Interpreting the Legislative History of Section 706(g) of Title VII

Steven Napolitano

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Recommended Citation
Steven Napolitano, Interpreting the Legislative History of Section 706(g) of Title VII, 7 B.C. Third World L.J. 263 (1987), http://lawdigitalcommons.bc.edu/twlj/vol7/iss2/7
INTERPRETING THE LEGISLATIVE HISTORY OF SECTION 706(g) OF TITLE VII

I. INTRODUCTION

The purposes of Title VII of the Civil Rights Act of 1964 are clear. The primary object of title VII is “to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. The twin goals of ensuring equal employment opportunities and granting "make whole" relief to victims of discrimination have proven more elusive than imagined in 1964. The parameters of the remedies which may be fashioned to achieve these goals have yet to be defined by the Supreme Court.

Section 706(g) of title VII invests broad equitable discretion in the federal courts to effectuate the “make whole” objective of title VII. Section 706(g) aims “to make the victims of unlawful discrimination whole” by restoring them “so far as possible ... to a position where they would have been were it not for the unlawful discrimination.” The function and scope of 706(g) have perplexed courts since the onset of title VII litigation. The Supreme Court has often attempted to set the constitutional limitations of race conscious relief under 706(g). However, there is a dispute in the Supreme Court as to whether courts, after a finding of discrimination, can grant relief under 706(g) which benefits both the actual victims of discrimination and nonvictims.

Both sides of the section 706(g) dispute base their positions on interpretations of the legislative history of 706(g). This note will examine the Supreme Court’s most recent attempts to define the class of individuals entitled to race conscious relief under 706(g).

4 42 U.S.C. § 2000e-5(g) (1982). Section 706(g) states “if the court finds that the respondent has intentionally engaged in or is intentionally engaging in, an unlawful employment practice . . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .”
6 Albemarle, 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972)).
focusing on the legislative history cited by each side in defense of its position. This note concludes that 706(g) remedies should not be limited solely to the actual victims of discrimination. While the legislative history is characteristically murky in certain areas, it indicates that Congress did not intend to preclude nonvictims from benefitting from race conscious relief.

II. THE SHEET METAL WORKERS AND FIREFIGHTERS HOLDINGS

The Supreme Court’s most recent attempts to enunciate the limits of 706(g) relief are Local Number 93 v. City of Cleveland 7 and Local 28 Of Sheet Metal Workers v. EEOC.8 Firefighters and Sheet Metal Workers, decided the same day, addressed the issue of defining the class of individuals entitled to 706(g) relief. Limiting race conscious relief to a specific class of individuals will similarly limit the types of remedies courts may order. Limiting section 706(g) relief to minority individuals who have been the actual victims of a particular employer’s or labor union’s racial discrimination would preclude the use of racial quotas or preferences which are targeted at racial or minority groups in general.

In Sheet Metal Workers, a sharply divided Supreme Court, by a vote of 5 to 4, affirmed a Second Circuit decision9 imposing race conscious remedies upon the petitioner labor union and apprenticeship committee.10 In view of the employer’s and labor union’s egregious history of discrimination, the Court upheld both a membership goal and fund order established by the district court below.11 The membership goal was originally set by the District Court for the Southern District of New York at 29% nonwhite membership in the union, a percentage based on the percentage of nonwhites in the relevant labor pool in New York City.12 The court of appeals affirmed a revised figure of 29.23%.13 The fund was established by the district court after the petitioners were held in civil contempt for disobeying the court’s orders. The court of appeals affirmed the order requiring the employer and labor union to place their $150,000 contempt fine in a fund to increase nonwhite membership in the apprenticeship program and union.14

The principal issue in Sheet Metal Workers, “whether the remedial provisions of Title VII . . . empower a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination,”15 was not decided by a majority of the Court. Justice Brennan’s discussion of the scope of 706(g), joined by Justices Marshall, Blackmun, and Stevens, held that 706(g) “does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a rem-

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7 Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986). Local Number 93 will be referred to throughout this article as Firefighters v. Cleveland.
8 Local 28 Of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986).
9 Local 28 Of Sheet Metal Workers v. EEOC, 753 F.2d 1172 (1976).
10 106 S. Ct. at 3034. Sheet Metal Workers included a number of Title VII issues beyond the scope of this paper’s analysis, including the accuracy of the percentage membership goal established, the imposition of criminal contempt charges against the petitioner, and the appointment by the district court of an administrator to supervise the petitioner’s compliance with the court’s orders.
12 Local 28 Of Sheet Metal Workers, 106 S. Ct. at 3028.
13 Local 28 Of Sheet Metal Workers, 753 F.2d at 1186.
14 Id.
15 106 S. Ct. at 3025.
edy for past discrimination." This view upholds quotas like the 29.23% hiring goal established by the court of appeals. Justice White agreed that section 706(g) "does not bar relief for nonvictims in all circumstances," but chose to dissent from the opinion of the court. Justice Powell, concurring in part and concurring in the judgment, stated that neither the plain language of title VII nor its legislative history "support a view that all remedies must be limited to benefitting victims." Justice O'Connor's concurrence in part and dissent in part did not address the victim/nonvictim issue. Chief Justice Rehnquist, joined in dissent by then Chief Justice Burger, rejected the use of hiring quotas and argued that 706(g) limits relief to the actual victims of discrimination. The fragmented Court failed to muster the requisite five votes needed to decide the section 706(g) issue as a matter of law and precedent. However, the Justices' opinions in Sheet Metal Workers indicate that at least five Justices believe that relief to nonvictims, including hiring goals and quotas, is sometimes allowable.

The Court in Firefighters held that 706(g) does not preclude entry of a consent decree which might benefit individuals who were not the actual victims of the defendant's discriminatory practices. The majority opinion, authored by Justice Brennan, and joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor, held that a consent decree, because of its voluntary nature, is not limited by section 706(g).

In holding that a federal court may enter a consent decree awarding broader relief than that which may be awarded after a full trial, the Court clearly sidestepped the principal issue of defining the limits of 706(g) relief. Justice O'Connor emphasized that "[t]he Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g), whatever those limits may be." Justice White, arguing in dissent that the consent decree exceeded the limits of a permissible remedy for the discriminatory practices shown, repeated his belief that 706(g) permits relief to nonvictims. "[I]n Title VII cases, enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for nonvictims being reserved for particularly egregious conduct." Chief Justice Rehnquist, in a dissent again joined by then Chief Justice Burger, reiterated his Sheet Metal Workers view that 706(g) prohibits relief to those who are not the actual victims of illegal discrimination.

Both sides of the victim/nonvictim issue cite the legislative history of title VII in defense of their position. Justice Brennan argues that the eighty-eighth Congress, which

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16 Id. at 3034.
17 Id. at 3062–63 (White, J., dissenting).
18 Id. at 3054 (Powell, J., concurring in part and concurring in the judgment).
19 Id. at 3057–62 (O'Connor, J., concurring in part and dissenting in part).
20 Id. at 3063 (Rehnquist, J., dissenting).
21 106 S. Ct. 3063, 3072 (1986). The consent decree approved was effective for four years and required specified numbers of promotions to be given to minority firefighters.
22 Id. at 3075.
23 Id. at 3080 (O'Connor, J., concurring).
24 Id. at 3082 (White, J., concurring).
25 Id. at 3085 (Rehnquist, J., dissenting).
26 Statutory interpretation must, of course, begin with an examination of the statute's plain meaning. While relevant, the plain meaning of 706(g) is sufficiently unclear to justify placing paramount importance on 706(g)'s legislative history.
passed title VII, never considered the issue of appropriate remedies under section 706(g), stating:

[W]hile Congress opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as remedies for Title VII violations ... the use of racial preferences as a remedy for past discrimination was not an issue at the time Title VII was being considered.\(^{27}\)

Justice Brennan justifies Congress' oversight on the grounds that "there was relatively little civil rights litigation prior to the adoption of the 1964 Civil Rights Act" and that "the cases that had been litigated had not resulted in the sort of affirmative-action remedies that, as later became apparent, would sometimes be necessary to eliminate effectively the effects of past discrimination."\(^{28}\)

The Brennan interpretation continues to search the legislative history "to determine whether Congress intended to preclude a district court from ordering affirmative action in appropriate circumstances as a remedy for past discrimination."\(^{29}\) Justice Brennan concludes that "[i]n the absence of any indication that Congress intended to limit a district court's remedial authority in a way which would frustrate the court's ability to enforce Title VII's mandate, we decline to fashion such a limitation ourselves."\(^{30}\) Title VII's grant of authority "to fashion the most complete relief possible"\(^{31}\) to eliminate discrimination permits affirmative action in some circumstances which may benefit both victims and nonvictims. Justice Brennan supports his position with an interpretation of the Equal Employment Opportunity Act of 1972,\(^{32}\) which amended title VII in several important areas.

The Rehnquist interpretation of title VII's legislative history, joined by then Chief Justice Burger, reflects the interpretation urged by the Solicitor General.\(^{33}\) While relying heavily on the Court's earlier holding in *Firefighters v. Stotts*,\(^{34}\) Chief Justice Rehnquist defends his position with legislative history. "Th[e] policy, ... to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the Congressional debates."\(^{35}\)

Chief Justice Rehnquist claims that "[l]egislative history can obviously be mustered in support of the Court's interpretation of § 706(g) ... the legislative history may be fairly apportioned among both sides."\(^{36}\) Although title VII's legislative history is vague

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28 Id.
29 Id.
30 Id.
31 Id.
33 Local 28 Of Sheet Metal Workers, 106 S. Ct. 3019, 3039.
36 Id. at 3087.
and unclear in areas, a careful analysis supports the interpretation that section 706(g) was not intended to limit title VII relief solely to the actual victims of discrimination.

III. AN OVERVIEW OF TITLE VII'S LEGISLATIVE HISTORY

The Civil Rights Act of 1964's passage through Congress has been described as "an epic legislative struggle" and a "torturous legislative history." 37 H.R. 7152, the bill that ultimately became the Civil Rights Act of 1964, was introduced in the House on June 20, 1963. 38 After seemingly endless amendments, proposals, and debate, H.R. 7152 became law on July 2, 1964. 39

While the sheer volume of H.R. 7152's legislative history may never be equaled, it is deficient in important areas. 40 The Senate version of H.R. 7152 was not sent through the usual committee procedure but was debated in informal bipartisan conferences. 41 Hence, there is not a committee report from the Senate. The eighty-eighth Congress, although it discussed 706(g) and the use of quotas, failed to settle the victim/nonvictim dispute at issue in Sheet Metal Workers and Firefighters.

The Equal Employment Opportunity Act of 1972 42, which amended title VII in several areas, is an essential part of title VII's legislative history. These amendments, Congress' final attempt to define the scope of title VII relief, establish that relief in title VII actions may be fashioned broadly enough to benefit nonvictims.

A. THE LEGISLATIVE HISTORY OF TITLE VII IN THE HOUSE

H.R. 7152 was introduced in the House on June 20, 1963, and referred to the Committee on the Judiciary. 43 The Judiciary Committee, recognizing the need to address the problem of employment discrimination, amended the bill by adding title VII. 44 Title VII's initial version of section 706(g) stated, in relevant part, "[n]o order of the court shall require the admission or reinstatement of an individual as a member of a union ... if such individual was refused admission, suspended, or expelled ... for cause." 45

The controversy concerning the permissible remedies for discrimination under title VII began before the bill even reached the House floor. Opponents of title VII argued that the bill would require employers to hire and promote blacks in order to achieve a racially balanced work force even in the absence of racial discrimination. 46 The Minority Report of the Judiciary Committee noted that the term "discrimination" was not defined in the bill, and claimed that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance ... ." 47 The report offered a

37 Vaas, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, 444, 445 (1966). Vaas' article is clearly the most influential abstract of title VII's legislative history to date.
38 Local 28 Of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3038 (1986).
39 Vaas, supra note 37, at 457.
40 Id.
43 109 CONG. REC. 11252 (1963)).
45 Id.
46 Id.
47 Id. at 67–68.
number of hypothetical employment situations where an employer would supposedly be compelled by title VII to racially balance his work force by the forced hiring or promotion of nonvictims of discrimination. Republican sponsors addressed the claim of racial balancing, stating that title VII would not require "equality with mathematical certainty" and that the title would require jobs and union membership to be "strictly filled on the basis of qualification."

Representative Celler, the Chairman of the Judiciary Committee and the congressman responsible for introducing H.R. 7152, was the moving force behind title VII on the House floor. Most of the sixteen amendments to title VII adopted by the House were proposed by Representative Celler. In his opening speech in support of H.R. 7152, Representative Celler addressed the charges of racial balancing. Claiming that others were "seriously misrepresenting what the bill would do and grossly distorting its effects," he stated that the claim "that a federal inspector could order the employment and promotion only of members of a specific racial or religious group is ... patently erroneous." Representative Lindsey, another chief proponent of title VII, asserted that "[t]his legislation ... does not, as has been suggested heretofore both on and off this floor, force acceptance of people in ... jobs ... because they are Negro. It does not impose quotas of any special privileges of seniority or acceptance."

Despite these assurances, claims similar to those voiced in the Minority Report continued to be heard on the House floor. Representative Abernathy argued that a union would be required to recruit a "racially balanced" crew of carpenters, a "racially balanced" crew of plumbers, electricians, plasterers, etc., before a construction job could begin.

Responding to the charges that racial imbalance would signify discrimination under title VII, and that the title would unacceptably limit management prerogatives, Representative Celler successfully proposed an amendment to 706(g). By substituting the words "any reason other than discrimination on account of race" in place of "cause" at the end of 706(g), Representative Celler attempted to put these claims to rest.

[T]he purpose of the amendment is to specify cause ... the court ... cannot find any violation of the Act which is based on facts other ... than discrimination on the grounds of race, color, religion, or national origin. [A] discharge [of an employee] might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin.

48 Id. at 69.
49 Id. at 29.
50 Vaas, supra note 37, at 438.
51 Id.
53 Id.
54 Id. at 1540.
55 Id. at 1620.
56 “[T]itle VII was designed to achieve the elimination of discriminatory practices with minimal interference in management’s realm.” Brodin, supra note 41, at 295.
58 Id. at 2567.
The House passed H.R. 7152 on February 10, 1964, by a vote of 290-130, with eleven members not voting.\(^{59}\)

Justice Brennan is correct in stating that although title VII's supporters in the House repeatedly asserted that the bill would not require employers or labor unions to implement hiring or promotional quotas, "[t]he question whether there should be any comparable restrictions with respect to a court's use of racial preferences as an appropriate remedy for past discrimination under § 706(g) simply did not arise during the House debates."\(^{60}\)

Representative Celler's statements, as Chairman of the House Judiciary Committee and the congressman responsible for introducing H.R.7152, must be accorded great weight. Representative Celler tried unsuccessfully to dispel the notion that racial imbalance signified discrimination. Representative Celler's amendment to 706(g), making clear that title VII would in no way limit an employer's right to hire and fire for lawful reasons, was in response to these claims of forced quotas. During the House debate, Representative Celler never made any reference to the remedies that a district court could order after a full trial and finding of discrimination by the court.

Both proponents and opponents addressed the possibility of forcing quotas onto an innocent employer who maintained an imbalanced workforce. Chief Justice Rehnquist, in his dissent in Steelworkers v. Weber, stated:

\[\text{[T]he battle lines were drawn early in the legislative struggle over Title VII, with opponents of the measure charging that agencies . . . such as the EEOC, by interpreting the word "discrimination" to mean the existence of "racial imbalance" would "require" employers to grant preferential treatment to minorities, and supporters responding that the EEOC would be granted no such power, and that indeed, Title VII prohibits "discrimination" in favor of workers because of their race.}\]

Thus Chief Justice Rehnquist recognizes that the proponents of title VII were responding to charges that employers would be forced to enforce quotas to maintain a racially balanced workforce whether or not the employer was found guilty of discrimination by a court. However, Chief Justice Rehnquist cites title VII's legislative history in Firefighters and argues that the House was referring to post-trial remedies. The House's legislative history makes no reference to the extent of remedies available under 706(g).

B. The Legislative History of Title VII in the Senate

The struggle of H.R. 7152 in the Senate has been described as "titanic and protracted."\(^{62}\) Title VII was debated on the Senate floor for eighty-three days.\(^{63}\) The Senate's consideration of H.R. 7152 can be broken down into three principal phases: (1) the debate on sending the bill to Committee, (2) the general debate on the bill prior to invocation of cloture, and (3) the debate following cloture.\(^{64}\)

\(^{59}\) Id. at 2567.
\(^{60}\) Local 28 Of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3040 (1986).
\(^{62}\) Vaas, supra note 37, at 443.
\(^{63}\) 110 CONG. REC. 14511 (1964).
\(^{64}\) Steelworkers, 443 U.S. at 235.
The legislative history in the Senate is atypical. The version of title VII originally adopted by the House was modified substantially in the substitute measure adopted by the Senate. The substituted bill was not sent through the usual committee procedure. As noted, this resulted in the absence of a committee report from the Senate.65 The Senate's debate of title VII provides the greatest amount of relevant legislative history to the victim/nonvictim issue.

After two readings on the Senate floor,66 opponents of the bill sought to have it sent to the Senate Judiciary Committee for consideration.67 The Senate Judiciary Committee was viewed by some as "hostile to civil rights legislation."68 The debate on the motion to refer the bill to Committee immediately raised the issues of quotas and balancing. Senator Ervin argued that title VII would allow the Equal Employment Opportunity Commission (EEOC) to force employers "to hire more persons, not because the employer thought he needed more persons, but because the Commission wanted to compel him to employ persons of a particular race."69 Senator Hill, another outspoken opponent of title VII, agreed that an "employer could be forced to hire additional persons . . . although the employer might not need the additional employees, and although they might bring his business into bankruptcy."70

Senator Humphrey, "one of the most vocal proponents of H.R. 7152,"71 addressed these claims. "The bill does not require [racial quotas] at all. If it did, I would vote against it."72 Senator Humphrey stressed that title VII "does not limit the employer's freedom to fire, promote, or demote for any reason- or no reasons- so long as his action is not based on race"73 and that "[t]he bill would not authorize anyone to order hiring or firing to achieve racial or religious balance."74 After seventeen days of debate, the Senate chose not to send the bill to Committee, but to take it up directly.

The formal debate on the merits of H.R. 7152 began on March 30, 1964.75 The supporters of the bill, recognizing the great advantages of a bipartisan approach, fashioned a unique system to guide H.R. 7152's passage. Senator Humphrey, the majority whip, and Senator Kuchel of California, the minority whip, were chosen as the bill's bipartisan leaders. Their roles were to speak generally in favor of the bill and to explain its provisions.76 The bipartisan floor leaders also published a "Bipartisan Civil Rights Newsletter."77 In addition, bipartisan captains were selected to explain each important title in detail and to defend it. Senators Clark of Pennsylvania and Case of New Jersey were the bipartisan captains responsible for title VII.78

Senator Humphrey, in his opening speech of the formal Senate debate, assured title VII's opponents that:

65 Vaas, supra note 37, at 443-47.
68 Id.
70 Id.
71 Local 28 Of Sheet Metal Workers, 106 S.Ct. at 3041.
73 Id. at 5423.
74 Id. at 6455.
75 Vaas, supra note 37, at 444-45.
76 Id.
77 Id.
78 Id.
Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times: but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing.79

Senator Kuchel, in the second major speech in support of the bill, confirmed that "the court cannot order preferential hiring or promotional considerations for any particular race, religion, or other group."80 Senators Clark and Case, the bipartisan captains in support of title VII, submitted a memorandum reaffirming this interpretation. "There is no requirement in title VII that an employer maintain a racial balance in his work force ... [a] deliberate attempt to maintain a racial balance ... would involve a violation of Title VII."81 The memorandum went on to state that "[n]o court order can require hiring, reinstatement, admission to membership, or backpay for anyone who was not discriminated against in violation of [title VII]. This is stated expressly in the last sentence of [706(g)]."82

Other supporters of H.R. 7152 voiced similar assurances concerning the remedial powers of title VII. Senator Humphrey promised Senator Robinson that "if [he could] find in title VII ... any language which provides that an employer will have to hire on the basis of percentage or quota related to color ... I will start eating the pages."83 Senator Allott stated that "if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill."84

During the Senate's general debate, "a bipartisan group, under the leadership of Senators Dirksen, Mansfield, Humphrey, and Kuchel were working outside the floor of the Senate to reach agreement on amendments to H.R.7152 that would ensure its passage."85 The first Dirksen-Mansfield amendment, in the nature of a substitute for the entire bill, "added several provisions defining and clarifying the scope of Title VII's substantive provisions."86 In order to finally end the dispute over racial balancing and quotas, section 703(j) was added to the amendment. Section 703(j) established in writing what title VII's defenders had long argued, specifically, that:

Nothing contained in this subchapter shall be interpreted to require any [employer or labor union] to grant preferential treatment to any individual or to any group because of the race ... of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of that race [employed or admitted to the union] in comparison with the total number or percentage of persons in any community, State ... .87

79 110 CONG. REC. 6459 (1964).
80 Id. at 6563.
81 Id. 7213.
82 Id. at 7214.
83 Id. at 7420.
84 Id. at 8500–01.
85 Vaas, supra note 37, at 445.
86 Local 28 Of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3042 (1986).
Senator Humphrey stated that 703(j) “states clearly and accurately what we have maintained all along about the bill’s intent and meaning.” 88 Section 703(j) apparently calmed fears that title VII required racial balancing and preferential treatment. 89 Nevertheless, some Senators, most notably Senator Ervin, were still not convinced that the bill was so limited. 90

On June 10, 1964, the Senate imposed cloture on its members for the second time in its history. 91 A limited debate followed on the twenty-four amendments to the second Dirksen-Mansfield substitute bill. 92 Final statements by the bill’s supporters reiterated the major points voiced throughout the Senate process. Senator Muskie avowed that the bill did not discriminate in favor of blacks at the expense of whites. “[I]t seeks to do nothing more than to lift the Negro from the status of inequality to one of equality of treatment.” 93 Senator Moss had the final word on the issue of quotas, stating that, “[t]he bill does not accord to any citizen advantage or preference . . . [and] does not fix quotas of employment. In short, the bill does not accord special considerations, it establishes equality.” 94

On June 19, 1964, the Senate passed the second Dirksen-Mansfield substitute by a vote of seventy-three to twenty-seven. 95 After Senate passage, H.R. 7152 was sent back to the House for its approval of the Senate’s amendments. On July 2, 1964, the House approved the Senate’s amendments by a vote of 289-126. 96 The Civil Rights Act of 1964 became law when President Johnson signed the bill later the same day.

The Senate legislative history is not as clear as that of the House. The statements of Senators Humphrey and Kuchel, the bipartisan leaders of H.R. 7152, and those of Senators Clark and Case, the bipartisan captains responsible for title VII, must be given great weight because of their important role in the passage of title VII. Chief Justice Rehnquist’s interpretation of the legislative history, although it finds greater support in the Senate history, is still weaker than that offered by Justice Brennan. Chief Justice Rehnquist seizes upon vague and poorly worded legislative history. Read in context, it is clear that the Senate never referred to the remedies which may be ordered upon a finding of discrimination.

Senators Ervin and Hill argued that title VII would permit the EEOC to force employers to hire minority individuals “although the employer might not need the additional employees, and although they might bring his business into bankruptcy.” 97 Senators Ervin and Hill continued the argument first begun in the House that discrimination would be defined as meaning racial imbalance. The scenarios they described involve innocent employers who through no fault of their own maintain a racially imbalanced workforce, not employers who have intentionally discriminated.

Senator Humphrey stated that “there is nothing in [title VII] that will give any power to the Commission or to any court to require hiring, firing, or promotion . . . to

91 Id. at 13319.
92 Vaas, supra note 37, at 446.
94 Id. at 14484.
95 Id. at 14511.
96 Id. at 15897.
97 Id. at 4764.
meet a racial ‘quota’ or to achieve a certain racial balance.”

It appears that Senator Humphrey was referring to a court’s remedial powers after a finding of discrimination. Senator Humphrey made it clear throughout the Senate’s consideration that he was merely responding to the argument that innocent employers would be forced to implement quotas:

[T]itle VII] is pictured by its opponents and detractors as in intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to ... racial balance ... Nothing could be further from the truth ... the court cannot order preferential hiring or promotion consideration for any particular race ... .

Senators Clark and Case stated in their interpretive memorandum to title VII that “no court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against ... this is stated expressly in the last sentence of [section 706(g)].” Chief Justice Rehnquist states that this “made it clear that a court was not authorized to give preferential treatment to nonvictims.”

Chief Justice Rehnquist’s interpretation is too broad. Although the statement is extremely imprecise, the Senators were repeating the point that an employer who had not discriminated against his or her employees would not be forced to favor minority employees. The overwhelming weight of legislative history suggests that Senators Clark and Case’s statement did not refer to remedies which may imposed on an employer or labor union after a court finding of discrimination.

Section 703(j), stating that “[n]othing contained in this subchapter shall be interpreted to require any [employer or labor union] to grant preferential treatment to any individual or to any group ... on account of an imbalance ... with respect to the total number or percentage of persons of any race” was adopted to convince opponents that title VII required neither quotas nor racial balancing. The adoption of 703(j) supports Justice Brennan’s contention that Congress focused solely on the issue of whether an innocent employer with an imbalanced workforce would have to implement quotas. The claims that 706(g) would require racial balancing became so strong that Congress was forced to amend title VII to prove otherwise. Justice Brennan claims that 703(j) ended most of the complaints of racial balancing and quotas.

Justice Brennan’s contention that “while Congress strongly opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as remedies for Title VII violations” is strongly supported by the Senate’s legislative history. Justice Brennan concluded that “[i]n the absence of any

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98 Id. at 6549.
99 Id. at 6563.
100 Id. at 7214.
104 Local 28 Of Sheet Metal Workers, 106 S. Ct. at 3044.
indication that Congress intended to limit a district court’s remedial authority in a way which would frustrate the court’s ability to enforce Title VII’s mandate, we decline to fashion such a limitation ourselves.”105 Justice Brennan contends that “make whole” relief may sometimes justify quotas which benefit both victims and nonvictims.

Although the Solicitor General advanced the contrary argument in Sheet Metal Workers and Firefighters, the Solicitor General stated in his brief for the EEOC in Steelworkers v. Weber that:

To be sure, there was considerable concern that the Act would be construed to require the use of quota systems to establish and maintain racial balance in employer’s work forces. The sponsors of the bill repeatedly assured its opponents that this was not the intent and would not be the effect of the statute. But these assurances did not restrictions on remedies that could be ordered after a finding of discrimination. Instead, they made it clear that the statute would not impose a duty on employers to establish racially balanced workforces . . . .106

The Senate did not consider the issue of whether title VII remedies were to be limited to the identifiable victims of discrimination. The Senate’s history, although vague and unclear in areas, was concerned with the effects of title VII upon an innocent employer with a racially imbalanced workforce.

VII. THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

The Equal Employment Opportunity Act of 1972107 amended title VII in several areas. The language of section 706(g) was modified to empower a court to order “such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate”108 (emphasis added). Senator Williams, who introduced a section-by-section analysis to accompany the Conference Committee Report on the 1972 Act, stated that the changes in section 706(g) were “intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible . . . .” 109

Justice Brennan cites three factors in support of the view that the 1972 amendments established the legality of race conscious remedies in title VII actions. First, the Conference Committee Report accompanying the 1972 Act stressed the need for “make-whole relief for the victims of unlawful discrimination.”110 However, Justice Brennan points out that “nowhere did Congress suggest that a court lacked the power to award preferential remedies that might benefit nonvictims.”111 The argument that Congress meant to include what it did not expressly exclude is of questionable value.

105 Id.
109 118 CONG. REC. 7168 (1972).
110 Id.
111 Local 28 Of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3045 (1986).
Second, Justice Brennan also notes that Senator Ervin offered two amendments to title VII during the 1972 debates which would have prohibited all affirmative race-conscious remedies.\textsuperscript{112} The clear defeat of both amendments shows how Congress explicitly approved of race conscious relief broad enough to benefit individuals who were not the personal victims of discrimination.\textsuperscript{113}

Third, Justice Brennan notes that the most compelling evidence that the 1972 Congress approved of the use of race-conscious affirmative remedies in title VII litigation is that by 1972 "both the Executive and Judicial branches had used such measures to remedy past discrimination."\textsuperscript{114} If Congress had disapproved of these remedies, it would not have broadened the scope of relief available under 706(g). Justice Brennan quotes the Solicitor General's brief in \textit{Steelworkers v. Weber}:

\begin{quote}
In light of Congress' keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senators Ervin and others over the use of race-conscious remedies, th[e] amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief be available under Title VII to remedy employment discrimination.\textsuperscript{115}
\end{quote}

Although Congress failed to consider race-conscious remedies for title VII violations in 1964, such remedies were explicitly approved in 1972. The legislative history of the 1972 Act affirms Justice Brennan's view that quotas and preferences broad enough to benefit nonvictims are permissible under title VII.

\textbf{VII. Conclusion}

Twenty-three years after the passage of title VII the Supreme Court still has not defined the class of individuals entitled to the remedies enumerated in the Act. Lower courts are forced to fashion title VII relief in the absence of sufficient guidance from the Court. It is imperative that the Supreme Court resolve the victim/nonvictim issue it inadequately addressed in \textit{Sheet Metal Workers} and \textit{Firefighters}.

Justice Brennan's interpretation of title VII's legislative history is clearly superior to the interpretation offered by Chief Justice Rehnquist. Justice Brennan shows that the eighty-eighth Congress which passed the Civil Rights Act of 1964 did not, and certainly could not, envision the type of remedies involved in \textit{Sheet Metal Workers} and \textit{Firefighters}. Congress at that time was concerned that quotas would be imposed on innocent employers and labor unions. Neither the House nor the Senate considered the possibility that quotas would be used to remedy past discrimination. Chief Justice Rehnquist bases his interpretation on poorly articulated statements that title VII would not force quotas upon employers and labor unions which were racially imbalanced. The legislative history cited by Justice Rehnquist is simply not on point.

\textsuperscript{112} Id. at 382–83.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 383–84.
Justice Brennan explains how the Equal Employment Opportunity Act of 1972 explicitly permitted race-conscious relief such as the quotas and preferences in *Sheet Metal Workers* and *Firefighters*.

At least five Justices support the view affirmative relief may be fashioned to benefit individuals who are the actual victims of discrimination. Until the Court officially sanctions such relief, however, there will continue to be unnecessary confusion in the lower courts.

Steven Napolitano