

# Naked Racial Preference

Carl Cohen

THE Board of Education in Jackson, Michigan, between 1972 and 1981, repeatedly laid off high-seniority white teachers to protect the jobs of others, with less seniority, who were "Black, American Indian, Oriental, or of Spanish descendancy." Those white teachers contend that they were discriminated against unjustly on the basis of their race, denied their constitutional right to the equal protection of the laws. Are they correct? This question—in the case of *Wendy Wygant, et al. v. Jackson Board of Education*—is now before the United States Supreme Court. The outcome is likely to have substantial impact upon what is loosely called "affirmative action."\*

All parties in this matter agree that unjust discriminatory practices must be uprooted, and that affirmative steps to achieve that end remain in order. All parties agree that when persons have been directly injured by racial discrimination they are entitled to a remedy, and that to give such remedies the use of racial classifications may sometimes prove essential. Affirmative action, in its wholesome forms, is not at issue in this case. However, the teachers whose jobs were protected in Jackson had not been discriminated against, and the teachers whose jobs were sacrificed to protect them had not discriminated against anyone. What is here at issue is the species of affirmative action properly described as naked racial preference.

## I

"EQUAL Justice Under Law" is the inscription carved into the frieze of the United States Supreme Court Building. The thrust of this principle is not merely the assurance that legal categories are to be applied fairly, but that some categories, intrinsically unfair, are not to be applied at all. Classifications by race (using "race" here and in all that follows as a shorthand

for the families of ethnic criteria—race, color, religion, national origin, etc.) are those chiefly to be guarded against. To be denied what one is otherwise entitled to on grounds of race violates the constitutional expression of that same principle, appearing in the Fourteenth Amendment: "No state shall . . . deny to any person under its jurisdiction the equal protection of the laws."

Because of the long history of injustices done on racial grounds, however, and the need to give appropriate remedy for them, the use of racial classifications cannot now be precluded absolutely. So we ask: when does equal justice under law permit the uses of racial classification, and when does it forbid them?

To this question the answers thus far given by the Supreme Court have been incomplete. Some principles are quite firmly established: racial classifications are invariably *suspect*, because their use tends to be, and traditionally has been, damaging and cruel. Jobs or other benefits in short supply given to some on the basis of their race must be taken from others on the basis of their race; hence no such racial distributions, whatever their alleged objective, can be "benign." Any use of racial classifications, therefore, must be subjected to what the courts have come to call "strict scrutiny." Weaker standards the Supreme Court has repeatedly rejected.

Thus, it will not be sufficient justification for the use of racial categories that they are plausible devices to achieve worthwhile ends, or that they are used in programs agreed upon by a majority of those immediately concerned, or that the intention of their users is honorable, or that there is some rational basis for their use. No. For the defense of racial and other suspect classifications it must be shown that the governmental interest served in applying them is *compelling*. Further, this defense

CARL COHEN is professor of philosophy in the Residential College and in the Medical School of the University of Michigan at Ann Arbor. His articles in COMMENTARY include "Why Racial Preference Is Illegal and Immoral" (June 1979) and "Justice Debased: The Weber Decision" (September 1979).

\* Wygant and seven other tenured teachers lost in the Eastern District Court of Michigan in 1982 (546 F. Supp. 1195), and lost again in the Sixth Circuit Court of Appeals in 1984 (746 F. 2d 1152). The case was argued orally before the Supreme Court (#84-1340) on November 6, 1985. Supreme Court decisions on related matters in the past have been long delayed; in this matter the final resolution will come quickly—very probably in the spring of 1986, and conceivably even sooner.

must show that to serve that compelling state interest, the racial categories used are *necessary*, no alternative being available. Yet further, it must be shown that the racial instrument applied has been *precisely tailored* to achieve the compelling objective in view.

Can a standard so high ever be met? Yes. If identifiable persons have been injured by racially discriminatory conduct, the need for a remedy that will make them whole is compelling. To determine the appropriate beneficiaries of the remedy devised—to right the wrongs done—the use of the racial categories that underlay the original injury may be necessary. And the racial instrument applied may be carefully designed to compensate all and only those injured, in appropriate form and degree. The test of strict scrutiny is not insurmountable—but it was designed, by the Supreme Court, to ensure that racial classifications would be used only in very special circumstances. From the standard of strict scrutiny this much may be confidently deduced: the use of a racial classification that imposes a serious burden upon innocent persons cannot be justified if those who benefit from that use are not themselves the victims of identifiable racial discrimination.

## II

How does the teacher layoff plan, adopted by the Jackson Board of Education and the Jackson teachers' union in 1972, fare when judged on these principles? To answer, the workings of that plan must be explained. It gave explicit preference by race, but in a way that partly obscured this fact. "Minority-group personnel" were defined as "employees who are Black, American Indian, Oriental, or of Spanish descendency." A "goal" for "minority racial representation" was established: racial proportions among the faculty were to be the same as racial proportions among the students. Layoffs then took place by reverse seniority, "*except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff*" (Article XII, Section B.1, of the Jackson Schools teacher contract; emphasis added).

The percentage of minority students in the Jackson schools was, and is, and for the foreseeable future will be, much higher than the percentage of minority teachers. The goal of equating them being unattainable, this plan operated inexorably (and remains in effect) as a contractual *ratchet*—the relative number of minority teachers is steadily raised, but it can never be lowered. Non-minority teachers, with seniority such that they would not otherwise have been laid off, have been laid off again and again. One of the eight white petitioners in this case was laid off eight separate times over nine years as a consequence of this device; another, Wendy Wygant, lost em-

ployment (and the seniority benefits that go with employment) for a total of more than three years. Under this contract in Jackson, keeping one's job as a teacher depends critically upon one's race.

No defense of this layoff plan is possible on the ground that it is a remedy called for by earlier discrimination against minority teachers in the Jackson schools. No one contends that any of the minority teachers here given preference was ever discriminated against, or injured unjustly in any way, because of race. This is of central importance. The behavior of the Jackson School Board was scrutinized (in 1979) by a Jackson County court in the course of an entirely separate proceeding. Referring to the same contract in which the now-disputed layoff provision appears, that court concluded that "there is no history of overt past discrimination by the parties to this [labor] contract."

This finding has never been contravened. No court, no legislative body, no administrative agency—and no Jackson School Board—has ever found that the Jackson Board of Education engaged in unlawful racial discrimination. Justifying Jackson's racial preference now as redress for some earlier discriminatory injury is simply out of the question.

## III

THE ethnic numbers game is an ugly but pervasive element in this case. It is a game that ought not to be played at all—but if it is to be played the rules must be at least rational. When, in categories of employment traditionally segregated, the numerical "balance" of the races is at issue, the only rational standard for judging it is the existing balance—i.e., actual racial proportions—in the labor pool from which all employees in the disputed category must come. So said the Supreme Court explicitly in an earlier case.

The relevant labor pool for schoolteachers consists of all those receiving degrees in education, and who are certified teachers, in that state. In Michigan colleges and universities, blacks were awarded (in 1975-76) 10 percent of the degrees in education. In 1980-81, when blacks constituted 9.7 percent of the population of Michigan, and Wendy Wygant was laid off for the seventh time to protect minority teacher ratios, minorities constituted 13.5 percent of the teachers in the Jackson schools. In other words, the number of "minority-group personnel" *exceeded* their number in the relevant labor pool by at least 30 percent.

Nor do these figures tell the whole story. In the school year 1981-82, the percentage of minority administrators in the Jackson schools was 19.6; the percentage of minority coaches was 18.3; the percentage of minority teacher aides was 29.6. If preferential protection were justifiable in Jackson to compensate for numerical imbalance, that compensation would more justly have been given to whites. Wendy Wygant and her fellow non-minor-

ity teachers were the victims of racial favoritism so blatant that it is rightly called naked.

## IV

IF THE Jackson layoff scheme cannot be justified as remedial, what might be offered in its defense? First proposed is a theory of contract. "This layoff provision is part of a collective bargaining agreement"—argues the Board, in effect—"reached through a process in which the duly elected representatives of all the teachers participated. Eighty percent of the teachers in the negotiating union were white; they had the opportunity to reject that contract if they thought it unfair. From the results of the democratic process some gain and some lose. White teachers who wound up losers in this process cannot now claim to be exempt from the provision of a contract bargained for by their own union."

This argument fails utterly. Collective bargaining between employers and democratic trade unions is indeed a treasured process. But the constitutional guarantee of equal justice—the guarantee that certain highly suspect classifications will not be used with damaging result, save under the compelling need to give redress for injury—cannot be bargained away.

No organization has a more intense interest in preserving the authority of collective-bargaining agreements than the American Federation of Teachers (AFT), AFL-CIO. Although not a party directly involved in this case, the AFT submitted a brief *amicus* in support of Wendy Wygant and her fellow petitioners—and in it rejected categorically the claim that the constitutional injury done to them may be "insulated from judicial scrutiny" or "constitutionally justified because it is included in collective bargaining agreements." If all that were necessary to validate the use of racial classifications by a public employer were a vote of approval by employees, it is a virtual certainty that many American school districts now healthily integrated would be segregated still. "[A]n individual teacher's right to be free from employer decisions based on race," concludes the AFT, cannot "be waived by fellow employees."

The Jackson Board of Education is a public employer, from whom the highest standards of constitutional integrity may be demanded. Its conduct overriding the constitutional rights of employees cannot be defended on the ground of a bargain with a union. No defense of preferential instruments can be even minimally plausible unless it deals with the substance of those instruments, not merely the method of their adoption.

## V

THE substantive justification of racial preference proposed by the Board (on its second theory) is the alleged need for *same-*

*race* role models. Only the visible presence of minority-group members in positions of authority and esteem, it argues, can give minority schoolchildren the self-confidence they need to break out of the long continued cycle of socioeconomic depression.

This is an old argument, not entirely without merit; here it is invoked crudely. Social gain is likely when minority-group members are visible in the public schools. But the extent of that gain, even the reality of it, is quite uncertain; it has never been empirically established. There is no good evidence concerning the relationship between the measurable success of students and the degree of race-match between them and their teachers. Even a systematic study of the effect of same-race role models on performance, contends one scholar, "does not appear to exist."\*

In the context of this case, moreover, the role-model argument cuts two ways. Small psychological gains may be achieved by protecting the jobs of additional minority teachers; such gains are likely to be converted to losses when it is widely believed (and true) that those minority "role models" occupy their posts only as the result of special favor given to them because of their race. Even the stature of minority teachers who sought no racial favors and received none is eventually undermined by such devices. For role models that are truly positive and effective, naked racial preference is counterproductive.

Teachers *are* role models for their students. By example as well as instruction, they influence and motivate their students, imparting values as well as knowledge. The presence of teachers of differing races and cultural backgrounds does tend to foster self-confidence and understanding. But what follows from all this? Of the many factors that contribute to the making of a role model, race is but one; in the making of a wholesome role model, the teacher's being of the same race as the student is of relatively little importance. More critical by far are those aspects of the teacher's character and conduct that bear directly upon school activity: intellect, effective speaking and writing, commitment to students, honesty and curiosity, fairness and absence of prejudice. A student is better served (as Justice Thurgood Marshall once suggested) by an excellent teacher role model of another culture than by a poor teacher role model of his own culture.

The same-race role-model theory—as federal courts have repeatedly pointed out—leads when extended (and traditionally did lead) to the general *segregation* of the races in public-school systems. Indeed, the heaviest reliance upon this argument in school-desegregation cases has been placed by those seeking to justify the segregation of min-

\* M.W. Clague, "Voluntary Affirmative Action Plans in Public Education: Matching Faculty Race to Student Race," 14 *Journal of Law and Education* No. 3, July 1985.

ority faculty in primarily minority schools. The argument has been consistently, and rightly, rejected.

Finally, even if the benefits of same-race role models had been shown to be substantial in some school contexts (which is not the case), those could only be contexts in which previously there had been very little minority presence, or none at all. In settings like Jackson, where the percentage of minority teachers has for some time been greater than the minority percentage in the population at large, and markedly exceeds the minority percentage in the relevant labor pool, the preferential protection of *additional* minority teachers against layoff on the ground that they are essential as role models cannot be taken seriously.

The same-race role-model theory is of dubious merit in general, worthless here. In this case the persons advantaged by the layoff plan had never been racially hurt, and the persons hurt by the layoff plan had never been racially advantaged. To justify the racially-based constitutional injury done by such a plan, some utterly compelling governmental interest would have to be shown. An interest weighty enough to serve that purpose is difficult even to imagine. The alleged need for additional same-race role models cannot hope to serve as that compelling end.

The positions of the parties in this case call upon the Supreme Court to pass judgment on the same-race role-model argument as a defense of racial preference in employment. The opinion handed down will greatly affect the inclination of all employers, private as well as public, to rely upon that argument in giving preference on the basis of race. The importance of *Wygant* lies partly in this.

## VI

WHAT plausible defense of the Jackson preferential layoff plan remains? It is constitutionally justifiable, argued the Federal District Court, because "minority teachers were 'substantially' and 'chronically' *underrepresented* on the Jackson School District faculty in the years preceding the adoption of the affirmative-action plan" (emphasis added). The Federal Circuit Court agreed. We may call this third theory the argument from underrepresentation. It has only two failings: (1) its premise (that minority teachers were underrepresented) is false; and (2) even if that premise were true, it could not justify this racial preference. Here we get to the nub of the matter.

How could the lower courts have reached the extraordinary conclusion that minority teachers were "underrepresented" in the Jackson School District? In the ethnic numbers game the standard measuring rod (as noted above) is the percentage of minority employees in the relevant labor pool. On that standard, the figures given above plainly show that the Jackson schools certainly were not

discriminating against blacks in 1980-81, although they may have been discriminating against whites.

The lower courts explicitly noted this standard in this case—but then refused to apply it. What numerical standard did they apply? The percentage of minority *students* in the school district! It did not matter how many black teachers were in fact available in Michigan, said the courts; minorities were "substantially and chronically underrepresented" because the ratio of black students to white students was greater than the ratio of black teachers to white teachers. And on what ground was this new standard defended? On the ground that teachers are role models for their students! Nothing can replace the words of the District Court:

[I]n the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role models for their students. This is vitally important because societal discrimination has often deprived minority children of other role models.

In superficially plausible passages like this one, well-meaning but confused, the seeds of racial bitterness are planted and germinate. The argument is a bald non sequitur. From the fact that minority children need positive role models it is inferred, uncritically, that only same-race role models will serve; but even if that oversimplification were true, it certainly would not follow that to provide such same-race role models the *proportion* of minority teachers must equal the proportion of minority students. Such a quota—and in use it was a quota in the strict sense, since persons in other racial categories lost their jobs as a consequence of its application—is nothing short of outrageous. The principle upon which it relies is that every ethnic subset, every national, religious, and racial minority in every school population, has a constitutional entitlement to a proportion among its public-school teachers equal to the proportion that subset constitutes among public-school students.

This principle is not merely difficult to apply, it is internally incoherent because of the mix and overlap of groups. The objective confusedly in mind is not merely distant, it is utterly unrealizable, for reasons both logical and factual. Yet the conclusion that minorities were "underrepresented" among Jackson teachers could only have been reached with that principle and that objective assumed. Additional same-race role models had somehow to be shown to be a compelling need; their overpowering importance is therefore first asserted, and racial preference then defended on the ground that the critical function served by same-race role models can only be fulfilled when the number of minority teachers becomes propor-

tional to the number of minority students. In *Wygant*, reasoning of this caliber cost teachers their jobs.

Proportionality by race among public-school faculties has previously been before the U.S. Supreme Court. In *Hazelwood School District v. United States*, in 1977, the claim that minority teachers were underrepresented was based on a comparison of the proportion of minorities among the teachers with the proportion of minorities among the general population. That comparison was rightly rejected by the Court, and with its rejection went this warning: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Gently put.

But if the probative value of racial proportions among the general population is low, how much lower is the probative value of racial proportions among student populations? Demographic factors bearing heavily upon the racial mix among students may have very little bearing upon teacher availability. The increasing departure of white families from the cities, and white students from the public schools, results in a steadily increasing proportion of minority students in urban public-school districts. In some cities that proportion exceeds 70 and even 80 percent. But the flow of teachers, white and black, is largely determined by considerations of very different kinds.

So long as the percentage of minority students in the public schools exceeds that of minority teachers—an increasing, not decreasing inequality—those who would apply the numerical standard used by the lower courts in this case are like dogs chasing their tails. To match the ratio of black or Hispanic students in a given district, black or Hispanic teachers must be drawn away from other districts—either blocking the pursuit of the same objective in other well-integrated districts, or reducing the number of minority teachers in districts where the proportion of minority students is small. For universal application the standard is absurd; by means of naked racial preference it might be achieved in a few districts, but only at the cost of resegregating, or tending to resegregate, others. Its general use would, in any event, undermine honest efforts to integrate all the public schools. Never was there a more painful case of zeal outrunning good sense.

Had the standard laid down in *Hazelwood*—that the appropriate comparison, if any, would be "[b]etween the racial composition of [the district's] teaching staff and the racial composition of the qualified public-school teacher population in the relevant labor market"—been applied in the present case, the conclusion forced (as I observed earlier) would be that, for mysterious reasons, minority teachers have been for some years overrepresented in the Jackson School District. But if

the "relevant-labor-market" standard had been established by the Supreme Court, how could the lower courts have replaced it with a different standard of their own in this case?

The maneuver, technically tricky, went like this. Between the *Hazelwood* decision in 1977, and the District Court's decision in the present matter in 1982, yet another case of this kind—*Oliver v. Kalamazoo Board of Education*—had been tried, this one in the Western District of Michigan. There the trial court had accepted the percentage of black students in that district (Kalamazoo) as the basis for explicit hiring and layoff quotas. This decision was reversed upon appeal, its reliance upon percentages in the student population being manifestly in error.

But *Oliver* had not yet been reversed when *Wygant* was first decided, so the use of student percentages in *Oliver* was relied upon in this case by the Eastern District Court. By the time *Wygant* was argued on appeal, however, *Oliver* had been reversed—and yet the Sixth Circuit Court permitted, in Jackson, the use of student populations forbidden in Kalamazoo. How could it? It could, said the appellate panel, because in Kalamazoo the quota was imposed by a court, while in Jackson it was the product of a labor-management contract. Judicial remedies (said the court) are subject to stricter constitutional standards than are racially preferential programs devised by local governments.

The irony of this distinction is that a judicial remedy (even when mistakenly based on student populations, as in *Oliver*) is issued only where some formal finding of discriminatory wrongdoing has been made. In *Wygant*, where there was no such finding and could have been none, a racially preferential device was approved which, by the appellate court's own reasoning, would certainly have been struck down if any lower court had ordered it as compensatory relief! In this upside-down condition matters now stand.

## VII

**M**IGHT the case for minority underrepresentation in Jackson be made hypothetically, by showing that if the layoff plan were not in effect, the decline in the number of minority teachers would result in their being inadequately represented? During oral argument before the Supreme Court the attorney for the Board made that try. Justice Sandra Day O'Connor, after observing that the Court would normally "look to see whether the government can demonstrate a compelling state interest to justify such a [racial] classification," went on to ask: "Now what is the compelling interest that the School Board asserts here? Is it to maintain a faculty-student ratio or is it some other purpose? What do you rely on today?" The Board's attorney first replied by saying that two factors, the need for integration and the

need for a diversified faculty, were equally important. The exchange continued:\*

*Justice O'Connor:* So the Board does rely essentially on a faculty-student ratio and the role-model rationale.

*Attorney for the Board:* Justice O'Connor, I didn't say that and I didn't mean that. I think what I was looking at specifically was, was it their duty to integrate, how to go about that integration, and certainly at the same time—and we make no apology for it—educationally—

*Justice O'Connor:* Integrate in hiring. You are talking about hiring employees?

This question the Board's attorney first evaded by remarking upon the racial complexion of the Jackson schools during the 1950's and 1960's which, according to him, led in 1972 to "the allocation of the faculty." He then continued:

Now, the reason it [race-based layoff] is addressed in Article XII is if you are not going to do something about layoffs is it going to be considered by the public as a good-faith effort to integrate?

*Justice O'Connor:* Maybe I can't get an answer, but I really would like to know what the compelling state interest is that you are relying on for this particular layoff provision in a nutshell.

*Attorney for the Board:* . . . to protect the gains made that was going to allow us to do that as we looked at what we certainly thought were some of the factors we ought to be looking at like faculty and wanting a diverse ethnic faculty, to protect that we had to have Article XII.

*Justice O'Connor:* To preserve a faculty-student ratio that the Board thought was appropriate?

*Attorney for the Board:* . . . If you are not going to protect them in a layoff, you are really going through an exercise in futility in hiring in the first place. We wanted them there. We had to have a method of protecting them. . . . If you are going to apply straight "inverse order [of seniority] to minorities" those gains were going to be long gone pretty quickly.

This is false. Years of experience in Jackson prove the contrary to be the case. Layoffs on a straight inverse-seniority basis were made in the very early 1970's, when the seniority of minority teachers was relatively lower than it was ten years later—and the percentage of minority teachers at that time steadily increased. Again in 1974, when 75 layoffs were made, the Board refused to comply with the preferential provision in Article XII, whereupon the percentage of minority employees nevertheless went *up*, from 11.1 in 1974 to 11.4 in 1975. In 1981, had layoffs *not* been preferential, the minority-faculty proportion resulting would have remained at nearly 12 percent—higher than the percentage of minority teachers in the relevant labor pool. Racial preference cannot be defended here as necessary to protect integration already

achieved. In every version, the argument from underrepresentation is hopeless.

## VIII

THE argument from underrepresentation fails for a deeper reason: it relies upon the seriously mistaken assumption that, absent discrimination, all ethnic groups would be randomly distributed among all categories of employment. With this conviction tacitly in mind, every departure from random distribution is held explainable only by some form of ethnic oppression. A just society, on this view, will be a homogeneous society. The reformer finds, of course, that reality does not approximate his version; having confounded equal treatment with numerical proportionality, he cannot rest content until the latter is achieved, since its absence is, for him, the sure mark of injustice. Statistical "underrepresentation" thus becomes the warrant for racially preferential instruments to set things right.

This vision underlying the argument from underrepresentation is not merely unrealistic, it is unwholesome. Even where discrimination is wholly absent, patterns of employment (or recreation, or education, etc.) are rarely random across ethnic groups, and for good reasons. Human beings commonly work and play, live and study, with fellow members of the groups—religious, racial, national—with which they most closely identify themselves. Ethnic clumps, the natural product of what we regard with pride as "cultural pluralism," may be broken up by force, but they will re-form as soon as the external pressure is removed. The evidence for this is overwhelming, both from the social sciences and from everyday experience. Decades of studies, sociological and historical, by scholars around the globe who have carefully noted and discounted discriminatory factors, leave the matter in no doubt. Cultural homogeneity—numerical proportionality in employment and other critical spheres—never can be real, never should be thought ideal.

The error is dangerous. If the numerical "representation" of Jews or blacks is taken to be no more than a factual report of the frequency with which the members of those groups are found, or not found, in certain employments (or other spheres) the numbers may be innocuous. When those reports are so framed as to imply that random distribution is a *moral* standard and that departures from it therefore indicate the presence of "societal discrimination," the use of numbers proves insidious. Even if (as was not the case in *Wygant*) comparisons are made with the "relevant labor pool," statistically even distributions are not to be expected. Living and working patterns

\* These passages are quoted from the *Official Transcript of Proceedings Before the Supreme Court of the United States*, November 6, 1985, Case # 84-1340, pp. 30-33.

among Mormons and Episcopalians are likely to prove very different; so also will be the workforce distributions of Italians and Swedes. Numerical proportionality in the outcome is not simply a crude standard, it is a wholly unsuitable standard by which to judge the fairness of a social process.

Of course some ethnic patterns *are* the result of discrimination, overt and covert; the deliberate exclusion of blacks, Jews, and others has been commonplace. To suppose that invidious maltreatment never had a role in creating ethnic clusters would be as wrong-headed as to suppose that all clustering entails such maltreatment. Causal factors in this sphere are exceedingly tangled. Nothing could be clumsier, or more obtuse, than social instruments designed on the assumption that one factor, invidious racial discrimination, is the paramount cause of every non-random ethnic distribution. Yet it is precisely upon such an assumption that racially preferential programs—in *Wygant* and in uncountable other contexts—are founded.

Ironically, the drive to achieve racial “balance” has consequences the very reverse of those hoped for. Wanting racial justice, the advocates of group proportionality do racial injustice; seeking to eliminate discrimination by race, they encourage and even employ it. The racial bitterness it has taken our country decades to reduce is now recreated and exacerbated by deliberate racial favoritism.

## IX

**T**HE premise of the argument from underrepresentation is plainly false. In Jackson the numbers show it false on its face. And even if that were not so, the argument wrongly supposes that non-random ethnic distributions entail “societal discrimination” as their cause. But the lower courts in *Wygant* erred more profoundly still. Not only did they use the wrong numbers, and then go on to draw unwarranted conclusions from the numbers they did use—they did all this relying upon a distorted conception of constitutional and moral rights.

The lower court argued in effect: “The failure to achieve the correct ratios in the Jackson schools proves societal discrimination. Those hurt by this discrimination are off the stage and cannot be compensated; those who did the hurting are also long gone and cannot make restitution. But because minority *groups* have been unfairly treated over generations, those groups are entitled to favored treatment now. Race-based layoffs, protecting low-seniority members of such groups who have not themselves been discriminated against, are but one device to accomplish this.”

The burden imposed by racially-preferential devices, however, is not carried by a group; the majority feels nothing. It is individuals from whom the price is exacted—Wendy *Wygant* and unnamed others who are thus made to pay for

wrongs they did not do, to persons who were not wronged.

Naked racial preference is ultimately grounded upon *group-think*. But rights do not inhere in groups; they are possessed by persons, human beings, and it is deeply wrong to injure individual persons in pursuing the alleged interests of some racial class by advantaging its uninjured members. The equal protection of the laws is a guarantee upon which no qualification by race, or religion, or nationality can have any bearing whatever. In our Constitution, that protection is explicitly afforded in the *singular*, to “any person.” As the Supreme Court has repeatedly affirmed, “The rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual” (*Shelley v. Kraemer*, 1948).

Blacks, Orientals, Jews, and many other groups have been historically discriminated against, often brutally. It simply does not follow, in morals or in law, that individual blacks, or Orientals, or Jews, who were not damaged are entitled now to special favor in the name of group redress. In this Republic, happily, that theory of collective rights has been rejected. The *Wygant* case gives to the Supreme Court a splendid opportunity to reaffirm this rejection in terms so clear and so forceful as to put an end, unambiguously, to group-think in American law.

Two recent Supreme Court opinions give promise. In *Bakke* (1978), striking down a race-based admission program in a medical school, Justice Lewis Powell made it clear that the goal of achieving “some specified percentage of a particular group merely because of its race or ethnic origin is not constitutionally permissible and constitutes discrimination for its own sake.” In *Stotts* (1984), striking down a race-based promotion system in a municipal fire department, Justice Byron White, delivering the opinion of the Court, made it clear that “mere membership in the disadvantaged class is insufficient to warrant a [preferential] seniority award; each individual must prove that the discriminatory practice had an impact on him.” And Justice O’Connor, in the same case, wrote that “a court may use its remedial powers . . . only to prevent future violations and to compensate identified victims of unlawful discrimination.”

## X

**F**INALLY, who is a member of what race? Homer A. Plessy was the central figure in the infamous case of *Plessy v. Ferguson* in which the “separate but equal” doctrine was approved by the Supreme Court in 1896. Plessy (according to his own petition) was seven-eighths white and one-eighth black, and “the mixture of colored blood was not discernible in him.” He was a black man under Louisiana law; in other states he would then have been classified as white. How would the Jackson Board of Education classify

him today? If black, such a person stands to enjoy a valuable employment benefit. If he claims it, who shall determine whether he is entitled to it? And by what criteria shall they decide?

Embarrassing these questions may be, but rhetorical they are not. In New York City in the autumn of 1985, when racial quotas were used in making police-department promotions, a rash of petitions was received from individual officers seeking to change the racial designation in their employment records to that of some minority. By such matters are we confronted unavoidably when once we begin, as a society, to "think with our blood."

Orientalism is given preference in the Jackson schools, presumably because they were once discriminated against. The substantial Finnish community in Michigan is still discriminated against in some quarters—but Finns do not qualify for special treatment in Jackson, probably because not many of them remain there. There are not very many Orientals in Jackson either, but a third generation Chinese-American, whose mother and father may be university professors, will have his job specially protected in the Jackson schools because he is, in the parlance of affirmative-action officers, "a minority."

As for "Spanish descendency"—who can say? If one's grandfather's name were Gonzales he is likely to be entitled to special protection in Jackson—unless that happened to be his maternal grandfather, in which case the rules are not clear. Between Supreme Court Justice Powell and the attorney for the Jackson Board of Education there

took place, during oral argument, the following colloquy:

*Justice Powell:* I was interested in the fact that minorities described in the collective bargaining agreement include blacks, American Indians, Orientals, or persons of Spanish descendency. How in the world would you determine who is a person of Spanish descendency?

*Attorney for the Board:* Well, I didn't write that.

*Justice Powell:* Pardon me?

*Attorney for the Board:* I didn't write that. Hispanics may have been a better term. I guess we just didn't think about it, Justice Powell, at that point. I think we were looking at Hispanic people. [*Official Transcript*, pp. 42-43]

Wherever racial preference is given there must be rules—required mixtures of blood, and required epidermal hues, black or Indian or whatever—to determine racial membership. There must also be public officials with the authority to apply those rules. In the Jackson, Michigan schools today, as in the Jackson, Mississippi schools of an earlier day, such rules are no doubt applied with scrupulosity. Now, as then, it is a nasty business.

Here is the lesson of *Wygant*: the equal protection of the laws requires not merely the even-handed application of legal categories; it requires that every single person be protected against the invidious use of some categories. Above all, the categories to be abjured are those of race. If that is done, *Wygant v. Jackson Board of Education* will become a true landmark in American constitutional history.