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GUARDING THE DUMPING GROUND: EQUAL PROTECTION, TITLE VII AND JUSTIFYING THE USE OF RACE IN THE HIRING OF SPECIAL EDUCATORS

Patrick Linehan *

In order to get beyond racism, we must first take account of race. There is no other way. **

I. INTRODUCTION

The disproportionate placement of black and other minority students in special education programs has been a topic of controversy for almost thirty years.¹ Although considerable litigation has addressed various discriminatory practices, the flow of these students into more restrictive educational environments continues. Despite the aims of federal special education law to provide equal educational opportunity to children with disabilities, special education classrooms have become “dumping grounds” for many minority students whose teachers perceive the students’ classroom behaviors and learning styles as “disabilities.”²

Considerable research attributes this imbalance to the cultural dissonance between black and minority student popula-

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** University of California Regents v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun J., Dissenting).

1. BETH HARRY, CULTURAL DIVERSITY, FAMILIES, AND THE SPECIAL EDUCATION SYSTEM: COMMUNICATION AND EMPOWERMENT 59 (1992).

2. See, e.g., Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Pedism*, RUTGERS L. REV. 1, 29-30 (1999) (noting that black children “are placed in special education classes in far greater proportion than children of other races . . . [and] are unable to escape special education, as they are kept in special education longer than other children”).

tions and predominantly white teachers. Race-conscious employment measures could help close this gap. The permissible rationales underlying race-conscious decisionmaking in employment have, however, gradually eroded at both the Constitutional and federal statutory level. But for the strategic settlement of the case of *Piscataway Board of Education v. Taxman* pending Supreme Court review,³ race-conscious hiring and placement plans designed to counteract the teacher-student cultural gap leading to this disproportionality may, at least according to some proponents of affirmative action, have been taken off the life support on which the Rehnquist Court has gradually put it.⁴

To address effectively the disproportionate referral and ultimate placement of black and other minority students in special education, school districts must be permitted to take affirmative measures in the hiring and placement of minority educators in capacities that would place them at the gates of the special education classroom. Section II of this article examines the extent to which minority students are disproportionately thrust into special education and the educational effects this placement has on these students. Section III identifies the cultural gap between minority students and predominantly white teachers as a major cause of this trend. Moreover, it argues that black and other minority educators, who tend to reciprocate the culture of these students, could play an important role in lessening the effects of this disconnect.

Section IV examines the parameters of the Equal Protection Clause of the Fourteenth Amendment, and concludes that the anti-dumping rationale, as a variation of the diversity rationale, constitutes a compelling state interest as required under the Equal Protection Clause. It then examines the parameters of Title VII as established by the Supreme Court, as it applies to non-remedial affirmative action in the public sector, and

3. See Linda Greenhouse, *Tactical Retreat, New Jersey School Move Leaves Affirmative Action in Limbo*, N.Y. TIMES, Nov. 22, 1997, at A1 (stating that the case ended with an unusual financial settlement, 70% of which was financed by a group of civil rights organizations).

4. See, e.g., Katrina Patterson, Note, *What May Have Become A New Title VII Precedent on Affirmative Action in the Workplace: Piscataway Township Board of Education v. Taxman - "Permissible or Impermissible?"* 15 N.Y.L. SCH. J. HUM. RTS. 355, 380 (1999) (noting that "[t]hose in favor of the settlement . . . viewed it as an effective legal strategy to prevent bad cases [from] mak[ing] bad law") (internal quotation omitted).

concludes that the anti-dumping objective is also a permissible interest under Title VII.

II. DISCRIMINATION IN THE SPECIAL EDUCATION CONTEXT

The earliest cases involving challenges against racial discrimination in the administration of special education took aim at the discriminatory impact of culturally biased assessment instruments.⁵ Two additional and interrelated areas of special education administration have come under recent fire: (1) the definitions of basic constructs, and (2) the existence of faulty referral and assessment practices.⁶ To understand the nature of these areas of concern, we must first examine the administrative structure created by federal special education law.

Congress sought to establish a federal mandate that school systems provide programs which would serve the unmet needs of handicapped children, while also ensuring that the rights of such children would be protected. The first major piece of federal legislation addressing special education was the Education of All Handicapped Children Act of 1975 ("EHCA").⁷ EHCA was subsequently amended several times and is now known as the Individuals with Disabilities Education Act ("IDEA").⁸ The original Act attempted to combine both a civil rights and an entitlement approach.⁹ Although IDEA in its current form has since added findings that reflect additional concerns with ac-

5. See, e.g., *Larry P. v. Riles*, 343 F. Supp. 1306, 1314 (N.D. Cal. 1972) (enjoining placement of African-American students in classes for educably retarded on basis of criteria which placed primary reliance on IQ test results); *Parents in Action in Special Educ. (PASE) v. Hannon*, 506 F. Supp. 831, 883 (N.D. Ill. 1980) (holding, despite finding that a minor portion of IQ test was culturally biased, that challenged tests did not discriminate against African-American children in assessment for special education). See also Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. SP. EDUC. 410, 420-21 (1994) (stating that "[i]ntelligence tests are merely a device to assess an individual's level of acculturation to the dominant culture. . . [W]e should use multiple indicators to assess intelligence across ethnic groups because certain individual differences. . . are greatly shaped by culture").

6. Artiles & Trent, *supra* note 5, at 420.

7. Pub. L. No. 94-142, (codified as 20 U.S.C. §§ 1400-1487 (1999)).

8. S. Conf. Rep. No. 94-455 (1975). See also S. Rep. No. 105-17 (1997) (stating that one purpose of IDEA amendments is "to strengthen the capacity of America's schools to effectively serve children . . . with disabilities").

9. MARK G. YUDOF, ET AL., *EDUCATIONAL POLICY AND THE LAW* 725 (1992) (citing Yudof, *Education for the Handicapped: Rowley in Perspective*, 92 AM. J. EDUC. 163 (1984)).

countability and local control,¹⁰ the law has retained its original overarching goal of providing appropriate educational services to children with disabilities.

Toward these ends, the law both prohibits discrimination and guarantees a "free appropriate public education" to all students.¹¹ It also establishes a requirement that school districts design an "individualized educational program" (IEP) that sets forth specifically designed instruction to meet the unique needs of handicapped children.¹² Federal special education law places significant emphasis on the role of the student's parents in the special education placement and the formulation of the IEP for their children.¹³ Parents are guaranteed notice of any changes in their child's educational placement¹⁴ and are afforded several levels of procedural guarantees. These guarantees include the opportunity to challenge a school's determination of the child's educational placement through a "due process" hearing,¹⁵ administrative appeal,¹⁶ and the right to sue in either federal or state court.¹⁷

Although criticism of federal special education law revolves around its highly bureaucratic and overregulated nature, imprecisions in the regulatory scheme's coverage raise concerns regarding the potential for discretionary error in student

10. Congress recently added to its official findings that:

Over 20 years of research and experience has [sic] demonstrated that the education of children with disabilities can be made more effective by – (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible; . . . (C) coordinating this chapter with other local, educational service agency, State and Federal school improvement efforts; . . . (G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

20 U.S.C. § 1400(c)(5) (1999).

11. *Id.* at § 1400(c)(3).

12. *Id.* at § 1414(d) (setting forth procedural requirements for development and maintenance of child's Individual Education Program).

13. *See, e.g.*, 20 U.S.C. § 1414(a)(1)(C) (1999) (requiring parental consent before child's initial evaluation for special education); § 1414(b)(4)(A) (1999) (requiring inclusion of child's parent in process of determining whether child has disability); § 1414(d)(1)(B)(i) (1999) (requiring inclusion of child's parent as member of individual education program team).

14. *See* 20 U.S.C. § 1414(f) (1999) (requiring state educational agency to ensure that the parent of each child with a disability are members of any group that makes a decision on the education placement of their child).

15. 20 U.S.C. § 1415(f) (1999).

16. 20 U.S.C. § 1415 (g) (1999).

17. 20 U.S.C. § 1415(i)(2) (1999).

evaluation. First, IDEA does not go very far in providing precision in the definition of a disability for purposes of special education placement. It establishes broad categories of “disabilities” within its statutory definition.¹⁸ Although several of the classifications within this definition are rarely subject to discretionary error (for example, “traumatic brain injury” or “autism”), categories such as “serious emotional disturbance” and “specific learning disabilities,”¹⁹ leave room for subjective considerations in student evaluations and assessments. For example, deciding whether a student exhibits “inappropriate” types of behavior under “normal circumstances” requires an ultimately subjective determination of what behavior is “inappropriate” and what constitutes “normal circumstances.”²⁰

18. “Child with a disability” is broadly defined as a child “with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance. . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C. § 1401(3)(A)(i) (1999). Federal law grants even broader discretion to the state for children aged 3-9, where it permits the state at its discretion to designate as a “child with a disability” a child “experiencing developmental delays. . . in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development.” 20 U.S.C. § 1401(3)(B)(i) (1999).

19. “Specific learning disability” is defined as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(26)(A) (1999). Although “serious emotional disturbance” does not have a statutory definition, the Department of Education defines it as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4) (2000).

20. Subject consideration can also permeate the use of formal assessment instruments in evaluating student eligibility for special education. See Beth Harry & Mary G. Anderson, *The Disproportionate Placement of African-American Males in Special Ed. Programs: A Critique of the Process*, 63 J. NEGRO EDUC. 602, 607 (1994) (noting that AAMR’s lowering of an IQ test’s cutoff score for identifying students as educably mentally retarded demonstrates an arbitrary shift in classification and noting that special education categories are defined “the parameters of normalcy defined by a given cultural group”); see also James H. Lytle, *Is Special Education Serving Minority Students?*

Second, although much attention is given to the procedures by which state and local educational agencies must conduct their evaluation of students for special education eligibility, no attention is given to the process by which a student initially enters the pre-placement evaluation process. With little regulatory guidance in this area at the federal level, referrals for evaluation are usually left to the discretion of the student's teacher and are based primarily on the teacher's perception of the student's classroom performance and behavior.²¹ If a teacher determines that a particular student is in need of evaluation for special education services, the evaluation process is triggered, subjecting the student to potential stigma and risk of misclassification.²² The problem of teacher discretion is exacerbated when one considers the high rate at which students who are referred for special education evaluation are subsequently placed in some sort of special education environment.²³ To a large extent, a teacher's referral for evaluation can seal a child's educational fate.

Finally, whatever theoretical advantages are gained by the current federal special education law, the actual provisions of special education services under this regulatory scheme often stray from the law's spirit of fairness and professional collaborative decision-making. The law's requirement that assessment for special education purposes be non-biased and conducted by a multidisciplinary team has been found difficult to implement.²⁴ For example, Boston public schools reported in the early 1980's that they had no established protocol of entrance and exit criteria for students placed in restrictive special education settings.²⁵ One study of the special education process concluded that the decision-making process that occurs in formal placement meetings often does not demonstrate a model of

A Response to Singer and Butler, SPECIAL EDUCATION AT THE CENTURY'S END (Thomas Hehir & Thomas Latus eds., 1992) (arguing that labeling creates a formal and medical-like model for what is, at bottom, a subjective construct).

21. See *infra* notes 49-53 and accompanying text.

22. See *infra* notes 41-43 and accompanying text.

23. HARRY, *supra* note 1 at 85; see also Artiles & Trent, *supra* note 5, at 421 (noting that student referrals expose students to the risk that diagnostic systems of questionable validity and reliability will identify false positives).

24. Harry & Anderson, *supra* note 20, at 602.

25. Ronda Goodale & Marcia Soden, *Disproportionate Placement of African-American and Hispanic Students in Special Education Programs*, ERIC DIG. EDUC. 204873 at 2 (1981).

“rational” decision-making.²⁶ Among the evidence supporting this conclusion was the practice of excluding potential placement or service options from consideration in determining students’ appropriate educational placement.²⁷ The outcome of placement meetings also tend to be heavily influenced by higher status school personnel within the professional team, who present their reports in such a way as to make it difficult for other team members and parents to understand the information and form an opinion.²⁸ Often these formal meetings are merely ratifications of decisions made privately by administrators prior to the formal placement meeting.²⁹

This is not to say that special education requires more federal regulation to govern referral and other aspects of the placement process. Indeed, critics are quite correct in noting the failings of the federal law’s often paralyzing effect on aspects of educating special-needs students.³⁰ However, it is important to note that the putative advantages that teacher and administrative discretion may bring to an otherwise overbureaucratic system of educational administration may also be accompanied by a heightened risk of error in student assessment and classification.

III. SPECIAL EDUCATION: A DUMPING GROUND FOR MINORITY STUDENTS

A. *The Disproportionate Placement of Black and Minority Students in Special Education*

An unfortunate outgrowth created by the combination of vague legal classifications defining “disability” and the broad discretion left to teachers and other school personnel involved in student placement is the disproportional placement of black and other minority students in special education programs. This section explores this outgrowth, the reasons underlying it, and the negative effects misplacement in special education in-

26. HARRY, *supra* note 1, at 85.

27. *Id.* (citing A.H. MEHAN ET AL., *HANDICAPPING THE HANDICAPPED: DECISION-MAKING IN STUDENT’S EDUCATIONAL CAREERS* (1986)).

28. *Id.* at 85-86.

29. *Id.* at 86.

30. *Id.*

flicts upon these students.

The placement of black and other minority students in special education programs was intentionally employed by school districts in the post-*Brown* desegregation efforts to avoid the desegregation effects. However, this practice has remained an unconscious reality in public schools throughout the United States.³¹ In 1955, surveys conducted in Milwaukee, Wisconsin, revealed that four predominantly-black census tracts were the source of more than twice the referrals for suspected mental retardation when compared to all the other areas of the city combined.³² More than forty years later, there has been little significant change in this trend.³³ A 1987 study shows that between 1978 and 1986 Blacks were over-represented in the Seriously Emotionally Disturbed (SED) category.³⁴ This is also evidenced by a 1983 study that found that Blacks were over-represented in almost 66% of state and local educational agencies in programs for students with learning disabilities.³⁵ A 1992 survey by the Office of Special Education evidenced a continuation in this trend from 1986 to 1992.³⁶ A 1982 study by the National Academy of Sciences concluded that while black students were overrepresented in the educably mentally retarded (EMR) category nationwide, overrepresentation of other minorities was likely to occur only in those states where such minority populations were high.³⁷ Beth Harry noted that black males are overrepresented in all disability categories, particularly the categories likely to be served in segregated classrooms or buildings.³⁸ The trend is clear: minority students continue to

31. See Smith, *supra* note 2.

32. Walter C. Farrell, Jr., et al., *Discrimination in Educational Placement and Referral*, 21 INTEGRATED EDUC. 122, 123 (1983).

33. Philip C. Chinn & Selma Hughes, *Representation of Minority Students in Special Education Classes*, 8 REMEDIAL & SPECIAL EDUC. 41, 43 (1987).

34. *Id.* Chinn & Hughes also found that whites were consistently underrepresented in EMR and TMR classes, and proportionately represented in SED, LD and speech impaired classes. *Id.* at 44.

35. Artiles & Trent, *supra* note 5, at 412-13 (citation omitted).

36. U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, FOURTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT (1992) *cited in* Harry & Anderson, *supra* note 18, at 604.

37. Harry & Anderson *supra* note 18, at 604; *see also* Chinn & Hughes, *supra* note 31, at 43 (noting that the national problem of disproportionately high numbers of Hispanics in EMR classes may no longer exist.)

38. Harry & Anderson *supra* note 18, at 605. *See also* Dewey G. Cornell, *Gifted*

be placed in special education settings at a rate that far outpaces their representation in regular education settings.

As a general matter, a student's placement in special education, even where the student's classification is "correct," is not without costs. Special education placement, particularly where it results in a student's separation from the regular education setting, can have adverse educational effects. These effects are two-fold: 1) emotional trauma to the student, and 2) a reduction in the quality of education provided. First, the way special education places a student into a category can often be traumatic and stigmatizing. Labeling children in a way that identifies that child with a learning difficulty generally leads to stereotypical attitudes and beliefs associated with the label.³⁹ Even where the labeling stems from misclassification, the public designation as a "special ed kid" shapes the way others interact with the child, negatively influencing the child's self-perception.⁴⁰ This effect often leads to a self-fulfilling prophecy, which generally ends with the child assuming the negative attributes that others had already presumed the child had by virtue of the label.⁴¹

Second, special education placement, despite its objective of guaranteeing a free appropriate public education, can often reduce the quality of the student's educational experience. Research has produced conflicting results on whether special education, at least for the "mildly handicapped," provides an education comparable to that provided in the regular education setting.⁴² One critic of special education noted: "Many educa-

Children: The Impact of Positive Labeling on the Family System, AM. J. ORTHOPSYCHIAT. 322, 322 (1983) (noting that false labels imposed upon a child "shapes the way other interact with the child and negatively influences the child's self-perception").

39. Artiles & Trent, *supra* note 5, at 416 (noting "deleterious effects" on "teacher's attitudes and expectancies and pupil's self-esteem and social status").

40. See ROGERS ELLIOT, LITIGATING INTELLIGENCE: IQ TESTS, SPECIAL EDUCATION, AND SOCIAL SCIENCE IN THE COURTROOM (1987) (noting the negative effects teacher expectancy can have on student behavior) (citations omitted). See also JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 189 (1985) ("[A] stigma results from placement in low groups that is likely to have a negative long term consequences, including lowered self-esteem and aspirations of students and lowered teach expectations for them that can result in a self-fulfilling prophecy.").

41. OAKES, *supra* note 40.

42. Artiles & Trent, *supra* note 5, at 418; see also HARRY, *supra* note 1, at 83 (stating that "research on effective schools suggests that effective instructional practices and school environment as a whole contribute more to student performance than do particular types of settings.").

tors are unwilling to admit that programs for the mildly handicapped have yet to demonstrate anything other than negative benefits."⁴³ Additionally, it has been suggested that Individual Education Plans often reduce the curriculum to drivel.⁴⁴ Indeed, the "intellectual segregation"⁴⁵ of underperforming students also contributes to a self-fulfilling prophecy. Teachers tend to have lower expectations of special education students, and consequently "teach less" as a self-imposed accommodation to the student's perceived mental shortcomings.⁴⁶

Disability classification must occur at some level in order for schools to fulfill their federal mandate to provide "free appropriate public education" for those whose disabilities clearly and objectively hinder learning in the regular education setting. However, students are often placed based on what often are subjective considerations. For example, teacher observations of poor academic performance and "inappropriate" behavior impose a stigma, the cost of which is not necessarily counterbalanced by a more individualized educational environment.

Because teachers have broad discretion in referring a child for special education evaluation and due to the inevitable degree of subjectivity permitted under IDEA, a child's educational fate often turns on the teacher's perception. The way teachers view a particular student's academic and social behavior lies at the heart of the referral process.⁴⁷ Thus, students perceived by their teachers to be potential candidates for SED classification, bypass more objective formal assessment instruments.⁴⁸

Research demonstrates that broad discretion that allows subjective determinations under IDEA permits the influence of the cultural disconnect between many minority students and their teachers. This contributes significantly to the disproportionate placement of these students in special education settings.⁴⁹ While a significant number of students in public schools

43. Lytle, *supra* note 18, at 192.

44. *Id.* at 191.

45. See LARRY W. HUGHES ET AL., DESEGREGATING AMERICA'S SCHOOLS 14 (1980) ("Resegregation on intellectual grounds is probably just as damaging to students as desegregation on racial grounds.").

46. OAKES, *supra* note 40, at 75-78 (discussing inequitable "distribution of knowledge" among high and low ability academic tracks).

47. Harry & Anderson, *supra* note 20, at 611.

48. *Id.*

49. *Id.*

are racial minorities, the teaching profession remains dominated by white women.⁵⁰ Although the cultural norms of individual students and teachers are not determined solely by race and ethnicity, researchers have found that different experiences between white teachers and minority students result in subjective distinctions concerning a student's ability to learn.

Conscious and unconscious racism and cultural bias infiltrate the educational process at a number of different levels. A lack of cultural awareness often results in overreferral or inappropriate referral of minorities to the most restrictive special education programs.⁵¹ Despite IDEA's express prohibition of the classification of students based on cultural or other environmental influences,⁵² teachers often evaluate student competency based on factors that include race and cultural characteristics.⁵³ Although such considerations may not be intentional, student evaluation teams are often composed solely of white educators who may be unaware or unconscious of the racial and cultural bias they bring to the decision-making process.⁵⁴

This bias is particularly true for black students. Several features of black student behavior can be perceived negatively by white female teachers, including the high physical activity or "verve" of black boys and patterns of language learning and usage.⁵⁵ These behavioral characteristics often do not coincide with the traits, such as rigid, conforming, and passive behaviors, valued by the (predominantly white) teaching professionals of middle-class school culture.⁵⁶ Black students are seen as

50. Harry & Anderson, *supra* note 20, at 610.

51. Goodale & Soden, *supra* note 25, at 3.

52. See 20 U.S.C. § 1401(26) (Supp. IV 1998) (excluding from definition of "specific learning disability" learning problems resulting from "environmental culture of economic disadvantage").

53. Robert Rueda, *An Analysis of Special Education as A Response to the Diminished Academic Achievement of Chicano Students*, in CHICAGO SCHOOL FAILURE AND SUCCESS; RESEARCH AND POLICY AGENDAS FOR THE 1990S 259 (R. Valencia ed., 1991).

54. Goodale & Soden, *supra* note 25, at 2-3.

55. Harry & Anderson, *supra* note 20, at 610.

56. Goerge B. Helton & Thomas D. Oakland, *Teachers Attitudinal Responses to Differing Characteristics of Elementary School Students*, 69 J. EDUC. PSYCH. 261, 263 (1977). Research has also shown that teachers are concerned and disturbed by such behaviors as arguing or "fussing" with teachers and peers. Jerry B. Hutton, *Teacher Ratings of Problem Behaviors: Which Student Behaviors "Concern" And "Disturb" Teachers?*, 21 PSYCH. IN THE SCHOOLS 482, 482 (1984). If unfamiliar with the cultural meaning of many of these behaviors, teachers may respond impulsively to children as their feelings dictate, rather than rationally, as good practice required. *Id.* All this is not to say that confrontational behaviors should not be addressed by teachers. This ar-

fun-loving, happy, cooperative, energetic, and ambitious by black teachers, while they are more likely to be seen as talkative, lazy, high-strung, and frivolous by white teachers.⁵⁷ White teachers may often be unaware of a black male student's life experiences.⁵⁸ As a result, the knowledge and skills of these students often go unrecognized.⁵⁹

The most significant manifestation of white educators' negative perception of minority student behavior is that white educators are more likely than non-white educators to refer minority students for special education evaluation.⁶⁰ Research demonstrates that regardless of ethnicity, teachers tend to more frequently refer students from backgrounds other than their own to specialized educational services.⁶¹ One explanation given for this is that teachers are unfamiliar with the cultural values of the student's ethnic group, and hence regard behavior which may be appropriate within the minority culture as being inappropriate in the middle class culture of schools.⁶² In a context where a predominantly white teaching force services a predominantly minority student population, it is not surprising, then, that these students are disproportionately steered into special education. In one study, teachers were found three and one-half times more likely to refer an African-American student for special education than an European-American student.⁶³ In another study, white teachers demonstrated a higher tendency to recommend special education than Hispanic or African-American teachers.⁶⁴

It has been noted that teachers evaluating the severity or

ticle argues only that these behaviors, when misread by a predominantly white teaching profession, often become grounds for inappropriate referral to and placement in special education.

57. HERBERT GROSSMAN, *ENDING DISCRIMINATION IN SPECIAL EDUCATION* 18 (1998).

58. Harry & Anderson, *supra* note 20, at 612.

59. *Id.*

60. Sigmund Tobias et al., *Special Education Referrals; Failure to Replicate Student-Teacher Ethnicity Interaction*, ERIC DIGEST, ED 224221, at 6 (concluding that white teachers tend to make special education referrals than non-white teachers; *See also* Artiles & Trent, *supra* note 5, at 421 (noting that "teacher prejudices, racial bias, expectations and differential treatment contribute in influencing referral decisions").

61. *See* Sigmund Tobias et al., *Bias in the Referral of Children to Special Services*, ERIC DIG. EDUC. 08637, at 7-8 (1981); *see also* Tobias et al., *supra* note 60, at 2.

62. Tobias et al., *supra* note 60, at 3.

63. GROSSMAN, *supra* note 57, at 19 (citation omitted).

64. Tobias et al., *supra* note 60, at 7.

deviancy of student behavior problems judge the exact same behavioral transgression as more severe or deviant when it is committed by a black male student than a white student.⁶⁵ One commentator explains the racial baggage many white teachers bring to student evaluation:

Many of the [special education] teachers would not live in a desegregated neighborhood, did not favor mandatory school desegregation, felt the civil rights movement did more harm than good, and felt that the problems of prejudice were exaggerated. One-third believed that Blacks and whites should not be allowed to intermarry. Furthermore, the majority of the teachers perceived their white students to be superior intellectually, socially and in other characteristics relevant to school achievement.⁶⁶

What makes the situation worse for these students is the general perception among regular educators that special education classes serve as an easily available option to reduce the demands of the regular education classroom. For many teachers, students whose behaviors differ from the cultural norm are better off with the special educator, whose specialized training and expertise are more well-suited for "behavior problems."⁶⁷ As one commentator explained, "It seems that the answers to students' difficulties in the regular classroom are all too often sought by attempts to refer students to special education rather than seeking to improve the quality of regular education."⁶⁸ Moreover, both regular and special educators operate under incentive systems associated with the referral process.⁶⁹

The conscious and unconscious cultural and racial biases that many white teachers bring to the classroom stand in clear contrast to what researchers have concluded about black and other minority teachers. In contrast to the general teaching population, black and other minority teachers have been found to be less prejudiced toward black and other minority students.

65. GROSSMAN, *supra* note 57, at 70.

66. *Id.* at 68 (citation omitted).

67. Goodale & Soden, *supra* note 25, at 8; *see also* HARRY, *supra* note 1, at 85.

68. HARRY, *supra* note 1, at 85.

69. Artiles & Trent, *supra* note 5, at 42; *see also* Goodale & Soden, *supra* note 25, at 4 ("The conception of special education as the savior for all educational, social, and emotional problems has contributed to the disproportionate placement of minorities in special education programs."); Tobias et al., *supra* note 58, at 5 (finding that special education teachers are more likely to make a special education referral than regular education teacher).

Research demonstrates that African-American or Hispanic teachers have a lower tendency to recommend a child to special education than white teachers.⁷⁰ Black teachers have also been found to give more positive feedback to black pupils than that given by white teachers.⁷¹ One group of commentators explains:

Since a black teacher shares racial experiences with the black student, including experience as a black student, a black teacher is more likely to be supportive of a black student who has trouble in class. This implies that such a teacher would be less likely to (1) discipline a black inappropriately and (2) conclude inappropriately that a black student belongs in a low-ability class.⁷²

Consequently, where there is a high percentage of African-American teachers in a school district, there is a decrease in the overrepresentation of black students in special education.⁷³ Boston public schools, for example, made a conscious effort in 1981 to incorporate minority educators into a working subcommittee on special education referral, and assigned to every student evaluation a professional of the same race as the student being evaluated.⁷⁴ As a result, although the rate at which Blacks and other minorities were placed in the pre-referral and referral stage did not decrease, the number of black learners placed in special education as a result of a new referral decreased significantly.⁷⁵

Yet, race-conscious measures taken to counteract disproportionate referrals by an overwhelmingly white faculty does not imply that all white teachers are either racist or have an unconscious cultural bias. I do not suggest that school districts should not sign an order tomorrow to lay off all white teachers and replace them with minority teachers. However, using race as one of several criteria in making hiring and placement decisions in the area of special education will increase the likelihood that there will be a culturally qualified educator partici-

70. Tobias et al., *supra* note 60, at 6.

71. Joseph Stewart Jr. et al., *In Quest of Role Models; Change in African-American Teacher Representation in Urban School Districts, 1968-1986*, 58 J. NEGRO EDUC. 140, 143 (1989).

72. *Id.* at 143.

73. GROSSMAN, *supra* note 57, at 75; *see also* Stewart et al., *supra* note 71, at 140 (noting evidence of link between proportion of African-American teachers and equal educational opportunities for African-American students).

74. Goodale & Soden, *supra* note 25, at 5.

75. *Id.* at 7.

pating in the evaluation of a referred student.⁷⁶ For example, "Rather than supporting the teacher's already held stereotypes of the ghetto child, the [black] psychologist can try to help the teacher to see his/her own constraints and incompetencies and provide the teacher with the non-directive support needed for most situations involving self-change."⁷⁷ The current special education student evaluation process, which may be difficult to monitor and control, can be helped by placing black and minority "special educators" such as, special education teachers, psychologists, social workers and other regular education teachers that participate regularly in the evaluation process, at the entrance gates of special education. This type of employment action will help counterbalance and minimize the cultural bias that currently drives the student evaluation process.

IV. THE EQUAL PROTECTION CLAUSE AND TITLE VII: AFFIRMATIVE ACTION IN PUBLIC SCHOOL SPECIAL EDUCATOR EMPLOYMENT

The need for adequate representation of black educators in the special education process is clear. The presence of black educators at the referral, evaluation and instructional stages of special education significantly minimizes the potential for the disproportionate placement of black students in special education within a school district. The use of race in the hiring and placement of special educators would facilitate the positioning of "culturally reciprocating" adults at critical stages of the special education system.⁷⁸ These placements would prevent minority students from falling victim to the failings of the potentially adverse effects of teacher discretion. Further, efforts to eradicate the conscious and unconscious teacher bias in referring minority students to a separate track of education would help the process to be fair and equal; qualities the United

76. See, e.g., Goodale & Soden, *supra* note 25, at 5.

77. Aaron D. Gresson, *The "Educational Psychologist" in African-American Special Education*, 49 J. NEGRO EDUC. 41, 50 (1980). Cf. Barbara Holmes, *Do Not Buy the Conventional Wisdom: Minority Teachers Can Pass the Test*, 55 J. NEGRO EDUC. 335, 336-37 (1986) ("black teachers have been good teachers, who traditionally played a vital role in the formation of values and expectations of black students.").

78. See BETH HARRY ET AL., BUILDING CULTURAL RECIPROCALITY WITH FAMILIES: CASE STUDIES IN SPECIAL EDUCATION 6-9 (1999) (arguing that effective special education requires that teacher be able to "reciprocate" the cultural values of student and family).

States Founding Father's highly esteemed:

Family lineage, wealth and education of parents, cultural difference – to select and discriminate according to these factors was abhorrent to the founders and followers of American democratic institutions long before the current classes of race and handicap were generally acknowledged.⁷⁹

Affirmative measures to increase black employment would reduce intra-school resegregation, reduce the number of black students “dumped” into a special education system, and move a school district closer to providing equal educational opportunities for all of its students.

However, the virtue of such a measure as a matter of policy does not end the inquiry. To implement a program geared toward achieving sufficient black and other minority representation at the various levels of special education, the policy must survive both Constitutional and statutory scrutiny. As a “state action,” such a policy would be subject to the exacting scrutiny of the Equal Protection Clause of the United States Constitution.⁸⁰ As an employment policy, such efforts could also create an actionable claim under Title VII of the Civil Rights Act. The next Sections examine whether an employment policy that uses race as a hiring consideration of teachers in the special education context would survive challenges under both the Equal Protection Clause and Title VII.

A. *The Equal Protection Clause and the Anti-Dumping Rationale as a Compelling State Interest*

1. *The Wygant Decision*

The Equal Protection Clause requires that the standard of strict scrutiny be applied to all race-based classifications by governmental entities.⁸¹ Under this analysis, the challenged classification must both serve a compelling state interest and be narrowly tailored to serve the state interest.⁸² Most relevant to this Article, the Supreme Court applied this analysis to a school district's affirmative action employment policy in *Wy-*

79. OAKES, *supra* note 40, at 190.

80. U.S. CONST. amend. XIV, § 1.

81. See *City of Richmond v. Croson*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., concurring).

82. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

*gant v. Jackson Board of Education.*⁸³

In *Wygant*, the Board of Education in Jackson, Michigan, responding to heightened racial tension in the community, negotiated an affirmative action layoff agreement with the local teachers union.⁸⁴ The agreement provided that in the event that it became necessary to lay off teachers, teacher seniority would govern, except that "at no time w[ould] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."⁸⁵ When the school district was faced with the need to lay off teachers, it refused to honor the affirmative action provision of the labor agreement.⁸⁶ The union and two of its minority members who were laid off in violation of the contractual provision brought suit in federal court alleging that the School Board's action violated the Equal Protection Clause under the Civil Rights Act of 1964.⁸⁷ After the suit was dismissed in federal court for lack of jurisdiction,⁸⁸ the complaining parties turned to the state court system and prevailed not on an Equal Protection grounds, but on breach of contract.⁸⁹ The state court ultimately rejected the Board's argument justifying the non-application of the layoff provision because such action would violate the Civil Rights Act of 1964.⁹⁰

After the Board began enforcing the provision, the laid-off non-minority teachers brought suit in federal court challenging the legality of the provision on both Equal Protection and Title VII grounds.⁹¹ The district court upheld the validity of the layoff provision, holding that racial preferences in hiring need not be grounded on a finding of historical discrimination against minorities in order to survive Constitutional scrutiny.⁹² The court found that the provision was permissible under Equal Protection analysis as an attempt to remedy societal discrimination by providing role models.⁹³ The Sixth Circuit affirmed,

83. 476 U.S. 267 (1985).

84. *Id.* at 270.

85. *Id.*

86. *Id.* at 271.

87. *Id.*

88. *Id.*

89. *Wygant*, 476 U.S. at 271-72.

90. *Id.* at 272.

91. *Id.*

92. *Id.*

93. *Id.*

and certiorari was granted on the Equal Protection Clause claim.⁹⁴

The Supreme Court reversed the district court's findings in a 5-4 vote with five separate opinions. Writing for the plurality, Justice Powell reiterated that strict scrutiny was the appropriate level of analysis where, as was the case here, a state action operated "against whites and in favor of certain minorities, and therefore constitute[d] a classification based on race."⁹⁵ As to whether the contractual provision's purpose to remedy societal discrimination constituted a compelling governmental interest, Powell wrote that "the Court ha[d] insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."⁹⁶ Although the plurality opinion required a specific showing of prior discrimination by the school district itself, it did not require that the requisite prior discrimination occur in the same specific arena at which the challenged racial classification was aimed.⁹⁷ Rather, focus was placed on the prior discriminating practices of the School Board *generally*.⁹⁸ Thus, the Court did not explicitly require that the prior discrimination for which a specific showing was required to have occurred in the area of personnel hiring. A showing that there was specific past discrimination exercised by the school district in any area of its decision-making would have been a sufficient governmental interest to satisfy the compelling state interest prong of strict scrutiny.⁹⁹ In this regard, *Wygant* leaves open the possibility that, at least within the bounds of the Equal Protection Clause, a school district can attempt to remedy the effects of prior discrimination in one area under its governance by aiming a race-based policy at another governing area. Under *Wygant*, proof of discrimination against students in special education referral could theoretically provide a state interest compelling enough to implement racial preference in hiring practices.

94. *Id.* at 273.

95. *Wygant*, 476 U.S. at 273.

96. *Id.* at 274.

97. *Id.*

98. *Id.* ("[T]he Court has insisted upon showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination").

99. *Id.*

Wygant also addressed the “role model” theory, on which the lower court relied in upholding the Board’s plan. In rejecting this theory, Justice Powell’s primary concern was its lack of a stopping point. Justice Powell wrote that a school board would be permitted to engage in “discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.”¹⁰⁰ Powell also warned that allowing such a justification for race-based decision-making by school districts could on the one hand provide justification for keeping a small percentage of minority teachers to parallel the small percentage of minority students, while on the other hand reinforce the principle that black students are better off with black teachers, a theory that was firmly rejected in *Brown v. Board of Education*.¹⁰¹ The fractured nature of the *Wygant* decision, however, illustrates that a distinction between the interests of providing role models and faculty diversity was not lost on some members of the court.

In concurrence, Justice O’Connor acknowledged the distinction between the provision of role models and the maintenance of a diverse school personnel: “The goal of providing ‘role models’ discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.”¹⁰² Likewise, in a dissent joined by Justices Brennan and Blackmun, Justice Marshall suggested that race can play a role in the pursuance of educational objectives attainable through diversity. Marshall also noted that racially-motivated violence that had erupted at the schools made urgent the imperative to integrate the public schools.¹⁰³ The dissent by Justice Stevens was even more explicit in its recognition that racial considerations are permissible to achieve educational objectives: “In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.”¹⁰⁴ The four dissenting votes, together with

100. *Wygant*, 476 U.S. at 275.

101. *Id.* at 276 (“Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown*. . .”).

102. *Id.* at 288 (O’Connor, J., concurring).

103. *Id.* at 306-07 (Marshall, J., dissenting).

104. *Id.* at 315 (Stevens, J., dissenting).

O'Connor's implicit acknowledgement that educational diversity can be a compelling state interest, establishes a five-Justice majority on the *Wygant* Court that a school district affirmative action hiring policy aimed at promoting faculty diversity would satisfy the compelling state interest prong of Fourteenth Amendment strict scrutiny analysis.

2. *The Bakke Decision*

The objective of achieving diversity as a compelling state interest is also articulated in *Regents of the University of California v. Bakke*.¹⁰⁵ In *Bakke*, a white applicant to the medical school at University of California at Davis challenged an affirmative action admissions policy that established a quota system for minority applicants.¹⁰⁶ In another sharply divided vote of 5-4, the Supreme Court struck down the policy as violative of the Equal Protection Clause. Justice Powell, again writing for a plurality, concluded that since the classification in question was racial in nature, strict scrutiny applied, rejecting the argument that Bakke was not a member of a discrete and insular minority.¹⁰⁷ Although the Court ultimately found that the admissions policy was not narrowly enough tailored, Powell's opinion did find that the state's interest in maintaining a diverse student body was sufficiently compelling to satisfy the first prong of strict scrutiny. Powell wrote that the attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."¹⁰⁸ In doing so, the Court invoked the four essential freedoms of "academic freedom," which "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹⁰⁹ These four essential freedoms include the freedom "to determine for itself on academic grounds *who may teach*, what may be taught, how it shall be taught, and who may be admitted to study."¹¹⁰ Because the medical school "invoke[d] a countervailing constitutional interest, that of the

105. 438 U.S. 265 (1978); see also *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. at 288 (O'Connor, J., concurring).

106. *Id.* at 280-81.

107. *Id.* at 290.

108. *Id.* at 311-12.

109. *Id.* at 312.

110. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

First Amendment[,] . . . [it] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."¹¹¹

Although the plurality's discussion focused solely on diversity in the higher education context, the opinion contained no explicit limiting language that would restrict this interest to extend its applicability to the elementary and secondary school context. As the opinions of the "Wygant Five" illustrate, the compelling interest of racial diversity in the field of education applies with equal force in the formulation of elementary and secondary school policy. Even before the *Bakke* plurality's acknowledgement that student body diversity rose to the level of a compelling state interest, the Court had identified the importance of student diversity in the public elementary and secondary school context. In *Swann v. Charlotte-Mecklenberg Board of Education*,¹¹² the Court expressly recognized that the educational objectives of public schools may permit the use of race in school district decision-making:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.¹¹³

The Court has also recognized repeatedly the importance of public education in American life.¹¹⁴ The "essential freedom" to determine "who may teach" and "how it may be taught" should include the school district's freedom to structure the racial composition of its staff in furtherance of fulfilling its educational "mission."

Even if student and faculty diversity in the area of education can be compelling enough to survive the first prong of strict scrutiny analysis, the question still remains whether the

111. *Bakke*, 438 U.S. at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

112. 402 U.S. 1 (1971).

113. *Id.* at 12.

114. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) ("[P]ublic schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.").

“anti-dumping” interest falls within this category. The argument that the “anti-dumping” interest falls into the diversity interest rubric is subject to attack on at least two grounds. First, it can be argued that because the “anti-dumping” interest promotes ethnic and racial “sameness” as opposed to diversity, characterization as a form of diversity interest is inappropriate. This interest may be arguably more akin to the role model theory expressly rejected in *Wygant*.¹¹⁵ In this light, the double-edged dangers cited in *Wygant* would be implicated by the assumptions underlying the “anti-dumping” interest, particularly the danger of “reifying the stereotype,” repudiated in *Brown*,¹¹⁶ that black students are better off with black teachers. Second, it can be argued that by bringing in more minority teachers to serve minority students, any race-conscious hiring policy will implicate the concern articulated by the Court in *Green v. County School Board*¹¹⁷ that the integration of school faculties is a mandatory component of the *Brown* mandate.¹¹⁸

Regarding the analogy of the “anti-dumping” interest to the role model interest, the two rationales are dissimilar in two significant respects. First, “anti-dumping” interest does not rest on the premise that all black students are necessarily better off with black teachers, but rather on the premise that certain minority students are less likely to be steered into the special education system when similar minority educators, who are less likely to see culturally variant behavior as evidence of a disability, are incorporated into the referral and evaluation process. The “anti-dumping” interest is consistent with the principle that a black child can learn just as effectively from a white teacher as from a black teacher, because the rationale does not rest on any assumptions about learning. It addresses the constitutional threat of teacher referrals to special education that may be based on conscious or unconscious racism or ethnocentrism. Because the objective would be to eliminate any racial element from the special education process, the gate-keeping role of the black special educator would be to correct any racially-driven referrals or evaluation, such that black students are returned to the mainstream classes taught (ideally)

115. 476 U.S. at 275-76.

116. *See generally*, *Brown v. Board. of Educ.*, 347 U.S. 483 (1954).

117. 391 U.S. 430 (1968).

118. 391 U.S. 430, 437 (1968).

by a racially integrated faculty. The black special educator would also enable white teachers to become more familiar with their own unconscious cultural biases and misinterpretations of student behaviors.¹¹⁹

Regarding the second argument, the faculty integration problem today is not that black students are too often being taught by black teachers; if anything black teachers are under-represented in the teaching labor force.¹²⁰ Moreover, to the extent that affirmative measures in the hiring of black special educators does have a resegregating effect on the racial composition of particular school or district's faculty, it may serve as an effective means to prevent the dumping of a disproportionate number of black students into special education classrooms. Given the number of different ways school tracking and ability-grouping policies effectively separate black and other minority students from white students, more black special educators in a given school or district may have a significant desegregative impact on school and classroom composition.

A better characterization of the "anti-dumping" interest is that it is a long-term goal of bringing diversity to public school faculties. It is the overwhelming cultural homogeneity of the faculty that contributes significantly to the disproportionate placement of minority children. There is often no special educator with an alternative cultural understanding for students standing at the precipice of the special education ravine. It is this lack of faculty diversity that renders the culturally different behaviors of many black and other minority students "inappropriate." Although affirmative measures to obtain more black educators may seem to be "anti-diversity," they seek to enhance the cultural diversity of public schools by keeping minority children within the relatively more integrated educational mainstream. In this sense, this version of the diversity rationale seems more compelling than diversity for its own sake.

B. The Anti-Dumping Rationale and Title VII

The constitutional question presented by race-based affirmative action in the hiring of special educators is a relatively straightforward one: is the policy narrowly tailored to serve a

119. See Gresson, *supra* note 71 and accompanying text.

120. Harry & Anderson, *supra* note 20, at 612.

compelling state interest? As this article has argued, the disproportional number of black students referred to and placed in special education resulting from the cultural disconnect between white teachers and their black minority students provides a sufficient basis for finding a compelling state interest under the rubric of diversity. Moreover, a policy that treats race as one of several considerations in hiring decisions would likely be narrowly tailored enough to satisfy the second prong of strict scrutiny analysis.¹²¹

A more difficult question is whether such a policy would survive a Title VII challenge under Title VII of the Civil Rights Act of 1964. Title VII provides that “[i]t shall be an unlawful employment practice for any employer to . . . fail or refuse to hire or to discharge any individual . . . because of such individual’s race. . . .” Although the original intent of Title VII was to regulate private discrimination in the workplace, Congress amended Title VII in 1972 to bring public employers to the statutory definition of employer.¹²² Thus, since 1972 the employment policies of state and local governmental agencies have been governed by the dual mandates of Title VII and the Equal Protection Clause.

In *United Steel Workers of America v. Weber*,¹²³ the Supreme Court first addressed the applicability of Title VII to voluntary affirmative action plans in the private sector context. The race-based policy at issue was a plan for on-the-job training that mandated a one-for-one quota for minority workers admitted to the program.¹²⁴ In an opinion written by Justice Brennan, the Court upheld the validity of the contractual provision.¹²⁵ Rejecting the argument that Title VII was intended to prohibit all race-conscious affirmative action plans, the Court pointed to portions of the legislative history that reflected a Congressional intent not to inhibit the private sector’s ability to

121. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (noting that a decision-making policy that treats race as one of many considerations would probably satisfy strict scrutiny’s “narrowly tailored” requirement”). A policy that focuses on hiring and placement rather than lay-offs would also have a higher likelihood of surviving strict scrutiny. See *Wygant*, 476 U.S. 267, 282-83 (1985) (noting that valid hiring goals place less of burden on innocent white workers than race-based lay-offs).

122. Equal Opportunity Act of 1972, Pub. L. No. 92-261 § 2, 86 Stat. 103 (codified as amended 42 U.S.C. § 2000e(a) (1999)).

123. 443 U.S. 193 (1979).

124. *Id.* at 199.

125. *Id.* at 209.

“tak[e] effective steps to accomplish the goal that Congress designed Title VII to achieve.”¹²⁶

In holding that Title VII’s prohibition on racial discrimination does not condemn “all private, voluntary, race-conscious affirmative action [plans],” the Court was careful to restrict the scope of *Weber*, defining at the outset the limited nature of its holding: “the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.”¹²⁷ It also repeatedly focused on the private nature of the policy. In this respect, the sequence of the Court’s argument is significant. It begins its analysis with references to various points in the legislative history espousing the overarching legislative intent. The references to the congressional record statements noted the “plight of the Negro in our economy,”¹²⁸ as the Court pointed to evidence that the employment anti-discrimination measures embedded in Title VII served to achieve the higher, more general purpose of facilitating the integration of Blacks into various aspects of American society. The quoted Senate floor statements reflect the Court’s understanding that Title VII filled a critical gap in already existing federal anti-discrimination law:

What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?¹²⁹

The Court also pointed to similar statements made by President Kennedy upon his introduction to Congress of the Civil Rights Act of 1963: “There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.”¹³⁰ By invoking this generalized Congressional intent—enabling of Blacks’ the enjoyment of rights protected under previously enacted anti-

126. *Id.* at 204.

127. *Id.* at 200.

128. *Weber*, 443 U.S. at 203 (citing 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

129. *Id.* at 203 (citing 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey)).

130. *Id.* (citing 109 Cong. Rec. at 11159 (remarks of Sen. Kennedy)).

discrimination law—the Court created the backdrop against which future Title VII challenges should be analogized. Its emphasis on Title VII's coordinate relationship with other anti-discrimination laws suggests that courts should recognize its purpose as an “enabling” statute for other anti-discrimination law when addressing the legality of a race-conscious measure, regardless of whether the measure is private or public, legally mandated or voluntary.

Only after the *Weber* Court had established the interpretive backdrop against which Title VII should be read, did it address the specifically voluntary and private nature of the affirmative action plan in question. The Court first cited from a House Report accompanying the Civil Rights Act: “Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.”¹³¹ In further support of this conclusion, the Court noted the importance of the traditional Congressional resistance to the regulation of private business in the ultimate enactment of the legislation:

Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that “management prerogatives, and union freedoms. . . be left undisturbed to the greatest extent possible.”¹³²

Thus, the Court found within the broad interpretive umbrella of Title VII, as articulated at the onset of its opinion, a specific Congressional intent to permit private sector employers to adopt voluntary race-conscious affirmative action plans without the threat of Title VII liability.

Next, while expressly declining to “detail a line of demarcation between permissible and impermissible affirmative action plans,”¹³³ the Court proceeded to identify three particular factors of the Kaiser Plan that rendered it permissible under Title VII. First, the Court noted that the plan's purpose mirrored that of Title VII, in that: “[b]oth were designed to break down old patterns of racial segregation and hierarchy.”¹³⁴ Second,

131. *Id.* at 203-04 (citing H.R. Rep. no. 914, 98th Cong. 1st Sess. 1, 18 (1963)).

132. *Id.* at 206 (citation omitted).

133. *Id.* at 208.

134. *Weber*, 443 U.S. at 208.

“[t]he plan did not unnecessarily trammel the interests of white employees”: that is, it did not require the replacement of white employees with black employees.¹³⁵ Finally, the court placed importance on the temporary nature of the plan, noting that the preferential selection of Blacks would end as soon as the percentage of black, skilled craftworkers approximates the percentage of blacks in the local labor force.¹³⁶

Despite its focus on these three factors of the Kaiser plan in justifying its compliance with Title VII, the Court declined to adopt them as exclusive requirements for affirmative action plans to comply with Title VII.¹³⁷ The limited holding of *Weber* is simply that an employment policy falling into the category of private and voluntary race-based affirmative action plans are not necessarily prohibited under Title VII. The Court spoke nothing of a “test for all seasons,” nor did it address Title VII’s relationship to the Equal Protection requirements governing public sector employers. Indeed, the limited parameters of *Weber* are further illustrated by the opening sentence of the Court’s legal analysis: “We emphasize the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment.”¹³⁸

C. *Weber and the Public Employer: Johnson v. Transportation Agency, Santa Clara County*

Nearly ten years after *Weber*, and two years after *Wygant*, the Court was presented with a slightly different category of race-conscious affirmative action plan in *Johnson v. Transportation Agency, Santa Clara County*,¹³⁹ where the plan was not voluntary and private but put in place by a local governmental entity. This case differed in significant respects from both *Weber* and *Wygant*.¹⁴⁰ The plaintiff in *Johnson* was a male em-

135. *Id.*

136. *Id.*

137. *See id.* at 208 (“We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenges plan falls on the permissible side of the line.”).

138. *Id.* at 200.

139. 480 U.S. 616 (1987).

140. Unlike *Weber*, *Johnson* involved a policy established by a public employer. Unlike *Wygant*, it involved a challenge under Title VII, rather than an Equal Protection challenge. *Id.*

ployee who challenged the local transportation agency's decision to pass him over for a promotion in favor of a female employee.¹⁴¹ The agency's decision was made in pursuance of an affirmative action plan directing that sex or race be considered for the purpose of remedying underrepresentation of women and minorities in traditionally segregated jobs.¹⁴² Although the defendant in *Johnson* was clearly a state actor for purposes of the Equal protection Clause, the Court was presented only with a Title VII claim, as the constitutional issue was neither raised nor addressed in the litigation below.

In affirming the agency's plan, the Court shoehorned it into the *Weber* category of remedy-based affirmative action plans. It first laid early emphasis on the explicitly stated intent of the challenged plan: "The Agency stated that its Plan was intended to achieve 'a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented.'"¹⁴³ With the remedial nature of the plan as context, the Court recognized the lower court's holding that "since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Weber*. . . should be applied" in evaluating its validity. In agreeing that *Weber* was controlling authority,¹⁴⁴ the Court implicitly ratified approvingly that the Plan was properly characterized as a *Weber*-type case by virtue of its remedial purpose. The Court's decision was necessarily guided by the *Weber* decision not simply because it was a Title VII claim, but because it was a Title VII claim against a remedy-driven affirmative action plan.¹⁴⁵ As such, the *Weber* criteria applied, notwithstanding the agency's status as a state actor.¹⁴⁶

That the *Weber* criteria only applied to race-based policies that are remedy-driven is supported by language in the concur-

141. *Id.* at 625.

142. *Id.* at 621-22.

143. *Id.* at 621.

144. *See id.* at 627-28 ("The assessment of the legality of the Agency Plan must be guided by our decision in *Weber*.").

145. *Johnson*, 480 U.S. at 628.

146. In examining the plan under the guidance of *Weber*, however, the Court declined, as it did in *Weber*, to establish a definitive test for determining the legality of race-based remedial affirmative action under Title VII. In upholding the agency's remedial plan, the Court found that the agency's plan exhibited two of the factors identified as dispositive in *Weber*. *Id.*

rence by Justice Stevens, one of the swing votes in *Johnson's* 6-3 decision. Justice Stevens made explicit what the opinion of the Court left implicit: the law after *Weber* and *Johnson* "does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups."¹⁴⁷ He noted that judicial interpretation of Title VII must necessarily "leave 'breathing room' for employer initiatives to benefit members of minority groups."¹⁴⁸ In light of the overarching purpose of Title VII to benefit minority groups, Justice Stevens construed Title VII not only to encourage employer scrutiny of possible exclusions of minorities in the past, but also to permit beneficial considerations of minority groups that are both generalized and prospective:

Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board "said it had done so in part to improve the quality of education in Jackson – whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force. . . . All of these reasons aspire to a racially integrated future, but none reduces to "racial balancing for its own sake."¹⁴⁹

This less restrictive construction of Title VII echoes the concern expressed in Justice Stevens' dissent from the Court's decision in *Wygant*, where he criticized the ruling's failure to recognize that race-conscious decisions can often serve sound (and constitutionally permissible) educational purposes.¹⁵⁰ Where non-remedial educational objectives may have suffered a blow on the Constitutional level in *Wygant*, the implicit corodoning off of remedy-driven affirmative action plans in *Weber* and *Johnson* leaves in place school district's ability to use race-

147. *Id.* at 642.

148. *Id.* at 645.

149. *Id.* at 647 (quoting Kathleen M. Sullivan, *The Supreme Court-Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986)).

150. See *Wygant*, 476 U.S. at 313-16 (Stevens, J., dissenting).

conscious employment decisions to accommodate the “racial and ethnic needs” of diverse student populations.

V. *BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY V. TAXMAN*,¹⁵¹ A LOST CHANCE?

Although the Supreme Court has not yet addressed directly the permissibility of non-remedial race-based teacher employment decisions under Title VII, it almost had the opportunity to address this issue when it granted certiorari to the Third Circuit decision of *Board of Education of the Township of Piscataway v. Taxman*.¹⁵² In *Taxman*, intervenor-plaintiff Sharon Taxman,¹⁵³ a white high-school business education teacher, was laid off by the school board (“the Board”) in favor of retaining the high school’s only black teacher in the business department.¹⁵⁴ Although the statute of limitations for an Equal Protection challenge under Section 1983 had already been exceeded,¹⁵⁵ Taxman challenged the district’s decision under Title VII.¹⁵⁶ The district court granted partial summary judgment for the plaintiffs, holding that the plan, regardless of its objective, was overly intrusive on the rights of non-minorities.¹⁵⁷

On appeal the Third Circuit affirmed, but focused squarely on the issue of whether the plan’s non-remedial objective of maintaining a diverse faculty comported with the intent of Title VII’s prohibition of racial discrimination. It reasoned that under both *Weber* and *Johnson*, race-based affirmative action

151. 91 F.3d 1547 (3d Cir. 1996).

152. *Id.* For commentary on the *Taxman* case, see generally Fred Hartmeister, *The Taxman Cometh: Reductions in Force and Affirmative Action*, SCHOOL BUS. AFF., July 1995, at 9 (summarizing reasoning of *Taxman* court); Henry Schuldinger, Note, *Still Searching For the Limits of the Permissible Use of Affirmative Action: United States v. Board of Education of the Township of Piscataway*, 6 GEO. MASON U. CIV. RTS. L.J. 97 (1996); Brendan M. Lee, Note, *The Argument for Faculty Diversity: Recommendations After Taxman v. Board of Education*, 27 STETSON L. REV. 739 (arguing that faculty diversity generally should be recognized as a valid affirmative action goal under the Equal Protection Clause and Title VII).

153. The original Title VII suit was filed by the federal government. Ms. Taxman eventually intervened. *Taxman*, 91 F.3d at 1552.

154. *Id.* at 1551.

155. *Id.* at 1552 n.5.

156. *Id.* at 1552. Taxman also pursued a claim under New Jersey’s employment anti-discrimination statute.

157. *United States v. Board of Educ. of the Township of Piscataway*, 832 F. Supp. 836, 851 (D.N.J. 1993).

policies in the employment context must serve one of the two purposes underlying the original enactment of Title VII: (1) ending discrimination and guaranteeing equal opportunity in the workplace; and (2) remedying the underrepresentation of racial minorities.¹⁵⁸ Because the Board's "diverse faculty" rationale did not fall within one of these two rubrics, the Court held that its termination of Ms. Taxman was in violation of Title VII. It explained:

The affirmative action plans at issue in *Weber* and *Johnson* were sustained only because the Supreme Court, examining those plans in light of congressional intent, found a secondary congressional objective in Title VII that had to be accommodated – i.e., the elimination of the effects of past discrimination in the workplace. Here, there is no congressional recognition of diversity¹⁵⁹ as a Title VII objective requiring accommodation.

Regarding the Board's argument that diversity is a permissible objective in implementing race-based employment policies in the educational context under *Bakke*, the Court deftly avoided addressing the issue directly. Instead of offering rebuttal, the Court concludes in summary fashion:

While we wholeheartedly endorse any statements in these cases extolling the educational value of exposing students to persons of diverse races and backgrounds, given the framework in which they were made, we cannot accept them as authority for the conclusion that the Board's non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII.¹⁶⁰

In addressing the significance of the *Bakke* decision in particular, the Court, after an extensive summary of the opinion, concludes simply that "*Bakke's* factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are, in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in *Bakke* to guide us."¹⁶¹

Finally, the Court addressed the concurring opinions of

158. *Taxman*, 91 F.3d at 1557.

159. *Id.* at 1558.

160. *Id.* at 1561.

161. *Id.* at 1563 n. 14. The Court also rejected the Board's invocation of statements in *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), noting that the decision was overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Justices O'Connor and Stevens in *Wygant* and *Johnson*, respectively. The Court noted that Justice O'Connor, following *Wygant*, rejected an expansive view of the purposes that may underlie affirmative action in her concurring opinion in *Johnson*, citing her statement that "contrary to the intimations in Justice Stevens' concurrence, this Court did not approve preferences for minorities 'for any reason that might seem sensible from a business or social point of view.'"¹⁶² Moreover, the Court dismissed Justice Stevens' comments in his *Johnson* concurrence concerning the "idea of forward-looking affirmative action where employers do not focus on purging their own past sins of discrimination" as not controlling.¹⁶³

In holding that non-remedial objectives are not a permissible grounds for a race-based employment plan under Title VII, however, the Third Circuit paid little credence to the overarching intent of Title VII as identified in *Weber* and the categorical approach followed in both *Weber* and *Johnson*. Ignoring *Weber's* explicit articulation of Title VII's purpose as the enabling for racial minorities the enjoyment of other rights free from discrimination, the court redefined Title VII as having two primary goals limited to the context of the workplace: (1) ending discrimination and to guarantee equal opportunity in the workplace; and (2) remedying the under-representation of minorities.¹⁶⁴ Based on this improper limitation of Title VII's purpose as recognized in *Weber*, the court concluded that an affirmative action plan must have a remedial purpose in order to be valid under the statute.¹⁶⁵ Otherwise, the plan would not "mirror the purposes of the statute" and would therefore fail the first prong of the *Weber* test.¹⁶⁶

Aside from its overly restrictive articulation of the purposes of Title VII, treatment of the criteria examined in *Weber* and *Johnson* as a "test" for all affirmative action plans contradicts the explicitly limited holding of *Weber* and its application in *Johnson*. To the extent *Weber* does establish a "test," it is a test that applies only to the category of remedially-driven race-based decisions. The proper analysis for testing the validity of non-remedial affirmative action under Title VII was left by the

162. *Taxman*, 91 F.3d at 1563 (citations omitted).

163. *Id.* (internal quotations omitted).

164. *Id.* at 1557.

165. *Id.*

166. *Id.*

Supreme Court in *Johnson* for another day – a day that would have arrived had *Taxman* not reached settlement.¹⁶⁷

Furthermore, even if one accepts the notion that Title VII permits only those race-based employment policies that serve remedial objectives and prohibits such policies when they are instituted for purposes of academic diversity,¹⁶⁸ it is not clear that this principle, if ultimately adopted by the Supreme Court, should prevent school boards from utilizing race-based employment policies under the anti-dumping rationale. As discussed *infra*, the anti-dumping rationale differs significantly from the more generalized rationale of academic diversity.¹⁶⁹ The First Amendment “concern” identified by Justice Powell in *Bakke* – i.e., the academic freedom of educational institutions to determine “who may teach?” and “how it may be taught?”¹⁷⁰ – are still undoubtedly extant within the anti-dumping rationale. However, the anti-dumping rationale is also properly characterized as a remedial objective. In essence, in the context of special education, race-based employment decisions serve to remedy the adverse effects of a culturally and racially-biased referral and assessment system. By consciously placing educators of color at the gates of the special education system, school boards can cure the defects of a system tainted with unconscious racial bias. Although the anti-dumping rationale may be a variant of the diversity rationale, it is a variant that also qualifies as a remedial objective. This objective falls well within the general overarching intent of Title VII as identified in *Weber* – the enabling of Blacks (and presumably other racial minorities) to enjoy the rights protected under previously enacted anti-discrimination law.

167. See generally Mathew S. Lerner, Comment, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement*, 47 BUFF. L. REV. 1035, 1038 (1999) (arguing that the decision by civil rights leaders to settle *Taxman* was rational); see also Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMPLOYMENT L. 229, 230 (1999) (arguing that *Taxman* is at best a “quirky” case to decide the fate of non-remedial affirmative action under Title VII).

168. Indeed, the *Taxman* decision takes this principle even further, holding that there are only two types of remedial objectives that can justify race-based employment policy under Title VII. See *Taxman*, 91 F.3d at 1557.

169. See *supra* Section IV.A.1 (distinguishing the differences between the anti-dumping rationale and the diversity rationale).

170. *Id.*

VI. CONCLUSION

The separate and unequal system of special education in America's public schools poses a grave problem that adversely affects black and other minority children nationwide, with students of color being disproportionately referred and assigned to unchallenging and intellectually vacuous special education programs. Despite the intent of IDEA and its subsequently enacted amendments to provide a free and appropriate education to those children having individualized educational needs, unconscious racial and cultural bias within the largely subjective referral and assessment process persist. To the extent that race can serve as an efficient proxy for culture and class, race-based employment policies that use race as a single consideration in the hiring and placement of special educators can work effectively to remedy this deeply entrenched problem.

Such policies face significant legal obstacles, namely the strict judicial scrutiny required under the Equal Protection Clause and Title VII. However, when implemented to prevent the "dumping" of black and minority children into separate classrooms based on teachers' subjective considerations and assessments, such employment policies, if narrowly enough tailored, should survive both Constitutional and statutory challenges.

Although this Article proposes that narrowly-tailored race-conscious employment policies are both Constitutionally and statutorily appropriate, this question continues to remain one yet to be answered in the wake of the *Taxman* settlement. Until another similar case comes along, however, school boards and other entities of educational governance should make strong efforts to make race a significant consideration in the hiring and placement of special educators. Otherwise, special education classrooms will continue to act as magnets pulling minority students out of the educational mainstream.