had originally filed suit in District Court, Sharon Taxman had intervened with her own private attorney in order to recover damages. Regardless of what position the United States took, Taxman and her lawyer remained respondents as the case moved to the Appellate Court in Philadelphia. In fact, the judges sitting on the panel at the Third Circuit were struck by the fact that given the option to withdraw, the United States chose to instead assault their previous position. Hypothetically, the government’s reversal raised questions regarding the manipulation of the appellate process as well as the ethical dilemma surrounding any confidential information shared between Sharon Taxman and the government’s lawyers. Judge McKee, sitting on the initial circuit court panel, highlighted this dilemma and made his distaste for what had just happened explicit:

\cite{Rosenzweig1994}

\textsuperscript{151} See \textit{Knox v. United States}. Here as well the administration took on criticism for reversing their position both due to the nature of their new position, but also because the process of “confession” itself is little known to the American public and presents general ethical concerns.


\textsuperscript{153} Supra at 1.
It was a bit unseemly—I guess is the word that comes to mind. This is a lawsuit and I understand the dynamics behind it and I understand the practical political universe and why it happened but, nevertheless, given the obligations that attorneys have, I guess not to the client here, because in a sense you are the attorney and the client. But it is the Government—it is a suit that was brought by the agency of the Government asking for a certain relief. The District Court gave you, as I read it, exactly the relief that you asked for and it’s almost as though you had scripted—I’m not suggesting you did—but it’s almost as though you had scripted the opinion, because the opinion basically gives the E.E.O.C. what it asks for. Having won the very relief you had asked for at your own insistence, you then turned around and say, No, what we got from the District Court…was wrong. And it just strikes me for being very unseemly.\textsuperscript{154}

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Even before the Circuit Court panel derided the Justice Department’s reversal, the brief submitted by Patrick and Scanlon began to stir controversy among Republicans and Democrats alike. During the fall of 1994, the Justice Department brief transformed \textit{Taxman} into a talking point in the ongoing debate over the continuation of affirmative action.

The usual suspects began their attack on Patrick’s position, and within a few months the case became notorious among conservatives and moderates who were leading the opposition to affirmative action. As per usual, Clint Bolick, the former Reagan Justice Department official and perpetual anti-affirmative action advocate, accused the Clinton administration of endorsing “quotas” in the Wall Street Journal. Republican Representative James Sensenbrenner of Wisconsin misconstrued the facts of the case, and commented that Piscataway had laid off Sharon Taxman to “retain a less experienced black woman.”\textsuperscript{155} An attorney with the Conservative legal think tank, The Institute for Justice, argued that “The Justice Department is trying to expand the situations where it is appropriate to take race into account—expanding it


from hiring to firing and expanding it from formal affirmative action plans to seat-of-the-pants types of decisions.”

Moderate Democrats called Patrick’s decision “morally indefensible and politically dangerous to the President”. Many so-called “New Democrats” felt the decision ran counter to the centrist vision they had in mind when they elected Clinton in 1992. Pragmatically speaking, these New Democrats argued that “Politically, Patrick’s program guarantees that the Administration will be on the receiving end of a steady stream of thunderbolts from conservative pundits going into the election year.”

By the end of 1994, Patrick was reportedly “stung by the fallout from the Piscataway case”. Frustrated, he complained, “All anyone ever wants to talk about is Piscataway.”

In a lighter moment, he admitted, “Being a lightning rod takes getting used to. If I walked on water, certain of my critics would still say that Patrick can’t swim.”

Jokes aside, Patrick and the lawyers at Justice knew this case had serious implications, especially if perceived as running counter to the middle ground approach Clinton was trying to carve out on affirmative action. The danger of contradicting the Administration on this issue was very real; as one Justice Department lawyer commented, “The Administration doesn’t want us to do anything that will turn into a bumper sticker in 1996.”

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160 Ibid.
Though isolated from the political process to some degree, Patrick remained sensitive to shining a negative spotlight on the Administration. Upon learning that Washington Post columnist Richard Cohen was set to print an editorial ridiculing the Department of Justice for switching sides in *Taxman*, Patrick gave Cohen a call—“Just listen, he implored”. Patrick then did something he clearly did not have to do: he provided a clear response to the Post columnist as to why it was imperative the United States support the Piscataway School Board. “…if you believe at all in the virtues of diversity”, Patrick told Cohen, “then Piscataway was your case. If Williams had been the one fired, the business education department would not have had a single minority teacher. How can we simply ignore race as a factor when race very often is a factor?”

The phone call served its purpose, and Cohen’s column presented Patrick’s position in *Taxman* as a common sense affirmation that race sometimes matters, and in some reasonable circumstances, should be accounted for.

Amidst all the attention the case began receiving, Clinton worked to maintain his moderate posture on the issue while not selling out the liberal position his Justice Department had taken. At a press conference he called *Taxman* “‘a very narrow case’ in which all other conditions…were equal. He stressed that if a majority black workplace had chosen to promote diversity by laying off an African-American, he would have supported that move as well.”

As 1995 rolled around it became increasingly clear that affirmative action could serve as a pivotal wedge issue for Republicans looking to divide moderate Democrats, allowing the opposition to take back the Presidency in 1996. At the moment, they appeared halfway there.

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163 Supra at 10.
Whites dissatisfied with the administration had come out strongly in favor of the Republicans in the previous November’s congressional elections. The Democrats lost control of both houses, with the House majority going to the Republicans for the first time since 1954. 1994 also brought the release of a highly controversial and influential study, *The Bell Curve*, which posited—among other things—that race could be a determining factor in intelligence. The book lent its hand to conservatives who fundamentally disagreed with at least one of the conceptual foundations for affirmative action: that blacks plagued by severe economic disadvantages due to historical discrimination could be brought up to speed by affirmative measures. The logical conclusion for proponents of the *Bell Curve* was powerful and elegant: the effort was futile.\textsuperscript{164}

The start of 1995 also brought to the Supreme Court what looked to be a landmark case on affirmative action and minority set asides. On January 17, the Court heard arguments in *Adarand Constructors v. Pena*, a case that nearly mirrored the 1989 *Croson* case involving the constitutionality of minority set asides in government contracting. The difference in *Adarand*, however, was that it concerned contracts being administered by the federal as opposed to state government. For Clinton and Patrick this distinction was a crucial one. In the past, the Court had shown great deference to the federal government, allowing them extraordinary discretion to implement affirmative action policies where they felt necessary. It was this line of reasoning which garnered a majority favoring racial preferences in *Metro Broadcasting v. F.C.C.* five years earlier. But the Court had not revisited the issue of affirmative action since the 1990 *Metro* decision, and the makeup of the bench had grown decidedly more conservative in the interim.

Legally for Deval Patrick and politically for Bill Clinton, *Adarand* had the potential to vindicate much of what their critics on the right had been saying all along. More specifically, if

the Court decided that strict scrutiny was the proper constitutional standard in determining the validity of federal affirmative action programs, it would call into question many of the policies the administration concurrently supported. For Deval Patrick it would make defending federal programs in court exponentially more burdensome, bringing the specter of new lawsuits on various fronts. For Bill Clinton, the imprimatur of the Supreme Court meant new fuel for critics who could now lambast him for defying the guidance of the highest court in the land.

It was the pending *Adarand* opinion, as much as the general dissent among moderates and independents on racial policies more generally, that catalyzed the decision at the start of 1995 to engage in a review of all affirmative action policies administered by the federal government. The review, led by Harvard Law Professor and public policy expert Christopher Edley, lasted six months, and concluded with a dramatic speech in July of 1995 before the National Archives in which Clinton called on America to “mend it, not end it” with regards to affirmative action. Edley recalls what the six month review entailed:

During that period, we had several long meetings with President Clinton and supplied him with many pages of study material. Our goal was to give him a solid understanding of the underlying facts about discrimination, exclusion, the design and operation of various federal programs, and private-sector practices. We considered constitutional and statutory law, executive orders issued by earlier Presidents and key voices from Congress and the statehouses.¹⁶⁵

Edley recalls the committee using actual examples as well as hypotheticals to speak in real terms about what types of affirmative action the Administration was ready to support and what types it would ultimately reject. At the moment, the *Taxman* case was awaiting an opinion from the Third Circuit Court of Appeals, and was thus front and center in much of the policy

debate. Interestingly enough, it wasn’t at all clear that the Administration was going to come out on the same side as Patrick and the Department of Justice. From Edley’s perspective, the matter was up for debate. On the subject of the then-pending Taxman decision, Edley’s words are indicative of the administration’s predicament: “Now, in the cold, clear light of a thoroughgoing review of the principles and values at stake in affirmative action broadly, would the President stand by the Justice Department’s earlier position? And if so, on what grounds?” Christopher Edley, who had taught Deval Patrick while at Harvard Law, appeared far less certain than his former student on how the administration would come out on this issue.

By the end of the President’s policy review and before he gave the concluding speech at the National Archives, the Adarand opinion had been released. As it turned out, the Court ruled by a bare majority that all affirmative action policies would now be subject to strict scrutiny, whether federal or state sanctioned. The opinion essentially overturned the Metro Broadcasting v. F.C.C. decision of five years earlier, and made ambiguous what, if any, forms of racial preferences would be upheld under the now universal standard of strict scrutiny. The nature of the opinion was important, as the Court remanded the case to the circuit court in order to determine whether the racial preference under consideration did indeed meet the heightened judicial requirement. As Clinton and Patrick repeatedly pointed out following the decision, the Supreme Court had in no way declared affirmative action dead. Rather, they simply tightened up the rules, and were allowing the lower courts to use their discretion in applying them.

\[166\] Ibid. (9).
In order to understand why Taxman’s legal question was particularly salient in the period from 1994 through 1997, you have to look at what was going on within the judicial branch of government, particularly the Circuit Courts of Appeals during the initial years Bill Clinton was in office. While the marquee case on affirmative action at the Supreme Court in 1995 may have been Adarand, it was actually two cases that never reached the High Court that made Taxman especially important. Of crucial significance both legally and politically, the outcome of these two lower court cases, Texas v. Hopwood and Podberesky v. Kirwan, do well to explain the growing angst of both liberal civil rights groups and the Administration, both of which were repeatedly placed on the losing side. Furthermore, given the outcome of these pivotal lower court decisions, it’s clear why both civil rights groups and the Clinton Administration took the positions they did as Taxman approached the Supreme Court.

First, it’s worth noting that despite the vision Deval Patrick had for civil rights at Justice, one of the arenas in which he was expected to enforce his understanding of the law, the Federal Circuit Courts, was disproportionately numbered with judges aligned against his legal positions. The explanation for this is very simple: in the 1980s Reagan had not only successfully appointed a record number of federal judges, but also vetted them for specific ideological viewpoints.

Historically speaking, it is routine, perhaps even expected, that presidents will make judicial appointments based on party membership. Indeed, the Reagan administration was no different in following this principle. However, what made Reagan’s appointments unique was the degree to which his staff ensured that nominees were not simply in agreement on broad ideals, but also on very narrowly defined, individual issues and legal doctrines. Of great relevance to Taxman, the man in charge of vetting judicial nominees in the 1980s, William Bradford
Reynolds, found it particularly important that conservative judges be sympathetic to the race-neutral, anti-affirmative action stance he was postulating in court.¹⁶⁷

In the early 1980s Reynolds predicted that by the end of Reagan’s tenure he would be able to appoint three or more Supreme Court Justices and roughly one-half of all federal judges, ultimately constructing an institution that would dismantle the legal foundation for affirmative action.¹⁶⁸ Reynolds’ predictions were nearly correct. When Reagan left office he had in fact appointed three Supreme Court Justices—perhaps four if you count Rehnquist’s elevation to Chief Justice—in addition to 83 of the 179 total judgeships on the Circuit Court of Appeals. And while Clarence Thomas may have been the most visible appointment made by George H.W. Bush, 42 other predominantly conservative judges were appointed to the circuit courts from 1989 through 1992.¹⁶⁹ When Bill Clinton took office in 1993 it was in the context of a federal circuit court of appeals comprised of 119 judges whom had been appointed by Republicans. Of the 161 total judges then serving on the circuit courts, only 42 had been appointed by a Democrat.

These two factors, the way in which Reagan had vetted judicial nominees as well as the sheer number of judges that he and Bush were able to push through congress, meant that Deval Patrick’s sharp turn to the left on civil rights in 1994 was facing a formidable opposition in the judicial branch. More specifically, the Kirwan and Hopwood decisions proved to be the manifestations of what Reynolds was trying to accomplish one decade earlier. Together, these circuit court rulings undercut much of the logic propping up the 1978 Bakke decision and

¹⁶⁸ Ibid.
¹⁶⁹ See chart on judicial appointments to the circuit courts appended to chapter.
implicitly questioned the constitutionality of affirmative action outside of the most narrow, victim-specific models.

The Kirwan case was a simple challenge to race based scholarships at the University of Maryland. Daniel Podberesky was a Hispanic student who applied, and was rejected, for the Benjamin Banneker scholarship at the University. The scholarship, created in the 1970s as part of a larger effort to rectify past segregation, was designated exclusively for 30 to 40 black students each year. Though Podberesky was deemed better qualified academically for the award than many of its recipients, his race precluded him from being eligible. The student subsequently brought the University of Maryland to court on 14th amendment equal protection grounds and lost. The District Court reasoned that because the University had a prior history of discrimination, the scholarship was constitutionally permissible as a remedial measure.\(^{170}\)

The Fourth Circuit Court of Appeals disagreed. A panel of three Republican-appointed judges placed a novel restriction on the University’s scholarship program. The Court ruled that in order to pass muster under the 14th amendment the school must be able to demonstrate that the actual effects of past discrimination were still present at the institution, and thus, the scholarship program was being used as an active remedy to combat prior discrimination. Setting this as the new standard for review, the panel remanded the case to the District Court.

The District Court stood by their initial decision, and the case returned to the Circuit Court of Appeals for a second hearing. The Circuit Court panel again decided in favor of Daniel Podberesky, striking down the University’s race-based scholarship. As the resulting opinion explains, “The purpose of our earlier remand in this case was to allow the district court to

determine whether the University could prove that there were present effects of past
discrimination which warranted such race conscious remedial action.”

Setting any and all race based scholarship programs up for imminent failure, the Circuit
Court Opinion explains:

To have a present effect of past discrimination sufficient to justify the program, the party
seeking to implement the program must, at a minimum, prove that the effect it proffers is
caused by past discrimination and that the effect is of sufficient magnitude to justify the
program. As to the effect justifying the remedial measure “absent searching judicial
inquiry into the justification for such race-based measures, there is simply no way of
determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in
fact motivated by illegitimate notions of racial inferiority or simple racial politics

The decision held powerful implications. At a University that had once been segregated
by race, it was still impermissible to use affirmative measures to further integrate the campus. If
this was not a constitutional usage of race for affirmative action, then it wasn’t quite clear what
was. To be precise, the decision became controlling law in five states: Maryland, North Carolina,
South Carolina, Virginia, and West Virginia. But the chilling effect and likely challenges this
case presented across the country was no minor ordeal. All race specific scholarships were
inherently suspect over night. Major state universities in Wisconsin and Texas, for example, had
racially oriented scholarship programs designated exclusively for blacks, nearly identical to
Maryland’s. Moreover, federal government scholarships such as the Minority Undergraduate
Studies Program at the Central Intelligence Agency similarly appeared to be on tenuous
ground.

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Programs in the United States. No. 8. Summer (11)
The Clinton administration had likely perceived the political danger of voluntarily getting involved in the case. During the first few months of the new term in 1993, Clinton’s team at Justice opted not to get involved, despite the urgings of the Department of Education. However, by November of 1993 the Justice Department decided to file an amicus brief in support of the Maryland scholarships just as it was getting set for its second hearing in the District Court.\(^{173}\)

As the Supreme Court was reviewing *Kirwan*’s petition for writ of certiorari in the spring of 1995, the Department of Justice seemed to take on a slightly more measured and cautious tone. In some ways, the amicus brief submitted by Solicitor General Drew Days in support of the Maryland scholarships was a sign of the increasingly hostile times. That is, rather than coming out and arguing that the Benjamin Banneker scholarship program was constitutional, the brief simply asked the court to reverse the decision based on grounds that the lower court had used the incorrect constitutional standard when reviewing the case.\(^{174}\) It was a calculated move by an administration that was concurrently reviewing the extent to which affirmative action should remain prevalent in the country.

As it turned out, the amicus brief was somewhat irrelevant. On May 22, 1995 the Supreme Court denied the petition for writ of certiorari, leaving the Fourth Circuit’s ruling in place. The Department of Education took this decision—or lack thereof—and ran with it. Releasing a statement to all college and university counsel, the Department of Education took the opportunity to confirm that its “policy guidance on race-targeted student financial aid has not


changed as a result of …the Supreme Court’s recent decision not to hear the appeal requested by the University of Maryland in the Podberesky v. Kirwan case.”

By this point it was clear: The Administration and the federal courts had two very different conceptions of what types of affirmative action were permissible under the law. It seemed it was only a matter of time until one would have to cede ground.

While the Kirwan decision might have suggested that guidance was needed on the relevance of Bakke, the Hopwood decision was nothing short of a judicial coup on affirmative action in higher education. For the second time in two years, a circuit court crafted an entirely novel and highly restrictive model for reviewing the constitutionality of affirmative action. To be clear, the timing of the circuit court decision in Hopwood is particularly relevant. Coming just months before the Third Circuit handed down their opinion in Taxman, the case weighed heavily on the minds of everyone interested in the issue of affirmative action. Legally, Hopwood added to the sense that the underlying logic being debated in Taxman required definitive guidance by the Supreme Court. Moreover, the decision was paramount in the minds of civil rights groups and liberals who feared that the rationale in Hopwood might be affirmed in Taxman upon reaching the hands of the Justices in D.C. For these reasons, a brief review of Hopwood is highly relevant to understanding the way in which Taxman played out from the Circuit Court forward and how individuals rationalized what they perceived as the direction of the law on this issue.

Running parallel to the premise in Bakke, the lawsuit in Hopwood began as a challenge to the affirmative action policy at the University of Texas’ law school. It’s worth noting however,  

that unlike the medical school being challenged in Bakke, the Texas law school had a clear and identifiable history of discrimination towards minorities. In fact, in one of the most famous desegregation cases of the twentieth century, Sweatt v. Painter, Texas had lost its attempt to maintain a “separate but equal” law school for black applicants. In light of this history, the Texas Law School established an affirmative action program that reviewed black and Mexican-American applicants separately. The stated goal was to construct an incoming class that was at least five percent black and ten percent Mexican-American.

Cheryl Hopwood and three other non-minority students sued the school on 14th amendment equal protection grounds after not being admitted. The District Court sided with the rejected students. The judge ruled that although recognizing diversity and remedying prior discrimination are both compelling interests under Bakke, the Texas program was not narrowly tailored and thus could not be upheld. During the litigation of the case, the law school abandoned the affirmative action program. Because of this, as well as the fact that the District Judge did not deem the plaintiffs necessarily more qualified than the minority candidates, no relief was granted to the students.

Cheryl Hopwood then appealed to the Fifth Circuit, and the opinion subsequently issued was nothing short of revolutionary. Circuit Judge Jerry Smith reasoned that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment”. Dismantling Bakke, Smith continued


with a strong repudiation of Powell’s 1978 opinion, and dismissed its relevance as controlling precedent:

Justice Powell’s argument in Bakke garnered only his own vote and has never represented the view of a majority of the court in Bakke or in any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.\(^{178}\)

In plain language, Smith categorically rejected the notion that diversity could ever be used as an argument to uphold affirmative action, and further pointed out that “No case since Bakke has accepted diversity as a compelling state interest under a strict scrutiny analysis.”\(^{179}\)

If this didn’t narrow the permissible instances of affirmative action enough, the opinion then moved on to whether or not the remedial purposes of the program were independently constitutional. Directly quoting the Kirwan decision, Smith noted that “in order to justify an affirmative action program, the state must show there are ‘present effects of past discrimination’”.\(^{180}\) Given the glaring history of racial discrimination in the state, the opinion conceded that “No one disputes that in the past, Texas state actors have discriminated against some minorities in public schools. In this sense, some lingering effects of such discrimination is not ‘societal’”\(^{181}\)

Thus, forced to get around what presumably would justify most affirmative programs in the country, the opinion further confined the instances to which remedial measures were


\(^{179}\) Ibid. (p 17)

\(^{180}\) Ibid (p 22)

\(^{181}\) Ibid (p 25)
permitted. Smith made it clear that the discrimination of the specific actor—in this instance the law school itself—must be responsible for the “present effects” of the discrimination it is looking to correct. In addition, “the law school must show that it adopted the program specifically to remedy the identified present effects of the past discrimination” that it is responsible for. 182

Closing the opinion Smith made explicit what impact this case was intended to have on affirmative action:

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school’s poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. 183

In short, when describing the extent to which affirmative action may properly be used, the only restrictive language the opinion left out was “never”. In a concurring opinion, Judge Weiner dissented from the analysis used to reach the Court’s opinion, noting quite pointedly “if Bakke is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement”. Weiner was quite candid with his objections to the other two judges on the panel, and wrote:

The main reason that I cannot go along with the panel opinion to that extent is that I do not read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest. 184

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182 Ibid (p 26)
183 Ibid (p 37)
184 Ibid (p 40)
Although the Fifth Circuit was dominated by conservatives, the unprecedented restriction placed on affirmative action by the majority did not sit well with a large minority of judges on the court. On their own initiative, the Fifth Circuit Court conducted a poll to determine whether or not to rehear the case en banc. The motion was denied 9-7, and in an unusual move, the seven opposing judges released a fiery dissent, criticizing their colleagues for not taking the case up as a panel in full. The Chief Judge, writing for the dissenters, remarked that “To decline to rehear a case of this magnitude because the parties have not suggested that we do so bespeaks an abdication of duty- the ducking of a tough question by judges who we know first-hand are made of sterner stuff”\(^\text{185}\). Concurring in the dissent, Judge Stewart accused his colleagues of ignoring the obvious history which led to the very policy in question and arose out of the seminal \textit{Sweatt v. Painter} decision. Stewart reminded the Court, “History, in its characteristic irony, takes this court to that hallowed ground of civil rights jurisprudence to assess the University’s effort to encourage minority enrollment and counter its legacy of segregation. It is an unfortunate, further irony that the panel majority opinion should so overreach in its decision.”\(^\text{186}\)

It seemed all but certain that \textit{Hopwood} was headed for the Supreme Court. In the month following the Circuit Court decision, amicus briefs for both sides began flooding the Clerk’s office at the Supreme Court. Interestingly enough, the case never made it there.

Despite the urging of the Solicitor General, as well as the Attorney Generals of nine states and the District of Columbia, the Supreme Court denied certiorari in July of 1996. Feeling it was necessary to explain why the petition was being denied—another exceptionally rare move—Justice Ginsburg emphasized that “Whether it is constitutional for a public college or

\(^{185}\) Chief Judge Politz Dissent from en banc poll result not to rehear \textit{Hopwood}. 84 F.3d 720.

\(^{186}\) Ibid. Judge Stewart concurring in the Dissent.
graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance”. However, because the University had long since changed its admissions policy, the case was deemed moot. Ginsburg thus concluded, “we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.” 187 Although this statement by Ginsburg is as close as one will ever get to learning the Court’s true rationale for denying certiorari, one might speculate that the liberals on the bench were loath to take on a case with such potentially damaging implications for affirmative action had the lower court ruling been upheld. More specifically, if an affirmative action plan was to be struck down in one of the nation’s historically segregated states, Texas, it would completely undermine the rationale for affirmative action in states with less discriminatory histories.

Thus, in Hopwood, as in Kirwan, the Supreme Court passed on the opportunity to give definitive guidance as to the extent to which Bakke was still relevant as controlling law. To be clear, in some parts of the country at this time the only rationale in place for affirmative action programs in education was the need to achieve greater diversity among membership, whether for students or teachers. Yet, following Hopwood and Kirwan, in at least two regions of the United States—those covered by the fourth and fifth circuits-- this appeared to be unconstitutional. Collectively, with Adarand outlining the parameters for heightened judicial scrutiny nationwide and Kirwan and Hopwood providing two clear examples of programs that ostensibly didn’t meet this heightened standard, it was reasonable to infer that it was only a matter of time until the

187 518 U.S. 1033, 116 S.Ct. 2581 (Justice Ginsburg’s opinion regarding the denial of certiorari to Texas v. Hopwood)
federal courts would declare everything but the most remedial forms of affirmative action in unconstitutional.

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By the spring of 1996 the *Taxman* case was part of much larger and complicated national debate going on between the Clinton administration, the federal courts, and to some degree, the American people themselves. At the moment, *Taxman* was the last case—among those that had garnered any sort of national attention—yet to be resolved on the issue of affirmative action. Deval Patrick was a dismal 0-3 in the federal courts, losing in *Kirwan, Adarand*, and *Hopwood* respectively. Of the four affirmative action cases, none had brought about the level of dissent directed at Patrick as *Taxman*. It seemed that out of all the forms of affirmative action his division was supporting, none seemed less tenable and more unpopular than the idea of layoffs. Unfortunately for Patrick, this was the only card he was left holding in his battle to maintain affirmative action. Much to the chagrin of many in the Administration, he wasn’t willing to fold.
United States Circuit Courts of Appeals: appointments by political party and president[^188]

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[^188]: See year 1992 where the ratio was 119:42 Republican to Democrat appointed judges sitting on the Circuit Court of Appeals.

The chart was taken from Wikipedia: [http://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts](http://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts). The specific numbers used in the chapter were cross-referenced with secondary sources.
Chapter 5
Death by circuit court overreach

*Taxman* was initially argued in front of the Third Circuit Court of Appeals in January of 1995. The court itself was characteristic of the circuits at the time; that is, heavily Republican. Of the thirteen active judges in 1995, eleven had been appointed by Republicans and two by Democrats. As is customary, a randomly selected three-judge panel heard the case. More specifically, Judges McKee, Mansmann, and Hutchinson sat for oral arguments. For the Piscataway School Board’s lawyer, David Rubin, the odds may have been against him given the makeup of the court as a whole, but the panel included Judge McKee, one of the two Democratically appointed judges and more liberal members of the Court. Essentially his task was to win over one of the two conservatives.

Rubin recalls after arguing the case, “I was fairly confident I had Judge McKee’s vote, equally confident I did not have Judge Mansmann’s, and not optimistic about Judge Hutchinson’s”. If anything, Rubin was confident “the panel would not be speaking with one voice when it rendered its decision.”

As it turned out, the panel never spoke at all. An agonizing ten months later, Rubin received a call from the clerk’s office informing him that the case was being scheduled for a rehearing; Judge Hutchinson had passed away of cancer before the opinion was finalized. Procedurally, if two judges on the panel were in agreement they could have issued the opinion

189 See chart appended on the judicial appointment history of the Third Circuit Court of Appeals.
regardless. This apparently was not the case. It seemed that McKee and Mansmann were split, just as Rubin had expected.

For the school board lawyer, what happened next was tantamount to winning the lottery. At random, Judge Hutchinson was replaced on the second panel by Chief Judge Sloviter, the only other Democrat-appointed judge on the Third Circuit besides McKee. On November 25, 1995 the litigants appeared before a packed courtroom in Philadelphia to rehear what had by then become a highly visible case.\footnote{Ibid (31)}

For the second time, however, no opinion was released. It seems that the Piscataway School Board had won the case this second time around, but this was simply unacceptable for the Third Circuit. More specifically, a process within the circuit courts exists whereby panel decisions are circulated to the Court at large before they are released. In certain rare instances, the court as a whole can vote not to release the panel opinion and instead rehear the case en banc. The official reason for this is quite reasonable and as David Rubin believes, “a good one”. That is, the procedure is needed to avoid having two panels release independent opinions that interpret the same law in two conflicting ways.\footnote{David Rubin. 2010. Interview by author. January 4.} Whether or not this was the case in \textit{Taxman} is unclear. Regardless, the case was rescheduled for a second time, now before twelve judges, for May of 1996.

Given the national media attention, and given the political leanings of the judges, it seems that the School Board’s lawyer was thinking “Supreme Court” well before the oral arguments rolled around for the third time. Rubin had already commented that the case had the potential to “skyrocket” to the High Court. Moreover, the remarks of the full panel during oral arguments

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\footnote{Ibid (31)}
were far from encouraging and made it clear that a victory for the school board was highly unlikely.\textsuperscript{193} In one exchange, Judge Lewis remarked, “I heard it said that one person’s diversity is another person’s discrimination.”\textsuperscript{194}

The opinion was released in August of 1996, just in time to repudiate Bill Clinton’s “mend it don’t end it” stance going into the Presidential election. Like Hopwood, the opinion went well beyond the bounds of what was necessary to decide the case. Ruling 8-4, the circuit court used language that further closed the door on racial preferences, whether with regards to employment decisions or education more generally.

Writing for the majority, Judge Mansmann—in similar fashion to the district court judge—analyzed the Piscataway School Board’s affirmative action program in light of Title VII as well as the Weber and Johnson precedents. Her line of reasoning was simple and straightforward: In order for an affirmative action plan to get around the seemingly absolute antidiscrimination language of Title VII, a plan must, as had been the case in Weber, mirror the intentions of Title VII itself.\textsuperscript{195} According to Mansmann, “Title VII was enacted to further two primary goals: to end discrimination based on race…thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and the underrepresentation of minorities that discrimination has caused…”\textsuperscript{196}


\textsuperscript{194} Supra 2(30).

\textsuperscript{196} Taxman v. Board of Education of Picataway (1996). 91 F.3D 1547. J.Mansmann majority opinion
In other words, according to the majority the only reason the plans in *Weber* and *Johnson* were upheld was their remedial purpose; that is, the fact they were enacted to account for a clear underrepresentation of a class of citizens, whether blacks or women. The logical extension of this was made explicit in the opinion: “Thus, based on our analysis of Title VII’s two goals, we are convinced 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…*Weber*.“\(^{197}\)

The court also dismissed the line of reasoning Rubin had used to argue that Title VII permitted the plan. As mentioned earlier, Rubin and many other lawyers believed that an affirmative action plan that could survive strict scrutiny under the 14\(^{th}\) amendment was by definition permissible, as strict scrutiny was the highest judicial standard. Moreover, to Rubin the Piscataway plan appeared to clearly pass strict scrutiny under the test as used by the Court in *Wygant*. Therefore, one could reasonably deduce, as Rubin had, that although there was no Title VII case law regarding the fostering of diversity, if the policy could withstand a 14\(^{th}\) amendment challenge this should have a transitive effect, implying permissibility under Title VII. Judge Mansmann addressed this directly, arguing that “While the Supreme Court may indeed at some future date hold that an affirmative action purpose that satisfies the Constitution must necessarily satisfy Title VII, it has yet to do so.”\(^{198}\)

Rather than strike down the affirmative action policy or its application by arguing that it unnecessarily trammeled the interests of the non-minority, Sharon Taxman, it went much further. It declared in categorical language that any employment decision whatsoever using race to foster diversity was illegal. Mansmann closed by writing, “Although we applaud the goal of racial

\(^{197}\) Ibid.

\(^{198}\) Ibid.
diversity, we cannot agree that Title VII permits an employer to advance that goal through non-
remedial measures.”

Chief Judge Sloviter’s dissent cut straight to the issue of overreach by the Court:

Although the divisive issue of affirmative action continues on this country’s political agenda, I do not see this appeal as raising a broad legal referendum on affirmative action policies…Instead, the narrow question posed by this appeal can be restated as whether Title VII requires a New Jersey school or school board, which is faced with deciding which of two equally qualified teachers should be laid off, to make its decision through a coin toss or lottery…or whether Title VII permits the school board to factor into the decision its bona fide belief…that students derive educational benefit by having a Black faculty member in an otherwise all-white department.

Moreover, Sloviter deconstructed the majority opinion’s underlying rationale, pointing out that their interpretation of Weber and Johnson was severely flawed and profoundly misleading. Put simply, the majority opinion reasoned that since the plan in Taxman did not correspond to that which was upheld in Weber or Johnson it must necessarily be impermissible.

Sloviter strongly disagreed with this reasoning, writing:

…it does not follow as a matter of logic that because the two affirmative action plans in Weber and Johnson which sought to remedy imbalances caused by past discrimination withstood Title VII scrutiny, every affirmative action plan that pursues some purpose other than correcting a manifest imbalance or remedying past discrimination will run afoul of Title VII.

Each of the four dissenting judges wrote separately to highlight the disagreement they had with an opinion they believed had grave implications for the furthering of racial integration. Judge Lewis used his dissent to provide powerful examples of the “real-life impact of the majority’s unprecedented construction of Title VII”. He presented the example of a law firm

199 Ibid.
200 Ibid. J. Sloviter dissenting opinion
201 Ibid J. Sloviter dissenting opinion
now barred from retaining a black associate, even if the firm knew it was in their best business interest to maintain a more diverse work force. At universities, he explained, the granting of tenure to a minority in the interest of diversity would also be prohibited. In this sense, he explained, “…the majority’s decision eviscerates the purpose and the goals of Title VII”  

With perhaps the most provocative language of the opinion, Judge McKee—who was coming down in favor of the school board for the third time—articulated his position with an appeal to history:

> We have now come full circle. A law enacted by Congress in 1964 to move this country closer to an integrated society and away from the legacy of ‘separate but equal’ is being interpreted as outlawing this Board of Education’s good faith effort to teach students the value of diversity...The shadows and images that moved Congress to enact Title VII in 1964 are already etched into our slate, and they define the reality that should guide our analysis. The Board has responded to those shadows with an action that is a narrow, individualized and reasoned attempt to foster respect for diversity.  

Following the release of the opinion, the school board met with David Rubin and discussed the options for moving forward. Though Rubin maintains that any calculations with regards to appealing were based solely around the interest of the client, his eagerness to litigate at the High Court was no secret. Just after the decision he told one reporter he knew of no other cases “where the issues are as alive, and as ripe for review as this one.”  

Like most lawyers, Rubin had never argued before the Supreme Court, though oddly enough, he was nearly granted certiorari in a case fifteen years earlier also involving the Piscataway school board.  

202 Ibid. J. Lewis dissenting opinion  
203 Ibid. J. McKee dissenting opinion  
205 Supra at 3. Two justices voted to hear argument for a case out of the New Jersey Supreme Court, Board of Education of Piscataway v. Caffiero, a case centered on the liability of parents for their children’s vandalism.
The school board was largely in agreement that their position was still the correct one. One third of the circuit court, as well as the Attorney General and the President of the United States, believed their position was right. In the immediate aftermath of the circuit court opinion, the board was less concerned with any broad national implications a Supreme Court decision may have for others, and more so motivated by the fact that an appeal still held the possibility of saving the district a sizeable portion of money. They voted in favor of filing a petition for writ of certiorari.

For David Rubin the challenge was having his case granted review. In cases in which the United States is not a party, which was now the case—the United States had by now been forced to reduce their involvement to amicus curiae—lawyers have less than a one percent chance of being granted certiorari. Rubin knew that to increase his chances he would have to “demonstrate, in as few words as possible, that the case presented an important unresolved issue worthy of consideration by the nation’s highest court.”

Doing just that, Rubin began his petition powerfully:

In a decision as sweeping as the Fifth Circuit’s recent Fourteenth Amendment ruling in *Hopwood v. State of Texas*, the court rejected the teaching of *Regents of the University of California v. Bakke*, and brought to an end the long-settled expectation of academic officials that race may be given limited consideration in their good faith efforts to offer an educationally enriching experience for our Nation’s youth.

Rubin’s petition made a persuasive case for granting certiorari, pleading with the High Court that guidance was gravely needed on the permissible use of race. As Rubin correctly pointed out, there was widespread disagreement between varying circuit courts, as well as

Supra at 1(32).

inconsistency among federal agencies enforced with the task of implementing the law without clear guidelines.

In November of 1996, two weeks after the school board had filed their petition at the Supreme Court, Deval Patrick stepped down from his post as Assistant Attorney General. His influence on Clinton in remaining steadfast on affirmative action had been extraordinary. If the government’s decision to support Piscataway was tied to any single man’s agency, it was undoubtedly that of Patrick’s. As aforementioned, the Department of Justice was offered the opportunity to withdraw entirely, but under Patrick’s guidance remained tied to the case as an amicus curiae, a point that had frustrated many within the administration for bringing political controversy where it may have been avoided. In many ways, the position the government took in Taxman was an undeniable measure of the influence Patrick had garnered within the administration and the deep level of trust he was accorded by Clinton. In an interview following his announced departure, Patrick gave a simple justification for his resignation and lamented, “I miss my kids and I love my wife”, who had moved back to Boston one year earlier. In discussing his imminent departure Janet Reno called Patrick “one of the finest public servants I have ever known.”208 The Piscataway School Board and David Rubin were losing a powerful friend indeed.

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After Bill Clinton won reelection over Bob Dole in the 1996 November election, it seemed, at least politically, that the Administration had little left to be bothered with in the long

drawn out case from Piscataway. As they were no longer an official party in the case, and without Deval Patrick pushing for the government to support the school board, they could have quite easily stayed out of the proceedings entirely. However, much to their dismay, the Supreme Court had other plans. On January 21, 1997 the Court requested that the Solicitor General express a position on whether or not certiorari should be granted in *Taxman.*

The independence of the Solicitor General is worth noting. Officially speaking, the only individual in government who can overrule his or her decision on an issue before the Supreme Court is the President. Again, individual agency becomes important. Had Drew Days stayed on as Solicitor General for the 1996-1997 Court term, the United States’ position may have remained what it had been in the circuit court, but Drew Days had also stepped down. In his place was now Walter Dellinger, a man who was open about the fact he opposed Patrick’s position in the case while at his previous post at the Office of Legal Council. Dellinger went directly to the President in order to discuss *Taxman* and told him “the position we would be arguing was utterly untenable.”

Dellinger discussed with Clinton how best to proceed, and explained why he thought “…the school board was wrong and that Sharon Taxman should prevail, even though we thought the Third Circuit had gone too far in a scorched-earth, zero-is-the-answer opinion.”

Dellinger knew taking a new position left the Administration in a bind with the civil rights community. The Solicitor General took an extraordinary step and scheduled meetings with

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209 519 U.S. 1089. “The Solicitor General is invited to file a brief in this case expressing the views of the United States”


211 Ibid.
civil rights leaders to explain the administration’s new position and quell the expected dissent. As Dellinger later explained, he felt “early engagement was the way to take that position.”²¹²

Of course, the first and most obvious option for a Solicitor General looking to avoid the controversy entirely is to get a petition for certiorari rejected. Dellinger’s attempt in Taxman failed. In fact, one can’t help but read Dellinger’s brief calling for the Court to reject certiorari as anything but another reason to be intrigued by the case itself. The Solicitor General, in language that could only make sense given the political nature of the issue, argued that “By holding that Title VII prohibits all non-remedial affirmative action in employment, the court of appeals incorrectly decided an issue of broad national significance”. Despite this, he maintained, “This case, however, is not an appropriate vehicle for resolving that issue.”²¹³ Essentially Dellinger argued that given the rare facts of the case, the Court should not use Taxman to determine whether non-remedial affirmative action can be upheld. Of course, the real position of the United States was something closer to “we would rather avoid having the Supreme Court rule on this case, given the possibility that it may extend the circuit court’s ruling to the entire country”.

For David Rubin, who had defended this case against the United States, and then with the United States, in a circuit court that had both upheld and struck down his client’s policy, this was just another political maneuver. As Rubin recalls, “Nothing at that point could surprise me with this case.”²¹⁴

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²¹² Ibid.


²¹⁴ Supra at 4.
Defying the Solicitor General’s advice, at least four Justices decided the Piscataway case held national implications important enough to hear and the Court granted certiorari to Taxman in the final day of the 1996-1997 term.\textsuperscript{215} The press took notice immediately and dramatically described the case as having been a “lightning rod for criticism of affirmative action for seven years.”\textsuperscript{216} Its hearing at the Supreme Court was to be “…the centerpiece of the new term, doing more to galvanize debate over affirmative action than any Presidential speeches or commissions.”\textsuperscript{217}

After certiorari was granted, the United States submitted its official amicus brief for the case. The government again took the position that the board was wrong in laying off Taxman, but the circuit court was incorrect in ruling that all affirmative action required a remedial justification. This would remain the government’s position through the conclusion of the case, though it would not go without criticism. This, the second shift in the government’s stance, was widely publicized. The New York Times released excerpts from the brief, and the story became mainstream news.\textsuperscript{218}

As the Administration expected, criticism was lobbed their way from the many who supported the earlier pro-affirmative action position. Frustrated by the latest reversal, David Rubin told the press, “I don’t understand politically what they get by doing that. This case has

\begin{footnotesize}\textsuperscript{215} According to the “rule of four”, if any four Supreme Court Justices decide that a petition of certiorari presents a question they wish to hear, the case will be added to the Court’s docket, and will ordinarily be scheduled for oral argument the following term. Less than one percent of all petitions are granted a review.\textsuperscript{216} Linda Greenhouse. 1997. Justices, ending their term, agree to hear a big affirmative action case. \textit{New York Times}. June 28.\textsuperscript{217} Linda Greenhouse. 1997. A Case on Race Puts Justice O’Connor in a Familiar Pivotal Role. \textit{New York Times}. August 4.\textsuperscript{218} \textit{New York Times}. 1997. Excerpts from Affirmative Action Brief. August 23.\end{footnotesize}
been an embarrassment for the administration. They are double flip-flopping back again.”219 A lawyer from the American Civil Liberties Union commented, “Given the number of times the federal government has flip-flopped in this case, I don’t know how much credibility the government’s brief will have.”220

Through the fall of 1997 the media scrutiny only intensified. Cameras and reporters increasingly found their way near the Piscataway High School and board members grew worried that coverage would hinder the daily business of the school.221 David Rubin began preparation for his upcoming appearance in front of the High Court, and began making trips with increasing frequency to D.C. in order to watch oral argument and get a feel for the Justices. As the oral argument date approached, the Supreme Court press corps began to recognize the school board lawyer, and used his appearances to further pepper him with questions about the big case.222

Civil rights groups had been very much aware of Taxman even before it was granted a review at the Supreme Court. As early as 1994 when the case was getting set for argument at the circuit court, the NAACP had filed a brief trying to get the case thrown out of court on procedural grounds. Former co-worker of Deval Patrick, Elaine Jones, argued that the District Court had never established as fact whether the board’s stated purpose of using the affirmative action program to foster educational diversity was in fact true. Jones and the NAACP noted that as a matter of law, until the fact that they were actually attempting to achieve educational


222 Supra at 4.
diversity was established, the court was barred from making a ruling. It was possible, as Sharon Taxman and her lawyer actually suggested in the District Court, that the school board had manipulated the numbers to create a “tie” in seniority. If this were true, any ruling on the merits of “fostering diversity” was unnecessary. Unfortunately for them, this argument was summarily dismissed by the circuit court.

Now that the case had made its unlikely arrival at the Supreme Court, a panic took hold among civil rights groups terrified by how the conservative leaning court might rule. They knew there were four justices who were happy to end affirmative action and race based policies entirely. And more than likely, the decision came down to how Sandra Day O’Connor would rule; David Rubin often joked that he might as well make his brief addressed to her directly.

Civil rights groups appeared increasingly angry, and for good reason. Twice in the previous two years there had been affirmative action cases, Kirwan and Hopwood, that had presented a set of facts indicative of the types of racial preferences they routinely defended. In each case, however, the Supreme Court declined review, and allowed a ruling perverse to their interests to stand. Now, in a case which presented a scenario they would have never chosen to defend unless forced to, there was a realistic possibility the Justices could make a broad ruling that would circumscribe affirmative action to the point of immobility.

Almost as the Clinton administration had done, civil rights groups began to abandon ship, and attempted to draw a bright line between the affirmative action they supported and that in Taxman. Yvonne Scruggs-Leftwich, the head of the Black leadership forum, called it “a personnel action—and a wrong-headed one—with none of the elements of real affirmative action

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because there was no ongoing policy or practice affecting hiring or training, and the decision did not affect more than one job.”

The head of the NAACP, Kweisi Mfume, appeared on Nightline to debate the case opposite Clint Bolick, and took a similar line of reasoning. Mfume called Taxman unrepresentative of affirmative action. He too saw it as a narrow personnel decision, and lambasted Bolick and other conservatives for using the case to dismantle bona fide programs across the country.

Bob Herbert of the New York Times opined that Debra Williams’ master’s degree was a “legitimate criterion other than race upon which to make [the board’s] decision”. Because the board didn’t recognize this early on, he argued, this “isolated, atypical and sloppily developed in terms of its factual record is now, incredibly, the most important and potentially most explosive employment discrimination case in the land.”

Behind the scenes, civil rights groups were frantically devising a plan to save affirmative action. Unbeknownst to even the school board’s lawyer, some of the country’s most prominent civil rights leaders met in secret at a hotel near Dulles airport in August of 1997. As Hugh Price, President of the Urban League recalls, “The general discussion was that this was one of the worst cases one could imagine bringing to the Court and it would allow it to make a sweeping ruling on affirmative action.”

Their goal was to craft a settlement that could pull the case from the


Supreme Court’s docket. In late September, Jesse Jackson called David Rubin, and after a lengthy discussion of the case, urged him to explore settling.\textsuperscript{227}

Jackson, along with Elaine Jones and Theodore Shaw of the Legal Defense Fund, as well as leaders from the NAACP and National Urban League, worked to raise money from private corporations who saw a vested interest in retaining their own affirmative action policies. In sum, the organizations raised $300,000. It was enough to pay for roughly 70\% of the potential settlement that was being worked out between David Rubin and Sharon Taxman’s attorney. The two men agreed to a settlement of $433,500, but it was up to the Piscataway School Board whether or not they wished to sign off on it.

\textbf{Third Circuit Court of Appeals: Judicial appointments by party and president}\textsuperscript{228}

\textsuperscript{228} The above chart was taken from Wikipedia: http://en.wikipedia.org/wiki/Judicial_appointment_history_for_United_States_federal_courts.
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Chapter 6
Neither “slayers nor saviors”: the settlement from two perspectives

In November of 1997, the Piscataway school board members were confronted with an unlikely escape route from the now eight-year-old case. There was a certain irony to the situation. Over the past two years the board had lost nearly all control over the happenings of the lawsuit. Now, just before it was set to receive the most definitive of rulings, they were granted the autonomy to decide its fate.

By this point the case had reached a level of discourse unfathomable to anyone. Bob Dole had used Taxman to indict Clinton for supporting racial quotas during the 1996 election. Of course, Dole chose to gloss over the fact that the school board had never used quotas in its history. Orrin Hatch and other Republicans in Congress appealed to the case when attempting to push through legislation in 1995 that would have made racial preferences of all kinds illegal. This bill, vehemently opposed by a broad coalition of affirmative action supporters, never passed. Now, with media attention as acute as ever, the case was effectively back where it started, in the hands of a school board that simply wanted to, as the District Court Judge had said four years earlier, “make the best of a very bad situation”.

Up through 1997, the decisions to move forward with the case had been widely supported by the board members; Just a little more than one year earlier they voted 7-2 to appeal their case to the Supreme Court. They strongly favored the affirmative action program that had been used, and maintained that their high school was better because of it. Diversity was an integral aspect of Piscataway high school, and was—even if only implicitly—a visible criterion when making

decisions in the school district, whether regarding hiring, promotion, recruitment, or matters concerning the curriculum. Moreover, the school board of 1997 was somewhat deferential to the board of 1989. They knew that the men and women on that school board were adamant about the importance of the affirmative action policy at issue, and this had—at the very least—a minor influence on their position.

There had also been a sense of unity on the case itself. As board member Catherine Greeley recalls, when new members joined the board they were given, among other materials, a briefing on *Taxman*. It was important that everyone knew the case, and understood why they supported the side they did. In each vote to move forward in the appeal process, a decisive majority favored going ahead. They believed they were “ahead of the curve” on this issue. More importantly, “diversity” was much more than a legal argument; it was something the board promoted wherever and whenever they could. Simply put, for eight years the board’s position remained clear and consistent: there was no reason the layoff required the random flip of a coin. Opting to instead promote diversity was not only equally valid, but also aligned with their interests and goals.²³⁰

Unity aside, by the time settlement negotiations were underway, the board was confronted with a more nuanced reality. Following Clinton’s reversal, the board felt betrayed. Commenting on the government flip flop, board member Robert DePaul explained, “One minute it seemed like we were doing the greatest thing in the world. The next minute they’re against us. They waffled.”²³¹

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By 1997 it seemed there was a shift in perspective. It was no longer about whether the board simply believed they made the correct decision in 1989. The press and civil rights leaders had reframed the case as the story of a school board on the brink of erasing decades of hard fought victories in the area of racial integration. Interested parties maintained contact with David Rubin as well as the board president and pressed them to settle. Interest groups lectured them in language suggesting a moral imperative, arguing that “…private litigants with no connection to these liberal advocacy groups, and lawyers concerned more with arguing their first case in the Supreme Court than safeguarding the hard-won gains of the civil rights movements had no business controlling cases that could turn into unguided missiles, putting at risk decades of progress.”

Eager to move the process forward, Reverend Jesse Jackson met privately with board president Jerry Mahoney to convey the strong feelings of the civil rights community. The interest groups remained persistent with the school board, and the message appeared to get through. Board member Paula Van Riper remembers “feeling the pressure of the growing likelihood that we would lose at the Supreme Court, and…[being] worried about where the money would come from.” At the same time, she recalls, “it was like Mahoney just plopped down a bag of money in the middle of the table.”

Three days after the meeting between Jesse Jackson and Jerry Mahoney, the board voted 5-3 in favor of accepting the settlement. The board members’ reasons for voting as they did ran the gamut. David Machinski, who voted to reject the settlement, thought that it was imperative

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Information regarding the meeting with Jesse Jackson as well as the quotes from Paula Van Riper are from an interview conducted by Lisa Estrada for her law journal article: “Buying the Status Quo on Affirmative Action: The Piscataway Settlement and its Lessons About Interest Group Path Manipulation”, cited in previous chapter.
the Supreme Court clarify the rules for future decisions. Anne Thomas, also opposing the settlement, was confident that Sandra Day O’Connor would side with the board. For the majority who voted in favor of settling, however, the implications of a loss at the Supreme Court weighed heavily. As board member Catherine Greeley told one reporter, "What if we are trying to teach our children unity through diversity and suddenly we are responsible for ending affirmative action?” But more than anything, the pragmatic argument trumped all, and as board member Robert DePaul saw it, "Here was an opportunity to get rid of this albatross around our necks…we don't need any more disruptions."\(^{234}\)

From the narrow self-interested perspective of the nine board members, settlement made very good sense. They effectively guaranteed themselves 70% of what they hoped to win anyway—an escape from paying Sharon Taxman’s back pay and legal fees. From a purely economic standpoint, the perceived probability of losing measured against the payout of settling made this a no-brainer; from this perspective the board would look plainly irrational if they rejected the deal.

The only reason they may have wished to keep marching forward was the strength of their convictions. It is worth recognizing, however, that with regards to their own personal utility, it was somewhat irrelevant whether or not they could conduct personnel decisions with race as a factor in the future; the school had a deep pool of minorities to choose from when hiring or promoting and had a faculty well represented racially in the status quo. Thus, with a monetary settlement before them, the only reason to keep up the fight was to protect the broader interests of civil rights groups and minorities across the country. Yet, as board member Catherine

Greeley recalls, these interests were now persuasive in taking the case the other way, and settling:

…all of the organizations that were very active prior to this case saw this as a fatal flaw, and when they saw this as a fatal flaw I tended to believe them, more than the politics going on in the Administration at the time… They were doing it before Clinton was born.235

For Greeley and perhaps other board members as well, it was the civil rights groups and the individuals with a lasting stake in the case that were credible and informative on how best to proceed. After all, it was the civil rights groups who stood to win or lose in real terms after the politicians were no longer in office. Important to Greeley, it was these groups who were most adamant that the board settle, and she did not take this lightly. All things considered, it seemed the board would be serving very few by moving forward. By taking the payment, the board saved taxpayer dollars and circumscribed the blow to affirmative action to one of thirteen circuits, and also worth noting, to just one issue within the realm of affirmative action itself, employment decisions.

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From the opposite perspective, the settlement was not only a missed opportunity to rectify the increasingly visible dilemma of “reverse discrimination”, but also an example of grave injustice. Liberal interest groups had seemingly placed the case on the free market and paid for the desired outcome. While legal settlements happen on a routine basis, reaching into the majestic docket of the nation’s highest court and perturbing the natural progression of the law struck a nerve for conservatives keen on settling the issue once and for all.

Supra at 2.
The level of discontent can only be properly understood within the context of the growing opposition of non-minorities to affirmative action measures in the mid-1990s. Opinion polls are generally limited with regards to their usefulness due to the varying language used in the polling, but a rudimentary portrait of white sentiment during this period can be gleaned from some of the results.

One poll conducted in the early 1990s by the Race and Politics Study (RPS) at the University of California at Berkeley focused exclusively on the way in which whites viewed racially charged public policy of all kinds. When asked if large companies “should be required to give a certain number of jobs to blacks”, 76% of whites opposed the idea. When asked the same question but in the context of companies where blacks were underrepresented, an even greater 82.5% of whites opposed idea. Finally, when asked in the context of companies who had explicitly discriminated against blacks, 59% opposed requiring affirmative action.236

The results are interesting when thinking about the Taxman settlement for two reasons. First, even in instances where the Supreme Court had explicitly placed their imprimatur upon affirmative action—in contexts of racial discrimination—whites were still predominantly opposed to forcing companies to rectify their past wrongs with something resembling a racial quota. Legally permissible or not, by the 1990s these types of policies were unfavorable to whites as a matter of basic equity. Secondly, and perhaps of greater relevance to Taxman, was the poll’s counterintuitive finding that when language was added about black underrepresentation at the hypothetical company, opposition to racial quotas actually increased. Perhaps the only reasonable explanation for this increase is that by focusing on one rationale for

affirmative action (to balance a workforce), whites were reminded of a specific instance in which they opposed the policy.

The idea that whites opposed affirmative action to correct underrepresentation of minorities is particularly germane to racial policies in the Clinton era. It was under this administration that disparate impact litigation was brought to new heights, much to the chagrin of individuals and companies that fell “victim” to a seachange in policy. Generally speaking, it was during this period in which underrepresentation of minorities was often a leading indicator used by federal authorities to determine when affirmative measures were needed. Various federal agencies and individuals began to increasingly scare such companies with the threat of litigation if they did not alter their workforce practices. Examples abound:

In Nassau County, New York—among other cities— the police department was told by the Justice Department they had to alter their hiring test; they were forced to lower their reading standard, scrap cognitive tests, and place greater weight on personality traits in order to increase minority representation. When outlining a new equal opportunity employment policy, the Food and Drug Administration mandated that “the common requirement for knowledge of rules of grammar and ability to spell accurately in clerical and secretarial job descriptions should be shunned because it may impede courtship of underrepresented groups or individuals with

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237 Any practice or policy that indirectly has a negative effect on an individual based on his or her race, religion, or national origin can be considered as having a “disparate impact” in violation of Title VII of the 1964 Civil Rights Act (see Griggs v. Duke Power Co. (1971)) The Civil Rights Act of 1991 overturned a series of Supreme Court decisions in the late 1980s that made it increasingly difficult to win a case on the grounds of disparate impact. Thus, by the time Clinton entered office Congress had reaffirmed the notion that disparate impact litigation was a legitimate tool to correct for racial inequality in the workplace.
disabilities.\textsuperscript{238} The Pentagon noted that “special permission will be required for the promotion of all white men without disabilities”

At the Office of Federal Contract Compliance Programs (OFCCP), over 500 compliance officers watched over the roughly 200,000 companies that received federal contracts. As the primary customer for a large number of these companies, the federal government had enormous leverage in dictating the employment policies of anyone they did business with. From the perspective of firms dependent on the government to remain profitable, the OFCCP’s exploitation of this leverage to implement their vision of racial equality was intrusive, economically unsound, and downright unfair. Where underutilization of women or minorities was found relative to the local labor pool, the OFCCP mandated hiring goals backed with the threat of lawsuits that would recover back pay to rejected job applicants. In some instances, it seemed the federal agency was bending over backwards to increase minority representation at the expense of contract recipients. At City Utilities of Springfield, Missouri for example, despite having “roughly the same percentage of minorities on its payroll as in the local labor market, the OFCCP demanded that the company in the future recruit from the Kansas City area—170 miles away” due to the much greater number of minorities present in the labor pool.\textsuperscript{239}

At the Equal Employment Opportunity Commission (EEOC) a radical revolution beginning in 1994 brought to the forefront a more proactive approach to equal opportunity as well. Whereas in the 1980s under the leadership of Clarence Thomas the organization had narrowed its interests to overt victim specific discrimination and warmed to the notion of

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pursuing reverse discrimination cases, in the Clinton era the agency broadened its efforts to promote equal opportunity for minorities in similar fashion to the OFCCP. Private firms that had no business with the federal government were held liable under Title VII of the Civil Rights Act of 1964 for failing to hire or promote enough minorities.\textsuperscript{240} Companies that had been largely autonomous to operate with an eye towards maximizing profit without significant governmental interference for fourteen years suddenly had reason to fear that the EEOC, backed by Deval Patrick at Justice, could undermine their viability with the mere threat of a lawsuit.

Immediately following the 1995 \textit{Adarand} decision—which made all federal race-based policies subject to strict scrutiny—many companies and non-minorities were likely relieved to see a legal barrier in place to deter the federal government from wanton enforcement of equal opportunity policies averse to their interests. The signal these opponents of affirmative action subsequently received from the Clinton Administration, however, was far from comforting. Deval Patrick remarked that “the Administration would not be intimidated by \textit{Adarand}.”\textsuperscript{241} Even more telling, Clinton’s commission on affirmative action released a detailed policy analysis in light of the decision. The conclusion was appalling to conservatives: of the 160 ongoing federal affirmative programs, the Clinton team advised that only one should be scrapped.\textsuperscript{242} For the Administration, strict scrutiny meant that policies would have to be justified in the language of “compelling interests” and “narrow tailoring”. In the aftermath of \textit{Adarand}, conservative onlookers were disheartened by the sober realization that little was set to change in real terms.

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\textsuperscript{241} Office of Legal Counsel. 1995. Memorandum to General Counsels. June 28
This wasn’t the first time the executive branch appeared loath to follow the guidance of the more conservative judiciary. One year after the Fifth Circuit’s *Hopwood* decision, Norma Cantu, Assistant Secretary for Education, threatened the state of Texas that if they discontinued affirmative action policies—as *Hopwood* demanded—the federal government would withhold 500 million dollars in higher education funding. One month after Cantu’s threat, acting Solicitor General Walter Dellinger “wrote an unusual retort to the Education Department, saying the appeals court decision banning affirmative action was the law in Texas.”\(^{243}\) Cantu and the Education Department backed down, and the Administration was left in the awkward position of appearing unwilling to enforce the clear mandate of the law.

It was in this context that conservatives looked on hopefully as *Taxman* awaited to be heard at the Supreme Court. Here was a case that could undercut Clinton’s vigorous enforcement of “equal opportunity”. Decided in the broadest possible way, *Taxman* could declare all non-remedial instances of affirmative action as invalid, from contracting and employment policies to college admissions. Even in the narrowest terms, the likely victory at the High Court would delimit the instances of permissible affirmative action in employment by prohibiting “the fostering of diversity” as a rationale. This meant greater protection for companies tired of wasting resources to ensure they were not liable for underutilization of minorities or the mere appearance of discrimination. Furthermore, it meant justice for non-minority individuals who perceived affirmative action as reverse discrimination. Beyond these pragmatic concerns, a ruling against the school board would also be a welcome rebuke to the Clinton administration; it

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would serve as retribution for the overzealous enforcement of policies fundamentally at odds with core conservative beliefs.

In light of this conservative anticipation, it is no surprise that the announced settlement of Taxman was met with outrage. On November 21, 1997 the deal became public, fostering widespread criticism on the right. Roger Clegg, general counsel for the conservative Center for Equal Opportunity noted that “Racial preferences are tearing this country apart, and here come these outside groups paying to keep the case out of the Supreme Court...the legal bankruptcy of their ideas comes through very clearly in their fear to continue the case.”

A long-time critic of the school board’s policy, Republican Senator Orrin Hatch was distraught by the “extraordinary lengths to which liberal civil rights organizations have gone to prevent the Supreme Court from ruling on the Piscataway Case.” The sentiment among conservatives was plain: the settlement “amounted to hush money paid by frightened civil rights groups.”

While settlements pull cases from the courts on a routine basis, there was something particularly repugnant about having it occur at the final stage by groups outside of the process itself. Problematic from an equity standpoint, cases poised to become Supreme Court precedents affect the interests of a broad range of individuals from coast to coast. Some argued that allowing third parties—civil rights groups in this case—to alter the outcome of such sweeping decisions was an obstruction of justice. Writing for the George Mason Civil Rights Law Journal, Lisa Estrada pointed out that “A rule permitting the Supreme Court to issue a ruling in all cases where

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246 Supra at 15
it has granted certiorari—without regard to any private disposition of the case by the parties—would eliminate the ability of interest groups to manipulate the order of legal decisions or maintain the status quo law by wiping cases off of the Supreme Court’s docket.”

The settlement did, however, illuminate an idea both conservatives and liberals could agree on. That is, the markedly conservative shift that began at the Supreme Court in the early 1980’s had fundamentally changed the relationship between liberal civil rights groups and the Court; the school board’s settlement and the specific issue of affirmative action was but a microcosm of this altered relationship. Following the settlement, the former legal director of the American Civil Liberties Union summed up the trend pointedly: “In the 70’s, my philosophy was, how can I get as many cases as possible before the Justices? I had a very aggressive litigation strategy. In the 80’s, I was much more defensive and much less prone to bringing cases to the Court.” More than halfway through the 1990s, it seemed the trend had reached its logical conclusion: avoid the Supreme Court at all costs.

One year removed from office, and safely isolated within the private sector, Deval Patrick sympathized with the plight of the civil rights organizations he had long been associated with. Referring to the Justices, he complained almost bitterly, “They don’t show respect for their own precedents and that’s one of the problems. We’d be fine with this Court if the judges acted like judges. The problem is they don’t always act like judges.”

Whether or not they would have “acted like judges” with regards to Taxman will never be known. Once the settlement was agreed to there was no longer a live controversy before the

247 Supra at 5. (9)
248 Supra at 16.
249 Ibid.
Court and the case was removed from the docket. It is unclear whether the majority would have upheld the broad ruling from the Third Circuit and prohibited all non-remedial affirmative action in employment, whether they would have instead made a narrower ruling about layoff decisions, or conversely, whether Sandra Day O’Connor would have joined the liberal bloc and reversed the circuit court decision entirely, upholding the “promotion of diversity” as a proper rationale for affirmative action. For the time being, the status quo on affirmative action was maintained and the legality of race-based policies continued to be ambiguous at best. Sharon Taxman got her long-awaited back pay, the school board was spared from being the “slayers or saviors” of affirmative action in the history textbooks, and the Clinton administration could rest peacefully that their questionable behavior during the litigation process would evade further scrutiny.\footnote{Quote taken from interview with Catherine Greeley. Supra at 2.} The affirmative action debate continued, but \textit{Taxman} lived on as but a dramatic footnote in its legal history.
Conclusion

More than the actual legal holding in *Taxman*, the story of the case and the history surrounding it speak on several levels about the way in which our federal court system, political parties, and population more generally was trying to grapple with something of an irreconcilable issue. By the 1990s it was quite clear that the majority of the country was at least partially moving away from the full fledged, zero-sum racial preferences and mandates that were deemed acceptable in the wake of the civil rights movement. Unclear, however, was the extent to which this left many affirmative action policies intact. In many ways, *Taxman* was significant in that it allowed us to better understand where everyone stood on this sensitive and divisive issue. Like it or not, many actors were forced to play their hand when taking a stance on *Taxman*.

It is worth observing that it was a fortuitous set of circumstances that allowed this unlikely case to climb the judicial ladder as it did. More specifically, because the Piscataway School Board and their private attorney, David Rubin, had no connection to the civil rights organizations involved in the final settlement, they were unconcerned with the broader harms this case potentially could bring about; these broader harms would undoubtedly have deterred the case from moving forward had civil rights groups been involved from the very beginning.

Perhaps more importantly, the board’s 1989 layoff decision represented affirmative action in a bare, revealing, and arguably negative light that would have clearly been avoided by the civil rights groups committed to maintaining the status quo. In other words, if this were a test case being used to expand or preserve affirmative action, the set of facts would have been nothing close to those in Piscataway. The fact that a private attorney representing the narrow interests of a school board litigated a case with broad national implications for a range of interested parties had several extraordinary effects on the affirmative action debate:
First, the unlikely set of facts being litigated lent themselves to a basic discussion among the American people on the equity of affirmative action. Individuals were able to ask themselves whether or not opportunity could justly be transferred from one person to another based simply on race. In the context of the 1990s, an increasing number of people saw *Taxman* and were provided with a real-life example to undergird the reservations they had with affirmative action in the status quo.

Second, the litigation of *Taxman* allowed the Reagan Revolution overhaul of the federal court system to continue pushing for substantive changes to the law regarding racial preferences. Thus, the growing discomfort Americans had with affirmative action was concurrently vindicated with the imprimatur of legal opinion, at least in the circuit courts. The Third Circuit Court of Appeals ruling in *Taxman* added an important provision to the growing list of limitations being placed on the use of race. Collectively, the *Kirwan, Hopwood,* and *Taxman* circuit court opinions—all released within roughly a two-year period—formed a triumvirate against the continued use of affirmative action. Each case provided instances of race being used in ways that would have been undeniably permissible just a few years earlier. Though the American people may have not fully endorsed the specific limitations these rulings put in place, the court opinions did well to reflect the growing desire for change on the issue.

Third, *Taxman* revealed the limit of Bill Clinton’s support for affirmative action policies specifically, and controversial civil rights issues more generally. Throughout his presidency, Clinton attempted to maintain a middle-of-the-road approach to affirmative action, criticizing the idea of “quotas” but praising the responsible use of racial preferences to achieve equal opportunity. By design, this left policy specifics to the imagination, and allowed the politically savvy leader to dodge the issue. *Taxman* essentially pinned the President in a corner, and forced
him to reveal whether or not he would support a very specific usage of race. As I have suggested several times in this paper, it is clear that Clinton only supported the school board because of Deval Patrick’s firm commitment to affirmative action. It is not merely coincidence that shortly after Patrick left the Clinton Administration the government’s position on the case shifted to the center. Just as the President had abandoned civil rights stalwart Lani Guinier the moment the public took an interest to disliking her, here too the President was happy to discard his support for the school board after the American people decided that Sharon Taxman had been wronged. One can only conclude that Taxman provides further evidence of a president who was committed to civil rights, but only insofar as it was not politically damaging.

Finally, the settlement in Taxman highlighted the way in which liberal civil rights groups were now thrust into a weak, defensive posture. Gone were the days where they could pick and choose hopeful test cases to expand their rights before a sympathetic judiciary. The settlement marked something of a 180-degree turn. These groups now had to tread carefully and maintain their interests by ensuring that the wrong case did not end up at the Supreme Court. In this case, they were able to do just that. And although this tactical move prevented Taxman from elevating to the status of Supreme Court precedent, the case remains relevant for the way in which it moved the debate forward in the 1990s.
In January of 2010 I found myself sitting in a small conference room in David Rubin’s law office. Rubin, the now fifty-something-year-old school board lawyer, had agreed to take some questions and reflect on his time litigating the Taxman case. The room we spoke in was an unabashed celebration of the almost-landmark lawsuit. On one wall hung a framed copy of a flyer; it was an advertisement for a talk on Taxman at Yale Law School given by Rubin himself. On the adjacent wall was a framed copy of a New York Times article written by Linda Greenhouse and covering the case’s settlement. The piece had gone on to help Greenhouse win the Pulitzer Prize in 1998 for “Beat Reporting”. 251 Though the lawyer may have hung these relics as warm reminders of his fifteen minutes of fame, they were also testaments to the range of interest the case had generated. 252

Like the vast majority of lawyers, Rubin has never argued a case before the Supreme Court, and Taxman was the closest he ever came. Almost wistfully, he noted how nice it would have been to obtain the “quill pen”, referring to the Court’s historic practice of leaving one such pen on the table of arguing counsel, as a keepsake, on the day of oral argument. Today, Rubin continues to work for the Piscataway School Board—among other school boards—and maintains a private practice in Metuchen, N.J. Rubin’s story litigating Taxman remains forever intertwined

Greenhouse was awarded the prize for “her consistently illuminating coverage of the United States Supreme Court”. Two articles from the Taxman case were highlighted by the Pulitzer Committee: “A Case on Race Puts Justice O’Connor in a Familiar Role” October 4, 1997 and “Settlement Ends High Court Case On Preferences” November 22, 1997.

All references to David Rubin’s office and direct quotes from the lawyer himself are part of: David Rubin. 2010. Interview by author. Metuchen, N.J. January 4.
with the affirmative action debate that embroiled the 1990s. For all that the case did and did not actually accomplish, it has left an important and fascinating history in its wake:

Following the controversial settlement, Taxman remained the law of the land in all areas covered by the Third Circuit Court of Appeals. Thus, in New Jersey, Pennsylvania, Delaware and the Virgin Islands all employment decisions cannot use race as a non-remedial factor. The Supreme Court had been prevented from providing definitive guidance on the broader parameters of affirmative action, and it would take five years for them to be granted another opportunity to do so.

With the door left open, two cases in 2003 finally provided the Court a chance to address some of the lingering questions surrounding the legality of affirmative action. The cases arose as challenges to the University of Michigan’s affirmative action programs for admissions into the undergraduate and law schools respectively. To the surprise of many, the Court in 2003 resurrected the logic of Bakke and reaffirmed that properly construed affirmative action was still permissible. In Gratz v. Bollinger, a 6-3 Court found the undergraduate admissions policy, which used a chart and point system to ascribe values to race, as too intrusive and akin to quotas; the policy was unconstitutional. However, in Grutter v. Bollinger, the Court found that the law school’s variant of affirmative action, which used race in the Powell-favored “plus factor” manner, was constitutionally viable.253

According to David Rubin, the Grutter and Gratz decisions are only further proof that it is unclear how Justice O’Connor—who was in the majority for both cases—would have came

down on Taxman. After O’Connor stepped down in 2006, however, the Court finally appeared to have a firm majority of justices willing to categorically reject affirmative action. Taking her seat on the bench, Samuel Alito of the third circuit court of appeals had been one of the eight judges to strike down the Piscataway school board’s policy in 1996. Unlike O’Connor, his views on the issue were very straightforward and decidedly against racial preferences.

In 2009, the conservative-leaning Court revisited the use of race in employment decisions in Ricci v. DeStefano. Put simply, the case arose when the city of New Haven, Connecticut invalidated an employment examination for firefighters after the results showed that no blacks had passed the threshold score for promotion. The white firefighters who passed the invalidated examination subsequently sued the city for reverse discrimination.254

The Court ruled 5-4 that the city of New Haven had violated Title VII of the Civil Rights Act of 1964 by nullifying the test results. Generally speaking, the majority decided that the possibility of facing a disparate impact lawsuit did not justify taking race into account as a corrective measure. This was a radical departure from the status quo during the Clinton era. As previously mentioned, under the guidance of Deval Patrick the Justice Department had repeatedly threatened disparate impact litigation if various actors—most famously a police force—did not amend their hiring processes in order to achieve results that would better favor minorities. Ricci suggested that the proactive disparate impact enforcement that began under Patrick’s watch was no longer valid in court. In the mid-1990s the ruling would have been an abrasive slap in the face for Deval Patrick, but coming thirteen years after he had left Washington, D.C. it was simply another sign that the Court would not tolerate racial preferences.

Fortunately for Patrick, his time as Assistant Attorney General only proved to be the beginning of a meteoric career. Following his tenure, Patrick began a short-lived but prosperous career in private law. More specifically, he went to work for Day, Berry, and Howard for one year before being offered a lucrative position as general counsel for Texaco. Following his brief stint there, Patrick became a general counsel for Coca-Cola and served on the board of directors for the parent company of Ameriquest. In 2005, Patrick announced his intentions to run for governor of Massachusetts. Perceived initially as an underdog candidate, Patrick’s grassroots organizing campaign boosted the Democratic primary turnout by 20 percent and successfully made him the first black governor of Massachusetts. At the age of 50, he was only the second black governor ever elected. Interestingly enough, Barack Obama’s subsequent 2008 presidential campaign paralleled Patrick’s so closely that it drew serious attention. In fact, some critics pointed out the striking similarity between Patrick’s oft-used “Together we can” and Obama’s later “Yes we can” rallying calls. Today, Patrick’s name remains on the short-list of contenders for the next seat set to open on the Supreme Court. Should Patrick ever accept such a nomination, his career under Clinton suggests that his views would draw vigorous dissent from conservatives looking to block his appointment.

Back in Piscataway, life returned to normal following the settlement. Sharon Taxman had been rehired two years into the lawsuit and continued her work as a teacher at Piscataway high school throughout the proceedings of the case. It’s worth noting that at several points in the litigation process various conservative interest groups offered their assistance to Taxman and her

lawyer. Despite their insistency, however, she was unwilling to allow their involvement.\textsuperscript{256} Sharon Taxman had no interest in being the poster-child for anti-affirmative action; she simply wanted her back pay. Taxman would later transfer out of the high school, and currently teaches at Conackamack Middle School in Piscataway.

The litigation process took an unfortunate toll on both teachers, but the damage was far more visible with regards to Debra Williams, who was often denigrated in the press as the infamous teacher retained solely because of her race. Williams’ frustration was evident throughout the proceedings. For example, after failing to secure a seat in the packed courthouse of the third circuit in Philadelphia, Williams reportedly made a scene, yelling out “this is my case!” to the marshal.\textsuperscript{257} As the case approached the Supreme Court, Williams convened a press conference to assert that her master’s degree made her a more qualified candidate irrespective of race. Unfortunately for Williams, the press continued to paint her as the villainous and undeserving recipient of Sharon Taxman’s job. Increasingly dismayed by the coverage, Williams went as far as suing one reporter of the Associated Press, Amy Westfeldt, after Westfeldt quoted Williams as saying “[y]ou don’t get nothing in this world for having an advanced degree.” A New Jersey appellate court dismissed the suit in 2001 after finding no compelling evidence that the reporter misquoted Williams.\textsuperscript{258} At the 1997 school board meeting to vote on the proposed settlement, Williams reportedly broke into tears after learning that the board was no longer going to fight the ruling.


\textsuperscript{257} Ibid.

Outside of Piscataway and independent of the court system, the country continued its march towards achieving a “post-racial” society in the years following the settlement. Beginning in 1996, a series of states attempted to end racial preferences via popular referendums. Starting with California’s Prop 209, Washington State, Michigan, Nebraska, and Colorado each held votes to amend their state constitutions in order to explicitly ban various types of racial preferences. The referendums have all been remarkably close, with the measures passing in California, Washington and Michigan.

In some ways, the *Taxman* case lived on despite never becoming Supreme Court precedent. In fact, a group of law professors went as far as publishing two sets of ghost-written opinions in order to reflect how the case might have been ruled on from opposing perspectives, and law school classes continue to use the case for moot court debates. Chief Judge Sloviter of the third circuit court was proved correct then in his dissent when noting that *Taxman* was “so stripped of extraneous factors that it could well serve as the question for a law school moot court.”

Wrapping up my interview with David Rubin I asked the lawyer if there were any remaining anecdotes or comments he wished to share about his experience litigating the case. With a careful choice of words, Rubin summarized perfectly why *Taxman* had captured the minds of individuals interested in the affirmative action debate. The case, he explained, was like a “Rubik’s Cube”, in which your view was very much determined by the way in which you turned it.


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