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Richard O. Lempert

University of Michigan Law School, rlempert@umich.edu

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The Force of Irony: On the Morality of Affirmative Action and *United Steelworkers v. Weber*

Richard Lempert

In recent years, affirmative action has posed difficult problems not only for courts and legislatures but also for individuals who puzzle over what is just. The claims made both by the proponents of programs that establish preferences on the basis of race and by their staunch opponents have an intuitive appeal. The slave society that preceded the Civil War and the Jim Crow era that endured for a century afterward are a shameful legacy for a nation that seeks to define itself in terms of justice and freedom. The proportionate underrepresentation of black people in positions of power and privilege may plausibly be traced to this legacy, giving moral force to the claim that unique arrangements must be made to redress this imbalance. But the intuitive case against special preferences for blacks is also powerful. Demanding unequal treatment in the name of equality has an Orwellian cast to it, and those whites whose opportunities are diminished by affirmative action have typically played no role in creating the social conditions that arguably justify it.¹

The Supreme Court has confronted the affirmative action problem on several occasions but has, to my mind, made only one statement that is truly helpful to those who are more concerned with the morality of such programs than with what the Constitution will be interpreted to permit. This case is *United Steelworkers of America v. Weber*.² *United Steelworkers* arose out of a voluntary agreement between the United Steelworkers and the Kaiser Aluminum and Chemical Corporation, which reserved for blacks 50 percent of the openings in in-plant craft-training programs until such time as the percentage of black craftworkers in a plant was commensurate with the percentage of blacks in the local labor force. Before this agreement was signed and the programs in question established, Kaiser had hired as craftworkers only persons with prior craft experience. These hires were almost invariably white because craft experience was

1. For purposes of this essay I shall perceive the world as black and white. One implication of the argument that follows is that affirmative action programs for groups such as women or Chicanos are more difficult to justify than affirmative action programs for blacks.

2. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

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usually available only through craft unions, and these unions had historically excluded blacks.

Brian Weber was a white production worker who wanted to enter his plant's craft-training program and would, by virtue of his seniority, have been admitted had not blacks with lower seniority had a preference. He brought suit alleging that his rights under Title VII of the Civil Rights Act of 1964, which prohibits racial discrimination in employment, had been violated.³ The District Court and the Court of Appeals for the Fifth Circuit upheld Weber's complaint. A majority of the Supreme Court reversed the decisions below and upheld the program, taking pains to point out that the case involved statutory rather than constitutional interpretation. In reversing, the majority relied on two of the traditional guides to statutory interpretation, the plain language of the Civil Rights Act and the debate surrounding its enactment. They also relied on a less traditional resource, their sense of irony. Indeed, reading the opinion, it appears that it was irony which was ultimately controlling. The language of the statute offers little comfort to supporters of affirmative action, and Justice Rehnquist, in dissent, has the better of the argument from legislative history. Without their sense of the ironic, the majority would have had little from which they could legitimately discern a congressional intent to allow institutions subject to Title VII to agree voluntarily to affirmative action quotas.

Irony is not a usual guide to statutory interpretation, and so it is understandably slighted by both majority and dissent. The argument from irony is spelled out in a statement by Justice Brennan which, if not essential to a principled decision, might be dismissed as a rhetorical flourish. The rebuttal is confined to one of Justice Rehnquist's thirty footnotes. Searching for the spirit behind the Civil Rights Act, Brennan writes, "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' . . . constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy."⁴ Rehnquist responds, "I see no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions. The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than

3. Title VII provides in part: "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling . . . on-the-job training programs to discriminate against any individual because of his race . . . in admission to . . . any program" (Civil Rights Act, 1964, sec. 703[d], 78 Stat. 256, 42 U.S.C. §2000e-2002[d]).

4. *United Steelworkers v. Weber*, 204.

another. Far from ironic, I find the prohibition on all preferential treatment based on race as elementary and fundamental as the principle that 'two wrongs do not make a right.'⁵

Rehnquist's rebuttal strikes a sound and familiar note. These are words that even those who approve of affirmative action programs want to agree with, and for this reason they constitute the single most useful statement the Court has produced for those who seek to understand the moral dilemma of affirmative action. To appreciate their powerful appeal is to understand why large numbers of decent people, including many supporters of the civil rights movement, have opposed affirmative action. To perceive Justice Rehnquist's error is to understand the moral fervor of those who support affirmative action and to recognize the underlying irony which makes the majority argument from irony in *Weber* essentially correct.

Rehnquist tells us that it is evil to base employment decisions (and by implication any decision that allocates important rewards) on characteristics that are utterly irrelevant to those decisions. We nod our heads in agreement, but, even while doing so, we are aware that employment and other decisions are often affected by characteristics that have no relationship to the advantage sought. These include styles of speech, height, family connections, hair length, and nervous tics, to name a few. The best among us are properly troubled by decisions which separate people (i.e., discriminate) on the basis of such irrelevancies, but as a society we do little to eradicate such discrimination. This may be in part because we think the task impossible (or not worth the cost), but it is also because, however much we deplore such irrational decision making, we do not think the discrimination involved creates an *intolerably* evil world.

Intolerable evil is not something that is defined for us but is, instead, the product of collective agreement. From time to time our views change as to what bases for discrimination are intolerable, emphasizing the subjective nature of our definitions. We can best appreciate this when our consensus as to what is tolerable breaks down, as has recently been the case with women and the handicapped.

Thus, the question posed by *Weber* is not that which Rehnquist implicitly answers, that is, Is discrimination on the basis of factors unrelated to the job in question evil? The fact that race is the basis on which Kaiser discriminated is as important as the fact that race is unrelated to job skills. The crucial question is whether such racial discrimination is intolerably evil, or whether, evil or not, it is to be tolerated like, for example, discrimination on the basis of obesity.

The question does not appear difficult. Most of us have been taught a correct answer. Race is special, and discrimination on the basis of race is intolerable. But why is this so? Why does racial discrimination excite us when so many other kinds of discrimination do not? It is because of

5. *Ibid.*, 228–29 at n. 10.

the way we interpret history, associating racial discrimination with practices that now appear self-evidently evil: forcing blacks from their homeland, enslaving blacks, lynching blacks for actions that among whites would not be criminal, intimidating blacks who sought to exercise their rights—in sum, systematically disadvantaging a people in almost every way that mattered because of the color of their skin. Blacks are not the only Americans who have suffered the evils of discrimination, but no other group has been disadvantaged simultaneously in so many spheres, over such a long period of time, and in such a peculiarly American way. Before we were conscious of this “to be discriminating” meant to have good taste. It is the suffering of black people that has given discrimination its bad name.

In this lies the deeper irony of *Weber*.⁶ A claim made by a white person as a member of the dominant majority draws its moral force largely from our collective horror at centuries of oppressing black people. It would be ironic indeed if evils visited on blacks had lent enough force to the moral claims of whites to prevent what appears to many at this point to be the most effective means of eliminating the legacy of those evils. Legislatures do not usually intend to act ironically. The majority in *Weber* understood that Congress in 1964 was attacking the evil of discrimination and not the word. Sensitive to the irony that Rehnquist could not see, they decided the case correctly.

6. There is a “shallower” irony as well. The in-plant training program in *United Steelworkers* was begun in an effort to redress the racial imbalance in Kaiser’s craft work force. But for this need, which existed because of the legacy of discrimination against blacks, there would have been no in-plant training program for Brian Weber to be excluded from, or, if he simply waited a bit longer, to enter.