United Steelworkers of America v. Weber

443 U.S. 193 (1979)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, *inter alia*, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft-work forces. . . .

This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.

Pursuant to the national agreement Kaiser altered its craft-hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703(a) and (d)[1] of Title VII. The District Court held that the plan violated Title VII…A divided panel of the Court of Appeals for the Fifth Circuit affirmed.... We reverse.

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[1] Section 703(d), 78 Stat. 256, 42 U.S.C. § 2000e-2(d), provides:

"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."

We emphasize at the outset the narrowness of our inquiry…. [S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is 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…..

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703(a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald* v. *Santa Fe Trail Transp. Co.*, [427 U.S. 273, 281 n.8 (1976)], settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703(a) and (d) and upon *McDonald* is misplaced. It is a "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Id.* (remarks of Sen. Humphrey); *id.* at 7204 (remarks of Sen. Clark); *id*, at 7379–80 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. *See id.* at 6548 (remarks of Sen. Humphrey); *id*. at 7204 (remarks of Sen. Clark). As a consequence, "the relative position of the Negro worker [was] steadily worsening."

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." *Id.*, at 7204 (remarks of Sen. Clark); *see also id.* at 7379-7380 (remarks of Sen. Kennedy). As Senator Humphrey explained to the Senate:

> "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?" *Id.* at 6547.

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 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." 109 Cong. Rec. at 11159.

Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 10 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

> "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963) (emphasis supplied).

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Our conclusion is further reinforced by examination of the language and legislative history of § 703(j) of Title VII.[2] Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. See 110 Cong. Rec. 8618–19 (1964) (remarks of Sen. Sparkman). Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or permit racially preferential integration efforts. But Congress did not choose

[2] Section 703(j) of Title VII, 78 Stat. 257, 42 U.S.C. § 2000e-2(j), provides:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

such a course. Rather, Congress added § 703(j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. The section does not state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

The reasons for this choice are evident from the legislative record. 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." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391. Section 703(j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance." 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller). *See also id*. at 9881 (remarks of Sen. Allott); *id*. at 10520 (remarks of Sen. Carlson); *id*. at 11471 (remarks of Sen. Javits); *id*. at 12817 (remarks of Sen. Dirksen). Clearly, a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permit" in § 703(j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.

We therefore hold that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans….

Mr. Justice POWELL and Mr. Justice STEVENS took no part in the consideration or decision of these cases.

Mr. Justice BLACKMUN, concurring.

While I share some of the misgivings expressed in Mr. Justice REHNQUIST's dissent concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its judgment.

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this litigation arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately described as a "high tightrope without a net beneath them." 563 F.2d 216, 230. If Title VII is read literally, on the one hand they face liability for past discrimination against

blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

In this litigation, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question. Although the labor force in the Gramercy area was proximately 39% black, Kaiser's work force was less than 15% black, and its craftwork force was less than 2% black. Kaiser had made some effort to recruit black painters, carpenters, insulators, and other craftsmen, but it continued to insist that those hired have five years' prior industrial experience, a requirement that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had. The parties dispute the extent to which black craftsmen were available in the local labor market. They agree, however, that after critical reviews from the Office of Federal Contract Compliance, Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry. Yet when they did this, respondent Weber sued, alleging that Title VII prohibited the program because it discriminated against him as a white person and it was not supported by a prior judicial finding of discrimination against blacks.

Respondent Weber's reading of Title VII endorsed by the Court of Appeals, places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the "tightrope" it creates would be to eschew all forms of voluntary affirmative action. Even a whisper of emphasis on minority recruiting would be forbidden. Because Congress intended to encourage private efforts to come into compliance with Title VII, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), Judge Wisdom concluded that employers and unions who had committed "arguable violations" of Title VII should be free to make reasonable responses without fear of liability to whites. Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to those persons. Also, to the extent that Title VII liability is predicated on the "disparate effect" of an employer's past hiring practices, the program makes it less likely that such an effect could be demonstrated. And the Court has recently held that work-force statistics resulting from private affirmative action were probative of benign intent in a "disparate treatment" case. *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978).

The "arguable violation" theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an "arguable violation" of Title VII. . . .

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

…Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703(d) of Title VII:

> "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." 78 Stat. 256, 42 U.S.C. § 2000e-2(d).

Equally suited to the task would be § 703(a)(2), which makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(2).

Entirely consistent with these two express prohibitions is the language of § 703(j) of Title VII, which provides that the Act is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force. 42 U.S.C. § 2000e-2(j). Seizing on the word "require," the Court infers that Congress must have intended to "permit" this type of racial discrimination. Not only is this reading of § 703(j) outlandish in the light of the flat prohibitions of §§ 703(a) and (d), but also, as explained in Part III, it is totally belied by the Act's legislative history.

Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII. This normally dispositive fact, however, gives the Court only momentary pause. An "interpretation" of the statute upholding Weber's claim would, according to the Court, "bring about an end completely at variance with the purpose of the statute." To support this conclusion, the Court calls upon the "spirit" of the Act, which it divines from passages in Title VII's legislative history indicating that enactment of the statute was prompted by Congress' desire "to open employment opportunities for Negroes in occupations which [had] been traditionally closed to them." But the legislative history invoked by the Court to avoid the plain language of §§ 703(a) and (d) simply misses the point. To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons. In most cases, "[l]egislative history . . . is more vague than the statute we are called upon to interpret." *United States* v. *Public Utilities Comm'n,* 345 U.S. 295, 320, (1953) (Jackson, J., concurring). Here, however, the legislative history of Title VII is as clear as the language of §§ 703(a) and (d), and it irrefutably demonstrates that Congress meant precisely what it said in §§ 703(a) and (d)—that no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance.

Introduced on the floor of the House of Representatives on June 20, 1963, the bill—H.R. 7152—that ultimately became the Civil Rights Act of 1964 contained no compulsory provisions directed at private discrimination in employment. The bill was promptly referred to the Committee

on the Judiciary, where it was amended to include Title VII. With two exceptions, the bill reported by the House Judiciary Committee contained §§ 703(a) and (d) as they were ultimately enacted. Amendments subsequently adopted on the House floor added § 703's prohibition against sex discrimination and § 703(d)'s coverage of "on-the-job training."

After noting that "[t]he purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin," the Judiciary Committee's Report simply paraphrased the provisions of Title VII without elaboration. H.R. Rep., pt. 1, p. 26. In a separate Minority Report, however, opponents of the measure on the Committee advanced a line of attack which was reiterated throughout the debates in both the House and Senate and which ultimately led to passage of § 703(j). Noting that the word "discrimination" was nowhere defined in H.R. 7152, the Minority Report charged that the absence from Title VII of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . . ." H.R. Rep., pt. 1, pp. 67–68. To demonstrate how the bill would operate in practice, the Minority Report posited a number of hypothetical employment situations, concluding in each example that the employer "*may be forced to hire according to race*, to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law." *Id.* at 69 (emphasis in original).

When H.R. 7152 reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, Chairman of the House Judiciary Committee and the Congressman responsible for introducing the legislation. A portion of that speech responded to criticism "seriously misrepresent[ing] what the bill would do and grossly distort[ing] its effects":

> "[T]he charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong . . . .
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> "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.
>
> "…The Bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race, religion, or national origin.
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> "It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." 110 Cong. Rec. 1518 (1964).

Representative Celler's construction of Title VII was repeated by several other supporters during the House debate.

Thus, the battle lines were drawn early in the legislative struggle over Title VII, with opponents of the measure charging that agencies of the Federal Government such as the Equal Employment Opportunity Commission (EEOC), by interpreting the word "discrimination" to mean the existence of "racial imbalance," would "require" employers to grant preferential

treatment to minorities, and supporters responding that the EEOC would be granted no such power and that, indeed, Title VII prohibits discrimination "in favor of workers because of their race." Supporters of H.R. 7152 in the House ultimately prevailed by a vote of 290 to 130, and the measure was sent to the Senate to begin what became the longest debate in that body's history . . . .

Formal debate on the merits of H.R. 7152 began on March 30, 1964. Supporters of the bill in the Senate had made elaborate preparations for this second round. Senator Humphrey, the majority whip, and Senator Kuchel, the minority whip, were selected as the bipartisan floor managers on the entire civil rights bill. Responsibility for explaining and defending each important title of the bill was placed on bipartisan "captains." Senators Clark and Case were selected as the bipartisan captains responsible for Title VII. Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 444–45 (1966) (hereinafter Title VII: Legislative History).

In the opening speech of the formal Senate debate on the bill, Senator Humphrey addressed the main concern of Title VII's opponents, advising that not only does Title VII not require use of racial quotas, it does not permit their use. "The truth," stated the floor leader of the bill, "is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII." 110 Cong. Rec. 6549 (1964). . . . At the close of his speech, Senator Humphrey returned briefly to the subject of employment quotas: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions." Id. at 6553.

A few days later the Senate's attention focused exclusively on Title VII, as Senators Clark and Case rose to discuss the title of H.R. 7152 on which they shared floor "captain" responsibilities. In an interpretative memorandum submitted jointly to the Senate, Senators Clark and Case took pains to refute the opposition's charge that Title VII would result in preferential treatment of minorities.

Of particular relevance to the instant litigation were their observations regarding seniority rights. As if directing their comments at Brian Weber, the Senators said:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged-- *or indeed permitted--to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier*." Id. at 7213 (emphasis added).

[W]hile the debate in the Senate raged, a bipartisan coalition under the leadership of Senators Dirksen, Mansfield, Humphrey, and Kuchel was working with House leaders and representatives of the Johnson administration on a number of amendments to H.R. 7152 designed to enhance its prospects of passage. The so-called "Dirksen-Mansfield" amendment was introduced on May 26 by Senator Dirksen as a substitute for the entire House-passed bill. The substitute bill, which ultimately became law, left unchanged the basic prohibitory language of §§ 703(a) and (d), as well as the remedial provisions in § 706(g). It added, however, several provisions defining and clarifying the scope of Title VII's substantive prohibitions. One of those clarifying amendments, § 703(j), was specifically directed at the opposition's concerns regarding racial

balancing and preferential treatment of minorities, providing in pertinent part: "Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of" a racial imbalance in the employer's work force. 42 U.S.C. § 2000e-2(j).

Contrary to the Court's analysis, the language of § 703(j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers voluntarily to prefer racial minorities over white persons. In light of Title VII's flat prohibition on discrimination "against any individual . . . because of such individual's race," § 703(a), 42 U.S.C. § 2000e-2(a), such a contention would have been, in any event, too preposterous to warrant response. Indeed, speakers on both sides of the issue, as the legislative history makes clear, recognized that Title VII would tolerate no voluntary racial preference, whether in favor of blacks or whites. The complaint consistently voiced by the opponents was that Title VII, particularly the word "discrimination," would be interpreted by federal agencies such as the EEOC to require the correction of racial imbalance through the granting of preferential treatment to minorities. Verbal assurances that Title VII would not require—indeed, would not permit—preferential treatment of blacks having failed, supporters of H.R. 7152 responded by proposing an amendment carefully worded to meet, and put to rest, the opposition's charge. . . .

Questions

Questions 1-6 below are quotes from the legislative history discussed in the majority or dissenting opinions in *United Steelworkers* v. *Weber.* For each quote, answer the following questions:

(a) does the quote directly address the key issue in the case, whether voluntary affirmative action violates Title VII?

(b) if the quote is in the majority opinion, how would the dissenters argue that the quote is consistent with their interpretation of Title VII and its legislative history? If the quote is in the dissenting opinion, how would the justices in the majority argue that the quote is consistent with their interpretation of Title VII and its legislative history?

(c) Do you think the quote is more consistent with the idea that voluntary affirmative action is allowed by Title VII or forbidden by Title VII, or do you think the quote is irrelevant to the legality of voluntary affirmative action?

1. Page 2 (majority opinion):

> 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?

2. Pages 3 (majority opinion):

> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

3. Page 7 (dissenting opinion):

> [T]he charge has been made that … a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong….

4. Page 7 (dissenting opinion):

> Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.
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> The Bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race, religion, or national origin.

5. Page 7 (dissenting opinion):

> It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped.

6. Page 8 (dissenting opinion):

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged-- *or indeed permitted--to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.* (emphasis added)

7. Justice Blackmun's concurring opinion does not discuss the legislative history or text of the Act. Why not? Why does he think voluntary affirmative action is legal? Do you think his argument is persuasive? How do you think Justice Rehnquist would respond to Justice Blackmun's arguments?

8. Ronald Dworkin is one of the most influential contemporary legal thinkers. This is what he wrote about *Weber*:

> [A] statute should be interpreted to advance the policies and principles that furnish the best political justification for the statute.
>
> It may, of course, be controversial which principles or policies supply the best justification for a particular statute, or for some particular provision or limitation of that statute. Nor is it possible to state any mechanical formula for determining the answer to that question. A proposed justification cannot be accepted, unless it is consistent with the provisions of the statute [i.e. the text] and finds substantial support in the political climate of the time [i.e. the legislative history]. The justification Brennan provided for Title VII of the Civil Rights Act—the policy of promoting economic equality[3] between the races, subject to the principle that private employers should not be forced to maintain a racial balance—meets that test of consistency. The main provisions of Title VII, which forbid traditional discrimination against blacks, could be expected to reduce economic inequality, and though the various speeches Brennan cited, which include a statement by President Kennedy as well as statements by various senators, do not establish that all congressmen had this justification in mind, they do establish that the justification had wide currency and political appeal.
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> But though Brennan's proposed justification does meet this test of consistency, other, different justifications might meet the test as well. It is easy to construct a different justification, according to which the coherence theory of legislation would support not the decision of the majority in favor of affirmative action, but Rehnquist's opinion condemning it. We might say that Title VII is justified not by a policy of promoting economic equality, but by the principle that any use of race-conscious criteria in hiring or promoting employees is unfair. That principle also fit the central provisions of the statute, and it is also supported by a substantial section of political opinion. But if *that* principle is taken to be the justification of Title VII, rather than the policy of promoting racial equality, then it is a decision for Weber, rather than a decision in favor of the Kaiser plan, that is most consistent with the statute so justified.
>
> How does a court choose between two justifications for statute, each of which fits the statute and finds a basis in political opinion? … If the legislative history shows that while one justification had great support among a number of legislators, the other went unnoticed or was rejected by all who noticed it, then that might well be some evidence that the second does not, after all, reflect any widespread political opinion. But in most hard cases testing whether a statute applies in controversial circumstances, when there are two justifications available that point in opposite directions, both justifications will fit well enough both the text of the statute and the political climate of the day…
>
> *Weber* was such a case. In these cases I see no procedure for decision—no theory of legislation—other than this: one justification for a statute is better than another, and provides the direction for coherent development of the statute, if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles. So judges must

[3] [The original text states "promoting inequality," but that is clearly an error.]

> decide which of the two competing justifications is superior as a matter of political morality, and apply the statute so as to further that justification. Different judges, who disagree about morality, will therefore disagree about the statute. But that is inevitable, and if each judge faces the moral decision openly, an informed public will be in a better position to understand and criticize them than if the moral grounds of decision lie hidden under confused arguments about nonexistent legislative intent.
>
> It is no use protesting that this procedure allows judges to substitute their own political judgment for the judgment of elected representatives of the people. That protest is doubly misleading. It suggests, first, that the legislators have in fact made a judgment so that it is wrong for the judges to displace that judgment. But, if there is no institutionalized intention, no pertinent collective understanding, and two competing justifications, there is no such judgment. Second, the protest suggests that judges have some way to decide such a case that does not require them to make a political judgment. But there is no such procedure, except a method that leaves the decision to chance, like flipping a coin.[4]

Do you agree with Dworkin's analysis? Why or why not? Do you agree that in *Weber*, both the idea that voluntary affirmative action violates Title VII and the idea that it does not, are equally consistent with the text and legislative history? Do you agree that where text and legislative history are equally consistent with two interpretations, a judge has no choice but to choose the interpretation that is "superior as a matter of political morality"?

[4] Ronald Dworkin, *How to Read the Civil Rights Act*, in *A Matter of Principle* 316, 327–29 (1985).